Guy Cumes

Murder as a Crime against Humanity in International Law: Choice of Law and Prosecution of Murder in East Timor

1. INTRODUCTION

According to the International Law Commission (ILC) ‘murder is a crime that is clearly understood and well defined in the national law of every State. This prohibited act does not require any further explanation’. Notwithstanding this confident and largely uncontestable analysis, it could also not be in dispute that the law of homicide at both the domestic as well as the international level has given rise to a large amount of jurisprudence. This jurisprudence is amplified where the prosecution occurs within a legal framework that permits prosecution under both international and/or domestic law. In this situation there are competing considerations in the application and choice of law; and the nature of the law and potentially different legal regimes under which the offence may be prosecuted need to be investigated.

Within international law there are various forms of homicide and murder as a crime against humanity is just one of these. Within domestic law similarly, the classification and requirements of homicide are dependent upon the legislative framework.
and judicial interpretation, and this may be informed by different legal and cultural contexts to that which informs international law. Where an accused is charged with murder in a legal infrastructure that is not purely municipal but rather founded on the intervention of the international community, there is a question as to whether the primary law should be international law or domestic law.

In the case of East Timor the framework for the choice of law is established by the United Nations through its representative authority in the province, the United Nations Transitional Administration in East Timor (UNTAET). The domestic law that UNTAET has elected to implement as the operative law in East Timor is Indonesian law.\textsuperscript{4} Cases are decided within a legal model which consists of a mixed international and local court that applies both international law and the ‘hybrid laws of UNTAET-administered East Timor’.\textsuperscript{5} This regulatory framework has the effect that the prosecuting authorities have significant influence in the decision as to which law, international or domestic, is relied upon in individual prosecutions.\textsuperscript{6}

The international law of murder has been examined in a number of decisions in the International Criminal Tribunal for the Former Yugoslavia (ICTY)\textsuperscript{7} and the International Criminal Tribunal for Rwanda (ICTR)\textsuperscript{8} with the result that only one major issue, premeditation, exists as a source of uncertainty as to the scope of the law. Coincidentally, premeditation is an important issue in Indonesian law as well as other criminal legal systems. An analysis of the international law of murder and the domestic law applicable in East Timor provides a site for assessing considerations of law and practice which might influence the choice of law and the substance of this law where the international community has a key role in the establishment of the applicable law.

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\textsuperscript{4} The selection of Indonesian law as the applicable law in East Timor is controversial. The background of this choice of law is outlined in S. Linton, ‘Rising From the Ashes: the Creation of a Viable Criminal Justice System in East Timor’, 25 Melbourne University Law Review (2001) p. 122 at pp. 131–137. As Linton notes, in the extreme situation presented to it, INTERFET (see infra) had to make a decision on the law to govern measures of arrest and detention which were necessary to restore peace and security. It chose Indonesian law and this choice was continued by UNTAET in Regulation 1999/1 (p. 137). \textit{See also} H. Strohmeyer, ‘Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor’, 24(1) University of New South Wales Law Journal (UNSWLJ) (2001) 171 at pp. 173–174.

\textsuperscript{5} S. Linton, \textit{loc. cit.}, pp. 146 and 148.

\textsuperscript{6} \textit{See also} S. Linton, \textit{loc. cit.}, p. 137 noting that the prosecutor has the discretion to determine whether an offence will be pursued in spite of the absence of precise instructions as to the compatibility of Indonesian law with internationally acceptable legal provisions.
