

**ANNOTATED LEADING CASES OF
INTERNATIONAL CRIMINAL TRIBUNALS**

VOLUME XIII

**TIMOR LESTE
THE SPECIAL PANELS FOR SERIOUS CRIMES
2001-2003**

André KLIP and Göran SLUITER (eds.)



intersentia

Antwerp – Oxford – Portland

Distribution for the UK:

Hart Publishing Ltd.
16C Worcester Place
Oxford OX1 2JW
UK
Tel: + 44 1865 51 75 30
Fax: + 44 1865 51 07 10

Distribution for the USA and Canada:

International Specialized Book Services
920 NE 58th Ave Suite 300
Portland, OR 97213
USA
Tel: + 1 800 944 6190 (toll free)
Tel: + 1 503 287 3093
Fax: + 1 503 280 8832
e-mail: info@isbs.com

Distribution for Switzerland and Germany:

Schulthess Verlag
Zwingliplatz 2
CH-8022 Zürich
Switzerland
Tel: + 41 1 251 93 36
Fax: + 41 1 261 63 94

Distribution for other countries:

Intersentia Publishers
Groenstraat 31
BE-2640 Mortsel
Belgium
Tel: + 32 3 680 15 50
Fax: + 32 3 658 71 21

Please cite as: TL, Judgement, *Prosecutor v. Leonardus Kasa*, Case No. 11/2000, SPSC, Klip /Sluiter, ALC-XIII-143, 9 May 2001

Annotated Leading Cases of International Criminal Tribunals

André Klip and Göran Sluiter (eds.)

Cover illustration: Charlotte Sluiter

© 2008 Intersentia
Antwerp - Oxford - Portland
www.intersentia.com

ISBN 978-90-5095-673-4
D/2008/7849/3
NUR 828

No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means, without written permission from the publisher.

TABLE OF CONTENTS

Table of Contents	5
Preface by the editors	9
Preface by Justice Rapoza	11
Introduction	15
 Part 1 / Preliminary matters	
 1. Arrest Warrant / Indictment	
Decision, <i>Prosecutor v. Francisco Pedro</i> , Case No. 1/2001, SPSC, 22 May 2001	29
Commentary <i>Brianne McGonigle</i>	35
 2. Provisional release / detention	
Judgement (Criminal Appeal No. 2001/1), <i>Prosecutor v. Júlio Fernandes</i> (Case No. 2/2000), <i>Carlos Soares Carmona</i> (Case No. 3/2000), <i>Romeiro Tilman</i> , <i>Benjamin Sarmiento</i> (Case No. 18/2001), <i>Joseph Leki</i> (Case No. 5/2000), <i>Mateus Tilman</i> (Case No. 8/2000), <i>Augustino da Costa</i> (Case No. 7/2000), <i>Manuel Gonçalves Leto Bere</i> (Case No. 10/2000), <i>Joni Marques</i> , <i>Manuel da Costa</i> , <i>João da Costa</i> , <i>Paulo da Costa</i> , <i>Amélio da Costa</i> , <i>Hilário da Silva</i> , <i>Gonsalo dos Santos</i> , <i>Alarico Fernandes</i> , <i>Mautersa Monis</i> , <i>Gilberto Fernandes</i> (Case No. 9/2000), <i>Carlos Soares</i> (Case No. 12/2000) and <i>Anígio de Oliveira</i> (Case No. 7/2001), CoA, 14 February 2001 [Translation by the Editors]	41
Judgement of Fredrick Egonda-Ntende	46
The Request for the Release of the Accused Benjamin Sarmiento, Romerio Tilman and Joao Sarmiento, <i>Prosecutor v. Benjamin Sarmiento</i> , <i>Romeiro Tilman</i> , <i>João Sarmiento and Domingos Mendonça</i> , Case No. 18/2001, SPSC, 22 March 2002	51
Decision to the Application for Release of the Accused Jose Cardoso Ferreira alias Muzhino, <i>Prosecutor v. João Franca da Silva</i> , <i>José Cardoso Ferreira and Sabino Gouveia Leite</i> , Case No. 4/2001, SPSC, 27 April 2002	59
Decision on the Application of Release of the Accused Salvador Soares aka Salvador Leos Marobo, <i>Prosecutor v. Salvador Soares</i> , Case No. 7/2002, SPSC, 16 September 2002	67
Decision to the Application for Release of the Accused Lino de Carvalho, <i>Prosecutor v. Lino de Carvalho</i> , Case No. 10/2001, SPSC, 28 October 2002	71
Decision on the Application for Conditional Release of Sabino Gouveia Leite, <i>Prosecutor v. Sabino Gouveia Leite</i> , Case No. 4b/2001, SPSC, 17 December 2002	77
Decision to the Application for Release of the Accused Abilio Mendez Correia, <i>Prosecutor v. Abilio Mendez Correia</i> , Case No. 19/2001, SPSC, 10 June 2003	83
Decision to the Application for Release of the Accused Carlos Ena, <i>Prosecutor v. Carlos Ena</i> , Case No. 5/2002, SPSC, 12 June 2003	89
Commentary <i>Salvador Zappalà</i>	93

Part 2 / Procedural matters

3. Procedural decisions

Ruling of the Court With Respect to the Request of the Defense Relating to the Interference With the Defense’s Witnesses, <i>Prosecutor v. Salvador Soares</i> , Case No. 7/2002, SPSC, 16 September 2002	103
Commentary <i>Brianne McGonigle</i>	109

Part 3 / Judgements

4. Judgements

Sentencing Judgement, <i>Prosecutor v. João Fernandes</i> , Case No. 1/2000, SPSC, 25 January 2001	115
Dissenting Judgement of Judge Maria Natércia Gusmão Pereira Regarding the Facts and the Sentencing for Serious Crimes	120
Judgement, <i>Prosecutor v. Júlio Fernandes</i> , Case No. 2/2000, SPSC, 1 March 2001	123
Dissenting Decision and Disagreement of Judge Maria Natércia Gusmão Pereira on the Analysis of Facts and Applicable Law	131
Judgement, <i>Prosecutor v. Carlos Soares Carmona</i> , Case No. 3/2000, SPSC, 8 March – 25 April 2001.	135
Judgement, <i>Prosecutor v. Leonardus Kasa</i> , Case No. 11/2000, SPSC, 9 May 2001	143
Judgement, <i>Prosecutor v. Manuel Gonçalves Leto Bere</i> , Case No. 10/2000, SPSC, 15 May 2001.	149
Judgement, <i>Prosecutor v. Carlos Soares</i> , Case No. 12/2000, SPSC, 31 May 2001	159
Judgement, <i>Prosecutor v. Joseph Leki</i> , Case No. 5/2000, SPSC, 11 June 2001.	169
Judgement, <i>Prosecutor v. Jose Valente</i> , Case No. 3/2001, SPSC, 19 June 2001	181
Commentary <i>Göran Sluiter</i>	192

5. Judgements

Judgement, <i>Prosecutor v. Francisco dos Santos Laku</i> , Case No. 8/2001, SPSC, 25 July 2001.	207
Judgement, <i>Prosecutor v. Mateus Tilman</i> , Case No. 8/2000, SPSC, 24 August 2001	217
Judgment, <i>Prosecutor v. Augusto Asameta Tavares</i> , Case No. 2/2001, SPSC, 28 September 2001	229
Judgement, <i>Prosecutor v. Augustino da Costa</i> , Case No. 7/2000, SPSC, 11 October 2001	239
Commentary <i>Steven Freeland</i>	252

6. Judgements

Judgement, <i>Prosecutor v. Joni Marques, Manuel da Costa, João da Costa, Paulo da Costa, Amélio da Costa, Hilário da Silva, Gonsalo dos Santos, Alerico Fernandes, Mautersa Monis and Gilberto Fernandes</i> , Case No. 9/2000, SPSC, 11 December 2001	257
Commentary <i>André Klip</i>	505

7. Judgements

Sentence, <i>Prosecutor v. Anígio de Oliveira</i> , Case No. 7/2001, SPSC, 27 March 2002 [Translation by the Editors]	511
Sentence, <i>Prosecutor v. Marcurious José de Deus</i> , Case No. 13/2001, SPSC, 18 April 2002	523
Judgment, <i>Prosecutor v. Augusto dos Santos</i> , Case No. 6/2001, SPSC, 14 May 2002	531
Final Judgement Pronounced in First Instance, <i>Prosecutor v. Armando dos Santos</i> , Case No. 16/2001, SPSC, 9 September 2002 [Translation by the Editors]	541
Commentary <i>Maria Fernanda Palma Pereira</i>	560

8. Judgements

Judgement, <i>Prosecutor v. Francisco Soares</i> , Case No. 14/2001, SPSC, 12 September 2002	567
Partly Dissenting Opinion of Judge Ramos.	577
Judgement, <i>Prosecutor v. Gaspard Leki</i> , Case No. 5/2001, SPSC, 14 September 2002	579
Judgement, <i>Prosecutor v. X</i> , Case No. 4/2002, SPSC, 2 December 2002	589
Commentary <i>Goreth Kyakuwa</i>	597

9. Judgements

Judgement, <i>Prosecutor v. João Franca da Silva</i> , Case No. 4a/2001, SPSC, 5 December 2002	609
Judgement, <i>Prosecutor v. Sabino Gouveia Leite</i> , Case No. 4b/2001, SPSC, 7 December 2002	637
Commentary <i>Kai Ambos and Ousman Njikam</i>	661

10. Judgements

Judgement, <i>Prosecutor v. José Cardoso Ferreira</i> , Case No. 4c/2001, SPSC, 5 April 2003	671
Judgement, <i>Prosecutor v. Agustinho Atolan</i> , Case No. 3/2003, SPSC, 9 June 2003	755
Commentary <i>Alexander Zahar</i>	762

11. Appeals

Judgement (Criminal Appeal No. 2001/2), <i>Prosecutor v. João Fernandes</i> , Case No. 1/2000, CoA, 29 June 2001	767
Judgement of Judge Egonda-Ntende	774
Judgement (Criminal Appeal No. 2001/9), <i>Prosecutor v. José Cardoso Ferreira</i> , Case No. 4c/2001, CoA, 29 June 2001 [Translation by the Editors]	781
Judgement of Judge Egonda-Ntende	783
Judgement (Criminal Appeal No. 2001/17), <i>Prosecutor v. Carlos Soares Carmona</i> , Case No. 3/2000, CoA, 2 August 2001 [Translation by the Editors]	785
Judgement (Criminal Appeal No. 2001/4), <i>Prosecutor v. Lino de Carvalho</i> , Case No. 10/2001, CoA, 29 October 2001 [Translation by the Editors]	791
Judgement of Judge Egonda-Ntende	796

Judgement (Criminal Appeal No. 2001/7), <i>Prosecutor v. Júlio Fernandes</i> , Case No. 2/2001, CoA, 29 October 2001 [Translation by the Editors]	801
Judgement of Judge Egonda-Ntende	808
<i>Commentary Pedro Caeiro</i>	817
Index	839
Contributors and Editors	845

PREFACE BY THE EDITORS

This is the first of two volumes on the case law of the Special Panels for Serious Crimes within the District Court of Dili (SPSC) and the Court of Appeal of East Timor. This thirteenth volume contains the most important decisions of both courts from the early days in 2001 to June 2003. Volume XVI will provide the decisions from July 2003 to May 2005. The collection and selection of the East Timorese decisions took place under entirely different circumstances than for all other volumes in this series. Even though difficulties sometimes occur with the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC), they are exceptional. However, they were the rule with regard to East Timor. For example, there have been decisions in Portuguese that mentioned that there was an original or translation in English, but we were unable to find it and *vice versa*. Some decisions were undated; some carried more than one date.

The selection of the decisions was made from those we could find in either Portuguese or English. Although the editors are convinced that the collection of decisions in this volume and in volume XVI is the most complete ever published, they are not in position to guarantee that the selection was made on all decisions taken. We simply do not know. The courts did not systematically keep a record of their decisions. There are a number of decisions of which we are uncertain whether the English or Portuguese translations we were able to find were in fact translated under the authority of the court.¹ We found that some translations were made on behalf of the Prosecution. Quite a number of decisions of which we were able to trace a Portuguese original but no English translation were translated on behalf of the editors. This is mentioned for each decision.

We could only include the full text of the decisions in this volume by reducing their original format. Still, we wanted the reader to be able to identify the page number of the original text, which is throughout the text put in brackets []. We are again very happy that a number of scholars in the field of international criminal law were prepared to write interesting and stimulating commentaries to the decisions.

A few words regarding the selection of decisions may give the user insight into our working method. In principle, we select all final judgements. In addition, we publish decisions taken at any stage of the procedure that are important for other reasons: because they deal with a specific legal question, because they are representative of a specific type of decision or because they enter new legal waters. Of course, we cannot publish all decisions. As a result we may not publish decisions in which issues have been decided in a way similar or identical to a decision that has already been selected.

The decisions are presented in different parts and under different headings.

Part 1 deals with preliminary matters, and contains a variety of legal issues that preferably need to be resolved before the commencement of the trial. Under Heading 1, we have included a decision that relates to the arrest warrant and the indictment. Heading 2 deals with issues related to provisional release. The majority of the decisions published are of the SPSC, one is from the Court of Appeal.² This is also a decision for which we provided a translation from the original Portuguese.

¹ The Judicial System Monitoring Programme (JSMP) notes that many Court of Appeal decisions were never translated into English from Portuguese. See JSMP, Digest of the Jurisprudence of the Special Panels for Serious Crimes, April 2007, p. 5; available via: [http://www.jsmp.minihub.org/Reports/2007/SPSC/SERIOUS%20CRIMES%20DIGEST%20\(Megan\)%20250407.pdf](http://www.jsmp.minihub.org/Reports/2007/SPSC/SERIOUS%20CRIMES%20DIGEST%20(Megan)%20250407.pdf); visited 2 May 2008.

² TL, Judgement (Criminal Appeal 2001/1), *Prosecutor v. Júlio Fernandes* (Case No. 2/2000), *Carlos Soares Carmona* (Case No. 3/2000), *Romeiro Tilman, Benjamin Sarmiento* (Case No. 18/2001), *Joseph Leki* (Case No. 5/2000), *Mateus Tilman* (Case No. 8/2000), *Augustino da Costa* (Case No. 7/2000), *Manuel Gonçalves Leto Bere* (Case No. 10/2000), *Joni Marques, Manuel da Costa, João da Costa, Paulo da Costa, Amélio da Costa, Hilário da Silva, Gonsalo dos Santos, Alarico Fernandes, Mautersa Monis, Gilberto Fernandes* (Case No. 9/2000), *Carlos Soares* (Case No. 12/2000) and *Anígio de Oliveira* (Case No. 7/2001), CoA, 14 February 2001, in this volume, p. 41.

Part 2 is entitled procedural matters and deals with only one decision. Under Heading 3, we have selected a decision dealing with interferences with witnesses. The fact that so few procedural decisions were found indicates that many of those procedural decisions were not in a written form and were only given orally.

Part 3 builds the largest part containing judgements. The different headings 4-10 distinguish themselves by the relevant period. Under heading 7, the judgements in the cases of Anígio de Oliveira³ and Armando dos Santos⁴ are translated by the editors. Under Heading 11, we have grouped a number of decisions of the Court of Appeal. Apart from the first decision and all Separate Judgements of Judge Egonda-Ntende, all Court of Appeal decisions under this heading⁵ have been translated by the editors.

We owe many thanks to Isabel Ferreira de Sousa for going through the lengthy process of translating decisions, the Portuguese original of which was often not comprehensive and used inconsistent legal language. We refrained from ‘making things better’, and with each translation, we have tried to remain as close as possible to the original.⁶ At times, this was extremely difficult. André Klip, who had learned Portuguese a long time ago, is responsible for the choices made in this regard.

This volume has two prefaces. We are very glad that Coordinating Judge Phillip Rapoza of the SPSC accepted our invitation to write a preface for this first volume on East Timor. Given the unique circumstances of East Timor and the inaccessibility of sources, we also found it necessary to add additional background information to the commentaries and an overall assessment in the form of an introduction. The editors wish to express their gratitude to Sergey Vasiliev and Steven Freeland, who wrote large parts of this introduction. Thom Dieben, our student assistant, once again assisted us and kept a keen eye on putting all the original and translated decisions in the right order.

André Klip and Göran Sluiter
Maastricht/Amsterdam, July 2008

³ TL, Sentence, *Prosecutor v. Anígio de Oliveira*, Case No. 7/2001, SPSC, 27 March 2002, in this volume, p. 511.

⁴ TL, Final Judgement Pronounced in First Instance, *Prosecutor v. Armando dos Santos*, Case No. 16/2001, SPSC, 9 September 2002, in this volume, 541.

⁵ TL, Judgement (Criminal Appeal No. 2001/9), *Prosecutor v. José Cardoso Ferreira*, Case No. 4c/2001, CoA, 29 June 2001, in this volume, p. 781; TL, Judgement (Criminal Appeal No. 2001/17), *Prosecutor v. Carlos Soares Carmona*, Case No. 3/2000, CoA, 2 August 2001, in this volume, p. 785; TL, Judgement (Criminal Appeal No. 2001/4, *Prosecutor v. Lino de Carvalho*, Case No. 10/2001, CoA, 29 October 2001, in this volume, p. 791; and TL, Judgement (Criminal Appeal No. 2001/7), *Prosecutor v. Júlio Fernandes*, Case No. 2/2001, CoA, 29 October 2001, in this volume, p. 801.

⁶ Even apparent grammatical and typographical errors have not been corrected.

PREFACE BY JUSTICE RAPOZA¹

It was with great pleasure that I accepted the kind invitation of André Klip and Göran Sluiter, the editors of this series, to provide a preface to the first of two volumes containing the jurisprudence of the serious crimes process² in East Timor.³ Although much of the included material has been made available online,⁴ what follows is the first effort to set out this body of case law in print. The publication of the present volume thus continues the process of making the decisions of both the Special Panels for Serious Crimes (SPSC) and the Court of Appeals (CoA) available to a wider audience. Moreover, by presenting the jurisprudence of both courts in the context of this series, the editors have made it possible to consider the decisions of the two courts in relation to those of other, similar tribunals.

In addition to presenting relevant decisions of both the SPSC and the CoA, this volume includes a number of commentaries on the jurisprudence of the serious crimes process. Such analysis is quite useful considering the absence, to date, of a comprehensive overview and analysis of the jurisprudence in its entirety.⁵ This is unfortunate, as the decisions of both the SPSC and the CoA are noteworthy for a number of reasons, not the least of which is that they represent the jurisprudence of the first hybrid criminal process to conclude its mandate.⁶ For better or for worse, the two tribunals were also the first to apply the substantive provisions of the Statute of the International Criminal Court, which formed part of the applicable law of the serious crimes process in East Timor. Similarly, both tribunals dealt with a number of legal issues concerning which there was little previous jurisprudence at the international level.⁷

There is another reason why these volumes are of value. As with everything else associated with the serious crimes process, the decisions that follow reflect the challenges associated with doing justice in East Timor. The judicial initiative in East Timor was not only the first hybrid criminal process to come into existence anywhere in the world, but also it was the first to be established in the very country where the underlying crimes occurred. Thus, the judicial process was itself required to endure all the privations of the post-

¹ Phillip Rapoza is the Chief Justice of the Massachusetts Appeals Court. He was a judge of the Special Panels for Serious Crimes (SPSC) from 2003 to 2005 and served as chief international judge during the period 2004 to 2005 under the UN title of Judge Coordinator.

² The term 'serious crimes process' refers generally to legal proceedings involving individuals accused of crimes against humanity and other serious criminal offenses that occurred in East Timor during 1999. See Sections 4 through 9 ('Serious Criminal Offenses') of UNTAET Regulation 2000/15 (genocide, war crimes, crimes against humanity, murder, sexual offenses and torture). The pertinent judicial institutions of the process were the SPSC, which was the trial chamber, and the Court of Appeal (CoA), which was the appellate chamber. The SPSC included both international and national judges and functioned as a special panel of the Dili district court, with exclusive jurisdiction over serious crimes committed throughout East Timor. See Section 9 ('Exclusive Jurisdiction for Serious Crimes') of UNTAET Regulation 2000/11 as amended. The CoA was similarly of mixed composition and was the court of last resort for all appeals in serious crimes cases as well as all other criminal and civil cases originating in the national court system.

³ The official name of independent Timor is *República Democrática de Timor-Leste* (Democratic Republic of East Timor). For ease of reference and for consistency with the other contributors, I use the name East Timor.

⁴ See Judicial System Monitoring Programme, SPSC Case Information at http://www.jsmp.minihub.org/Language_English/spsc2000_english.htm and University of California Berkeley War Crimes Studies Center, Special Panels for Serious Crimes Final Documents at <http://socrates.berkeley.edu/~warcrime/ET-special-panels-docs.htm>.

⁵ Two works that do look at the case law of the serious crimes process are D. Cohen, *Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor*, East-West Center Special Report No. 9, June 2006 and JSMP, *Digest of the Jurisprudence of the Special Panels for Serious Crimes*, April 2007, available via:

[http://www.jsmp.minihub.org/Reports/2007/SPSC/SERIOUS%20CRIMES%20DIGEST%20\(Megan\)%20250407.pdf](http://www.jsmp.minihub.org/Reports/2007/SPSC/SERIOUS%20CRIMES%20DIGEST%20(Megan)%20250407.pdf); visited 11 March 2008.

⁶ The mandate of the SPSC ended on 20 May 2005. The tribunal tried a total of 87 defendants, dismissed charges against 13 defendants, and found one defendant not fit for trial. The SPSC also issued 285 arrest warrants, which remain pending. The overwhelming majority of the defendants named in the outstanding warrants are outside of East Timor and believed to be in Indonesia.

⁷ See, for example, TL, Findings and Order on Defendant Nahak's Competence to Stand Trial, *Prosecutor v. Josep Nahak*, Case No. 1a/2004, SPSC, 1 March 2005, to be published in volume XVI (competence to stand trial); TL, Judgement, *Prosecutor v. Alarico Mesquita, Florindo Morreira, Domingos Amati, Francisco Matos, Laurindo da Costa, Laurencço Tavares, Mateus Guterres and Angelino da Costa*, Case No. 28/2003, SPSC, 6 December 2004, to be published in volume XVI (persecution in the form of abduction as a severe deprivation of liberty); and TL, Judgement, *Prosecutor v. X*, Case No. 04/2002, SPSC, 2 December 2002, in this volume, p. 859 (prosecution of a minor).

conflict society in which it was located and that fact alone placed a number of obstacles in its path. In addition, although the international community had previously made a significant commitment of financial and human resources to the international criminal tribunals for both the former Yugoslavia and Rwanda, there was no comparable effort to support the serious crimes process in East Timor.

The serious crimes process in East Timor, including not only the judiciary, but also the prosecution and defense, was essentially established by and supported through successive United Nations missions in the country.⁸ Both the UN administration and staff did their best to be of assistance, but they were limited by their own lack of experience with respect to judicial institutions. Moreover, they were hampered by the failure of the international community to define a clear mandate for the judicial process, to prepare a strategic plan to accomplish its goals and, finally, to match the rhetoric of justice with the support required to accomplish that objective.

The serious crimes process was thus entirely dependent on the cooperation of the local UN mission and the resources that it could make available. This produced a scenario in which, by way of illustration, the recruitment of international judges was handled through the local personnel office of the mission, which had no experience in judicial matters or in the operation of a tribunal. Recruitment was further complicated by the insistence of Timorese authorities that judges serving in the serious crimes process come exclusively from civil law countries.⁹

Like other mission staff, judges were hired on short-term contracts, injecting an element of suspense every six months as to whether they would be retained. Considering the difficult conditions in East Timor and the lack of international support for the serious crimes process, a number of judges declined to renew their brief contracts, even though they were sitting on ongoing trials. This unfortunate reality delayed the trial of cases and interfered with the smooth operation of the judicial process. In one particularly egregious example, the CoA failed to sit for 18 months, from October 2001 to June 2003, owing to the lack of a sufficient number of international judges.¹⁰

The SPSC and the CoA were located in a courthouse that had neither a functioning law library nor a collection of even the most basic texts in international criminal law.¹¹ Judges used books and other materials that they were able to assemble on an ad hoc basis and they made use of the internet when it was available. Until shortly before the closure of the process, neither court had law clerks or other assistants to perform legal research. Translation problems were similarly woven into the daily operation of both courts. The SPSC included separate Portuguese and English speaking panels of judges and it was only very late in the tribunal's mandate that judges were supplied translations of their colleagues' decisions. Similarly, the CoA experienced a period during which it was not uncommon for majority and dissenting opinions in the same case to be

⁸ The serious crimes process was established by the United Nations Transitional Administration in East Timor (UNTAET) in 2000. See Section 1 ('Panels with Jurisdiction over Serious Criminal Offences') of UNTAET Regulation 2000/15. Following Timorese independence in 2002, the SPSC continued to function as before and the existence of its mixed panels was recognized in Section 163.1 of the Constitution of East Timor. The SPSC continued to operate until May 2005, at which point, pursuant to Security Council Resolution 1543 (2004), all trials and other judicial activities were brought to a close. This occurred during the period of the United Nations Mission in Support of East Timor (UNMISSET).

⁹ Although East Timor is a civil law country, the serious crimes process, and the Special Panels in particular, operated under transitional rules that contained elements of both civil law and common law legal systems. See Transitional Rules of Criminal Procedure, UNTAET Regulation 2000/30, as amended. In comparable circumstances, the *ad hoc* tribunals for both the former Yugoslavia and Rwanda, as well as the hybrid tribunals located in Sierra Leone, Bosnia and Cambodia, have routinely included judges from both civil law and common law countries. To the extent that this writer, although from a common law system, served on the Special Panels, his appointment has been attributed to the unique circumstances of "his Portuguese ancestry, his ability to speak Portuguese, and his connections with the Portuguese judiciary." See D. Cohen, *Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor*, *supra* note 5, p. 11, footnote 19.

¹⁰ To a significant degree, such lapses in recruitment resulted from the preference given to Portuguese-speaking judicial candidates despite the fact that equally qualified non-lusophone judges were available. It should be noted that, in addition to Portuguese, from the outset English, Bahasa Indonesia and Tetum were all formally recognized as working languages of the serious crimes process. Although the President of the Court of Appeals issued a language directive in 2004 declaring that only Portuguese and Tetum could be used in the national court system, he continued to recognize English as an official language of the serious crimes process.

¹¹ There was a library room that contained a number of random volumes relating to Australian traffic regulations, tort law, property law and the rules of inheritance.

issued in different languages.

Little material assistance was provided by the Timorese authorities, although the SPSC operated as a panel of the Dili district court. In large part, this reflected the policy of the Timorese leadership to distance itself from the tribunal and to decline ownership of the serious crimes process.¹² Although the courthouse used by the SPSC and the CoA was operated by the Timorese Ministry of Justice with financial assistance from the UN, basic services such as electricity were supplied intermittently. In the absence of electrical power, as was often the case, basic office equipment could not function, including computers, the internet, copy machines, and, of course, lighting and air conditioning. Eventually, the local UN mission intervened, repairing the courthouse generator and providing sufficient fuel to last until the end of the court's mandate.

Considering all these factors, it is hard to imagine a situation less conducive to the successful operation of a tribunal and to the development of a vigorous and consistent jurisprudence. To the extent that numerous decisions reported in the present volume and its later companion did rise to the occasion, substantial credit should be given to the judges involved. Indeed, it was significant that both international and Timorese judges produced a number of superior decisions despite the many hurdles they had to overcome. Ultimately, the success of every institution depends on the efforts of its individual members and a court is no exception. Doing justice is never easy, but achieving it in such difficult circumstances as were presented in East Timor was a significant challenge.

There was, however, one very bright spot on this otherwise dark horizon. The presence of Timorese national judges on both the SPSC and the CoA proved to be one of the strong points of the hybrid criminal process. As anticipated, their professional interaction with international judges helped them to develop professionally and to enhance their judicial skills. Perhaps the most significant beneficiary of their participation, however, was the serious crimes process itself. The presence of Timorese judges, both at the trial and the appellate level, ensured that ethnic sensitivity, cultural awareness and familiarity with the social realities of the country were brought to bear during judicial proceedings. Moreover, the Timorese judges who served produced some of the finest examples of judicial writing to emerge from the serious crimes process.

Considering the limited number of international and hybrid tribunals that have dealt with such serious criminal offenses as occurred in East Timor, the publication of the present volume, with a second one to follow, should be extremely welcome. The development of international criminal law continues to be a work in progress and this volume and its successor will no doubt make an important contribution to that process.

Phillip Rapoza
September 2007

¹² Indeed, Timorese officials did more than simply distance themselves from the process. For example, Timorese Prosecutor General Longuinhos Monteiro publicly condemned the issuance of an arrest warrant by the SPSC for General Wiranto, the former Indonesian commander in chief and minister of defense. Similarly, following the issuance of the warrant, President Xanana Gusmão flew to Bali to be photographed by the international media embracing Wiranto in a show of solidarity. Such lack of support for the serious crimes process was foreshadowed in 2003, when the Serious Crimes Unit originally filed the Wiranto indictment with the SPSC. Timorese authorities distanced themselves from the charges by asserting that the indictment was the handiwork of UN staff. UN officials in New York, on the other hand, issued a statement declaring that although international staff had prepared the charges, the indictment was not the work of the UN, but rather had been issued under the authority of the Timorese prosecutor general. In sum, there was no political will on the part of either national or international authorities to support the serious crimes process, even when such assistance was most needed.