JUDICIAL SYSTEM MONITORING PROGRAMME

PROGRAM PEMANTAUAN SISTEM YUDISIAL

Report on the Court of Appeal Decision in the Case of Armando dos Santos

Dili, East Timor

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The* Judicial System Monitoring Programme *(JSMP) was set up in early 2001 in Dili, East Timor. Through court monitoring, the provision of legal analysis and thematic reports on the development of the judicial system, JSMP aims to contribute to the ongoing evaluation and building of the justice system in East Timor. For further information see www.jsmp.minihub.org

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1. Executive Summary

On 15 July 2003 the Court of Appeal delivered its decision in the case of Public Prosecutor v. Armando dos Santos. This decision marks a watershed in the post-independence development of East Timor's legal system because it decided that the applicable subsidiary law in East Timor is the Law of Portugal, rather than Indonesia. The Court also found that parts of UNTAET Regulation 2000/15, establishing the Special Panel for Serious Crimes to be invalid and purported to significantly expand the commonly understood definition of genocide.

The Court of Appeal's decision has raised four crucially important questions:

(a) What should be the subsidiary law applicable in East Timor?

(b) Can the Special Panel for Serious Crimes continue its current mode of operation? Are the decisions of this Court to date valid?

(c) Are lower courts required to follow the decisions of higher courts?

(d) Can Armando dos Santos be lawfully convicted of genocide?

In addition, the decision has generated an enormous amount of uncertainty, confusion and division within the Courts, East Timorese legal community and the community at large regarding the sources of laws in East Timor.

Although JSMP concurs with the view that the Indonesian occupation of East Timor was illegal, we believe that the question of what should be the subsidiary law is a separate issue.

Implications of the Court of Appeal Decision for the Law in East Timor

The Court of Appeal has applied Portuguese law in several subsequent appeal cases after its decision in the Dos Santos case. However, as at the date of writing, the District Courts, including the Special Panels for Serious Crimes, was continuing to apply Indonesian law in their decisions.

In practice this duality between the courts means that parties appearing before them can no longer have any certainty as to what constitutes the applicable law in this country, and the basis upon which cases are to be decided at first instance and at any appeal levels.

In its broader application, the Court of Appeal decision has the potential to render invalid many transactions conducted in East Timor during the last 28 years because they have been determined under Indonesian, and not Portuguese Law. These would include commercial contracts, registration of births, deaths and marriages, bank loans, bankruptcy proceedings and other matters, such as criminal prosecutions undertaken between December 1974 and 25 October 1999.

In relation to the accountability for crimes committed in the context of the 1999 referendum, the consequence of the Court of Appeal decision is that all decisions handed down by the Special Panel for Serious Crimes can be deemed to be unlawful. It is essential that the disparity between the laws applied by the Special Panel for Serious Crimes and the Court of Appeal is resolved to

ensure the legitimacy of the process for prosecuting persons who committed serious crimes in 1999 in East Timor.

Given the present uncertainty regarding these fundamental issues of law, JSMP considers that it is incumbent upon the National Parliament to intervene in these matters.

Therefore JSMP recommends that:

Recommendation 1.

The National Parliament should take positive steps to legislate to clarify what is the applicable subsidiary law in East Timor from the commencement of the United Nation's Transitional Administration on 25 October 1999 to date.

Recommendation 2.

The National Parliament should, further, declare in its enacted legislation that Indonesian law, and not Portuguese law, is the applicable subsidiary law since October 1999 except for acts in violation of the international human rights standards as listed in Section 2 of UNTAET Regulation 1999/1.

Recommendation 3

The National Parliament could include in this present legislative initiative a position on the issue of which law should be deemed to apply in the period of Indonesian occupation in East Timor, with full consideration of the implication of its choice.

Recommendation 4.

The National Parliament should enact legislation to reiterate the inclusion of international customary law as one of the sources of law in East Timor. JSMP recommends that the wording can specifically include the recognition of Crimes against Humanity, genocide and war crimes as being part of international customary law.

Recommendation 5

The National Parliament could consider whether further legislation is required to clarify the provision of the Statute of Judicial Magistrates as to whether lower courts are bound by the decisions of higher courts.

2. The Court of Appeal Decision

The Court of Appeal decision on the 15 July 2003 was a decision on the appeal filed by the prosecution in the case of Public Prosecutor v. Armando dos Santos[1].

The appeal was against the conviction by the Special Panel for Serious Crimes[2]. The accused in this case, Armando dos Santos, was convicted of three counts of murder, which included participation in the murders committed during the attacks on Liquica Church on 5 April 1999 and Mario Carrascalao´s house on 17 April 1999. He was sentenced to 20 years imprisonment by the Special Panel for Serious Crimes in September 2002.

The prosecution submitted that Dos Santos should have been convicted of murder as a Crime against Humanity instead of murder under the Indonesian Criminal Code.

2.1 Majority Decision

The Court of Appeal is comprised of a 3 Judge Panel. Its decision, issued on Tuesday, 15 July 2003, was split 2:1. The majority comprising President of the Court of Appeal, Judge Claudio Ximenes and Judge Jose Maria Antunes essentially decided three things.

(a) Indonesian law has never been validly in force in East Timor, and that the applicable subsidiary law (i.e. law used in the absence of East Timorese law promulgated post-independence, or an applicable UNTAET Regulation) according to Section 165 of the Constitution is the Law of Portugal and not the Laws of the Republic of Indonesia.

(b) that parts of UNTAET Regulation 2000/15 which forms the basis for prosecution of Crimes Against Humanity by the Special Panel for Serious Crimes is invalid as it violates the prohibition of retroactive application of criminal laws as provided in the East Timorese Constitution , and

(c) that the crimes of which Armando dos Santos had been found guilty amounted to ´genocide´ under the Portuguese Criminal Code (an offence with which, incidentally, he had not been charged).

Although recognising that the assumption taken by the courts up until the present time had been that Indonesian law should apply as the valid subsidiary law in East Timor, the Court in its decision stated there was no valid judicial basis upon which to make that assumption.

The Court found the Indonesian occupation of East Timor between 1975 and 1999 was unlawful under international law. Consequently, Indonesian law could not ***validly*** be said to be in force in East Timor to 25 October 1999, and that the appropriate law was that of Portugal. In coming to this finding, the Majority of the Court stated:

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[1] Court of Appeal Decision, Prosecutor v. Armando dos Santos, 15 July 2003.

[2] The Special Panels for Serious Crimes, a Division of the Dili District Court, were created by UNTAET Regulation 2001/15. Each Panel is comprised of 2 International Judges and 1 East Timorese Judge. Under UNTAET Regulation 2001/15, the Special Panel has exclusive jurisdiction to hear and determine cases involving Crimes against Humanity and other serious offences committed in East Timor between 1 January 1999 and 25 October 1999.

> "The 'laws applied in East Timor prior to 25 October 1999' could only be those which, in accordance with the principles of international law, were legitimately in force in that territory (East Timor).
>
> "… Portugal continued to be recognised by the international community, by the United Nations Security Council and by the Timorese People as the Administering Power of East Timor during the period between December 1975 and 25 October 1999.
>
> "… (for this reason) the 'laws applied in East Timor prior to 25 October 1999' could only be the Portuguese law."[3]

The majority decision also relied on a decision of the Columbia District Court of the United States in a case for compensation initiated by two East Timorese citizens against Indonesian Lieutenant General Jhony Lumintang. In reaching its decision, the Columbia District Court applied Portuguese law based on the argument that the Indonesian invasion was in violation of international law.

2.2 Dissenting Decision of Judge Jacinta Correia da Costa

The Court of Appeal decision was not unanimous, as the third panel member, Judge Jacinta Correia da Costa dissented from the majority.

Judge Jacinta expressly dissented in the case of Armando dos Santos but only issued her dissenting opinion and her supporting arguments on the subsequent case of the Court of Appeal on 18 July 2003 in which Portuguese Law was applied.

Judge Jacinta stated that she found no ambiguity regarding UNTAET´s clear intention to nominate Indonesian law as the applicable subsidiary law in East Timor. In her view, Article 3 of UNTAET Regulation 1999/1 needs to be interpreted in its entirety, taking into consideration subsections 2 and 3 which expressly provides for laws to be repealed in East Timor. In her opinion, Article 3 of UNTAET Regulation 1999/1 together with the May 5th Agreement between Indonesia, Portugal and the United Nations in 1999 clearly referred to a continuing operation of Indonesian law.

Judge Jacinta expressed her view by stating that:

> "In my opinion, if Article 3.1 is interpreted in isolation then a dualistic interpretation is possible. That is, on the one hand, that Portuguese Law was the applicable law and, on the other hand, that Indonesian law was the applicable law.
>
> But in principle, in interpreting any law or provision from an Article, one must also look at other provisions of the same Article; [the relationship] between one clause and another."[4]

[3] Court of Appeal Decision, Public Prosecutor v. Armando dos Santos, 15 July 2003, p. 5.
[4] Dissenting Opinion Concerning the Law as applied in this case: Jacinta C. da Costa, Criminal Case No 3/2002, para. 1 and 2.

Judge Jacinta's dissenting opinion was also supported by the argument that the presence of Indonesia in East Timor was not recognised *de jure* but rather *de facto;* highlighting the reality that after Portuguese withdrawal from East Timor, Indonesia laws were applied in East Timor[5].

For this reason, Judge da Costa held that Indonesian law, and not Portuguese law, should remain the applicable subsidiary law[6].

3. Subsequent Developments

3.1 Prosecutor General's Appeal to the Supreme Court

On 23 July, the Prosecutor General of East Timor, Mr Longuinhos Monteiro, filed an application with the Court of Appeal sitting in its capacity as the Supreme Court requesting a review of their decision in the appeal of Armando dos Santos.

The grounds for the application have not been publicly released. However, JSMP is aware that the application asserts that the Court of Appeal has made an error in finding Portuguese Law as the applicable subsidiary law and has further erred in finding UNTAET Regulation 2000/15 to be unconstitutional.

The application of the Prosecutor General was based on Section 150 and 152 of the Constitution of East Timor[7]. The Prosecutor General further requested the Supreme Court of Justice to hear the case expeditiously so as to provide judicial certainty on the issue of applicable law.

3.1.1 Can the Supreme Court decide on this matter expeditiously?

To JSMP's knowledge, at the time of writing of this report the appeal by the Prosecutor General has not been listed for hearing.

JSMP is aware of the practical difficulties in hearing this appeal. When considering the appeal of the General Prosecutor two main issues need to be considered. Firstly, the current exercise of jurisdiction of the Supreme Court of Justice by Court of Appeal and secondly the lack of judges available to sit on the Supreme Court of Justice.

Due to the lack of human resources, the Court of Appeal has been given the competence to exercise the tasks of the Supreme Court of Justice in terms of the East Timorese Constitution[8]

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[5] Ibid, para 5.

[6] For further comments on the dissenting opinion see below *Chapter 4. JSMP´s Analysis and Comments*.

[7] Section 150 (Abstract review of constitutionality)
Declaration of unconstitutionality may be requested by: (...)
c) The Prosecutor-General , based on the refusal by the courts, in three concrete cases, to apply a statute deemed unconstitutional;
Section 152 (Appeals on constitutionality)
1. The Supreme Court of Justice has jurisdiction to hear appeals against any of the following court decisions:
a) Decisions refusing to apply a legal rule on the grounds of unconstitutionality;
b) Decisions applying a legal rule the constitutionality of which was challenged during the proceedings.
2. An appeal under paragraph (1) (b) may be brought only by the party who raised the question of unconstitutionality.
3. The regime for filing appeals shall be regulated by law.

[8] Section 164 (Transitional competence of the Supreme Court of Justice)
1. After the Supreme Court of Justice starts its functions and before the establishment of courts as laid down in Section 129, the respective competence shall be exercised by the Supreme Court of Justice and other courts of justice.

and UNTAET Regulation 2000/11[9]. Earlier this year the Court of Appeal has taken a decision while exercising the powers of the Supreme Court of Justice[10].

However, in relation to this appeal filed by the General Prosecutor it is necessary to take into account the fact that, if the Court of Appeal would sit as the Supreme Court of Justice, the result would be that the Supreme Court would be composed of the same judges of the Court of Appeal that were involved in the decision appealed against.

JSMP believes that it is not ethically correct to expect the same panel of judges to decide on their own decision. If that were to happen, the impartiality of judges would be seriously challenged.

Currently the Supreme Court of Justice has not been established for lack of judges with the necessary experience as required under the Statute of Judicial Magistrates[11].

Realistically it is improbable to expect that a separate Supreme Court of Justice will convene as a matter of urgency in order to decide the appeal filed by the General Prosecutor.

Consequently, JSMP is of the opinion that clarification of the issue of the applicable law and other issues included in the Court of Appeal's decision of 15 July 2003 cannot realistically be dealt with by the Supreme Court of Justice in the near future.

3.2. The Special Panel Decision in the Trial of Domingos Mendonca

On 24 July 2003, the Special Panel for Serious Crimes delivered a decision upon a Defence motion requesting that, in accordance with the Court of Appeal's decision in Dos Santos, the Prosecutor should be directed to amend the indictment to reflect Portuguese, rather than Indonesian Law, as being the applicable subsidiary criminal law in East Timor.

The decision of the Special Panel dealt with three main issues:

a) whether the Special Panel was bound to follow the decision of the Court of Appeal;

b) which law they would consider as being the subsidiary law in East Timor and;

c) whether UNTAET Regulation 2001/15 is unconstitutional, as declared by the Court of Appeal.

The decision of the Special Panel was supported by reference to various international instruments as well as to principles of customary international law[12].

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2. Until such a time as the Supreme Court of Justice is established and starts its functions all powers conferred to it by the Constitution shall be exercised by the highest judicial instance of the judicial organization existing in East Timor.

[9] See Articles 4 and 14 UNTAET Regulation 2000/11.

[10] The decision was the issuing of an opinion on the Constitutionality of certain provisions of the Draft Immigration and Asylum Law. For more information see JSMP Report on Court of Appeal Decision (Constitutionality of East Timor's Immigration and Asylum Law), June 2003.

[11] Law 8/2002, Statutes of Judicial Magistrates, Democratic Republic of East Timor.

[12] Many of the issues highlighted by the Special Panel for Serious Crimes are considered below in *Chapter 4. JSMP Analysis and Comments.*

JSMP strongly believes that it was of great importance for the Special Panel to clarify their position in relation to the decision of the Court of Appeal as the decision of the Court of Appeal had challenged the legal basis of the work of the Special Panel and created uncertainty as to the future developments.

However, the decision of the Special Panel does not resolve this issue and there remains the need for a clear and uniform clarification of the issues brought by the decision of the Court of Appeal.

Any decision handed down by the Special Panels could be appealed against to the Court of Appeal. Currently, the result of any appeal before the Court of Appeal, as evidenced by recent decisions, would be the application of different laws by different courts and possibly the undermining of basic rights of the accused. Therefore, JSMP still believes that a further step needs to be taken in order to ensure a uniform application of laws in the different courts in East Timor.

3.3 Draft Bill by Members of Parliament

On 29 July, a group of nine Members of Parliament tabled a draft bill in Parliament proposing that a new law be promulgated confirming Indonesian, and not Portuguese Law as the applicable subsidiary law to be applied in East Timor.

The stated purpose of the bill is to resolve the uncertainty generated by the Court of Appeal's decision in the Armando dos Santos case in relation to the issue of the subsidiary law applicable in East Timor.

On 8 August, the general assembly of the National Parliament forwarded the draft proposal to its Commission "A" on Rights, Guarantees and Liberties (*Commissao A – Direitos Guarantias e Liberdades*) for specific studies and further consideration.

JSMP is concerned, however, that the proposed bill has been hurriedly drafted, and in its present form, does not address all of the legal issues arising from the Court of Appeal's decision. Importantly, the bill states that the law will only have effect from 20 May 2002 (the date on which the UNTAET Administration ended and East Timor assumed full sovereignty and independence). The bill therefore fails to address:

(a) what is, or what does Parliament intend to be considered, the valid applicable law for events which occurred during the period of Indonesian occupation (between December 1974 – 25 October 1999), and

(b) What is the valid applicable subsidiary law for events which occurred during the UNTAET administration (25 October 1999 – 20 May 2002).

JSMP believes that unless these issues, and especially the question of what should be considered the valid applicable law for the period December 1974 – 25 October 1999 are addressed, the bill as drafted in its present form, will do little to solve the present crisis concerning identification of the applicable law in this country.

4. JSMP's Analysis and Comment

4.1 The Doctrine of Separation of Powers

Fundamental to the issue of determining the source of laws to be applied in Timor Leste, and the respective roles of the Legislature (National Parliament) and the Court in this respect, is an understanding of the ¨Separation of Powers¨. This doctrine is embodied in Sections 67 (Organs of Sovereignty) and 69 (Principle of Separation of Powers) of the RDTL Constitution.

The RDTL Constitution further provides that the National Parliament is the organ of sovereignty vested with responsibility for political decision making and the formulation and content of laws (Section 92), whereas the courts are responsible for the interpretation and enforcement of those laws (Sections 118 – 121). Where the intended meaning of an applicable law is certain and unequivocal, the clear duty of the courts is to apply those law according to that interpretation unless those laws are unconstitutional. Where there is an irreconcilable difference of opinion between the Courts as to the correct interpretation of a law, however, and where the interpretation of that law also involves a political element (such as the laws which should now govern events which took place during the 1974 - 1999 Indonesian occupation), the situation is slightly different. In those circumstances, JSMP believes it is appropriate for the National Parliament to intervene and resolve any confusion or uncertainty by promulgating new legislation.

4.2 Are the Courts in East Timor Bound by Decisions of Higher Courts?

The first aspect which the Special Panel considered in their decision of 24 July 2003 concerning the motion by Domingos Mendonca's defence counsel was whether or not the Court of Appeal's decision in the case of Armando dos Santos was binding.

In considering that question, and concluding that they were not bound, the panel members (Judge Maria Natercia Gusmao Pereira, Presiding, Judge Siegfried Blunk and Judge Sylver Ntukamazina) examined the relevant provisions of the Constitution, UNTAET Regulation 2001/25 and the Statute of Judicial Magistrates Number 8 of 2002.

JSMP remains unpersuaded by the argument advanced and considers the better view to be that the issue, at best, remains unclear.

4.2.1 The Position under the UNTAET Regulations

Section 2 of UNTAET Regulation 2000/11 as amended by Regulation 2001/25 states:

> "2.1 Judges shall perform their duties independently and impartially, and in accordance with the applicable laws in East Timor and the oath or solemn declaration given by them to the Transitional Administrator pursuant to UNTAET Regulation 1999/3.
>
> 2.2 Judges shall decide matters before them without prejudice and in accordance with their impartial assessment of the facts and their understanding of the law, without improper influence direct or indirect, from any source.

> 2.3 Notwithstanding their rank or grade within the hierarchy of the courts, Judges have to respect all decision made by the Court of Appeal. *Such decisions are binding and the independence of the individual Judge is not affected*" (emphasis added).

In JSMP's view, the use of the expression "Judges have to respect all decisions made by the Court of Appeal", and "such decisions are binding" infers that the intention of the drafters was to import this doctrine of binding precedent usually applied in common law countries into the legal system of East Timor.

The principle of binding precedents, *Stare Decisis*, is based on the authoritative and binding nature of decisions of higher courts. In essence, the principle of *Stare Decisis* is that "like cases should be decided alike" and that the reasons for decisions by superior courts must subsequently be followed by inferior courts in deciding cases involving the same legal issues.

However this principle is not a necessary element to civil law systems, which uses the doctrine that, save for decisions of the Tribunal of Cassation, where it exists, the independence of the Judiciary includes the freedom to determine cases without interference from superior courts and based entirely upon their own independent interpretation of relevant statutes and jurisprudence.

It is JSMP's interpretation that the wording and meaning of Section 2 of UNTAET Regulation 2001/25 are plain and unequivocal; that is lower court judges are bound by decisions of the Court of Appeal. The issue that remains to be analysed is whether this provision has been superseded by the Statute of Judicial Magistrates[13].

4.2.2 Relevant Provisions of the Statute of Judicial Magistrates

The Statute of Judicial Magistrates is the current main piece of legislation providing for the judicial organisation in East Timor. Amongst its provisions, it includes Section 113 which provides for the repeal of UNTAET Regulations, including Regulations 2000/11 and 2000/25, that are contrary to the Statute of Judicial Magistrates Law[14].

Section 4 of the Statute of Judicial Magistrates provides that:

> "Judicial magistrates shall adjudicate in accordance with the Constitution, the law and their conscience and they shall not be subject to orders, instructions or directions, except for the duty of lower courts to obey to decisions awarded by higher courts on cases appealed against".

In JSMP's view, Section 4 clearly covers the ground previously covered by Section 2 of UNTAET Regulation 2001/25. It is arguable that a contradiction can be found between these two provisions. If that is correct, the consequence is that, by the operation of Section 113, the provision under UNTAET Regulation 2001/25 would have been superseded upon promulgation of the Statute of Judicial Magistrates on 9 September 2002. Consequently, within this argument,

[13] Statute of Judicial Magistrates came into force on 9 September 2002.

[14] Section 113 reads: "Legislation contrary to this law is hereby repealed, specially relevant legal provisions contained in Regulations n. 1999/1, 1999/3, 2000/11, 2000/25, 2001/18, 2001/25 and 2001/26 of the United Nations Transitional Administration in East Timor (UNTAET)."

from this date Section 2.2 of UNTAET Regulation 2001/25 would no longer have any force or effect.

The applicability of the Statute of Judicial Magistrates for international judges of the Special Panels for Serious Crimes is confirmed by Section 111.1 (International Judges)[15]. By virtue of Section 1, the Statute of Judicial Magistrates is also applicable to judges of the other divisions of the District Court, albeit these judges remain employed on a probationary basis[16].

Whether or not Section 2 of UNTAET Regulation 2001/25 remains in force, the issue of the meaning and application of Section 4 of the Statute of Judicial Magistrates remains crucial. The question which must be posed as to the proper interpretation of that section is a challenging one.

4.2.2.1 The Interpretation of the Special Panel for Serious Crimes

In answering the question and determining that the Special Panel should not be bound to follow the Court of Appeal's decision, the Special Panel in the case of Domingos Mendonca relied partly on the guarantee of independence of judges found in Section 119 of the Constitution as a basis upon which they could avoid following the Court of Appeal decision.

In doing so, the Special Panel stated:

> "Section 2.3 of UNTAET Regulation 2000/11 as amended by Regulation 2001/25 and Section 4 [of the] Statute of Judicial Magistrates, which ask judges to follow the decision of higher courts, would violate the independence of the Court stipulated in Section 119 Constitution if they were interpreted literally and without exception."[17]

Section 119 of the Constitution states simply that:

> "Courts are independent and subject only to the Constitution and the law."

JSMP is of the opinion that Section 119 is a simple reiteration of the doctrine of the Separation of Powers found in Section 69. That principle establishes simply that the courts should be independent from the other organs of sovereignty (the President of the Republic, the National Parliament and the Government) and should act according to the Powers and duties afforded it by the Constitution and the Laws. The interpretation given by the Special Panel, in JSMP's view, is a too broad extension of this Constitutional provision.

The Special Panel also considered that:

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[15] Section 111 (International Judges) states:

1. The provisions of this law shall apply on a transitional basis, and with the necessary adaptations, to international judges engaged to exercise functions in East Timor pursuant to item 1, Section 163 of the Constitution (Special Panels for Serious Crimes).

[16] See Section 1 (Scope of Application) and Section 25 (Requirements to Enter the Judiciary) of the Statute of Judicial Magistrates, Law No. 8/2002.

[17] Decision on the Defence (Domingos Mendonca) Motion for the Court to order the Public Prosecutor to amend the indictment, Special Panel for Serious Crime, 24 July 2003, para 5.

> "Therefore, and according to Section 2.1 & 2 of Regulation 2000/11 as amended by 2001/25 this panel is unable to follow that decision, because it would not be following its understanding of the applicable law in East Timor and the oath 'to faithfully apply the Constitution of the Republic and other laws in force'. Also, if this were the case, the Special Panel judges would not be adjudicating in accordance with their conscience."

JSMP is aware that legal professionals in East Timor differ in their interpretation of Section 4 of the Statute of Judicial Magistrates. The expression 'the duty of lower courts to obey to decisions awarded by higher courts on cases appealed against' could be interpreted to be limited to determinations of the superior court in specific cases appealed against, and then remitted to the court of first instance (or another inferior court) for consequential action (for example, in cases of Interlocutory Appeal). The other possible interpretation is that the expression relates to all cases of higher courts, which would, to a great extent, mean that cases from higher courts are binding precedents.

The issue is however palpably unclear and must be resolved for certainty within East Timorese laws.

In this circumstance, a possible solution is for Parliament to legislate on the issue of the binding or non-binding nature of decisions of higher courts. JSMP proposes that Parliament reflect on this issue in order to clarify the intention of the legislature in the Statute of Judicial Magistrates.

Parliament may wish to take this initiative and use the opportunity to resolve this issue in the current Draft Proposal on the Interpretation of Article 1 of Law 2/2002 currently under consideration by Commission "A".

4.3 Issue of Subsidiary Law in East Timor

4.3.1 What did UNTAET intend to be the subsidiary law applicable in East Timor following the promulgation of UNTAET Regulation 1999/1?

JSMP believes that the answer to this question is clear and unequivocal. In drafting Section 3 of UNTAET Regulation 1999/1 the intent of the UNTAET Administration was to introduce the *Laws of Indonesia* as being the subsidiary law which should apply in East Timor. To understand this, it is necessary to examine the historical development of the law in East Timor.

4.3.1.1 Historical Development of the Applicable Law in East Timor

The starting point here is the powers that were given to the Transitional Administrator following the ¨popular consultation¨ process and commencement of the UNTAET mandate in October 1999. Acting under Chapter 7 of the Charter of the UN, the Security Council in paragraph 1 of Resolution 1272 stated that it:

> " … Decides to establish, in accordance with the report of the Secretary-General, a United Nations Transitional Administration in East Timor (UNTAET), which will be endowed with overall responsibility for the administration of East Timor and

will be empowered to exercise *all legislative and executive authority, including the administration of justice*" (emphasis added)

The terms of this paragraph means that the UN-appointed Transitional Administrator, Sergio Vieira de Mello, became the Legislature, the Executive and the sole Judicial authority of the United Nations. This afforded him the authority to decide what would constitute the applicable law in East Timor. His first act was the promulgation of Regulation 1999/1 which established how he was to exercise his authority under Security Council Resolution 1272.

Section 3 of the Regulation 1999/1 sets out what would henceforth be the "applicable law in East Timor" until the "restoration of independence". Section 3.1 provides as follows:

> "… Until replaced by UNTAET Regulations or subsequent legislation of democratically established institutions of East Timor, *the laws applied in East Timor prior to 25 October 1999 shall apply in East Timor* insofar as they do not conflict with standards referred to in Section 2, the fulfillment of the mandate given to UNTAET under United Nations Security Council Resolution 1272, or the present or any other Regulation and Directive issued by the Transitional Administrator." (emphasis added)

The passing of this Regulation was a deliberate act of law making in exercise of the authority vested in the Transitional Administrator as the law maker for East Timor. In accordance with the broad provisions of his mandate, the Transitional Administrator may lawfully have designated the legal regime of almost any country in the world to be the applicable law in East Timor.

The exercise of his authority in choosing a particular legal regime as the applicable law means that this deliberate legislative act has superseded the applicability of any other law which might otherwise have been applicable in the past, be that Portuguese or Indonesian law. The Court of Appeal in the case of Armando dos Santos clearly recognised that in Regulation 1999/1, the Transitional Administrator had made a choice of applicable law for East Timor. The question of what law was applied is not just a legal question. It is also a question of fact.

It should be highlighted that Section 5.2 of UNTAET Regulation 1999/1 states that:

> "UNTAET regulations shall be issued in English, Portuguese and Bahasa Indonesian. Translations in Tetun shall be made available as required. *In case of divergence, the English text shall prevail.* (Emphasis added)"

In analyzing both the English and the Portuguese versions of Section 3 of UNTAET Regulation 1999/1, JSMP realizes that there is a slight difference on the wording used. While the Portuguese version provides that the laws *'vigentes'* in East Timor, which could be translated as the laws applicable in East Timor, the English version makes use of the word 'applied'. In JSMP's view any uncertainty that could have been generated by the Portuguese version of UNTAET Regulation 1999/1 is overridden by the use of the clear and plain wording under the English version, which takes precedence.

4.3.2 Principles of Statutory Interpretation

Judges from both the common law and civil law traditions employ a number of standard rules, or ¨principles of statutory interpretation¨ when seeking to establish the meaning, or intent of the legislature when interpreting laws and regulations. The first, and fundamental principle is that courts must apply the örd inary and natural meaning¨ to terms which are unambiguous and clearly defined.

The applicabilty of this principle has been confirmed by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Celebici case: [18]

> "In every legal system, whether common law or civil law, where the meaning of the words in the statute is clearly defined, the obligation of the judge is to give the words their clearly defined meaning and apply them strictly. This is the literal rule of interpretation. If only one construction is possible, to which the clear, plain or unambiguous word is unequivocally susceptible, the word must be so construed. .."

In JSMP's view, the ordinary and natural meaning of the word "applied" is "*used*". Thus, in our respectful opinion, the proper role of the Court of Appeal in interpreting the meaning of Section 3 of Regulation 1999/1, was to determine what law *was used* in East Timor prior to 25 October 1999, and then to determine the appeal issue in accordance with that law. This is a question of historical fact, and does not demand any consideration by the Court of Appeal regarding whether the law that was *in fact used* prior to 25 October 1999 was valid under international law.

Given Indonesia was the *de facto* occupying authority in East Timor for 24 years, and that Indonesian, rather than Portuguese laws had *in fact* most recently been used or enforced by the courts prior to 25 October 1999, JSMP believes that the appropriate conclusion (had the Court of Appeal employed the ordinary and natural meaning of the term äpplied¨) would have been to find that Section 3 of Regulation 1999/1 unquestioningly referrred to the Law of Indonesia.

This interpretation is confirmed by one of the principal drafters of UNTAET Regulation 1999/1 Hansjoerg Strohmeyer who was the acting Principal Legal Advisor to UNTAET at the time the Regulation was drafted (Oct. 99 to Feb 2000).

In an article written for the University of *New South Wales Law Journal* in 2001, Strohmeyer states:

> "By Regulation No1999/1, UNTAET had, in effect decided that the laws which applied in East Timor prior to the adoption of the Security Council Resolution1272 (i.e., the Indonesian laws) would apply *mutatus mutandis* in so far as they were consistent with the internationally recognised human rights standards, and insofar as they did not conflict with the mandate given to the mission by the Security Council, or with any other subsequent regulation promulgated by the mission.
>
> The decision was made solely for practical reasons; first to avoid a legal vacuum in the initial phase of the transitional administration, and second, to avoid a situation

[18] *Prosecutor v. Delali et al*, Case No IT-96-21-t. 16 Nov. 1998, paras 160-162.

> in which local lawyers, virtually all of whom had obtained their law degrees at domestic universities, had to be introduced to an entirely foreign legal system."

Strohmeyer then goes on to state in Footnote 5 to his article (page 173):

> "...The wording of 3.1 (the factual statement 'the laws applied' is used rather than 'the applicable laws') carefully avoids the retroactive legitimisation of the Indonesian occupation as a lawful legal regime in East Timor."

In JSMP's view, the above comments make absolutely certain that the intent of UNTAET at the time was to introduce Indonesian law, and not that of any other country.

4.3.3 Additional Indicators that Indonesian Law was intended to be the Applicable Subsidiary Law

If the above were not enough, there are a number of further indicators – all of which point to the intent of the Transitional Administration as having been to import the law of Indonesia, rather than Portugual (or some other country) as the applicable subsidiary law. These include:

(a) May 5th Agreement

The May 5th Agreement states in Appendix A: "Constitutional Framework for the Special Autonomy for East Timor" provides in Article 11: "Indonesian laws in force upon the date of entry into force of this agreement that fall within the competence of the Central Government, as defined in this Chapter, shall remain in force in SARET (the Special Autonomous Region of East Timor)".

This Article clearly evidences an acceptance on the part of Indonesia, Portugal and the United Nations that Indonesian law had applied in East Timor prior to 25 October 1999, and would continue to apply in East Timor. Further, as a signatory to this agreement, Portugal, under its own domestic law, [19] renounced the application of its laws in East Timor.

(b) Indonesian Laws Referred to in Section 3.2 of Regulation 1999/1

JSMP agrees with the reasoning of Judge Jacinta Correia da Costa in her dissenting opinion in the Court of Appeal decision. In interpreting legislation, Judges should examine the entire body of the law to place an Article in its appropriate context. Each Section is meant to be read as a part of the whole document, and *should not be read in isolation*. For this reason, JSMP believes the majority of the Court of Appeal erred in seeking to interpret the meaning of Section 3.1 of Regulation 1999/1 in isolation, and in failing to consider the relevance of subsection 3.2 which follows. Subsection 3.2 states:

> "Without prejudice to the review of other legislation, the following laws, which do not comply with the standards referred to in Sections 2 and 3 of the present

[19] *Portuguese Law regarding International Judicial Cooperation* (DL43/91 de 22/1) states in Title 1, Chapter 1 General Dispositions, Article 3, that the dispositions contained in the International Conventions, Treaties, and Pacts signed by the State and ratified by Parliament as international commitments, prevail over all national legal dispositions.

regulation, as well as any subsequent amendments to the laws and their administrative regulations, shall no longer be applied in East Timor.

- Law on Anti-Subversion;
- Law on Social Organisations;
- Law on National Security;
- Law on Mobilisation and Demobilisation;
- Law on Defence and Security."

Importantly, each of the five laws enumerated above exist in current Indonesian Law, and the Indonesian titles of those laws exactly matches the English used in Section 3.2.[20] None of the laws referred to in Section 3.2 have any counterpart in Portuguese Law. This is further, clear evidence that UNTAET intended Indonesian laws, and not the laws of any other country to apply. Further, if UNTAET had envisaged that Portuguese law should, or might apply, why did they expressly repeal laws which do not exist in that country?

(c) Abolition of the Death Penalty

Section 3 of Regulation 1999/1 also expressly repeals the death penalty and states that henceforth it shall not apply in East Timor. As a matter of logic, the abolition of the death penalty must mean that the legal regime which UNTAET intended to import into East Timor must have been one which still exercises capital punishment. Again, this points to Indonesia which prescribes death as being the penalty for murder under Section 340 of the *Indonesian Criminal Code.* Again, it points away from Portugal, which did not in 1999, and still does not, have the death penalty in its statutes.

(d) UNTAET Regulations and Executive Orders

There are a number of UNTAET Regulations and Executive Orders subsequent to Regulation 1999/1 which make express reference to the repeal, or non-applicability of Indonesian laws in East Timor. These include UNTAET Regulation 2000/30 which states:

> "[This] regulation takes precedence over *Indonesian laws on criminal procedure*…" (Emphasis added)

Also included are Executive Order No 2002/2 (decriminalisation of defamation) and Executive Order No 2001/16 (decriminalisation of adultery), both of which state explicitly that the relevant Articles of the *Indonesian Criminal Code* no longer constitute criminal offences in East Timor and are not to be used as a basis for criminal charges.

[20] Law on Anti-Subversion (Pencabutan Undang-undang Nomor II/PNPS/1963 Tentang Pemberantasan Kegiatan Subversi); Law on Social Organisations (Undang-undang 8/1985 Tentang Organisasi Kemasyarakatan); Law on National Security (Undang-undang 29/1954 Pertanahan Negara Republik); Law on Mobilisation and Demobilisation (Undang-undang 27/1997 Tentang Mobilisasi dan Demobilisasi); Law on Defence and Security (Undang-undang 20/1992 Kententuan-kententuan Pokok Pertanahan Keamanan Negara Republik).

Finally, and not least, evidence that UNTAET intended the Indonesian (and not the Portuguese) law to apply in the courts comes from the fact that the Transitional Administrator knew that the Courts were using Indonesian laws as the applicable subsidiary law during the term of the UNTAET mandate. If the Transitional Administrator not intended this to occur, then one would have expected intervention from him by way of a directive that the Courts should thereafter apply the laws of that other jurisdiction. This did not occur.

In JSMP's view, the above arguments, taken together, demonstrate unequivocally that ¨the law applied in East Timor prior to 25 October 1999¨ and which the UNTAET Administration intended should form the subsidiary law to be applied during the term of the UNTAET Administration (October 1999 – 20 May 2002), are the Laws of Indonesia.

4.3.4 What law forms the applicable subsidiary law in East Timor today?

If it is accepted that the subsidiary law which the UNTAET Administration intended to be applied during their administration were the Laws of Indonesia, then it follows that the valid subsidiary law that applied in Timor Leste following Independence, and which continue to apply today are the laws of Indonesia.

This flows as a natural consequence of Section 165 of the RDTL Constitution which provides:

> "Laws and regulations *in force* in East Timor [as at the time of Independence] shall continue to be applicable on all matters *except to the extent* that they are inconsistent with the Constitution or principles contained therein". (Emphasis added)

The drafters of the Constitution must be assumed to have understood that the operable subsidiary law in force at that time of Independence was Indonesian law, and the intended consequence of Section 165 was the continued application of those Indonesian laws.

4.3.5 What law should be applied by the courts when considering criminal charges, commercial transactions and other matters which took place during the 1974 - 1999 Indonesian occupation of East Timor?

Although JSMP concurs with the view that the Indonesian occupation of East Timor was illegal, we believe that the question of what should be the subsidiary law is a separate issue.

JSMP is aware that neither the Constitution nor any UNTAET Regulation or domestic law deal with the issue of what should be the deemed law applied during Indonesian occupation. It also acknowledges that this issue was not raised by the Court of Appeal in its decision on the 15 July 2003.

That leaves open the question of what was the applicable law in East Timor *prior to* 25th October 1999. This is an uncertain and contentious issue and JSMP is of the opinion that it is necessary for the National Parliament to consider this issue in order to prevent uncertainties arising from future disputes regarding the applicable law in that period.

4.4 Is UNTAET Regulation 2001/15 Unconstitutional?

Another important finding of the Court of Appeal in the Dos Santos case was that the accused could not be tried and convicted for acts committed in 1999 pursuant to UNTAET Regulation 2000/15 because that regulation did not enter into force until June 2000. The Court of Appeal found that applying UNTAET Regulation 2000/15 breached Section 31 of the Constitution which establishes the principle of non-retroactive application of criminal laws.

The consequences of holding that UNTAET Regulation 2000/15 is unconstitutional are far reaching. The Special Panel for Serious Crimes has tried individuals for their conduct within the context of the 1999 referendum for the past three years. If indeed UNTAET Regulation 2000/15 is unconstitutional it invariably means that all the decisions of the Special Panel for Serious Crimes may be deemed unlawful. An analysis of the principle of non-retroactivity and international customary law is necessary to evaluate the validity of UNTAET Regulation 2000/15.

4.4.1 Non-retroactive application of Criminal Law

The non-retroactive application of criminal laws is based on the principle of *nullum crimen sine lege* ("no crime, no law"). It reflects an essential guarantee that a person shall not be convicted of an act which was not a crime at the time the act was committed. It ultimately aims at preventing arbitrary application of criminal laws.

This principle is incorporated in the East Timorese Constitution under Sections 31.2 and 31.5, which state that:

> 31.2. No one shall be tried and convicted for an act that does not qualify in the law as a criminal offence at the moment it was committed, nor endure security measures the provisions of which are not clearly established in previous law.
>
> 31.5 Criminal law shall not be enforced retroactively, except if the new law is in favor of the accused.

4.4.2 Recognition of Crimes under Customary International Law

International customary law is one of the sources of international law. For a rule to become customary law at international level, two elements must be present: first, there must be a practice, a course of action, or some kind of behaviour followed by nations over a period of time; and secondly, that practice or course of action must be viewed by these nations as binding upon them.

Once a rule becomes international customary law it is binding on all states irrespective as to whether that specific state has followed the same course of action provided under customary international law.

The Constitution of East Timor provides that international customary law shall be applicable in East Timor[21].

It is generally accepted that the crimes of genocide, Crimes against Humanity and war crimes are recognised as customs under international law. These crimes have existed in customary international law for over half a century.

In reality, the codification of the crimes of genocide, Crimes against Humanity and war crimes does not create substantive law, but establishes a framework for the enforcement of existing international customary law[22]. Practically speaking, the codification of crimes having the status of custom at international level is simply a mechanism for writing down, within the national system, the norms to which states are already bound. Such codification provides a mechanism for prosecution of international crimes at a domestic level.

In JSMP's view, in the case of Domingos Mendonca, the Special Panel for Serious Crimes has correctly highlighted the main issues related to the application of the principle of non-retroactivity in relation to crimes against humanity, genocide and others and was of the opinion that UNTAET regulation 2000/15 does not violate the Constitution[23].

4.4.3 Whether UNTAET Regulation 2000/15 violates the principle of non-retroactivity

In reaching its decision, the Court of Appeal considered solely the prohibition of non-retroactivity of criminal laws as provided by the Constitution under Section 31.

JSMP respectfully submits that the Court of Appeal interpreted the Constitution too narrowly. In determining whether the regulation applied retroactively, the court appeared to solely analyse the dates the accused's conduct was committed against the date of UNTAET Regulation 2000/15. Respectfully, JSMP believes that the Court of Appeal has mistakenly overlooked the application of customary international law as one of the sources of law in East Timor as stated in the Constitution.

In order to have a complete analysis of the application of the non-retroactivity principle to crimes against humanity and others, the Court of Appeal should have analysed all sources of laws in East Timor in an attempt to identify whether the conduct in question was considered as a crime before the date of coming into force of UNTAET Regulation 2000/15.

UNTAET Regulation 2000/15 can be of guidance in understanding the interaction between international and national law regarding this issue. Section 12.1 provides that "A person shall not be criminally responsible under the present regulation unless the conduct in question constitutes, at the time it takes place, a crime under *international law* or the laws of East Timor." (Emphasis added)

[21] Section 9 (International law): 1. The legal system of East Timor shall adopt the general or customary principles of international law.
[22] *Prosecutor v. Delalic and Others* 16 November 1988, International Tribunal for Former Yugoslavia
[23] See Decision on the Defence (Domingos Mendonca) motion for the Court to order the Public Prosecutor to amend the indictment, Special Panel for Serious Crimes, para 11-34.

Consequently, JSMP strongly believes that UNTAET Regulation 2000/15 clearly does not violate the principle of non retroactivity enshrined in the East Timorese Constitution. JSMP is of the opinion that the Court of Appeal has erred in interpreting the application of the non-retroactivity principle to UNTAET Regulation 2000/15.

Currently the Special Panel for Serious Crimes is continuing to conduct trials pursuant to UNTAET regulation 2000/ 15 and has indicated that this will continue. It is essential that the disparity between the laws applied by the Special Panel for Serious Crimes and the Court of Appeal is resolved to ensure the legitimacy of the process for prosecuting persons who committed serious crimes in 1999 in East Timor.

4.5 Was the Conviction of Armando dos Santos Lawful?

JSMP is of the opinion that the decision of the Court of Appeal in the Dos Santos case is unlawful on the basis of serious procedural and legal errors. The reasoning and process adopted by the Court in substituting Dos Santos' conviction of murder by the Special Panel for genocide under the Portuguese Penal Code is flawed.

4.5.1 The Decision of the Court of Appeal

As previously discussed the Court found that the defendant could not be tried and convicted under UNTAET Regulations but Portuguese law. The Court stated:[24]

> "Resorting to the Portuguese law in force on 24 October 1999, we realise that the defendant's conduct includes three crimes of murder provided for and punishable under article 131 of the Portuguese Penal Code, with the amendments introduced by Law 65/98, of 2 September (hereinafter referred to as CPPort/98), and a crime against humanity in the form of genocide, provided for and punishable under article 239.1(a) of the same Code."

In considering the question of genocide, the majority judges referred to Section 239 of the *Portuguese Penal Code*, which prescribes 'genocide' for in the following terms:

> "1 Where a person, with the intention to destroy, in whole or in part, a national ethnic, racial or religious group, as such, commits:
>
> (a) murder of members of the group;
>
> (b) serious offences against the physical integrity of group members;
>
> (c) subjecting the group to cruel, degrading or inhumane forms of existence or treatment, which are likely to cause its partial or total destruction;
>
> (d) transfer of children of the group to another group by violent means; or
>
> (e) impediment to procreation or births within the group;

[24] Ibid.

shall be punished with a penalty of 12 to 25 years imprisonment."

The court then looked at the nature of the three murders to which Dos Santos been found to be a party, and said:[25]

> "The purpose of these killings was to destroy supporters of East Timor's independence, a purpose that the defendant was aware of and adhered to by taking part in the laying of the sieges and in the execution of the attacks and killings after he had been informed that the victims were supporters of East Timor's independence (as were the cases of the church at Liquiçá and Manuel Carrascalão¨s house), or were against the Indonesians (as was the case in Maukuru´s killing)."

The court found that whilst the accused was guilty of three separate murders, for the purpose of sentencing this amounted to one, rather than three, counts of crimes against humanity in the form of genocide, and as earlier stated, sentenced him to a cumulative fixed term of 22 years imprisonment.

4.5.2 Errors in the decision of the Court of Appeal

In examining this aspect of the Court´s decision, JSMP is concerned by several apparent breaches of fair trial procedures and substative legal errors.

4.5.2.1 Procedural Errors

The Court of Appeal convicted Armando dos Santos of Crimes against Humanity in the form of genocide. However, in the indictment filed by the Serious Crimes Unit, he was charged with murder as a Crime against Humanity under Section 5 (a) of UNTAET Regulation 2000/15. At no point before the decision of the Court of Appeal was handed down was the accused or his legal representative advised that he may be convicted of Genocide. Genocide is a different, and far more serious offence than any of the forms of Crimes against Humanity enumerated in the UNTAET Regulation. Further, the result was that Dos Santos was convicted of an offence with which he has not been charged, and which was not contained in the indictment. This is clearly contrary to Section 32.4 of UNTAET Regulation 2000/30.

The basic components of the right to a fair trial include the right to be informed of the charges and an opportunity to provide a defence to those charges. These standards are internationally accepted[26] and are also specifically protected in the Constitution[27] and laws of East Timor[28].

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[25] English translation of Court of Appeal decision, page 20.

[26] Articles 14.1 and 14.3(a) of the International Covenant on Civil and Political Rights state:
14.1 ¨All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. . . . ¨, and
14.3.. ¨In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing, etc.

The UNTAET regulations not only provide that the accused "has the right to be informed in detail, and in a language which he or she understands, of the nature and cause of the charges against him or her", but also clearly states the procedures to be followed if an indictment is to be changed after the indictment has been presented to the accused. The procedures which should be followed, where amendment or variation to an indictment is contemplated are found in Section 32, UNTAET Regulation 2001/25 which states:

> "Section 32: Amendment of an Indictment
>
> 32.1 After the indictment has been presented and prior to the commencement of the trial, the Public Prosecutor may amend the indictment only with leave of the Court.
>
> 32.2 After the trial and prior to final decision in the case, the Court may, at the request of the prosecutor, allow amendment of the indictment if the Court determines that the evidence at trial establishes qualification of the crime or crimes which is different that that which appears in the indictment. *The accused and his or her legal representative have the right to be immediately informed by the Court of the new qualification of the criminal offence for which he or she may be convicted.* (Emphasis added)
>
> 32.3 In the circumstances defined in Sections 32.1 or 32.2 of the present regulation, the accused, if he or she so request, must be granted a delay in the proceedings to prepare his or her defence with respect to any new matters alleged, and to propose and examine new evidence.
>
> 32.4 *The accused shall not be convicted of a crime that was not included in the indictment, as it may have been amended, or of which the accused was not informed by the judge.* For the purposes of the present subsection, a crime which shall be deemed to be included in the indictment is a lesser included offence of an offence which is stated in the indictment." (Emphasis added)

As provided in the above regulation the only lawful exception to not informing the accused of a change to the charges is if it is a lesser offence to that included in the indictment. As the Special Panel in its decision of 24 July properly found, genocide is not a lesser included offence of Crimes against Humanity. JSMP agrees with their view that, notwithstanding the fundamental differences between the two crimes, genocide is the most serious of all human rights offences.

Numerous breaches of the above regulations appear to have occurred in the processing of the Dos Santos case by the Court of Appeal including the following;

(i) at no stage was Armando dos Santos informed by the Court of Appeal judges that they were contemplating substituting the charge of murder as a Crime against Humanity with the more serious charge of genocide;

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[27] Article 34.3 of the Constitution states that: *"Every individual is guaranteed the inviolable right of hearing and defence in criminal proceedings."*

[28] Section 2.1 and Section 6.3 of the UNTAET Transitional Rules of Criminal Procedure (UNTAET Regulation 2001/25)

(ii) on a plain and ordinary reading of section 32.2, an amendment to an indictment can only be made at the request of the Prosecutor, and is not something which the court can do of their own volition; and

(iii) the accused and his counsel were not given the opportunity to request an adjournment to prepare or present a defence.

JSMP is of the opinion that where charges are substituted the proper procedural mechanisms to be followed are those found in the above mentioned Transitional Rules. However, irrespective of this, Section 358 of the Portuguese Code of Criminal Procedure mirrors Section 32.4 of the UNTAET 2001/25 in stating that if a court considers altering the charge described in the indictment, the presiding judge must communicate that alteration to the accused. The effects of such breaches are the same pursuant to either the Transitional Rules or the Portuguese Penal Code. Failure to comply with these requirements results in a nullity of any consequential decision under Section 379 of the Portuguese Code and Section 55 (Nullity of Prior Acts) of UNTAET Regulation 2001/25. Pursuant to Section 55.2 of this UNTAET Regulation, JSMP believes that the failure of the Court in this regard is a nullity which may only be properly remedied by holding fresh proceedings to re-sentence the accused.

4.5.3 Errors of Law

In addition to the procedural errors identified above, the Court of Appeal's finding that the conduct in issue amounts to genocide constitutes a significant expansion of the meaning of "genocide" as that term has traditionally been understood in international and Portugese law. The Court of Appeal´s decision in this regard is, in JSMP's view, inconsistent with the accepted jurisprudence. The proven facts in the Dos Santos case, according to JSMP, do not constitute genocide as that crime has been defined and incorporated under the *Portuguese Criminal Code*.

4.5.4 The Meaning of Genocide under International Law

The definition of genocide is set out in the *Convention on the Prevention and Punishment of the Crime of Genocide*,[29] and is a codification of pre-existing customary international law which is binding on all states. Article 2 defines genocide as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group." It is a violation to which individual criminal responsibility is attached. This definition has three main elements:

a) the accused undertook one of a series of specified acts – killing; causing serious bodily or mental harm; deliberately inflicting conditions of life calculated to bring about physical destruction, imposing measures intended to prevent births, or forcibly transferring children from the group,

b) the accused committed these acts against a "national, ethnical, racial or religious group";[30] and

[29] 9 December 1948, 78 UNTS 277 ("Genocide Convention")

[30] The meaning of these categories is explored by the International Criminal Tribunal for Rwanda (ICTR) in *Prosecutor v Akayesu*, Case No ICTR-96-4-T (2 September 1998) at para 511 and *Prosecutor v Rutagunda*, Case No ICTR-96-3-T (6 December 1999) at para 57.

c) the accused did so "with intent to destroy, in whole or in part" one of these groups "as such".

This definition is exhaustive and excludes isolated murders or even mass murders if the killer has no intent to destroy, in whole or in part, a stated group; thus elevating genocide above random killings. Importantly, it is also limited to the ¨national, ethnical, racial or religious¨ groups enumerated above. Political groups or affiliations were intentionally not included in the definition. This void is significant because, although the Court of Appeal found that Dos Santos´ conduct was part of an orchestrated campaign to destroy independence supporters or pro-FALINTIL East Timorese, according to JSMP that conduct does not fulfil the basic elements of genocide under international law.

4.5.5 Genocide under the Portuguese Penal Code

The Court of Appeal found that the accused was guilty of Crimes Against Humanity, Genocide pursuant to Portugese law[31].

Under the Portuguese Penal Code, the category of political affiliation or belief is not included under Section 239. Consequently JSMP's position is that, the facts proven in Dos Santos case do not fulfill the required elements under Portuguese Law.

In JSMP's view, therefore, the conduct in issue, based on the Court's findings, does not constitute genocide under either customary international, nor Portuguese domestic law.

[31] JSMP is aware of the differences between the classification of genocide under Portuguese law and International law. According to international law Genocide is considered a specific crime and not included as Crimes Against Humanity. However, neither the Portuguese nor International definitions of genocide consider political beliefs or affiliations to be a basis for genocide and therefore an analysis of the differences in classification is not required for current purposes.

5. Conclusion

For the reasons set out in this paper, JSMP would argue that the Court of Appeal has wrongly interpreted and applied UNTAET Regulation 1999/1 in finding that Portuguese, and not Indonesian Law is the applicable subsidiary law in this country. In our view, the dissenting opinion of Judge Jacinta da Costa Correia in the Dos Santos Appeal, and the subsequent decision of the Special Panel for Serious Crimes represent the correct interpretation of the applicable subsidiary law.

JSMP is of the opinion that the clear intention of United Nations Transitional Administration in promulgating Regulation 1999/1 and subsequent Regulations was to introduce the Law of Indonesia in East Timor from 25 October 1999. Further, in accordance with Section 165 of the Constitution, those Indonesian laws remain in effect until such time as the democratically elected Government of East Timor has them repealed, or promulgates new East Timorese laws to replace them.

JSMP is also of the opinion that, on the basis of the reasons presented earlier in this report, that the Court of Appeal has erred in its findings that (a) parts of UNTAET Regulation 2001/15 is invalid on the basis of unconstitutionality, and (b) that Armando dos Santos can lawfully be convicted of genocide. There also remains ambiguity regarding the issue of whether the decisions of higher courts must be followed by lower courts.

As stated previously, under the Separation of Powers doctrine enshrined in Section 69 of the Constitution, the Parliament or legislature is the organ of sovereignty responsible for deciding the law which is to be applicable in East Timor, and it is the responsibility of the Courts to give effect to the will of Parliament through interpreting and enforcing its laws.

6. Recommendations

In recognition of the current absence of a Supreme Court of the Justice, JSMP recommends the following actions:

Recommendation 1.

The National Parliament should take positive steps to legislate to clarify what is the applicable subsidiary law in East Timor from the commencement of the United Nation's Transitional Administration on 25 October 1999 to date.

Recommendation 2.

The National Parliament should, further, declare in its enacted legislation that Indonesian law, and not Portuguese law, is the applicable subsidiary law since October 1999 except for acts in violation of the international human rights standards as listed in Section 2 of UNTAET Regulation 1999/1.

Recommendation 3

The National Parliament could include in this present legislative initiative a position on the issue of which law should be deemed to apply in the period of Indonesian occupation in East Timor, with full consideration of the implication of its choice.

Recommendation 4.

The National Parliament should enact legislation to reiterate the inclusion of international customary law as one of the sources of law in East Timor. JSMP recommends that the wording can specifically include the recognition of Crimes against Humanity, genocide and war crimes as being part of international customary law.

Recommendation 5

The National Parliament could consider whether further legislation is required to clarify the provision of the Statute of Judicial Magistrate as to whether lower courts are bound by the decisions of higher courts.

JSMP is aware that Commission "A" of the National Parliament is currently considering the Draft Proposal on Interpretation of Article 1 of Law 2/2002 and Sources of Law forwarded by Parliament on 8 August 2003. JSMP hopes that Commission "A" will take into account the recommendations above in their deliberations.