



REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

RDTL

**TRIBUNAL DISTRIAL de DILI
SECÇÃO CRIMES GRAVES**

Before:

Judge Sylver Ntukamazina

Judge Maria Natereia Pereira

Judge Siegfried Blunk

Case No. 5/2002

The Public Prosecutor

Versus

Umbertus Ena and Carlos Ena

**Decision on the Defense Motion to Call Authors of Four Reports on
Human Rights Situation in East Timor dated 6 February 2004**

For the Prosecutor:

Charles Nsabimana

For the defense:

Ana Beatriz Sanchez Lara (for Umbertus Ena)

Alan Michael Gutman (for Carlos Ena)

Procedural background

1. On 15 September 2003 commenced the trial of Umberto and Carlos Ena.
2. On 29 October 2003, the defense for Carlos Ena and Umberto Ena filed a "Joint Defense Motion to Excluded Four Reports on Human Rights Situation in East Timor From Being Admitted As Evidence."
3. On 30 October 2003, the prosecutor submitted a response to the defense motion titled, "Prosecutor Response to a Series of Documents from the Counsels of the Accused Umberto Ena and Carlos Ena".
4. On 14 November 2003, the defense filed a response to the issues raised by the prosecutor in a motion titled "Defense Reply to Response by Prosecution to Defense Motions Filed on Record on 29 October 2003."
5. On 4 December 2003, the Court rejected the defense motion and admitted into evidence the Human Rights Reports stating that the defense could call the authors of the report if it wished to have them examined.
6. The defense in an oral motion pursuant to right granted in Section 27.2 of the Rules requested that all experts responsible for the drafting of human rights reports be called. The defense specifically requested that they be called to testify as to a number of specific items including: their qualifications, the protocol used in their investigation and the source of their information.
7. The Prosecutor responded orally that the whereabouts of the authors of the reports were unknown for the Prosecution.
8. On 6 February 2004 the defense counsel for Carlos Ena filed a second motion requesting the Court to rule on its request to call the authors of the four reports.

Submissions of the parties

9. On his motion of 6 February 2003 the defense counsel for Carlos Ena alleges that the defense has a right to call or have examined any adverse witness. The defense further invokes Section 36.3 that establishes that on exceptional grounds the statement of a witness or a witness expert may have another form other than oral. The defense counsel assumes that such exceptional grounds don't appear in the case. The defense counsel also regrets what it understands as a reversal of the burden of proof by being obliged to show how those witnesses are necessary

while it should be the Prosecutor who must show exceptional grounds for admitting non viva voce evidence.

Decision of the Court

10. The Court, in its decision of 4 December 2003 admitting the four human rights reports presented by the Prosecutor recalled that its interpretation of the concept of evidence was not strict.
11. The Court, quoting the ICTY decision in the *Celibici Case* said that *"the threshold standard for the admission of evidence ... should not be set excessively high, as often documents are sought to be admitted into evidence, not as ultimate proof of guilt or innocence, but to provide a context and complete the picture presented by the evidence gathered"*¹.
12. The Court continued by saying that given the fact that *"the above-mentioned documents were not created to be used before a Court and they were not supposed to support criminal charges, [...] to guarantee a fair trial the facts described in the documents (the widespread and/or systematic violation of human rights occurred throughout East Timor in 1999) should be supported by other evidence, or, in the case the Court decides to establish the existence of a Crime against Humanity on the solely basis of the reports, at least, their probative value should be weighted by the Court in its final decision."*
13. The decision of the Court also stated that the admission of the documents *does not* mean that the prosecutor does not have to prove the facts contained in the documents fact at trial, nor that the facts cannot be challenged, refuted or qualified by evidence at trial. In conclusion, the Court concluded that for its mere admission the Court did not consider these facts as proven for the case.
14. Therefore, the Court has already assured the parties that the probative value of the given reports will be prudently weighted by the Court.

¹ Prosecutor v. DELALIC and Others (IT-96-21) "Celebici case", ICTY, decision 19 January 1998, § 20. Where it is also specify that *"while the importance of the rules on admissibility in common law follows from the effect which the admission of a certain piece of evidence might have on a group of lay jurors, the trials before the International Tribunal are conducted before professional judges, who by virtue of their training and experience are able to consider each piece of evidence which has been admitted and determine its appropriate weight. As noted above, it is an implicit requirement of the Rules that the Trial Chamber give due considerations to indicia of reliability when assessing the relevance and probative value of evidence at the stage of determining its admissibility. However, this terminology may leave some room for misunderstanding, and could possibly be misperceived as demanding that a binding determination be made at this stage as to the genuineness, authorship or credibility of evidence. For this reason the Trial Chamber wishes to make clear that the mere admission of a document into evidence does not in and of itself signify that the statements contained therein will necessarily be deemed to be an accurate portrayal of the facts. Factors such as authenticity and proof of authorship will naturally assume the greatest importance in the Trial Chamber's assessment of the weight to be attached to individual pieces of evidence"*.

15. From this the defense deduces a right to call the authors of the reports to have them examined.
16. The Court admits the right of the defense to examine any person with relevant information pertaining to the case, including expert witness, as far as the information is of relevance to the Court, pursuant to Section 34.1 of the Transitional Rules of Criminal Procedure (UNTAET Regulation 2000/30 as amended).
17. But in this particular case, there is no necessity to call the authors of the reports to come to testify on the facts that there was a widespread or systematic attack on the civilian population of East Timor on or around 9 September 1999. Those facts are now well-known facts, which have already been adjudicated by this court in many other cases. According to Art. 184.2 of the Indonesian Code of Criminal Procedure, matters that are generally known need not to be proved.

Therefore,

The Court rejects the motion of the defense.

Dili, 12 February 2004

Judge Sylver NTUKAMAZINA
Judge Maria Natercia PEREIRA
Judge Siegfried BLUNK

Sylvester
Blunk
according to dis. opinion attached
Blunk

Dissenting Opinion by Judge Blunk

Para. 17 needs clarification:

That the Court has "adjudicated" in a certain way does not signify that a certain fact is proved.

However, that there was a systematic attack on the civilian population of East Timor in September 1999, is now a well known fact of history was such an attack, that can be ascertained from history books (cf. for example James Dunn, East Timor 3rd edition 2003 page 350 -352), and according to Art. 184.2 Indonesian Code of Criminal Procedure matters which are generally known need not be proved.

13.2.04

A handwritten signature in black ink, appearing to be 'Blunk', is written below the date.