

94 /

20 May 1976

TIMOR - DEATHS OF JOURNALISTS

MR JOSEPH

Here is a brief note on
some of the legal aspects of the
problem.

(E. Lauterpacht)
Legal Adviser

TIMOR - JOURNALISTS

Legal Notes

These notes are concerned only with the position in international law.

The fact that Australian officials warned the journalists before their departure that they were going into a dangerous area makes no legal difference, though it may affect the extent of the moral commitment of the government to exert itself on behalf of the next-of-kin. But even this must be said with hesitation for it can be strongly argued that no matter how much an Australian has been warned of the dangers of the area to which he proposes to go, there always rests upon the Australian Government a duty, moral if not legal, to intervene on his behalf if he is exposed to conduct which falls below the international standard.

The question of nationality

2. Of the five journalists, only two, Mr Shackleton and Mr Stewart, held Australian passports; two, Mr Rennie and Mr Peters, held British passports, and one, Mr Cunningham, held a New Zealand passport. As a matter of international law a state is only entitled to make an international claim on behalf of persons who are its nationals. This rule is not so strictly applied when, in contrast to bringing a claim for an international tribunal, a state is merely making diplomatic representations. The normal justification for deviating from the strict rule is that the person concerned

though not a national is a resident of, domiciled in, or otherwise significantly connected with the state which is intervening on his behalf. In the present case I am told that all five journalists were members of the Australian Journalists Association which suggests that even those who did not hold Australian passports had some more-than-transient connection with Australia. If this is correct then, for the time being, it will be in order to continue to treat all five of them on a footing of equality.

General proposition

3. It is a basic proposition that an alien accepts the situation in a foreign territory as he finds it. This is particularly true in time of war or insurrection. The alien cannot ask for special consideration just because he is an alien. On the other hand, the authorities with which he comes into contact, particularly state authorities, are bound to treat him in accordance with the standards of international law applicable to the country.

Applicable international standards

4. Whatever may have been the international status of FRETILIN or MAC, the position of Indonesian forces, even if in East Timor unlawfully or covertly, is clear. They were bound by the Geneva Convention of 1949, relative to the treatment of prisoners-of-war.

- (a) Article III of the Convention prescribes that in cases of armed conflict not of an international character occurring in the territory of one of the Parties each Party to the conflict shall be bound to apply certain minimum provisions. Clearly East Timor was part of the territory of Portugal, a Party, and therefore Indonesia was bound to apply the relevant provisions. Though these are of a minimal character they expressly require that persons taking no active part in the hostilities including members of armed forces who have laid down their arms shall in all circumstances be treated humanely. In particular, violence to life and person and murder are prohibited.
- (b) Article IV of the same Convention deals with prisoners-of-war who may be taken in the course of any armed conflict. Prisoners-of-war are defined as including "persons who accompany the armed forces without actually being members thereof, such as ... war correspondents ... provided that they have received authorisation from the armed forces which they accompany, who shall provide them for that purpose with an identity card ..."

4.

Thus, whether or not the conflict was one of an international character there can be no doubt that wanton killing - if that is what happened - of the journalists cannot be justified.

5. Certainly it would be no defence for Indonesia to contend either that the journalists entered the area unlawfully or that they did not possess identity cards. If it is established that the journalists were shot by Indonesian soldiers or persons under the control of Indonesian forces, then the only defences open to Indonesia would be that the shooting took place in the circumstance of battle either mistakenly or because, in all the circumstances, no alternative was possible.

6. It hardly needs saying that, although the shooting occurred on what was at the time technically Portuguese territory, no responsibility can be attributed to Portugal. The situation was clearly beyond their control, and it would be very difficult to say that it had come about as a result of their negligence.

The problem is one of evidence

7. Thus, the real question is whether the journalists were killed by the Indonesians or forces under their control; and in what circumstances. It is not necessary for Australia to show (or to be satisfied) beyond a reasonable measure of doubt that Indonesians were responsible for the killings. The situation is not to be equated with a criminal trial in the common law system; nor are the

Indonesians being prosecuted before a war crimes tribunal. The standard of evidence to be achieved is that applicable to claims between states. On this there is an important and helpful statement made by the International Court of Justice in the Corfu Channel Case (Merits), ICJ Reports 1949, p.4 at p.18:

"It is true, as international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation. It is also true that that State cannot evade such a request by limiting itself to a reply that it is ignorant of the circumstances of the act and of its authors. The State may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal. But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself, and apart from other circumstances, neither involves prima facie responsibility nor shifts the burden of proof."

"On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion."

This statement was made in a case where two British destroyers had been mined in Albanian territorial waters and the British Government had experienced difficulty in collecting evidence which directly and unavoidably linked

Albania to the episode. In the same way as the ICJ in that case acknowledged the admissibility and force of indirect evidence so equally it can be said that in the present case the fact (if it be a fact) of Indonesian control over the area in question at the relevant moment has a bearing on the methods of proof available to establish what occurred. In the circumstances, Australia - to quote the words of the Court - "should be allowed a more liberal recourse to inferences of fact and circumstantial evidence".

Lack of jurisdiction of the International Court of Justice

8. Diplomatic representation is as far as the Australian Government can go - unless of course the Indonesian Government should show any disposition to accept the jurisdiction of the ICJ or of some special tribunal. This is because Indonesia has not accepted the compulsory jurisdiction of the ICJ under the optional clause and there does not appear to be any other operative jurisdictional link.

Publication of names of individuals in connection with the episode

9. The Government will no doubt wish to consider carefully the desirability of publishing documents which contain the names of individuals who were or may have been involved in the episode. There are two aspects of the matter.

The first is domestic. Provided that documents are properly tabled in Parliament their publication is absolutely privileged and no action in defamation could lie against the government. However, this protection will not extend to documents which had been published (in the technical sense) to anyone prior to being tabled in Parliament. Thus, for example, the affidavit sworn by Mr Martins on 7 May 1976 was published by him to the solicitors and by the solicitors to the Department of Foreign Affairs. Of course, the responsibility for that prior publication is not the Department's, so that in fact even if the affidavit did contain defamatory material, which is doubtful, the only persons liable would be Mr Martins and the solicitors.

10. The second aspect is the diplomatic aspect. Can any embarrassment arise as between the Australian and Indonesian Governments out of the publication by the Australian Government of a document which names a number of Indonesian or PGET officials. In the case of names contained in the report of the Taylor team, there should be no difficulty, since the only names mentioned there are those of people whom the team actually saw. On the other hand, in the affidavit of Mr Martins, a number of persons are mentioned with whom there has been no contact, e.g. the Indonesian Commander, Colonel Dadin. It may be that the Indonesian Government will take objection to this reference. On the other hand, Colonel Dadin is not identified as being directly involved in the shooting and

86

8.

if there is reason to believe that what Mr Martins
says in this respect is true, then there should be no
objection to publication.