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Prosecutions of Crimes
Against Humanity in
Timor-Leste: A Case Analysis

Prosecutions of Crimes Against Humanity in Timor-Leste: A Case Analysis

Prosecutor General v Domingos Noronha, Serious Crimes Case Number 08/2004

Background

In 1999, the East Timorese people voted overwhelmingly for independence in a United Nations-sponsored referendum, bringing to an end 24 years of Indonesian military occupation characterized by mass human rights violations. The report of a subsequent national truth and reconciliation commission (CAVR) estimated that a minimum of 102 800 civilians died as a result of the conflict.¹ During the campaign of violence surrounding the 1999 referendum, Domingos Noronha (aka Maubuti) was a member of the Mahidi militia in Zumalae, Covalima. The Mahidi militia received weapons, funds and training from the Indonesian security forces to intimidate and attack supporters of Timorese independence.²

Following the ballot the newly established UN Transitional Administration for East Timor (UNTAET) established a judicial mechanism tasked with bringing to justice those responsible for the most serious crimes during the 1975-1999 conflict. The relevant bodies included an investigation and prosecution unit (the Serious Crimes Unit or SCU), and a hybrid tribunal within the national court system (the Special Panels for Serious Crimes or SPSC).³ After the SCU closed in 2005, a Serious Crimes Investigation Team (SCIT) was established within the UN Integrated Mission in Timor-Leste (UNMIT) to complete pending SCU investigations. The Special Panels have convicted 85 individuals of serious crimes committed in Timor-Leste in 1999. Although the convictions constitute a significant achievement, those tried were all low-level perpetrators and did not include representatives of the Indonesian security forces who had planned and commanded the campaign of violence. More than 300 others, including senior members of the Indonesian military and police and Timorese militia, were indicted but fled over the border to Indonesia, outside the jurisdiction of the Special Panels. The high-level political opposition within Indonesia, and increasingly Timor-

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1 See CAVR Final Report, *Chega!*, Part 6, para. 8.

2 G Robinson, *East Timor 1999: Crimes Against Humanity*, A Report Commissioned by the High Commissioner for Human Rights, (Los Angeles: University of California, 2003) pp. 115-118.

3 Under section 1 and 2 of UNTAET regulation 15/2000, the SPSC were granted jurisdiction over genocide, war crimes, crimes against humanity, and torture committed at any time, and murder and sexual offences committed between 1 January 1999 and 25 October 1999. For more information about the serious crimes prosecutions, please see ICTJ publications, M Hirst and H Varney, *Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor*, June 2005; C Reiger and M Wierda, *The Serious Crimes Process in Timor-Leste: In Retrospect*, March 2006, and J Kirk and C Da Costa Bobo, *Impunity in Timor-Leste: Can the Serious Crimes Investigation Team make a Difference?*, June 2010.

Prosecutions of Crimes

Crimes Against Humanity

Crimes against humanity are not isolated events but form part of a widespread or systematic attack, planned or supported by the government or a *de facto* authority, against a group of civilians.

UNTAET Regulation 15/2000 defines crimes against humanity as:

“any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack:

- a. Murder;
- b. Extermination;
- c. Enslavement;
- d. Deportation or forcible transfer of population;
- e. Imprisonment or other severe deprivation of physical liberty...;
- f. Torture;
- g. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization...;
- h. Persecution...;
- i. Enforced disappearance of persons;
- j. The crime of apartheid;
- k. Other inhumane acts...”

Leste, represents a serious challenge to prosecutions of crimes related to the 1999 independence ballot violence.

The Maubuti case is the third serious crimes case to be brought to trial after the closure of the UN-supported SCU in 2005. The case is significant as it undermines the ability to convict persons under the serious crimes legislation and brings into question scores of prior successful prosecutions of crimes against humanity in Timor-Leste.

The decision and procedural aspects of the trial raise serious concerns about the Timorese courts’ capacity to try international crimes. In a political environment in which serious crimes prosecutions of 1999 cases are discouraged it is vital that such capacity issues are addressed to ensure that when future trials do take place, these are fair, credible and the rule of law is upheld. The international criminal law expertise within the UN Mission on international criminal law should be utilized to develop a sustainable national capacity to try international crimes before the planned withdrawal of the UN in 2012. A strategy to ensure that SCIT investigations actually result in indictments and credible prosecutions should form part of the UN mission’s exit strategy.

Summary of the Maubuti Case

In 2004, the SCU indicted Maubuti for three counts of crimes against humanity: murder, attempted murder,⁴ and rape committed in 1999. The indictment remained dormant for almost five years, as Maubuti was among those who had crossed the border to Indonesian West Timor following the referendum. However, in 2009 he returned to Timor-Leste, was arrested and brought to trial before a Special Panel. In March 2010, Maubuti was found guilty under article 338 of the Indonesian Criminal Code for the manslaughter of a family of three. (Indonesian laws continued to apply in Timor following independence until they were gradually replaced.)⁵ The prosecutor appealed the court’s decision, arguing that the facts proven during the trial supported a conviction for murder as a crime against humanity. The prosecutor also requested that the 16-year sentence handed down by the district court be increased due to the gravity attached to a crime against humanity as opposed to an ordinary murder. The appeal court rejected the prosecutor’s appeal and upheld the Dili District Court’s decision to convict Maubuti of manslaughter and not murder as a crime against humanity.

The Dili District Court Decision and Trial

The Decision: The Dili District Court found that, on 27 March 1999, Maubuti and other members of the Mahidi militia went to the house of a known supporter of Timorese independence, Luis da Silva. The militia forcibly took da Silva, his pregnant wife Fatima Mesquita and their six-year-old daughter, Sabina, to an Indonesian trans-migrant neighborhood, killing Sabina on the way. When the militia reached their destination, they killed and dismembered the couple.

The indictment had also alleged that Maubuti was responsible for the rape of Fatima Mesquita, and the murder and attempted murder of two other men, as crimes against humanity.

4 Attempted murder was not recognized as a crime against humanity under international law prior to the Rome Statute, which recognizes attempts only in limited circumstances.

5 Section 3 (1) of UNTAET regulation 1/1999 provides that East Timor would apply the laws in force prior to 25 October 1999 until replaced by subsequent legislation. Timor-Leste continued to apply the Indonesian Penal Code, as it stood in October 1999, until it passed its own code in 2009.

However, the court ruled that the prosecution failed to prove Maubuti's involvement in these crimes.

The district court decision did not provide a detailed explanation of why Maubuti was convicted of manslaughter rather than murder as a crime against humanity, as originally charged.⁶ The court did, however, make mention of the *nullum crimen sine lege* principle, which provides that no one shall be criminally liable for acts that did not constitute a crime at the time they were committed. The court's reference to this principle suggests that the court believed that the application of UNTAET regulation 15/2000 violated this principle. This issue was later dealt with extensively in the appeals court's decision.

Commentary: The Maubuti trial calls into question the Timorese courts' capacity to try complex international crimes such as crimes against humanity and to ensure fair trials of indicted militia leaders who return to Timor-Leste.

Flawed charging: The indictment failed to specify the *mens rea* (intent) of the accused in the numbered "statement of facts". For Maubuti to be found guilty of a crime against humanity the prosecution would have had to prove that he knew of a widespread or systematic attack on civilians—in this case supporters of Timorese independence—and knew the murders of Luis da Silva and his family formed part of this widespread or systematic attack. This omission by the prosecution led to the court not making any finding of fact on the knowledge of the accused, making it impossible to convict him of a crime against humanity even if the district court had chosen to apply UNTAET regulation 15/2000. The prosecution should have included the *mens rea* requirement of crimes against humanity in the indictment.

Failure to ensure access to competent defense counsel: Maubuti was represented by four different public defense counsels during the court process. On at least two occasions, substitute defense counsel was not provided sufficient time to familiarize with the case before being forced to proceed with the trial. For example, when the court traveled to Suai district for a hearing Maubuti's counsel missed the plane. As the accused had elected not to attend the Suai hearing, the locally based public defender, at the urging of the court, proceeded with the defense despite the fact that the accused was not present, the public defender had never met his client and he had not had the opportunity to take instructions, nor to read the defense case files that had remained in Dili.⁷ This rendered the presence of the public defender practically useless. The court should not have allowed the trial to proceed in the absence of a properly briefed defense counsel.

Inadequate defense: Maubuti's defense counsel did not call any witnesses and cross-examined only three of the ten witnesses called by the prosecution. The prosecution led evidence by four eyewitnesses who had made statements to the police prior to Maubuti's capture and trial, which placed him at the scene of the crime and described his participation in the abduction of the family and then the decapitation of Luis da Silva and dismemberment of him and his wife, Fatima. During the preliminary questioning of the accused prior to trial, evidence surfaced that the victims were murdered pursuant to a private land dispute and not as part of the systematic attack against independence supporters.

6 The Timor-Leste legal system permits an accused to be convicted at trial of a lesser crime not alleged in the indictment. However, if the court believes that the facts alleged in the indictment support an alternate criminal charge, the court should inform the prosecution and the defense and either side may request time to revise their case. See article 274 of the Timor-Leste Criminal Procedure Code.

7 Article 260 (3) of the Timor-Leste Criminal Procedure Code requires the court to provide substitute defenders with time to look over the case documents and communicate with the accused.

The facts that no witnesses were called on behalf of the defense, counsel did not cross examine all of prosecution eye witnesses who had provided very damaging evidence and did not raise the issue that the killings may have been related to private matters rather than part of a widespread or systematic attack, call into serious question the quality of the legal representation of the accused.

Inadequate witness protection: Fear of reprisal from militia leaders made it difficult for the prosecution to obtain clear and coherent testimony from witnesses. Despite having provided detailed statements to police about the crimes in question, once in court, witnesses were reluctant to provide incriminating testimony against the accused. Only after witnesses were confronted with the content of their prior statements to the police did they testify to Maubuti's direct involvement in the murder of Luisa da Silva and his family. Mid-way through the testimony of the third prosecution witness, the court ordered the accused to wait outside for the duration of the remaining testimony on the grounds that his presence was intimidating the witnesses.⁸ Witnesses next in line to testify then found themselves sitting outside the courtroom beside the accused. Immediately after the accused left the court, the witness being questioned informed the judges that former militia leaders had threatened him. Prior to the hearing in Suai, Maubuti's male relatives were able to mingle with and speak to prosecution witnesses, raising concerns of intimidation. The court should have at least have prepared a separate waiting room that would have shielded them from contact with the accused and his family prior to giving testimony.

Decision to convict the accused of manslaughter: It is not clear why the Dili District Court chose to convict the accused of manslaughter under article 338, and not the more serious crime of premeditated murder under article 340 of the Indonesian penal code.⁹ In the Maubuti decision, the district court found that on the way to the victim Luis da Silva's house, militia member Manuel Magno informed the others, including the accused that they were going to abduct Luis da Silva and his family in order to kill them.¹⁰ The group then proceeded to the victims' house, tied up the victims and walked them to an Indonesian transmigrant area one hour away where they were killed. In a 2001 serious crimes case, the district court held that the premeditation required for a conviction under article 340, "does not necessarily imply a long term planning of the conduct. It is enough to have thought about acting and to have decided whether to take the life of the victim or to withdraw from that intention."¹¹ It could be argued that the hour or more that elapsed between the accused receiving the information that they were going to kill Luis da Silva and his family, and his participation in the killing provides strong evidence of the essential element of premeditation under article 340.

8 Article 253 (4), Timor-Leste Criminal Procedure Code, "The defendant may also be sent away from the courtroom for a period of time deemed necessary when his or her presence may contribute to inhibiting or intimidating a person who is to make statements."

9 Article 338 of the Indonesian Criminal Code reads, "The person who with deliberate intent takes the life of another person, shall, being guilty of manslaughter, be punished by a maximum imprisonment of 15 years." Article 340 reads, "The person who with deliberate intent and with premeditation takes the life of another of another person, shall, being guilty of murder, be punished by capital punishment of life imprisonment or a maximum imprisonment of 20 years."

10 Case No. 08/CG/TDD/2004, The Public Prosecutor vs Domingos (Maubuti) Noronha, Dili District Court Judgment 26 March 2010. See number 26 of facts found proven by the court.

11 Case No. 03/2001, The Public Prosecutor vs Jose Valente, Dili District Court Judgment 19 June 2001, p. 9. District court decision was upheld upon appeal.

Proving Crimes Against Humanity, Murder

To prove murder as crimes against humanity, the prosecutor must show that:

- Maubuti's acts substantially contributed to the victims' death,
- Maubuti intended to kill the victims,
- this murder occurred as part of a widespread or systematic attack against a civilian population, and
- Maubuti knew that the murder of the family of three formed part of this widespread or systematic attack.

The Court of Appeal Decision

The appeal court considered two major questions in relation to the Dili District Court's decision: whether murder as a crime against humanity was applicable law in 1999 and whether the evidence proved the elements of that crime.

1) Did the crime against humanity of murder exist as a crime under the law applicable in East Timor in 1999?

UNTAET Regulation 15/2000 which includes the crime against humanity of murder was passed in 2000, after Maubuti murdered Luis da Silva and his family. The court discussed whether this law had retroactive effect.

The Decision: On the issue of retroactivity of UNTAET Regulation 15/2000, the appeals court found that although in 1999 crimes against humanity did not exist within East Timor's domestic legislation, they did exist at that time as customary international law, which was binding on "all nations and citizens". However, the court went on to state that international criminal law should only be applied in situations where the rule of law within a country deteriorates to the extent that an international intervention is required to bring perpetrators to account.¹² The court stated that except for such situations domestic law should be applied rather than international law, and for this reason the Dili District Court had been correct to convict Maubuti of murder under the Indonesian penal code rather than crimes against humanity. In addition, the court suggested that Maubuti's low position in the militia hierarchy and the nature of the crime did not warrant a charge of crime against humanity.

Commentary: The question of whether UNTAET Regulation 15/2000 could be used to convict individuals of acts committed in 1999 has been considered several times by the Special Panels. In the May 2002 João Franca decision, the Dili District Court examined the issue in depth and held that that application of 15/2000 did not constitute a retroactive application of law, as long as the conduct with which the accused is charged constitutes a "crime under international law giving rise to individual criminal responsibility".¹³ Subsequent decisions of the District Court proceeded to apply Regulation 15/2000 based on this reasoning until the Court of Appeal held to the contrary in the Armando dos Santos case of July 2003.¹⁴ In 2004 the appeal court overruled its prior decision in dos Santos, stating that, "we are of the opinion that with customary international law we have legal 'coverage' to judge the conduct of the appellant as a crime against humanity, notwithstanding the absence of an express penal norm, without violation the principle of *nullum crimen sine lege*."¹⁵ In the Maubuti case, neither the Dili District Court nor the Court of Appeal referred to these prior SPSC decisions. However, the Court of Appeal's comments concerning the relationship between national and international law, by implication, appears to question the legitimacy of the scores of successful prosecutions based on UNTAET Regulation 15/2000.

In determining the issue of whether charging Maubuti under UNTAET Regulation 15/2000 violated the principle of non-retroactivity of criminal law (*nullum crimen sine lege*), the appeal court should have assessed whether regulation 15/2000 served to codify the 1999 cus-

12 Case No.36/CO/2010/TR, Appeal Court Decision of 1 June 2010, p. 21-22

13 Case Number 4a/2001, Prosecutor v Joao Franca da Silva alias Jhoni Franca, Dili District Court Decision of 5 December 2002, pp. 15-30.

14 Case Number 16/2001, Appeal Court Decision of 15 July 2003.

15 Appeal Court Decision Case 11/2001 of 14 September 2004, p. 7.

tomary international law definition of crimes against humanity and if so, whether the accused could be validly be tried under UNTAET Regulation 15/2000.

In 1999, murder as a crime against humanity was clearly recognized in customary international law. The elements of murder as a crime against humanity had been elaborated upon by various decisions by the war crimes tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) and were also included in the Rome Statute of the International Criminal Court 1998, although the latter was not yet in force.¹⁶ Article 5.1 of UNTAET Regulation 15/2000 defines crimes against humanity in terms almost identical to the Rome Statute.¹⁷ The Rome Statute definition of murder as a crime against humanity was indisputably a reflection of the state of customary international law in 1998.¹⁸

As the law applicable in East Timor in 1999 was unclear, the UNTAET Regulation drew on customary international law to define the crimes.¹⁹ This was all the more permissible since UNTAET itself was an international administration governing Timor-Leste prior to its independence. Regulation 15/2000 did not create a new offence of murder as a crime against humanity but created a hybrid jurisdiction in which international crimes could be prosecuted directly. In other hybrid jurisdictions such as the Special Court for Sierra Leone international law was also applied, including crimes based on customary international law. Charging the accused under Article 5 of UNTAET Regulation 15/2000 therefore did not violate the *nul-lum crimen sine lege* principle and instead was done with many accused throughout the lifespan of the serious crimes regime.

Furthermore, the court's reasoning for rejecting the applicability of customary international law in this case was very flawed. In its discussion of the supremacy of domestic law, the appellate court appears to reflect an opinion that international customary law may only be applied by 'supra national courts' which have been established in places where the rule of law has collapsed.

This The State is, in the first instance, responsible for protection of human rights, and supra state intervention only becomes necessary to fill gaps in this protection that arise from the dissolution of the rule of law, only in such cases can the recourse to international customary law justify the creation of supra national tribunals. As it is possible to avoid resorting to this principle [use of international law], domestic law should prevail and one must demand fulfillment of the principle of legality in full Effectively, also in the struggle against international crimes, the Rome Statute provides, in articles 17, 18 and 19, the principle of complementary jurisdiction, under the terms of which the ICC

16 The Rome Statute of the International Criminal Court (ICC) was adopted in July 1998, by vote of 120 out of 148 states present at the Rome Statute Conference. Some 25 countries had signed the statute by early 1999. Key ICTR and ICTY decisions on the elements of crimes against humanity include Prosecutor vs Tadic (Trial Judgment) Case No IT-94-1-T, ICTY, 7 May 1997, Para 659 and Prosecutor vs Akayesu (Judgment) Case No. ICTR-96-4, 2 September 1998, para 563-597.

17 Article 7 (1) of the 1998 Rome Statute reads; "...a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [...]". Article 5.1 of UNTAET regulation 15/2000 reads; "...a widespread or systematic attack and directed against any civilian population, with knowledge of the attack; [...]".

18 The Rome Statute definition of murder as a crime against humanity was consistent with international customary principles. See A Cassese, *International Criminal Law* (New York: Oxford University Press, 2008, 2nd Edition) 109-116.

19 Article 3.1 of UNTAET regulation 15/2000, "In exercising their jurisdiction, the panels shall apply: (a) the law of East Timor as promulgated by Sections 2 and 3 of UNTAET Regulation No. 1999/1 and any subsequent UNTAET regulations and directives; and (b) where appropriate, applicable treaties and recognized principles and norms of international law, including the established principles of the international law of armed conflict."

may only intervene in cases of where states renounce their punitive powers or fail to exercise them adequately.²⁰

This opinion neglects the fact that in national situations in which the rule of law is intact, customary international law may still apply if it is recognized as a source of law. The creation of “supra national tribunals” is determined by both political and security considerations (in the case of tribunals established by the UN Security Council under Chapter VII of the UN Charter), or by international agreements or treaties such as the Rome Statute, but these factors are not necessarily or strictly related to the collapse of the rule of law in a particular country. The Special Panels established to try serious crimes committed in 1999 under UNTAET Regulation 15/2000, were not “supra-national tribunals” but hybrid in nature. However, at the time Timor-Leste was under UN administration and the UNTAET Regulation was formulated exactly because there was a gap in the applicable legal framework.

It also appears that the court is using the principle of complementarity to argue that, where possible, national law should apply rather than international law. However, this is not the true meaning of the principle of complementarity, which highlights that national legal systems can bring perpetrators of international crimes to justice within those national systems. Complementarity means that the ICC will only investigate or prosecute crimes if states are unable or unwilling genuinely to investigate and prosecute themselves.²¹ Complementarity as referred to in the Rome Statute allows for states to take primary responsibility for bringing perpetrators of international crimes to justice, and this is further facilitated if states incorporate international criminal law into their domestic legal systems, allowing States to charge the types of conduct that are prohibited by the Rome Statute.²² This is exactly what UNTAET regulation 15/2000 did.²³

Additionally, the court’s suggestion that crimes against humanity should be reserved for high-level commanders or persons who planned and ordered the systematic or widespread attack is erroneous.²⁴ Although the concept of crimes against humanity evolved in order to condemn widespread or systematic crimes against civilians, crime against humanity prosecutions can in principle proceed against both high and low-level perpetrators.²⁵ Both militia members who committed crimes in 1999, and commanders who ordered their commission, are individually responsible for crimes against humanity if the elements of the crimes are proven.²⁶

20 Case No.36/CO/2010/TR, Appeal Court Decision of 1 June 2010, p. 21-22.

21 Article 13, 14 and 17 of the Rome Statute of the International Criminal Court, 1998.

22 Principle 20 from the Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005.

23 Human Rights Court Act No. 26/2000 of November 2000.

24 “Moreover, one must avoid relegating the concept of crimes against humanity to some kind of aggravation of individual murders or rapes rather than the massive crimes they are and...undermine[s] the importance of the concept [of crimes against humanity] in general. The individual crimes committed by men in the field became the focus not the acquiescing or contributing behavior of the generals who could have ended it all”, Case No.36/CO/2010/TR, Appeal Court Decision of 1 June 2010, p. 22. The court is quoting an article written by Patricia Wald, a US Supreme Court Judge and ICTY Judge (1999-2001) who is discussing a prosecutor’s view that the ICTY Appeals Court treated some high-level perpetrators as mere ‘accessories’ to the mass crimes committed.

25 Cassese, *A International Criminal Law* (New York: Oxford University Press, 2008, 2nd Edition) 98.

26 Maubuti’s rank within the militia is only relevant to the question of whether he was following superior orders and if this mitigated his sentence. See Section 21 of UNTAET Regulation 15/2000.

2) Did the prosecution prove that Maubuti committed the crime against humanity of murder?

Although the Court of Appeal's decision to deny the prosecutor's appeal was based on the grounds that the applicable law in this case was the Indonesian Criminal Code (which did not include crimes against humanity) it proceeded to analyze whether the facts proven at trial would have fulfilled the elements of murder as a crime against humanity. An examination of the trial judgment showed that no finding of fact had been made as to whether the accused was aware that the murders were committed, "as part of a single widespread or systematic attack against any civilian population." Therefore, a conviction for a crime against humanity could not be sustained.

Commentary: As mentioned above, the indictment failed to allege that Maubuti knew that the murders he committed were part of the 1999 attack against supporters of independence.

The indictment charging Maubuti did refer to this element of knowledge in the summary of the charges.²⁷ Also, there were approximately 18 other SCU-drafted indictments that used the same format as the Maubuti indictment. This did not prevent the SPSC, in 11 of the 12 cases that went to trial, from finding the accused guilty of crimes against humanity. Omitting this element from the numbered paragraphs of facts to be proven has not, in the past, been fatal to a conviction for crimes against humanity in the Timor courts. This is despite the general requirement that an indictment must contain sufficient detail to put to the accused on notice of all facts that the prosecutor intends to prove.

In the Maubuti case, the prosecutor relied on the pre-trial questioning of the accused to prove that Maubuti was aware of the systematic attack against supporters of independence, of which the murders formed a part. During the pre-trial questioning Maubuti admitted to:

- i. being a member of the Mahidi militia,
- ii. knowing that the militia's purpose was to detain supporters of Timorese independence, assault and sometimes kill people, and
- iii. knowing that there were some 1000 militia members in Suai who were armed by Cancio Lopes de Carvalho, a deputy commander of the militia umbrella organization, the Integration Fighters Force.

Evidence was led at trial that the reason for killing Luis da Silva and his family was their connection to the pro-independence movement, situating the murders within the context of the broader systematic attack described by Maubuti during the preliminary questioning.

However, instead of requiring the prosecutor to amend the indictment, the court made no findings of fact on this element of murder as a crime against humanity of murder, complicating the ability of the Court of Appeal to revisit the issue. For future cases the Office of the Prosecutor General would be wise to amend outstanding SCU indictments to be more specific on the *mens rea* requirement.

²⁷ "Domingos Mau Buti ... [is] responsible ... under section 14.3 (a), (c) and (d) of Regulation 15/2000 for the murder of Luis da Silva on 17 April 1999 ... as part of a widespread and systematic attack against a civilian population with knowledge of the attack," Serious crimes indictment number o8/2004, December 6, 2004, p 7.

Conclusion

The evidence presented at the trial of Domingos Noronha aka Maubuti, may have been sufficient to support a successful prosecution for murder as a crime against humanity. However, a combination of flawed charging and the Dili District Court's erroneous refusal to apply UNTAET regulation 15/2000 to the facts of the case meant that Maubuti was convicted of the ordinary crime of manslaughter.

The Dili district court and Court of Appeal case judgments suggest that the courts are moving to a position in which the application of UNTAET Regulation 15/2000 is no longer deemed applicable to acts committed by low-level members of Timorese militia groups in 1999. For the reasons stated above, such a view is clearly erroneous and is also inconsistent with scores of crimes against humanity convictions previously decided by Timorese courts. It is yet to be seen whether the court's reasoning in this case will be applied to the expected 2011 trial of a former militia member for the crime against humanity of murder.

Reports from Indonesian West Timor indicate that former members of the Timorese militia many of whom have outstanding indictments and arrest warrants against them, wish to return to Timor-Leste.²⁸ It is important that, should these former militia return to Timor-Leste, the legal system is sufficiently well equipped to process these cases. The Maubuti case demonstrates that if future serious crimes cases are to be processed in a credible manner improvements must be made in relation to witness protection and the consistency and quality of defense counsel made available to the accused. Additional training on crimes against humanity should be offered so that problems relating to potentially defective indictments are avoided, and deficient knowledge of international criminal law is remedied.²⁹ As mentioned above, justice sector actors should seek to take advantage of the resources and expertise within UNMIT to develop a sustainable national capacity on matters relevant to international criminal law before the end of UNMIT's mandate in 2012.

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²⁸ Speech by His Excellency Prime Minister Kay Rala Xanana Gusmao on the Occasion of the National Dialogue on Truth Justice and Reconciliation, 21 October 2010, Conference Hall, Ministry of Foreign Affairs, Dili.

²⁹ See recommendations made in J Kirk and C da Costa Bobo, *Impunity in Timor-Leste: Can the Serious Crimes Investigation Team Make a Difference?* ICTJ Report, June 2010.