REPÚBLICA DEMOCRÁTICA DE TIMOR-LESTE

DILI DISTRICT COURT

THE SPECIAL PANELS FOR SERIOUS CRIMES

Before:
Judge Phillip Rapoza

CASE NO. 05/2003

THE DEPUTY GENERAL PROSECUTOR FOR SERIOUS CRIMES

v.

WIRANTO, et al.

Legal Ruling Concerning the Applicability of *Ne Bis In Idem* at the Arrest Warrant Stage of the Proceedings

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I. BACKGROUND

1. On 24 February 2003, the Deputy General Prosecutor (DGP) filed an indictment with the Special Panels for Serious Crimes charging the defendant Wiranto and seven others with crimes against the humanity in the form of murder, deportation or forcible transfer of population and persecution. Moreover, the indictment alleged that the defendants are responsible both as individuals and as persons having command responsibility over others.

2. On the same date, the DGP also filed a "Request for Warrants of Arrest" for all the defendants, including Wiranto.

3. During the period of time that the DGP's motion for arrest warrants was under advisement, charges were pending against five of the eight defendants before the Ad Hoc Human Rights Court in Jakarta.[1] Two of the defendants were acquitted (Suratman and Sudrajat) and three were found guilty, although their convictions were later reversed on appeal (Damiri, Muis and Soares).

4. Despite the trials conducted in Indonesia, on or before 5 May 2005 the Special Panels issued arrest warrants against all the defendants named in the indictment. It did so based on its conclusion that the principle of *ne bis in idem* is not applicable at the arrest warrant stage of the proceedings.[2]

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[1] No charges were ever brought against Wiranto, Makarim or Syahnakri.

[2] The principle of *ne bis in idem* refers to the concept that a person shall not be tried or punished twice for the same offense. Thus, *ne bis in idem* seeks to protect the same values expressed in the rule barring double jeopardy. These include promoting fairness and efficiency in the administration of the criminal law as well as preventing the harassment of an individual by the state through the use of the courts.

II. DISCUSSION

A. The principle of *ne bis in idem* applies to prosecutions before the Special Panels for Serious Crimes.

5. The applicable law in Timor-Leste refers extensively to the principle of *ne bis in idem*.[3]

6. UNTAET Regulation No. 2000/15 ("On the establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences") provides in Section 11(titled *"Ne bis in idem"*) that the principle shall apply in three different circumstances.

7. Section 11.1 states that "[n]o person shall be tried before a panel established by the present regulation with respect to conduct (which formed the basis of crimes) for which the person has been convicted or acquitted by a panel." Thus, an accused tried before a Special Panel shall not be tried before another Special Panel for any crime so long as the charges are based on the same conduct.

8. Similarly, Section 11.2 states that "[n]o person shall be tried by another court (in East Timor) for a crime referred to in Sections 4 to 9 of the present regulation [defining the crimes within the jurisdiction of the

[3] The sources of law in East Timor are described in Law No. 2/2002 ("Interpretation of Applicable Law on 19 May 2002."Pub 7/8/2002) and Law No. 10/2003 ("Interpretation of Section 1 of Law No. 2/2002 of 7 August and Sources of Law." Pub. 10/12/2003). The latter provides that "regulations and other legal instruments of UNTAET, as long as these are not repealed" shall continue to serve as part of the applicable law. Pursuant to existing UNTAET regulations, including Regulation No.1999/1, Regulation No. 2000/11 as amended by Regulation No. 2001/25, and Regulation No. 2000/15, the Special Panels for Serious Crimes shall apply the following: (a) the laws of East Timor as promulgated by Sections 2 and 3 of UNTAET Regulation No. 1999/1; (b) any subsequent UNTAET regulations and directives; (c) the laws applied in East Timor prior to 25 October 1999 (until replaced by UNTAET regulations or subsequent legislation) insofar as they do not conflict with internationally recognized human rights standards (Law 10/2003 also clarified that the law applicable in East Timor prior to 25 October 1999 was Indonesian law, a fact previously held by the Special Panels in the case of Prosecutor v. João Sarmento and Domingos Mendonca. Decided 24 July 2003); (d) applicable treaties and recognized principles and norms of international law, including the established principles of international law of armed conflict; and (e) subsequent laws of democratically established institutions of Timor-Leste.

Special Panels] for which that person has already been convicted or acquitted by a panel." Accordingly, when an accused is tried before the Special Panels for a serious crime as set out in UNTAET Regulation No. 2000/15, not only another Special Panel, but also any other court in East Timor is barred from a subsequent prosecution.

9. Finally, Section 11.3 is sufficiently broad as to apply the principle of *ne bis in idem* to cases where the prior proceedings occurred outside East Timor: "No person who has been tried by another court for conduct also proscribed under Sections 4 to 9 of the present regulation shall be tried by a panel with respect to the same conduct" (emphasis added).

10. As applied to the present matter, the Court concludes that the reference in Section 11.3 to trials "by another court" includes courts in foreign states. It is significant to note that Section 11.2 makes reference to no person being tried "by another court (in East Timor)" who has already gone to trial. However, the reference in Section 11.3 to a defendant who has been tried "by another court" does not include the parenthetical limitation "in East Timor." Consequently, the use of the unmodified term "by another court" in Section 11.3 permits a broader application to include courts outside East Timor.

11. Section 11.3 also provides that *ne bis in idem* shall not apply in those instances where (1) the purpose of the prior proceeding was to shield the accused from criminal responsibility or where (2) the prior proceeding was not conducted in an independent, impartial and fair manner or was not intended to bring the accused to justice. These considerations have less application within the context of a single judicial system. They are more appropriately applied when a court in one state must evaluate the performance of the judicial system in a foreign state.

12. The principle of *ne bis in idem* is also recognized in the Transitional Rules of Criminal Procedure (TRCP).[4] TRCP Sec. 4.1 (titled *"Ne bis in Idem"*) similarly asserts that "[n]o persons shall be liable to be tried or punished in a court of East Timor for an offence for which that person has already been finally convicted or acquitted."

13. TRCP Sec. 4.2 mirrors Section 11.3 of UNTAET Regulation No. 2000/15 and states: "No person who has been tried by another court for conduct proscribed under Sections 4 to 9 of UNTAET Regulation No. 2000/15 shall be tried by a court of East Timor with respect to the same conduct." Moreover, the section includes the same two exceptions found in Section 11.3.[5]

14. The Constitution of East Timor also expresses the same concept concerning further jeopardy, although in a more general way. As stated in Section 31.4, "[n]o one shall be tried and convicted for the same criminal offence more than once."

15. The principle of *ne bis in idem* also has standing in East Timor by operation of international law, which has official status pursuant to Section 9 of the Constitution. Section 9.1 states that "[t]he legal system of East Timor shall adopt the general or customary principles of international law." Similarly, Section 9.2 states that "[r]ules provided for in international conventions, treaties and agreements shall apply in the internal legal system of East Timor" following their formal approval and application." Accordingly, international law is binding on the Special Panels.[6]

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[4] UNTAET Regulation No. 2000/30 as amended by UNTAET Regulation No. 2001/25.

[5] See, supra at par. 11.

[6] This is consistent with Section 3.1(b) of UNTAET Regulation No. 2000/15, which states in part that the Special Panels shall apply "where appropriate, applicable treaties and recognized principles and norms of

16. The Rome Statute of the International Criminal Court has been adopted in East Timor as provided in Section 9.2 of the Constitution and thus its provisions "shall apply in the internal legal system of East Timor."[7] One such provision is Article 20 (titled *"Ne bis in idem"*), which bars a second trial for previously adjudicated persons. The language used is substantially the same as that found in Section 11 of UNTAET Regulation No. 2000/15, reflecting the fact that the UNTAET regulation in issue is largely adapted from the Rome Statute.

17. A comparable provision is contained in the International Covenant on Civil and Political Rights (ICCPR), which also has the force of law in East Timor.[8] Article 14.7 of the ICCPR states: "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

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international law. See also TRCP Sec. 54.5: "On points of criminal procedure not prescribed in the present regulation, internationally recognized principles shall apply."

[7] The Rome Statute entered into force on 1 July 2002 and was adopted by the National Parliament of East Timor on 12 August 2002. Following approval by the President, the resolution adopting the Rome Statute was published on 11 June 2003, giving it official status as provided in Section 9.2 of the Constitution. Although Article 10 of the Rome Statute provides that the jurisdiction *ratione temporis* of the ICC "is only with respect to crimes committed after the entry into force of this Statute," both the Rome Statute and the corresponding Rules of Procedure and Evidence (RPE) nonetheless reflect "general or customary principles of international law" and thus can serve as a source of law in East Timor. The Special Panels have previously recognized the Rome Statute as having legal effect in East Timor in the case of Deputy General Prosecutor for Serious Crimes v. Josep Nahak, Case No. 01A/2004. See "Findings and Order on Defendant Nahak's Competence to Stand Trial" (Decided 1 March 2005) at par. 22.

[8] National Parliament Resolution No. 3/2003 ratifying the International Covenant on Civil and Political Rights. Approved 23 May 2003. Published 10 August 2003. See also, supra at n. 7, Deputy General Prosecutor for Serious Crimes v. Josep Nahak, Case No. 01A/2004, "Findings and Order on Defendant Nahak's Competence to Stand Trial" (Decided 1 March 2005) at par. 36 asserting that the ICCPR has the force of law in East Timor.

B. The principle of *ne bis in idem* does not apply at the arrest warrant stage of the proceedings as a matter of law.

18. The fact that the principle of *ne bis in idem* applies before the Special Panels for Serious Crimes does not automatically require that it attach at the arrest warrant stage of the proceedings. Indeed, the Court has been unable to identify any case either in East Timor or in the realm of international jurisprudence in which *ne bis in idem* was considered at the arrest warrant stage rather than at some point following arrest.

19. Every one of the sources of law cited in the previous section refers to the stage of the proceedings at which the concept of *ne bis in idem* shall apply. Without exception, they all refer to the principle attaching at the time of trial, and not before. Accordingly, the earliest stage at which *ne bis in idem* can be raised is after the issuance of the warrant of arrest.

20. In Sections 11.1 and 11.2 of UNTAET Regulation No. 2000/15 it is stated that "[n]o person shall be tried" who has already been convicted or acquitted by another court" (emphasis added). Similarly, Section 11.3 states that no person who has gone to trial before another court shall "be tried by a [special] panel with respect to the same conduct" (emphasis added).

21. TRCP Section 4.1 more broadly states that "[n]o person shall be liable to be tried or punished" for an offence for which he has already been "convicted or acquitted" in accordance with UNTAET regulations (emphasis added). TRCP Section 4.2 uses substantially the same language as Section 11.3 of UNTAET Regulation No. 2000/15 when it states that no person who previously went to trial "shall be tried by a court of East Timor with respect to the same conduct" (emphasis added).

22. The Constitution of East Timor, like TRCP Section 4.1, bars further jeopardy by stating that "[n]o one shall be tried and convicted for the same criminal offence more than once" (emphasis added).

23. The ICCPR, like the Constitution of East Timor and TRCP Section 4, states at Article 14.7 that "[n]o person shall be liable to be tried or punished again for an offense for which he has already been finally convicted or acquitted" (emphasis added).

24. The Rome Statute also provides for the application of the principle of *ne bis in idem* at the trial stage. Each subpart of Article 20 states that no person "shall be tried" following a prior conviction or acquittal for the same offense (emphasis added).

25. The only circumstance in which the concept has been applied other than at trial nevertheless comes after the issuance of an arrest warrant and not before. In TCRP Section 19A.7(d) it is provided that following the arrest of an unindicted suspect, the prosecutor may dismiss the case and request the Court to release the party in circumstances where "the suspect has already been tried by a court for the same offenses and has been finally convicted or acquitted."

26. This is comparable to Article 19.2 (a) of the Rome Statute, which affords an "accused or a person for whom a warrant of arrest . . . has been issued" the right to challenge whether or not a case should be admitted before the Court in light of the provisions contained in Article 17.1(c). One such consideration is whether the person has "already been tried for conduct which is the subject of the complaint." In such circumstances, "a trial by the Court is not permitted under article 20, paragraph 3."

27. This provision is consistent with the general legal framework of the Rome Statute. The drafters of the Statute avoided specifying a list of rights that would attach from the moment an individual becomes a suspect.[9] Instead, the Statute focuses on the rights that pertain to a person at particular points in the criminal proceedings. Thus, they "decided that references would be made to certain rights at specific stages in the procedure . . . Furthermore, the new structure provided different rights with respect to the legal review of an arrest warrant, notification, disclosure of evidence and confirmation of the charges."[10] The Rome Statute affords no explicit rights to a suspect when a judge considers whether to issue an arrest warrant. Rather, such rights are extended to a person during the course of the investigation, at the time of arrest and when the individual makes his/her initial appearance before the Court.[11]

28. The same is true under the Transitional Rules of Criminal Procedure. Section 6.2 describes the rights of a suspect "immediately upon arrest" while Section 6.3 describes rights that pertain subsequently "[a]t every state of the proceedings."

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[9] Hakan Friman, "Rights of Persons Suspected or Accused of a Crime,"in International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results at 247-262 (Roy S. Lee, ed. 1999).

[10] Id., at 254.

[11] See Rome Statute, Articles 55-57, 59 and 60. No rights are listed in Article 58, which addresses the issuance of an arrest warrant. To the extent that Article 55.1(d) states that a person "[s]hall not be subjected to arbitrary arrest or detention," the Court does not read this as an invitation to consider the issue of *ne bis in idem* upon the issuance of an arrest warrant. This is especially true where the drafters specifically inserted consideration of *ne bis in idem* at a later stage in the proceedings. Moreover, in the view of this Court, "arbitrariness" at the arrest warrant stage is avoided when there is sufficient factual justification for an arrest and where all procedural formalities have been observed with respect to the issuance of the warrant. In this context, it is not necessary for the issuing judge first to consider the applicability of *ne bis in idem* in order to ensure that the issuance of a particular warrant is not arbitrary. The same result is reached under the Transitional Rules of Criminal Procedure, which state: "No person shall be subjected to arbitrary arrest or detention." TRCP Sec. 2.3. In TRCP Sec. 19A, the drafters described exactly what findings must be made to issue an arrest warrant, but did not require judicial consideration of legal defenses or bars to prosecution. Nonetheless, later in the same rule it is specified that following arrest it may be considered whether "the suspect has already been tried by a court for the same offences and has been finally convicted or acquitted." TRCP Sec. 19A.7(d). Similarly, the issue can be raised at trial. See TRCP Sec. 4 (titled "*Ne bis in idem*").

C. There are sound reasons of judicial policy not to apply the principle of *ne bis in idem* at the arrest warrant stage of the proceedings.

29. Whether or not the principle of *ne bis in idem* bars a particular prosecution is not always readily apparent. The resolution of the issue requires a judicial determination as to both whether the two proceedings relate to the same conduct and whether the party has been previously tried or convicted for the same criminal offence. The complexity of the matter is enhanced by the need to determine whether previous proceedings were for the purpose of shielding the accused from criminal responsibility. Similarly, it must be decided whether the earlier proceedings were conducted independently and impartially, in accordance with international norms of due process and consistent with an intent to bring the person concerned to justice. In the present case, the process is rendered more difficult to the extent that such an evaluation must be applied to five different defendants who were tried in different proceedings.

30. For a judge to resolve the application of *ne bis in idem* in a particular case without an adversarial hearing would thus be impractical, if not inappropriate. The issue is a complex one requiring the input of all interested parties and necessitating a full hearing. It is not a matter to be resolved by a judge following a mere *in camera* review of the case. Moreover, fundamental fairness requires that the prosecutor, and especially the defendant, have the opportunity to be heard on such a significant issue.

31. Accordingly, it is not surprising that the prevailing international norm is that the issue of *ne bis in idem* attaches at the trial stage when all parties are present and where the issue can be fully joined. Moreover at the time of trial, unlike at the arrest warrant stage, there is no issue of secrecy to be taken into account, permitting a thorough consideration of the matter. The

secrecy of arrest warrant proceedings must be protected in order to preserve the Prosecutor's ability to gather evidence, to protect potential witnesses and to avoid endangering the results of investigations.

32. In another context, this Court has already declined to conduct a public adversarial hearing at the arrest warrant stage of the proceedings. When we were previously asked to provide an adversarial hearing with respect to the issuance of an arrest warrant against Wiranto, we declined to do so indicating, *inter alia*, that no such hearing is provided for in the Transitional Rules of Criminal Procedure nor is one required by the general norms of international criminal procedure law.[12] Moreover, as here, we determined that there was no sound policy reason to conduct such a hearing.

33. Although this Court has not considered the principle of *ne bis in idem* as it might apply to the facts of the present case, it is aware of claims suggesting that the proceedings in Indonesia were not independent, impartial or conducted in good faith. See, e.g. David Cohen, "Intended to Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta" (International Center for Transitional Justice, 2003). Given the issues raised by such charges, it is especially important that they be litigated both thoroughly and openly. It is no small thing for the courts of one state to evaluate the performance of courts in another. If nothing else, the significance of such a determination strongly indicates that the matter is more appropriate for consideration by an entire panel of judges prior to trial rather than a single judge considering the issuance of an arrest warrant.

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[12] See "Decision on the Motion of the Deputy General Prosecutor for a Hearing on the Application for an Arrest Warrant in the Case of Wiranto" in Deputy General Prosecutor for Serious Crimes v. Wiranto et al. (No. 05/2003. Motion decided on 18 February 2004).

34. Thus, there are sound reasons of judicial policy not to consider the issue of *ne bis in idem* at the arrest warrant stage of these proceedings. Absent a clear statutory imperative to proceed otherwise, the issue should be addressed after a defendant is brought before the Court and before his case goes to trial.

III. CONCLUSION

For the foregoing reasons, the Court concludes that the principle of *ne bis in idem* does not apply at the arrest warrant stage of these proceedings. Accordingly any prior trial or adjudication of the defendants before the Ad Hoc Human Rights Court does not bar the issuance of the requested arrest warrants.

By the Court,

Phillip Rapoza
Special Panels for Serious Crimes

Date: 5 May 2005