Judgements

Commentary

1. Introduction

Each of the judgements that is the object of this commentary was issued by the Dili District Court’s Special Panel for Serious Crimes (SPSC) in the year 2001. They are illustrative of the manner in which serious crimes committed in East Timor in 1999 were prosecuted and tried; they are indicative of a number of shortcomings. There already exist abundant reports and literature criticising many aspects of the ‘serious crimes process’ in Timor Leste.1 The recurring theme is that of insufficient attention for the project, particularly a serious lack of funding on all levels. This is of course vital background information in the critical assessment of the output of the serious crimes process, notably the judgements.

Furthermore, the significant number of critical points should be put into proper perspective. For example, what standard does one apply in assessing the quality of judgements? As an exercise of transitional justice by a hybrid or internationalised legal system, it may not be appropriate to assess the serious crimes process in light of the practice and case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), which are international tribunals operating in far more favourable circumstances. There are also elements of the jurisprudence of the SPSC that are refreshing when compared to the (sometimes unnecessary) long trials and judgements of the ICTY and ICTR. The judgements are direct and written in generally understandable language, also to laymen. Given the lack of sufficient supportive staff, the judgements reflect directly the views of the judges, who cannot in these circumstances ‘hide’ behind legal assistants: every disadvantage has its advantage! It is with this in mind that I offer my critical commentary below. I have selected a number of themes that are in my view of particular interest.

2. Jurisdiction

In the Leonardus Kasa case,2 the SPSC had to answer the question of whether its jurisdiction extended to the territory of West Timor. The prosecutor had charged Leonardus Kasa with rape, but not as a war crime or crime against humanity, allegedly committed in the village of Betun, West Timor, Indonesia. Pursuant to Section 2 of UNTAET Regulation 2000/15, it seems that the jurisdiction of the SPSC is either based on the universality principle (genocide, war crimes, torture and crimes against humanity) or the territoriality principle (the aforementioned crimes, plus murder and sexual offences). Yet, the prosecutor submitted that, pursuant to Section 3 of UNTAET Regulation 1999/1, the Indonesian Penal Code (IPC) is applicable in East Timor; it provides for jurisdiction on the basis of the nationality principle, which, applied mutatis mutandis, would give the SPSC jurisdiction in the present case.

The SPSC dismissed this argument on the basis of adequate statutory authority. Indeed, the UNTAET Regulations can be considered the lex specialis regarding jurisdiction of the Special Panels, providing an exhaustive attribution of jurisdiction.3 Furthermore, Section 5 of UNTAET Regulation 2000/11 refers to jurisdiction in respect of crimes committed in East Timor (emphasis added). In addition to these statutory reasons, one may imagine political considerations as well. The prosecution of ordinary crimes committed on Indonesian territory might be regarded as further unnecessarily complicating relations between the countries.

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3. In this respect it can be noted that the principle of legality, although formally dealing with substantive criminal responsibility, tends to be extended to jurisdictional provisions as well; see the recent decision by The Hague District Court: ‘De rechtbank is van oordeel dat de nationale rechtstreekstregeling - in het belang van de rechtszekerheid voor zowel de burgers als de instanties die met vervolging en berechting belast zijn - naar haar aard als een uitputtende regeling moet worden beschouwd.’ (Translation by the author: “The court is of the view that national jurisdiction provisions are – in the interests of legal certainty for individuals and prosecuting authorities – by their very nature exhaustive.”) (Rechtbank ’s Gravenhage, Interlocutory decision on jurisdiction, Case No. 09/7500069-06 +09/750007-07, 24 July 2007, Landelijk Jurisprudentie Nummer (LJN): BB0494).
Be this as it may, the result is unsatisfactory, for a number of reasons. Firstly, the quarrel over jurisdiction could have been avoided if the rape were charged as a crime against humanity or war crime, for which universal jurisdiction is available. This is a matter of prosecutorial strategy and is addressed in general below. The judgement offers insufficient information as to whether this would in fact have been a feasible option.

Secondly, although the SPSC stresses that “East Timor, in this phase of United Nations transitional administration, chose to adopt the principle of territoriality with very few exceptions”, the exercise of jurisdiction on the basis of the active nationality principle is widely accepted and used in legal practice. In this regard it is unfortunate that the SPSC only refers to totalitarian states using the principle of active personality. What matters, though, is that the exception, namely the exercise of universal jurisdiction, is far more controversial internationally than the exercise of jurisdiction on the basis of active personality. Given the serious nature of the crimes concerned, a jurisdictional scheme including the active personality principle would seem obvious, particularly since universal jurisdiction is included.

Thirdly, if the Indonesian law in respect of jurisdiction continues to be applicable in East Timor, this would produce a bizarre result: jurisdiction of Timorese courts for serious crimes would stop at national borders, whereas a more permissive jurisdictional regime applies to other, lesser offences (for example theft or assault). In each system of criminal law, the more serious crimes, according to the national view, are accompanied by broader jurisdictional possibilities. This matter remains unexplored in the judgement, which has opted for a rigid approach that does not correspond to the serious nature of the charge.

3. Procedural and factual issues

The judgements warrant a number of comments from a procedural and fact finding perspective. The first heading of a SPSC judgement tends to concern the procedural background/history. The accounts here are not only extremely succinct, but also reveal vital flaws in the procedure. For example, in a disconcerting number of instances, the SPSC did not find on the file documents about the detention and the extension of detention. What is most probably meant here are the arrest warrant and the decision of the investigating number of instances, the SPSC did not

There are interesting differences with the ad hoc tribunals concerning the establishment of facts. Compared to ICTY and ICTR judgements, the determination of facts underlying the conviction is not substantively argued. One notices in ICTY and ICTR judgements ample attention to the credibility of witnesses. The SPSC are in this respect in their decision making more akin to inquisitorial courts; they simply brie

5 This occurred in ICTR, Judgement and Sentence, Prosecutor v. Nahimana, Barayagwiza and Ngeze, Case No. ICTR-99-52-T, T. Ch. I, 3 December 2003, to be published in volume XVII (“reduction” from a life sentence to 35 years imprisonment); ICTR, Judgement and Sentence, Prosecutor v. Semanza, Case No. ICTR-97-20-T, T. Ch. III, 15 May 2003, Klip/ Sluiter, ALC-XII-599 (reduction of 6 months – from 25 years to 24 and a half).
6 This was the case for Rwamakuba; after acquittal he received 2000 Euro in damages: ICTR, Decision on Appropriate Remedy, Prosecutor v. Rwamakuba, Case No. ICTR-98-44C-T, T. Ch. III, 31 January 2007.
While the SPSC have been criticised for unsatisfactory treatment of evidence, one also has to be in mind the difference in approaches that exist in this respect between various systems, both national and international, of criminal justice. For example, in civil law systems, to which the East Timorese legal tradition also belongs, cursory treatment of evidence and facts is not uncommon. The reason for this lies – in part – in the 'intimate conviction' (conviction intime) of the fact finder as a basis for establishment of facts, the active role of the judiciary in the fact finding process and the familiarity of all participants with the evidence beforehand via the case file. In these circumstances, it is felt that matters such as the credibility of certain witnesses need not be directly considered, as it follows from the establishment of facts which evidence the judges deemed in the end to be credible and convincing.

The trials at the SPSC may thus, as reflected in the judgements, have stronger resemblance to the civil law approach to fact finding than is envisaged on the basis of the applicable law. This is also facilitated by the circumstance that there appear not to be significant struggles over the evidence. Also on this point, the trial appears to resemble an inquisitorial trial, where no two conflicting versions of facts are presented, but where fact finding is regarded as a joint and objective endeavour.

Thus, any criticism on the factual part of the judgements should bear in mind the various approaches. While for a reader of the judgements this may be unsatisfactory, as many questions may remain unaddressed in the judgements, the positive side is that these types of judgments allow, as in civil law systems, for more cases to be processed.

A final matter in relation to the establishment of facts concerns the role of the accused. Compared to the ICTY and the ICTR, the accused plays an important role in practically all judgements of the SPSC in respect of the determination of the facts. One notices that statements by the accused tend to occupy a vital position in evidentiary constructions. These statements are made at the preliminary hearing or at trial. UNTAET Regulation 2000/30 affords the accused ample opportunity to present evidence to the court, in the form of unsworn statements and thus without having to formally 'take the stand', which entails an obligation to answer questions and to answer them truthfully. The possibility to make unsworn statements – also a right in the law and practice of the ICTY and ICTR – has undeniably triggered more information coming from the accused.

However, compared to the ICTY and ICTR, two other factors may even better explain the production of often incriminating evidence by the accused himself. First of all, the accused are more easily available for pre-trial questioning than accused indicted by the ICTY or ICTR, who operate far away from the scene of the crime. Furthermore, one may wonder to what degree the accused has prior to and during questioning and pre-trial questioning than accused indicted by the ICTY or ICTR, who operate far away from the scene of the crime. Furthermore, one may wonder to what degree the accused has prior to and during questioning and pre-trial questioning than accused indicted by the ICTY or ICTR, who operate far away from the scene of the crime. Furthermore, one may wonder to what degree the accused has prior to and during questioning and pre-trial questioning than accused indicted by the ICTY or ICTR, who operate far away from the scene of the crime. 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One has the impression that the combination of permissive rules, the pressure of detention, lack of adequate legal assistance and the inquisitorial origin of the East Timorese legal culture has made fact finding quite easy. While the prevailing circumstances in East Timor, particularly the lack of adequate legal assistance,
taint a generally accurate fact finding process from a fairness perspective, the question arises whether the accused at the centre of the process is not an attractive alternative to the adversarial ICTY and ICTR proceedings. For a civil law judge basing a conviction and sentence on evidence, without having had the opportunity to question the accused about the events, is highly unsatisfactory.

The International Criminal Court (ICC) and East Timor model may not even go far enough, as the initiative lies exclusively with the accused and direct questioning is only possible after the accused has elected to make a statement. The possibility of directly questioning the accused by the fact finder will result in judgments with greater accountability of the accused.

4. Prosecutorial choices: international versus ordinary crimes

All the judgements under review – and the bulk of judgements of the ‘serious crimes process’ – do not deal with international crimes, but with ‘ordinary crimes’, particularly murder. This has attracted great criticism. Judge Pereira expressed dissatisfaction from the bench: “the facts in this case indicate that the defendant should have been charged with crimes against humanity […]. A judge can not decide on more than what is submitted in the indictment if the Prosecutor does not change the indictment”.

This is quite an unusual step, particularly since the dissent does not concern the judgement at all, but understandable in light of the object and purpose of the whole ‘serious crimes process’. There are indeed many reasons why international crimes should be prioritised in prosecutorial policy. These crimes are of international concern, lying at the basis of the involvement of the international community in hybrid courts. Furthermore, for these crimes a duty exists to either extradite or prosecute (aut dedere aut iudicare). One also has to examine the reason for the inclusion of non-international crimes in the jurisdiction of internationalised courts; it seems that it was seen as safety net in case the international crimes threshold could not be met, offering the advantage that proceedings need not be started anew. There is a striking contrast between the East Timor serious crimes process and the Special Court for Sierra Leone (SCSL). The latter also has jurisdiction over crimes under national law, but the prosecutor’s focus has been exclusively on international crimes.

There is also a certain paradox in the neglect of prosecuting international crimes in East Timor. The qualification of conduct as a national instead of an international crime is considered in the law and practice of the ad hoc tribunals as a ground to a) take over prosecution (primacy), b) not apply ne bis in idem protection, hence a right to retry, and c) prohibit transfer of cases to national courts. In light of the importance attached to the national/international crimes distinction the prosecutorial choices made in East Timor...

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12 The rationale given by the United Nations Secretary-General for inclusion of national crimes in the subject matter jurisdiction is as follows: “The Security Council recommended that the subject-matter jurisdiction of the Special Court should also include crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone. While most of the crimes committed in the Sierra Leonean conflict during the relevant period are governed by the international law provisions set out in articles 2 to 4 of the Statute, recourse to Sierra Leonean law has been had in cases where a specific situation or an aspect of it was considered to be either unregulated or inadequately regulated under international law. The crimes considered to be relevant for this purpose and included in the Statute are: offences relating to the abuse of girls under the 1926 Prevention of Cruelty to Children Act and offences relating to the wanton destruction of property, and in particular arson, under the 1861 Malicious Damage Act.” (Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc. S/2000/915, par 19).

13 See Rule 9, sub i of the ICTY and Rule 9, sub i of the ICTR RPE.

14 See Article 10, paragraph 2, sub a of the ICTY Statute (Article 9, paragraph 2, sub a of the ICTR Statute).

15 See the ICTR’s Bagaragaza decision: “In this case, it is apparent that the Kingdom of Norway does not have jurisdiction (ratiune materiae) over the crimes as charged in the confirmed Indictment. In addition, the Chamber recalls that the crimes alleged – genocide, conspiracy to commit genocide and complicity in genocide – are significantly different in term of their elements and their gravity from the crime of homicide, the basis upon which the Kingdom of Norway states that charges may be laid against the Accused under its domestic law. The Chamber notes that the crime of genocide is distinct in that it requires the “intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such”. This specific intent is not required for the crime of homicide under Norwegian criminal law. Therefore, in the Chamber’s view, the ratiune materiae jurisdiction, or subject matter jurisdiction, for the acts alleged in the confirmed Indictment does not exist under Norwegian law. Consequently, Michel Bagaragaza’s alleged criminal acts cannot be given their full legal qualification under Norwegian criminal law, and the request for the referral to the Kingdom of Norway falls to be dismissed.” (ICTR, Decision on the Prosecution Motion for Referral to the Kingdom of Norway, Prosecutor v. Bagaragaza, Case No. ICTR-2005-86-R11bis, T. Ch. III, 19 May 2006, par. 16).
The situation in East Timor can in this regard be approached from two angles. Firstly, one could argue that Indonesia has (unlawfully) occupied East Timor since 1975; the term ‘international armed conflict’ is a wide one and includes the use of armed force of whatever length or intensity by one State against another, including the invasion and military occupation of another State meeting with no armed resistance. This then brings in the entire corpus of humanitarian law applicable to international armed conflicts. As a result, reported involvement in the atrocities committed against unarmed East Timorese and United Nations Mission in East Timor (UNAMET) personnel by forces clearly linked to Indonesia, namely the Tentara Nasional Indonesia (TNI) and Indonesian police forces, can form the basis of war crimes investigations under Section 6.1, sub a and b of UNTAET Regulation 2000/15. The question of the degree of armed resistance from pro-independence militias is in this respect irrelevant, as going back to 1975 – any atrocity committed by Indonesian de jure or de facto organs against the unarmed East Timorese took place and was associated with Indonesia’s occupation of East Timor.

The judgements that are the subject of this commentary offer a number of situations of atrocities that can without doubt be attributed to Indonesia as occupying State. For example, in the João Fernandes case, the accused acknowledged that he killed the victim on the orders of TNI for being a pro-independence supporter. In the Manuel Gonçalves Leto Bere case, the defence filed a written motion saying that the accused “was involved by the Indonesian army and followed its political targets.” In addition to this direct and de jure involvement of Indonesia, there are also cases dealing with militias that were supported by Indonesia and for which a case of de facto involvement does not seem difficult to make. While it still needs to be established in each individual case whether the accused satisfied the mental elements of a) existence of Indonesia’s occupation of East Timor; and b) in case of a war crime under Section 6.1, sub a of UNTAET Regulation

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2. In many of the judgements under review, this defence has been invoked; see further below.
3. This is the famous Tadić test: “[W]e find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.” (ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Tadić, Case No. IT-94-1-AR72, A. Ch., 2 October 1995. Tadić (1995) I ICTY JR 353), Klip/ Shuter, ALC-I-33, par. 70)
5. See also S. Linton, Prosecuting Atrocities at the District Court of Dili, 2 Melbourne Journal of International Law 2001, p. 441
7. Ibid., p. 469.
To the extent that the prosecution does not wish to involve Indonesia – on the assumption that a) it may not be established beyond a reasonable doubt that Indonesia has not occupied East Timor in violation of international law; or b) certain groups have not acted as Indonesia’s (de facto) organs, there remains the possibility – according to the Tadić test28 – of a non-international armed conflict being found to have taken place between Forças Armadas da Libertação Nacional de Timor-Leste (FALINTIL) and so-called pro-integration militias. This is, however, more problematic. Although it may be proven that the warring non-state groups satisfy the minimum degree of organisation, it is uncertain whether the fighting between these groups reached the required level of intensity, and even if it did, it would be open to doubt whether the bulk of the September 1999 atrocities could be seen as having been associated with such fighting.29 Interestingly, the judges sometimes feel the need to underline the fact that certain of the indicted crimes had nothing to do with the independence conflict, possibly with a view to – obiter dictum – explaining why the prosecution was in this instance correct not to prosecute for war crimes or crimes against humanity. For example, in the Carlos Soares Carmona case, the SPSC emphasised that the killing of the victim could not be related to the broader attacks against the civilian population, as it was a matter of private revenge because of the alleged use of ‘black magic powers’ against the accused’s children.30

It is puzzling that in the discussion on the need to prosecute international crimes, the focus tends to be on crimes against humanity, as evidenced by the abovementioned declaration of Judge Perreira. She mentioned the need to prosecute as crimes against humanity, but not as war crimes.31 This may be due to a lack of understanding of the possibilities in this regard. However, the prosecution of war crimes offers in my view two distinct advantages. Firstly, as already mentioned, the contextual burden of proof may not be very difficult to meet, taking the Indonesian occupation as a starting point. Secondly, particularly in the context of East Timor, one would expect a certain desire to connect some of the crimes to what can be considered the ultimate cause of the atrocities, namely the unlawful Indonesian occupation. Even in respect of senior Indonesian military leaders such as General Wiranto, the prosecution has opted exclusively for crimes against humanity.32

The elements of crimes against humanity can be found in Section 5.1 of UNTAET Regulation 2000/15, replicating, just as in respect of war crimes, the definition in the ICC Statute. What matters here is the threshold of the widespread and systematic attack on the civilian population. Investigations into the 1999 violence in East Timor allow us to safely identify the existence of such attacks.33 Furthermore, the facts of many cases, particularly a number of incriminating statements by the accused themselves, warrant the conclusion that it would not be very difficult to prove that the accused acted with knowledge of these attacks.

26  C. Kress, The 1999 Crisis in East Timor and the Threshold of the Law on War Crimes, supra note 19, p. 469.
27  For example, one could take the factual assessment by the International Court of Justice in 1995 in the East Timor case as important proof that in December 1975 East Timor came under Indonesian occupation within the meaning of both common article 2 of the Geneva Conventions and customary international law: ‘Following internal disturbances in East Timor, on 27 August 1975 the Portuguese civil and military authorities withdrew from the mainland of East Timor to the island of Atauro. On 7 December 1975 the armed forces of Indonesia intervened in East Timor. On 8 December 1975 the Portuguese authorities departed from the island of Atauro, and thus left East Timor altogether.’ (International Court of Justice, Judgement in the case concerning East Timor, Portugal v. Australia, [1995] I.C.J. Reports 90, 30 June 1995, par. 13). For further support and proof, see C. Kress, The 1999 Crisis in East Timor and the Threshold of the Law on War Crimes, supra note, p. 426–427 and authorities cited there.
28  Supra note 18.
29  C. Kress, The 1999 Crisis in East Timor and the Threshold of the Law on War Crimes, supra note 19, p.469.
32  Cf. S. Linton, Prosecuting Atrocities at the District Court of Dili, supra note 20, p. 449.
In this light, the prosecutorial strategy is puzzling. In spite of all the pragmatic reasons to focus on ordinary crimes, one wonders if more focus on war crimes/crimes against humanity would really be so complicated, if one were to build up a strategy with a strong role for the taking of judicial notice of adjudicated facts. This would require an in-depth investment in the first trials, but would accelerate proceedings later on.

The question now addressed is whether there might be obstacles in the individual cases under review justifying the choice for ordinary crimes indictments. I already referred to the case where the murder was considered an act of private revenge and could thus not be connected to either an armed conflict or a widespread or systematic attack on the civilian population. All other cases seem to me typical crimes against humanity and war crimes cases, or at least would justify an attempt in that direction. It is furthermore noteworthy that when it comes to mens rea matters, such as knowledge of the occupation and knowledge of the attack, the statements of the accused themselves are quite incriminating, as they readily acknowledge membership of militia, acting pursuant to the orders of the Indonesian army etc. Compared to the ICTY, for example, this represents a luxury for the prosecution.

In addition to the 'private revenge' case and the Leonardus Kasa case dealing with crimes committed in West-Timor, there is one other case that raises complications in terms of the prosecution of war crimes or crimes against humanity, thus justifying on legal grounds the prosecutorial choice for ordinary crimes. This is the Júlio Fernandes case, where the accused was a member of the pro-independence militia FALINTIL. From the view of avoiding any impression of victor’s justice, it is good prosecutorial strategy that this accused was prosecuted. However, in his case one can better understand, from a legal perspective, the decision not to prosecute him for international crimes. First of all, it will be difficult to qualify his acts as war crimes, in the sense that FALINTIL did not have a sufficient link to one of the parties to the Geneva Conventions. Indeed, the conduct of pro-independence militia is difficult to categorise, and raises complicated questions. Formally, the international armed conduct, which as was mentioned above would be the most successful basis for prosecuting war crimes, is between Indonesia and Portugal, thus entailing obligations on those parties to the conflict; the pro-independence movement cannot be associated, for obvious reasons, with Portugal.

As far as crimes against humanity are concerned, the Júlio Fernandes case is doubly problematic. Firstly, the victim was not a civilian, but sufficiently linked to the Indonesian armed forces to qualify as a combatant. Secondly, although non-state entities holding de facto authority over a territory can commit crimes against humanity, there is simply not much indication, let alone proof, that FALINTIL carried out widespread or systematic attacks on the civilian population. Thus, in respect of crimes against humanity, the prosecutor also had solid legal arguments not to pursue prosecution.

5. Guilty plea

Probably one of the strongest procedural alterations to East Timor procedural law, which is of an inquisitorial origin and nature, concerns the issuance of a plea of guilty or not guilty. For the decisions that are the subject of this commentary, the following standard applied in respect of the acceptance of guilty pleas, as set out in Section 29A of UNTAET Regulation 2000/30:

Proceedings on an Admission of Guilt

29A.1 Where the accused makes an admission of guilt in any proceedings before the Investigating Judge, or before a different judge or panel at any time before a final decision in the case, the court or judge before whom the admission is made shall determine whether:

(a) The accused understands the nature and consequences of the admission of guilt;

(b) The admission is voluntarily made by the accused after sufficient consultation with defense counsel; and

34 Judgement, Prosecutor v. Carlos Soares Carmona, supra note 4.
36 See S. Linton, Prosecuting Atrocities at the District Court of Dili, supra note 20, p. 450 – 455, who also concludes that in relation to pro-independence militia members, it was not inappropriate to charge them with the ordinary crime of murder.
37 See ibid., p. 455.
(c) The admission of guilt is supported by the facts of the case that are contained in:
   (i)  The charges as alleged in the indictment and admitted by the accused;
   (ii) Any materials presented by the prosecutor which support the indictment and which the
        accused accepts; and
   (iii) Any other evidence, such as the testimony of witnesses, presented by the prosecutor or the
        accused.

29A.2 Where the court is satisfied that the matters referred to in Section 29A.1 of the present regulation are
established, it shall consider the admission of guilt, together with any additional evidence presented, as
establishing all the essential facts that are required to prove the crime to which the admission of guilt relates,
and may convict the accused of that crime.

29A.3 Where the court is not satisfied that the matters referred to in Section 29A.1 are established, it shall
consider the admission of guilt as not having been made, in which event it shall order that the trial be
continued under the ordinary trial procedures provided in this Regulation.

29A.4 Where the Court is of the opinion that a more complete presentation of the facts of the case is required
in the interests of justice, taking into account the interests of the victims, the court may:
   (a) Request the prosecutor to present additional evidence, including the testimony of witnesses; or
   (b) Order that the trial be continued under the ordinary trial procedures provided in this Regulation,
in which event it shall consider the admission of guilt as not having been made.

29A.5 Any discussions between the prosecutor and the defense regarding modification of the charges, the
admission of guilt or the penalty to be imposed shall not be binding on the court.

This provision is almost identical to Article 65 of the ICC Statute. The position of a guilty plea in international
criminal proceedings is certainly contested. In this respect, it should also be borne in mind that in the early
years of the ICTY, it was emphasised that its procedural system differed in relation to a few important points
from common law criminal procedure; the absence of plea bargaining was specifically mentioned as an
important difference. Much has changed over the years; guilty pleas – including plea bargaining – are on
the increase in the practice of the ICTY and even the ICTR. It is one of the most important tools to meet the
strict deadlines imposed by the completion strategies and generally allows for swift processing of cases. In
this light, its survival, although in a slightly altered form, in the ICC Statute is not a great surprise.

The question arises, however, whether it has been a wise choice to introduce the guilty plea in the procedural
system in East Timor. This is a procedural element unique to common law systems, with which the East
Timorese legal tradition is not familiar at all. One thus notices in the cases that are the subject of this
commentary some puzzling defence strategies. In a number of instances, the accused acknowledged the
indicted facts, but yet did not fully admit guilt, in the sense that he did not agree with the charge.40 This
plea was rejected, for reasons which evoke memories of the ICTY Erdemović case.41 In addition, pleas
were rejected in a disconcerting number of cases – including the Júlio Fernandes and Jose Valente cases, that
are the subject of this commentary – because of insufficient consultation with defence counsel over the
plea.42

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38 See Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of
A/49/342-S/1994/1007, par. 71: “[T]he granting of immunity and the practice of plea-bargaining find no place in the rules.” See also
ICTY, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, Prosecutor v. Tadić, Case
39 See, among others, A. Tieger and M. Shin, Plea Agreements in the ICTY: Purpose, Effects and Propriety; 3 Journal of
International Criminal Justice 2005, p. 680. See also N. A. Combs, Guilty Pleas in International Criminal Law. Constructing a
42 See also D. Cohen, Indifference and Accountability. The United Nations and the Politics of International Justice in East
Timor, supra note 1, p. 36, referring to this as a recurring theme in the trials of 2000-2001.
This is also telling about the quality of defence counsel in certain cases. The problem is that the clearly insufficient understanding of the legal implications of a plea of guilty produced negative results for the accused. They did not benefit from the advantages of true guilty plea, in the form of sentence reduction, for example, but did offer some pretty incriminating evidence. One really wonders whether accused and their counsel have sufficient understanding of this procedural mechanism. One also wonders how defence counsel advise their client in this regard.

Obviously, the attraction of the guilty plea from a purely legal perspective lies in the sentence and/or charge reduction; conversely, the risk of not pleading guilty is a significantly higher sentence. Good advice on the effects of the combined ‘carrot and stick’ connected to plea bargaining is extremely difficult in international criminal proceedings, as there is not a great degree of predictability; the practice of the ICTY and ICTR offer some good examples, such as Kambanda at the ICTR pleading guilty but still receiving the maximum penalty. For the SPSC this is even more the case, given their limited lifespan and their absence of a reasoned judgement regarding the effects of plea-bargaining on sentencing. For example, in the João Fernandes case the plea of guilty was fully accepted; it then figured prominently as a mitigating factor in sentencing (even twice, in the form of aiding the administration of justice and as public acknowledgement/remorse), but the sentence of 12 years imprisonment seems to me not to offer a distinct advantage compared to similar cases without a guilty plea. In that light, given the impossibility of properly informing an accused of the consequences of his plea, any competent counsel should advise against it. Taking this matter one step further, as there is a significant degree of uncertainty surrounding the guilty plea, judges could also wonder whether it is at all possible under these circumstances to comply with Section 29A.1 of UNTAET Regulation 2000/30. In my opinion, in the absence of clearly established law and practice, it is not possible for an accused to truly understand the consequences of his plea.

6. Premeditation

With one exception, the Leonardus Kasa case where jurisdiction was found not to exist, the judgements under review have resulted in convictions for the crime of murder. Pursuant to Section 8 of UNTAET Regulation 15/2000, the elements of the crime of murder are to be found in the provisions of the applicable Penal Code in East Timor, which brings us to Article 340 of the Indonesian Penal Code (IPC). Each of the judgements sets out the elements of this provision, namely (a) the person, (b) who with deliberate intent, (c) and with premeditation, (d) takes the life of another person. Then follows an assessment as to whether the established facts meet the requirements of each of these elements.

The key and legally most challenging and interesting element is undeniably that of premeditation. Premeditation is not a special intent, but concerns the circumstances under which the intent materialised, in the sense that there was an opportunity to reflect, and as such is a clearly aggravating factor. There exist two reasons why it is important to meet this element. Firstly, without premeditation there is the problem of

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jurisdiction, in the sense that intentional taking of life, manslaughter, is not a crime within the SPSC’s jurisdiction. Secondly, bearing in mind that in many instances the conduct of the accused could be qualified as war crimes or crimes against humanity, a conviction of murder seems imperative, in the sense that it clearly is the second best option. In other words, manslaughter (as opposed to murder) instead of war crimes is far less acceptable in terms of prosecutorial strategy.

One notices in all judgements that only cursory treatment is given to the premeditation element. While reference is made to Indonesian jurisprudence, there is hardly any explanation or elaboration. The applicable standard appears flexible: "It’s enough to have thought about acting and to have decided whether to take the life of the victim or to withdraw from that intention. The time for the decision can be very short (i.e. minutes or seconds), but what is important is that nothing exceptional interferes with the decision."46

Since reference is made to the Dutch penal code as lying at the basis of the IPC and as the elements of the crime of murder are indeed identical under Dutch law,47 it is worthwhile to assess the premeditation standard in light of Dutch law. A certain degree of caution is nevertheless required. At the origin of the IPC lies the Penal Code for the Dutch Indies, the first codifications going back to 1866 and 1872 and which is in many respects identical to the Dutch Penal Code.48 Obviously, after the independence of Indonesia in 1949, while many of the material provisions remained identical, jurisprudence may have evolved differently for both States. I therefore mention Dutch law and practice as an additional source of law, after Indonesian jurisprudence, which is not accessible to me.

Study of Dutch law and jurisprudence may be particularly helpful in light of two circumstances. Firstly, among the judges there does not appear to be a uniform understanding of the premeditation notion. The dissenting opinion of Judge Pereira in the Júlio Fernandes case is illustrative of this.49 She adopted the view that the accused was overcome with emotion and that the killing of the victim occurred spontaneously and without premeditation. As is the case with the majority in this case and the entire bench in other judgements, one does not encounter even an attempt at elaboration on the criteria of premeditation. One cannot help but wonder whether the dissent in this case – but not in other cases where accused can also be said to have acted under pressure of stress and emotions – has to do with the fact that Júlio Fernandes was member of pro-independence militia, giving rise to a slight suspicion of victor’s justice.

Another reason to elaborate on the premeditation element concerns its relationship to frequently raised defences, namely those of superior orders and/ or duress and/ or self-defence. While these defences are further addressed in their own right below, the question arises as to their effect on premeditation. Even if these defences do not produce the result desired by the defence – an acquittal – they could still serve as the basis to negate the element of premeditation. Surprisingly, both the defence and the judges did not substantively address this matter.

According to Dutch jurisprudence, the standard of premeditation is an objective rather than subjective test. What matters is that the accused had sufficient time to reflect on the consequences of his decision, in order for him to have had the opportunity to reflect on the meaning and consequences of his intended action and to account for this.50 It is not necessary that the accused did in fact reflect.51 This therefore sets a fairly flexible standard, in conformity with the majority’s approach in Júlio Fernandes and with the bench’s approach in general, which emphasises that the required time span for premeditation can be quite short indeed. Dutch case law is also instructive in respect of the effect of certain defences on premeditation. For example, a certain degree of mental incapacity is not an impediment to premeditation,52 likewise the existence of the specific circumstance of ‘honour killing’.53

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47 See ibid., and Article 289 of the Dutch Penal Code.
49 TL, Dissenting Decision and Disagreement of Judge Maria Natércia Gusmão Pereira on the Analysis of Facts and Applicable law, Prosecutor v. Júlio Fernandes, Case No. 2/2000, SPSC, in this volume, p. 131
50 Hoge Raad der Nederlanden, 27 June 2000, Nederlandse Jurisprudentie 2000, 605, par. 3.5.
51 Ibid.
52 Hoge Raad der Nederlanden, 6 May 1975, Nederlandse Jurisprudentie 1975, 416.
It is true that a number of defences are by definition incompatible with the element of premeditation, in the sense that establishment of premeditation excludes the validity of the defence and vice versa. This is the case with defences that do not allow time for reflection, but rather require an immediate effect, like duress and self-defence. In the structure of the judgements that are the subject of this commentary, this connection has not been made. The defences are dealt with in their own right, whereas the preceding establishment of premeditation could easily have served to negate the validity of the defences of self-defence and duress.

7. Defence of duress/ superior orders/ self-defence

A significant number of accused have tried to justify their actions or to excuse themselves on the basis of legal defences. In the judgements that are the subject of this commentary, these are self-defence, duress or superior orders. The generally common factual basis for these defences is that the accused claimed to have been ordered to kill the victim, or to have acted in response to an imminent threat. In the Joseph Leki case, there is even mention of the following testimony: “shoot him or I’ll shoot you!” The matter reminds us of the Erdemović case, where an almost identical defence was given by the accused for his killing of many civilians. It would have been recommendable for all participants in these trials to have carefully studied this case and commentaries to it, because – with respect – the treatment of the legal aspects of this defence by the bench is incoherent.

First of all, there is the lack of adequate legal qualification of the defence. The SPSC generally starts with mentioning three provisions. These are Article 49, paragraph 1 of the IPC: “Not punishable shall be the person who commits an acts necessitated by the defense of his own or another one’s body, chastity or property against direct or immediate threatening unlawful assault.”

(d) the conduct which is alleged to constitute a crime within the jurisdiction of the panels has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be (i) made by other persons; or (ii) constituted by other circumstances beyond that person’s control; and Section 21 of UNTAET Regulation 2000/15: “The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if a panel determines that justice so requires.” The SPSC then proceeds to conclusions without any clarification as to the legal aspects. The reader is therefore left with many questions.

The first one concerns the relevance of Article 49 IPC, which deals with self-defence. The selective English translation of this provision as provided by the SPSC leaves us in the dark as to whether or not it concerns the defence of self-defence in respect of attacks that have already been launched, in which case this ground excluding criminal responsibility is different from duress, which rather deals with an imminent threat (reactive versus proactive). The facts underlying the defences in the judgements under review do not appear to fall within the category of immediate attack/threat. Whether or not there is a situation of an imminent...
threat requires analysis of the facts on the basis of the appropriate legal standard developed in case law. Neither the relevant test nor its application to the facts is offered by the SPSC. The starting point for doing this is, of course, citing the relevant provision of the IPC in full and in a correct translation!

The most important question in relation to the defences that are raised concerns the relationship between duress and superior orders. In the view of the SPSC, duress is available as a defence, on the basis of Section 19, paragraph 1, sub d UNTAET Regulation 2000/15 cited above (replicating Article 31, paragraph 1, sub d of the ICC Statute), but superior orders is not, pursuant to Section 21 of UNTAET Regulation 2000/15. In this respect it is to be noted that Section 21 of UNTAET Regulation 2000/15 only copies the first sentence of the first paragraph of Article 33 of the ICC Statute.

The central problem is the extent to which the UNTAET legislators could incorporate elements of the ICC Statute in relation to non-international crimes. It produces some questionable results and also raises pertinent questions as far as the nullum crimen rule is concerned. To start with, Section 21 of UNTAET Regulation 2000/15, categorically rules out the defence of superior orders and does not contain the exceptions acknowledged in the ICC Statute.\(^{60}\) The scope of criminal liability is therefore expanded considerably compared to the ICC’s legal framework.

In respect of international crimes, one might argue that the ICC Statute does not fully correctly codify customary international law and that replicating Article 7, paragraph 4 of the ICTY Statute is more appropriate.\(^{61}\) However, as far as murder, a crime of a non-international nature, is concerned, there is no legal ground in general international law to expand criminal liability. The limited (or non) availability of superior orders to international crimes is an aspect unique to conduct directly penalised by international law and cannot be transplanted to domestic crimes without violating the rule of non-retroactivity of criminal law. In other words, at the time of commission of these murders, the availability of the defence of superior orders needs to be assessed on the basis of domestic law. To do otherwise violates the rule of legality.

Surprisingly, there is no discussion in these judgements as to whether the effect of Section 21 should not be limited, on the basis of customary international law, to the international crimes within the jurisdiction of the Special Panels. This being said, the questions arise as to whether under domestic law – the IPC – a defence of superior orders is available and whether the accused would have benefited from this. Article 51 of the IPC provides for the superior orders defence. Its wording is identical to Article 43 of the Dutch Penal Code. Article 51 of the IPC reads as follows: “(1) Not punishable shall be the person who commits an act for the execution of an official order issued by the competent authority. (2) An official order issued incompetently shall not exempt the punishment, unless it was considered in good faith by the subordinate to be issued competently and its execution lied within the limit of his subordination.”\(^{62}\)

It is beyond the scope of this commentary to analyse the scope of application of this provision in detail, as the SPSC should have done, particularly in cases where the accused claimed that he received orders from the Indonesian army.\(^{63}\) Suffice it to say that the following steps have to be taken in that analysis:

a. the nature of the order (competent or incompetent; the first is a justification, the latter an excuse);

b. superior-subordinate relationship

c. method of execution; this has to correspond to the demands of subsidiarity and proportionality;

d. in respect of an order issued incompetently, there is a test of good faith for the subordinate (Dutch doctrine is divided as to whether this should be an objective rather than subjective test).

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\(^{60}\) These are contained in Article 33 ICC Statute commencing with the ‘unless’ part.

\(^{61}\) However, in light of the historical development of the defence of superior orders – with the two extremes of respondeat superior and absolute liability – the ICC compromise is defensible, as no clear customary rule can in my view be discerned. For a different conclusion, see P. Gaeta, The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law, 10 European Journal of International Law 1999, p. 172.


The SPSC could have benefited from interesting precedent in applying this defence to conduct that also qualifies as war crimes. On the basis of special legislation, war criminals and traitors were prosecuted in the Netherlands after World War II. Needless to say, many of them raised the defence of superior orders. The applicability of Article 43 of the Dutch Penal Code was not ruled out (neither by statute nor by the special nature of the criminal conduct). The Dutch Special Courts tended to reject the defence of superior orders on the basis of, among other things, *culpa in causa* – the accused willingly and knowingly joined organisations known for their widespread commission of crimes – or on the basis that ‘the competent authority’ referred to in the provision only means Dutch authority and not that of an unlawful occupying power. One also notices that the SPSC in the judgements under review brings in the *culpa in causa* argument. In the Joseph Leki case, for example, it rejected the defence of duress: “the alleged – and proved – duress on the accused at the very last time he fired his gun at Paulino Cardoso would exclude his responsibility, since he could not necessarily and reasonably avoid that threat, as says Sect. 19.1 (d) of UR-2000/15. However, the undisputed fact that he, prior to the very last moment of duress, could avoid that circumstance endows the Court sufficient grounds to believe that Joseph Leki was able to avoid such threat simply by refusing to contribute to the attacks.”

However, confining ourselves to the defence of superior orders in the sense of Article 51 of the IPC, it is difficult to argue that joining the TNI or a related militia in itself amounts to *culpa in causa*, particularly if one does not really have much of a choice. In the Joseph Leki case, the accused submitted that he joined the militia to avoid threats against himself and his family; the SPSC did not deny the existence of such threats, but ruled that the accused had other options.

As to the second ‘solution’ in Dutch case law, that only Dutch authority is competent in the sense of a valid defence, this is equally of not much avail, regardless of its merits. It would be stretching the law to argue that Indonesian authority is also the one of an unlawful occupying power, similar to that of the Germans; it would deprive many of a defence that is otherwise reasonable from a criminal law perspective.

It thus seems that the domestic defence of superior orders has been incorrectly excluded; furthermore, at first glance, application of this defence is not *a priori* without merit. In this respect, it must be borne in mind that, for obvious reasons, there is a far less demanding test in relation to national as opposed to international crimes. Hence, this is once more every reason to prosecute conduct as an international rather than a national crime. It is therefore quite possible that available and possibly valid defences have incorrectly been excluded. Interestingly, when it comes to a factual assessment, there is support in the judgements in relation to the – hypothetical – question of whether the domestic defence of superior orders could have been successful. In the determination of mitigating circumstances in both the Joseph Leki and Carlos Soares cases, the SPSC held that the accused acted to carry out orders from the Indonesian government.

The focus is now in these and other judgements on duress, which imposes more demanding standards. The SPSC was generally correct in excluding that defence. An exception may be the Joseph Leki case, where a valid defence of duress was excluded on the basis of a *culpa in causa* argument; having regard to the Erdemović case, where the facts were very similar, this is not a decisive point, since there is insufficient support in the facts of the Joseph Leki judgement. Rather, the point is fundamentally, as in Erdemović, whether the accused was entitled to value his life over the victim’s. The point is, however, that for the ordinary crime of murder, the defence of superior orders under the IPC was incorrectly excluded.

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66 There is a big difference in this respect with post World War II case law, dealing with organisations such as the Schutzstaffel (SS) and fully voluntary membership.
67 Ibid., p. 11; Judgement, Prosecutor v. Carlos Soares, supra note 25, p. 11.
8. Sentencing

A recurring theme in this commentary: the sentencing sections of all judgements under review leave much to be desired, particularly a lack of adequate reasons. However, let us start with the prosecution side. Remarkably, in a number of cases, the prosecutor did not give any recommendation for an appropriate sentence.70 This is puzzling. In every criminal justice system, the demanded penalty by the prosecution is an important basis for judicial deliberation; only when the prosecutor has little idea of what to do with the case, a ‘deferral’ to the court’s judgement occurs, but this rarely happens. The cases we are dealing with here are, however, quite straightforward, and the prosecution’s silence is a sign of weakness.

The reasons for the imposed sentences are clearly inadequate and defective. There is no solid basis upon the purposes of sentencing generally and this type of administration of justice in particular. Furthermore, there is hardly any attention paid to the individual circumstances of the case. Earlier case law, including the judgements in João Fernandes and Carlos Soares Carmona, only mention aggravating and mitigating circumstances and do not contain a single word on sentencing policy. Other judgements are not much of an improvement, since they repeat standard formula: “The penalties imposed on accused persons found guilty (...) must be directed, on the one hand, at retribution of the said accused, who must see their crimes punished (punitur quia peccatur), and over and above that, on other hand, at deterrence, namely to dissuade forever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of law and human rights (punitur ne peccetur),”;71 and “the objective to prosecute and punish the perpetrators of the serious crimes committed in East Timor in 1999 is to avoid impunity and thereby promote national reconciliation and the restoration of peace.”72

This is not very impressive. In the first citation, there is no reference to the East Timorese community and legal order. Given the nature of the serious crimes project as a hybrid endeavour, reference only to the international community is somewhat surprising. In a similar vein, one would like to have known to what extent the judges have been guided by international law and practice (the ICTY and ICTR) and by national law and practice (Indonesia) in the determination of the sentence. There is not a word about this.

One finds some remarkable observations in the individual judgements, particularly in the form of aggravating or mitigating circumstances. For example, in Carlos Soares Carmona, the influence of ‘black magic’, as part of the East Timorese culture, was accepted as a mitigating factor.73 Without further explanation, the SPSC submitted that national reconciliation was an important sentencing factor in the Júlio Fernandes case, more than in the others.74 This has to do with the fact that the accused was a pro-independence figure and may seem understandable, but one can also consider this an obvious aspect of appropriate prosecutorial strategy, as it should be. Thus, it should not serve as a mitigating factor in individual cases.

As to the sentences imposed, they range from 7 to 14 years. The 7 years concerns the pro-independence militia member, Júlio Fernandes and confirms the suspicion of victor’s justice. Given the absence of adequate reasons, particularly setting clearly articulated standards and comparing with similar national and international cases, one can hardly offer any commentary as to whether these sentences are just in all of the circumstances.

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71  Judgement, Prosecutor v. Manuel Gonçalves Leito Bere, supra note 4, p. 12.
72  Ibid., p. 13.
73  Judgement, Prosecutor v. Carlos Soares Carmona, supra note 4, p. 9.
74  Judgement, Prosecutor v. Júlio Fernandes, supra note 4, p. 12.