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2003–2005

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PREFACE BY THE EDITORS

This is the second 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 sixteenth volume contains the most important decisions of both of those courts from July 2003 to 20 May 2005, when the serious crimes process came to an end. 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 more 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. For further particulars on the history and the practice of the serious crimes process, we refer to the Introduction in Volume XIII.[1]

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 XIII is the most complete ever published, they are not in a position to guarantee that the selection took into account 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 as to whether the English or Portuguese translations we were able to find were in fact translated under the authority of the SPSC or the Court of Appeal. We found that some translations were made on behalf of the Prosecution. Quite a number of decisions for 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 previously 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 decisions that relate to the arrest warrant and the indictment. Heading 2 deals with issues related to the specific arrest warrant for General Wiranto. The third topic is the applicable law. Other issues are provisional release, evidence and fitness to stand trial.

Part 2 comprises the largest part and contains judgements. The different headings 7-16 distinguish themselves by the relevant period. Quite a number of these judgements have been translated by the editors. Both in the Table of Contents, as well as for each individual decision, it is indicated when a translation was made. Under Heading 16, we have grouped a number of decisions of the Court of Appeal.

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

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[1] See Freeland *et al*., Introduction, Klip/ Sluiter, ALC-XIII-15.

close as possible to the original.[2] 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 honoured by the fact that Deputy General Nicholas Koumjian of the Serious Crimes Unit accepted our invitation to write a preface for this second 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 Steven Freeland of the University of Western Sydney, for correcting once again the language in the commentaries. Thom Dieben, our student assistant, assisted us and kept a keen eye on putting together all the original and translated decisions in the right order.

André Klip and Göran Sluiter

Maastricht/Amsterdam, July 2009

[2] Even apparent grammatical and typographical errors have not been corrected.

PREFACE NICHOLAS KOUMJIAN[1]

1. Introduction

This is the second volume of case law emanating from the Special Panels for Serious Crimes within the District Court of Dili (SPSC) and the Court of Appeal of East Timor covering the period from July 2003 through to the end of the process in May 2005. The SPSC were created by the United Nations Transitional Administration in East Timor (UNTAET) in 2000 to address demands for justice for the massive crimes that occurred during the autonomy referendum period. United Nations personnel were given positions inside the domestic court system with the objective of applying not only domestic criminal laws to the crimes but also international humanitarian law and the laws of war. The decisions and judgments reported in these volumes reflect some of the accomplishments and limitations of these efforts.

The SPSC were unique in their origin and structure. While the International Criminal Tribunals for Rwanda (ICTR) and the Former Yugoslavia (ICTY) were established by United Nations Security Council Resolutions, and the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) were established by treaties between the United Nations and the host country, the SPSC were created by regulations issued during the transitional period of United Nations administration of East Timor.[2] These regulations vested the SPSC with exclusive authority to deal with crimes enumerated in UNTAET Regulations 2000/11 and 2000/15. The serious crimes process, while part of the domestic system, was largely staffed by United Nations personnel and funded under the budget of the United Nations peacekeeping mission. The regulations required that each trial panel be composed of two international and one national judge creating a hybrid domestic-international structure.[3]

From its establishment in 2000 until its closure in May 2005, ninety-five indictments were filed with the SPSC indicting a total of 392 persons. Most of those indicted were believed to be residing in Indonesia, and never arrested. These included 41 accused persons that were members of the army, police officials or officials in the Indonesian civil administration of East Timor at the time the alleged crimes were committed. Verdicts were delivered in 55 trials involving 87 accused.[4] Three accused were acquitted of all charges and 84 were convicted of at least one charge, although, in several cases, the convictions were for much lesser charges and the sentences much lower than those sought by the prosecution.

While the number of persons indicted and tried at the SPSC in East Timor compares favorably with much better-funded and longer established ICTY, ICTR, SCSL, the cases in East Timor were much more limited in scope and complexity than the leadership cases from these other tribunals. Most accused arrested and brought before the SPSC were direct perpetrators or mid to low-level commanders. Higher-level indictees were never arrested as they remained beyond the reach of the serious crimes process for reasons explained below.

2. Jurisdiction and enforcement limitations

The fact that the serious crimes process was established within the national legal system had certain practical consequences. It had the benefit of keeping justice close to the victims, and in the territory where the crimes were committed. Conversely, the process was hampered by some of the weaknesses and deficiencies prevailing in a domestic system that was in the early stages of development. Placing the process with the domestic system also meant that the court lacked the enforcement powers of other international tribunals.

The principal organizers and commanders of the 1999 violence were citizens of in Indonesia who resided in that country. Indonesia, consistent with it domestic constitution and applicable laws, did not recognize

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1 The author was Deputy General Prosecutor for Serious Crimes in East Timor from 2003-2005.

2 See UNTAET Regulation 2000/15.

3 *Ibid*., Section 22.

4 In addition, charges were dismissed in the pre-trial stage against 13 accused, and one accused was found mentally incompetent to stand trial.

any legal obligation to extradite these citizens to East Timor,[5] and the court lacked the authority to enforce its orders under Chapter VII of the United Nations charter, which is utilized by other international tribunals.[6]

The regulations establishing the SPSC granted the court broad jurisdiction. For genocide, war crimes and crimes against humanity, there were no temporal or geographic limitations – crimes could be prosecuted that occurred at anytime, anywhere in the world, even if neither the perpetrator nor victim had any link to East Timor.[7] However, this very broad jurisdiction was not matched with corresponding authority to enforce orders of arrest or detention outside of Timorese territory. In contrast, the ICTY and ICTR Statutes obligated all United Nations member states to cooperate with orders from the tribunal.[8]

3. Capacity and strategic planning

The shortcomings of the work of the serious crimes process can be partly explained by the lack of an agreed vision at the outset of the process as to what should, and realistically could, be accomplished with the resources and political will that was available from both the Timorese authorities and the international community. Unlike other international tribunals which shared concurrent jurisdiction with a domestic court, the SPSC were the only courts in the Timorese judicial system with jurisdiction over these crimes. If a murderer or rapist was not charged under the serious crimes process, they would enjoy effective impunity, and victims and victim communities would have no legal redress. However, since the mission depended on yearly extensions and budgets approved by the United Nations Security Council, it was never clear how long the process would be supported until the Security Council issued a resolution in mid-2004 which mandated the SPSC to conclude all outstanding trials and other work within the next year.

The process would have greatly benefited if, at the outset, there was some understanding of the likely length and extent of the international commitment to the serious crimes process. This would have allowed planning prosecution filing strategy that fit the resources and time likely to be available. This uncertainty as to the capacity of the system resulted in a lack of a clear prosecution strategy at the outset that limited the numbers and prioritized indictments to fit within the capacity of the system. In *post*-conflict situations where crimes against humanity are committed, no justice system is ever likely to bring to trial all those involved in crimes. The number of perpetrators is always likely to far exceed the resources available, so it is important at the outset to have an understanding of the capacity of the system that is being built and to devise a prosecution charging policy that realistically focuses resources so as to achieve the maximum impact.

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5 Indonesia and East Timor do not have an extradition treaty. The 'Memorandum of Understanding between the Republic of Indonesia and the United Nations Transitional Administration in East Timor Regarding Cooperation in Legal, Judicial and Human Rights Related Matters', signed on 5 and 6 April 2000 (Available via: http://www.etan.org/et2000c/december/10-16/14mou.htm; visited 11 February 2009) obligated each of the parties to execute arrests and facilitate the transfers of persons but this was never put into practice.

6 However, all states have an obligation under international law to cooperate in bringing to justice those responsible for crimes against humanity and the Geneva Conventions also require all states to cooperate in bringing violators to justice (known by the maxim *aut dedere aut judicare*). Indonesia could have fulfilled its obligations by prosecuting the violators in its own courts. Although Indonesia did make an attempt to do so, its efforts were widely judged by informed observers as unacceptably flawed. Eventually, all accused in those trials were acquitted at either the trial or appeal level. (See Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999, 26 May 2005, Annex II of Letter dated 24 June 2005 from the Secretary-General Addressed to the President of the Security Council, 15 July 2005, U.N. Doc. S/2005/458). Furthermore, although the SPSC were not established by the Security Council under Chapter VII of the United Nations Charter (as is the case with the ICTY and ICTR) they were created by regulations of a United Nations Peacekeeping Mission in turn established under Chapter VII and therefore arguably received an implicit endorsement of its authority by the continued Security Council resolutions approving extension and funding of the mission.

7 See Section 2.2 of UNTAET Regulation 2000/15. Furthermore, the Timorese constitution – which took effect in 2002 – provides in Article 160 that "[a]cts committed between the 25th of April 1974 and the 31st of December 1999 that can be considered crimes against humanity of genocide or of war shall be liable to criminal proceedings with the national or international courts." However, the constitution makes it clear that the serious crimes process was to be limited to dealing with the 1999 election violence, providing in Article 163 that "[t]he collective judicial instance existing in East Timor, integrated by national and international judges with competencies to judge serious crimes committed between the 1st of January and the 25th of October 1999, shall remain operational for the time deemed strictly necessary to conclude the cases under investigation."

8 Article 29, paragraph 2, sub e of the ICTY Statute states that "[s]tates shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, the surrender or the transfer of the accused to the International Tribunal."

Despite limited investigative resources and access to evidence outside of East Timor, investigations uncovered substantial evidence demonstrating the responsibility of top military, police, civilian and militia commanders. Those indicted include General Wiranto, who was commander of Indonesia's armed forces during the violence and who was a candidate for the presidency of Indonesia at the time the warrant was issued.

4. Resource limitations

The serious crimes process funding came solely from the peacekeeping mission budget and was a fraction of what has been expended at other tribunals who were concentrating their efforts on a more limited number of generally high-level accused. The total budget for the five-year existence of the Serious Crimes Unit (SCU) was approximately USD 30-40 million. This is not much more than the annual budgets for the SCSL and the ECCC and a fraction of the well-over a billion dollars expended on both the ICTY and the ICTR since their establishment.

In my view, a modest increase in resources in particular areas would have significantly improved the quality of the proceedings and jurisprudence. More money and effort should have been put into hiring more qualified interpreters and translators and experienced international lawyers working within the trial and appeal chambers.

The language situation for the serious crimes process in East Timor was far more complicated than that faced by any of the other international tribunals. English and Portuguese were official court languages but virtually none of the defendants or witnesses spoke those languages. Tetum, an indigenous language understood by most but not all East Timorese, was also an official language but was not understood by any of the international judges. There are an estimated 14 indigenous languages in East Timor. Most of the Timorese judges and lawyers were most fluent in speaking and writing in Bahasa Indonesian, as this was the language of their education. Since the interpreters themselves were of mixed qualifications and there was no formal training, the quality of translation was often a serious problem. Many of the interpreter and translator positions were at the United Nations volunteer level. Given the importance of accurate interpretation and translations, future efforts at international justice must ensure that sufficient resources are allocated to ensure the highest quality of translation possible. In Timor, many of the interpreters used for the less-widely spoken indigenous languages could not translate into the language of the judges, requiring the court to use a relay system of interpreters, greatly increasing the risk of inaccuracies. The lack of the highest quality interpreters meant that simultaneous translation that had been donated to the court could not be used and the trials were limited to using consecutive translations.

Also many of the judges and lawyers, who were unaccustomed to using interpreters in their past experiences, would confuse the record by asking the interpreter to ask the witness a question, instead of speaking directly to the witness. Training for judges and lawyers in using interpreters is also essential.

A further investment in hiring additional lawyers with education or experience in the field of international criminal law would have assisted all parties, including the judges.[9] A single senior international lawyer assigned to advise the judges and assist in writing judgments and decisions in areas of international criminal law would have significantly benefited the process. None of the judges had prior practical or academic experience in the still incipient field of international criminal law. Most of the judges did consider international jurisprudence in their decisions, as can be seen in the decisions reported in this volume. However, one egregious example of a failure to do so was the extremely controversial decision in the Armando dos Santos case.[10] The Court of Appeal in that case held that the UNTAET regulations that had established crimes against humanity as within the jurisdiction of the court violated prohibitions against *ex post facto* law, in that

[9] In my view, the most important qualification for judges and lawyers at international tribunals is that they have practical experience in adjudicating criminal cases, even if only in a domestic setting. However, international criminal law has its own important jurisprudence and it is important that both international courts and international advocates have access to persons of experience or expertise in this field in order to build a consistent body of jurisprudence in the field and to overcome the natural tendency of all lawyers to favor the national law with which they are most familiar.

[10] TL, Judgement, *Prosecutor v. Armando dos Santos*, Case No. 16/2001, CoA, 15 July 2003, in this volume, p. 103.

they were written in the year 2000 while the crimes in question were committed in 1999.[11] This issue was not raised by the defense or by judges in oral arguments and consequently had not been addressed by either party. The Court of Appeal did not refer to any of the jurisprudence from the ICTY or ICTR, where the same issue had been considered in those tribunals.

Similarly, the defense office would have benefitted from having some senior international lawyers, particularly in the beginning of the process. When a strong defence office exists, the entire process benefits in the end as the challenges not only reduce the risk of injustices, but force the prosecution and judges to address fundamental issues and articulate reasoned responses.

5. Political constraints

A serious obstacle to the work of the SPSC was the lack of support, and at times open hostility, from the Timorese government. Leading political figures in East Timor, particularly the then President and now Prime Minister Xanana Gusmão, expressed their opposition to the entire serious crimes process and expressed a clear preference for efforts at reconciliation with the Indonesian and East Timorese perpetrators of these crimes.

The opposition of East Timorese leadership to efforts to bring to justice Indonesian officials is understandable given the geo-political realities, as any hope of a peaceful and prosperous future for the tiny nation is dependent on continued good relations with its giant neighbor. However, there are strong reasons to argue that the rule of law and respect for human rights in both countries would benefit from ending the impunity of those most responsible for these crimes, and that the long-term relationship between the peoples of these countries will never be harmonious as long as this injustice is not addressed. It is more difficult to understand the Timorese leadership's lack of support for efforts to pursue cases against those perpetrators present in East Timor. When the United Nations Mission of Support in East Timor (UNMISET) was scheduled to end in May 2005, the Timorese leadership petitioned the United Nations to extend the mandate of what it viewed as the essential components of the mission. None of the leaders proposed an extension of the SPSC or the SCU.

Furthermore, as the UNMISET mandate was winding down, several of the participants brought to the attention of the Timorese leadership the fact that the existing law required that two international judges sit on all panels adjudicating crimes within the jurisdiction of the SPSC. Without an amendment to the legislation, such as merely deleting this provision, there arguably would be no legal way to try any alleged perpetrator who was apprehended by domestic authorities after the winding up of the serious crimes process. However, no action was taken by the East Timorese leadership to amend the law or otherwise put in place mechanisms to continue the serious crimes process after the withdrawal of United Nations personnel.

This lack of political will continues to be displayed by current East Timorese leadership. President José Ramos-Horta has already granted pardons to some of those convicted in the serious crimes process, including one militia commander found responsible for the slaughter of 9 members of a church delegation, and the president now argues that it is unfair to keep Timorese in prison for these crimes when their Indonesian commanders are not being prosecuted.

6. Contributions to the serious crimes process

The serious crimes process has contributed to the establishment of the historical truth about the events of 1999, and the investigations, indictments and judicially-approved arrest warrants have helped to keep alive the hope for an eventual end to the impunity of those responsible. However, the benefits of the effort in East Timor extend beyond the individual cases adjudicated to the long-term advancement of judicial system within the country. The serious crimes process contributed to the professional development of national legal professionals. Timorese judges who sat on the SPSC had the opportunity to learn from their international colleagues. The serious crimes prosecution unit provided practical training for Timorese prosecutors, investigators, witness assistants, evidence custodians, forensic assistants and IT professionals in a program

[11] The most controversial aspect of the Court of Appeal decision in the Armando dos Santos case was that the applicable law in East Timor absent UNTAET regulations or Timorese legislation was Portuguese law and not Indonesian law. The Court of Appeal eventually abandoned this holding in the face of virulent opposition from all corners.

funded by Norway. Unfortunately, the Timorese trainee prosecutors in the SCU were unable to be involved in the actual adjudication of cases, as the relevant authorities refused to license them to appear in court until all had completed and passed Portuguese language and legal training.

Moreover, the indictments of the 305 individuals who remain fugitives are not without consequences. In some cases, the existence of these warrants has prevented groups of perpetrators from returning to the communities where their surviving victims reside, and thus contributed to the peace and stability of these communities. If any accused were to return to East Timor, they may face arrest and trial. The names of those indicted are public and this may affect decisions of third countries to grant visas or to allow those fugitives who are military or police officers to participate in internationally funded training programs.

7. Conclusion

The serious crimes process certainly did not succeed in its efforts to bring to justice those most responsible for the violence in East Timor, who remain at large in Indonesia. These efforts were crippled by the lack of political will among the leadership of Indonesia, East Timor and the international community who failed to give the process the authority to enforce its arrest warrants and bring all perpetrators before the court. However, the indictments and arrest warrants are publicly available and the supporting evidence remains in the records of the East Timor Prosecutor General and the United Nations.

Admittedly, in the current political climate there would seem to be little reason to expect that fugitives named in indictments will soon face justice; but political changes can take place rapidly and unexpectedly. No one would have predicted at the time of President Milošević's indictment that two years later the government of Yugoslavia would affect his arrest and transfer to the ICTY, but momentous political change in the country did indeed lead to this result. It is interesting to note that former Indonesian President Wahid in July 2008 spoke in favor of the establishment of an international tribunal to try those responsible for the 1999 violence in East Timor.

The shortcomings of the serious crimes process must be balanced against its achievements: contributing to development of the domestic system, the efforts, however incomplete, to fight against impunity for those most responsible for the violence, and the completed trial and punishment of 84 persons for the commission of heinous crimes. To the victims of these crimes and their families, these efforts brought some badly needed satisfaction to a country still suffering from the pain of injustices unaddressed.

Nicholas Koumjian