

**War Crimes, Genocide, and Crimes Against Humanity in East Timor:
Options for an International Criminal Tribunal
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Indonesian troops and anti-independence militias have committed gross violations of international humanitarian law against civilians in East Timor. This paper will present the case for creation of an international criminal tribunal to try those who are responsible. It will briefly set forth the legal grounds for prosecution, and will then explore the options for creation of a tribunal where prosecution could take place. The political context of such a tribunal will then be briefly considered, including its impact on Indonesia's transition to democracy, and East Timor's future as an independent state.

The Legal Grounds for Prosecution

War Crimes

War crimes committed in East Timor are grave breaches of the Geneva Conventions, 1907 Hague Convention, and the customary international laws of war now codified in the statutes of the International Criminal Tribunals for Yugoslavia and Rwanda. The crimes committed include: willful killing of thousands of civilians; torture and inhuman treatment; extensive destruction and appropriation of property not justified by military necessity; unlawful deportation of thousands of East Timorese to West Timor and other Indonesian islands; taking civilians as hostages; wanton destruction of cities, towns or villages; seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education...; and plunder of public or private property.

Genocide

The Genocide Convention defines genocide as "the intentional destruction, in whole or in part, of a national, ethnical, racial or religious group, as such." The intent in genocide need not be to wipe out an entire group. It can be to target the leadership of a national, ethnic or religious group, a part of a group. That is what is happening in East Timor. The intent in the killing is religious: Catholic priests and nuns have been targeted. The killing is also intended to destroy the leadership of a national group: Leaders of East Timor's national independence movement have been hunted down and killed. The genocide has also been ethnic: at least 200,000 Timorese have died as a result of the Indonesian army's invasion and repression of East Timor since 1975.

Crimes Against Humanity

The Indonesian army and the militias have knowingly committed the following acts as part of a widespread and systematic attack directed against the East Timorese civilian population: murder of thousands of persons; deportation and forcible transfer of the population to West Timor and other Indonesian islands; torture; rape; persecution against Catholic clergy and pro-independence activists on political, national, and religious grounds; enforced disappearance of thousands of persons; and other inhumane acts causing great suffering and serious injury to body and to mental and physical health. Currently hundreds of thousands of East Timorese have been forced out of their homes into the hills and are without food and water, and are in imminent danger of

starvation. Thousands of others are being held hostage in camps in West Timor by the same predatory militias and Indonesian military forces that drove them out of East Timor.

Options for Prosecution

1. International Commission of Inquiry

The first step toward any prosecution – domestic or international -- could be the creation of an International Commission of Inquiry. Such a Commission has been called for by the U.N. High Commissioner for Human Rights, Mary Robinson, and apparently agreed to by Indonesian President Habibie. The Commission could be created by the High Commissioner under the authority of the U.N. Commission on Human Rights or by the U.N. Security Council, U.N. General Assembly or U.N. Secretary General. The Commission would collect evidence of crimes committed in East Timor and recommend responses by the U.N. The Commission should be named quickly and get into East Timor as soon as possible. Judging from its past record, reliance on the U.N. Center for Human Rights to organize and support such a commission will mean a minimum of three months for the inquiry to begin and six months for preliminary results to be written.

PROS:

- A Commission of Inquiry report could help build international political will necessary to create an international tribunal. Both the ICTY and ICTR were preceded by such commissions.
- The Commission could be named quickly and would cost relatively little.
- If a Tribunal is never created, the Commission report will serve as an official finding of fact and application of law to the crimes committed in East Timor.

CONS:

- A Commission would not have the power to try individuals. The need for creation of a tribunal for that purpose would remain.
- The Commission could delay creation of an international tribunal while the outrage over the crimes in East Timor subsides. It might dissipate the political force necessary to get such a tribunal approved by the U.N. Security Council.

2. International Tribunal created by the U.N. Security Council

The U.N. Security Council could create an international tribunal as it did for the former Yugoslavia and for Rwanda. If it acts promptly, the Security Council could determine that the situation in East Timor is a threat to international peace and security and it could act under Chapter VII. It could also create a tribunal acting under Chapter VI dispute settlement powers and its Article 29 power to create subsidiary organs.

PROS:

- The Security Council can act quickly.
- Two precedents support this option: the ICTY and ICTR.
- The tribunal could be financed either by U.N. assessments or by voluntary contributions, as determined by the resolution creating it.
- The U.S. (possibly acting through allies) could draft the resolution and court's statute, with modifications by other U.N. Security Council members, and can thereby avoid structural problems in the ICTY and ICTR statutes.

- The U.N. Security Council is already seized of the East Timor situation and its deep concern over the crimes committed there has been expressed publicly. A tribunal would institutionalize the Security Council's urgent desire for justice as a deterrent to further killing.

CONS:

- Tribunal fatigue might doom this option, unless it can be overcome by current outrage over the crimes committed in East Timor.
- The crimes in East Timor will be compared to crimes in Cambodia and Iraq, where tribunals have not been created, yet the crimes were as egregious. (The counter-argument is that those crimes were committed far in the past, whereas those in East Timor are being committed now, when deterrence is still a possibility.)
- China might threaten to veto, and might actually do so if Indonesia opposes a tribunal as interference in its "domestic" affairs. (In fact, however, China has never recognized East Timor as legally part of Indonesia and China seldom vetoes except when its own vital interests are at stake.)
- Establishing a new ad hoc tribunal is time-consuming and costly. (Actually, the cost to the U.S. would probably be less than \$20 million per year.)
- Additional U.N. costs would push the U.N. regular budget over the cap demanded by the U.S. Congress. The Tribunal could also be financed out of peacekeeping assessments, but offsets would have to be found in other operations to fit within existing U.S. appropriations. U.S. voluntary contributions would have to be made from funds not yet identified.

3. International tribunal created by the UN General Assembly.

The UN General Assembly could establish an international tribunal under its Article 22 power to create subsidiary organs. An UNGA resolution would pass by majority vote, unless it is determined to be an "important question" requiring a two-thirds vote. China would have no veto.

PROS:

- Creation of the tribunal could not be blocked by a Chinese veto.
- The General Assembly has passed resolutions condemning Indonesia's occupation of East Timor, though by diminishing margins.
- An international tribunal created by the General Assembly could have all the powers of one created by the Security Council if a Security Council veto forced UNGA action under the Uniting for Peace Resolution.

CONS:

- The U.S. will not have a veto over the resolution and statute for an UNGA created tribunal.
- Although it has the power to create tribunals, the UNGA has never done so before, and this could be a dangerous precedent, under which the UNGA might create other tribunals. (This is, however, unlikely, since the International Criminal Court will come into being by 2004, at the latest.)

4. International tribunal created by multi-lateral treaty.

An international penal tribunal could be created at the request of the new government of an independent East Timor, by treaty between East Timor and other states, under Article 6 of the

Genocide Convention as well as the general treaty powers of states. The tribunal could sit wherever stipulated, and could be supported administratively and financially as agreed in the constitutive treaty. A national legal system such as Australia's or the Philippines', could, for example, provide administrative support. Judges and prosecutors would be designated by the contracting parties. The tribunal could be endorsed by the U.N. Security Council or U.N. General Assembly.

PROS:

- Treaty terms (possibly based on acceptable provisions of the Rome Statute of the International Criminal Court) could be signed by East Timor and key states (U.S., Netherlands, Australia, New Zealand, Philippines, Thailand, and a few others) fairly quickly.
- Creation could not be blocked by Chinese or Indonesian opposition in the UN Security Council or General Assembly.
- With East Timor as a State-Party to the treaty creating it, the tribunal would not impinge on national sovereignty, and could be assigned territorial jurisdiction over crimes committed in East Timor.
- Such a tribunal could hold trials either in or outside of East Timor, depending on security conditions, an advantage over a national court.
- If trials were held outside East Timor, they could be secure, and prisoners and witnesses could be protected. (This advantage is also shared by international tribunals.)
- Judges and personnel could be chosen outside the U.N. personnel system, which is a ponderous bureaucracy. Trials could use existing courtrooms in a national judicial system (Australia, Philippines) or even an international court (the ICTY in The Hague).

CONS:

- Treaty parties would have to be chosen carefully to avoid time-consuming negotiations. (Other states could accede after the treaty has been concluded.)
- National legislatures would have to ratify the treaty in the U.S., Australia, New Zealand, the Philippines, the Netherlands, and East Timor. (If the U.S. Senate refused, the tribunal could still be established, but without the U.S. as a party.)
- Financing would be by parties to the treaty, requiring re-programming of funds in the U.S. budget or a special appropriation.
- Until the treaty comes into force, detention would have to be under existing national law in the receiving state, requiring jurisdiction or an agreement to render judicial assistance.

5. Trial in East Timor by an East Timorese Court

East Timorese law outlaws murder and war crimes. East Timor is a successor state to Portugal in accession to the Geneva Conventions and the 1907 Hague Convention. Neither Portugal nor Indonesia are parties to the Genocide Convention, but the crimes prohibited by it could also be prosecuted as common crimes. Crimes against humanity are *jus cogens*, part of the international humanitarian law that applies to all states. As soon as an independent East Timor is able to constitute a government and courts, it could begin prosecutions of those who committed the crimes committed in its territory and against its citizens.

PROS:

- Many of the militiamen who committed the crimes are in East Timor, where they could be apprehended by adequate force.

- Trials would be in the local languages of the defendants, witnesses, and judges, and would give the public an ability to follow the trials.
- Trials could go forward without waiting for establishment of an international tribunal.
- Local trials would provide public justice, an important contribution to national reconciliation.

CONS:

- The East Timorese judiciary has been decimated. Most lawyers and judges have fled or have been deported and are unaccounted for. Many have been murdered.
- Courtrooms and other governmental infrastructure have been systematically destroyed by the Indonesian Army and militias.
- East Timor may therefore lack the human and material capacity to conduct national trials anytime soon.
- Detention and trial in East Timor may not be secure. Militias are encamped along the West Timor border and may wage a long guerilla war against the new government.
- The East Timor government is unlikely to get cooperation from Indonesia in arrests, extradition, production of evidence, and other necessary elements for trials of Indonesian army personnel.

6. Trial in East Timor with United Nations assistance.

The United Nations could provide assistance to the new East Timor government to create a working court system to try these crimes. Such assistance could be in the form of money, judges, prosecutors, defense counsel, police, administrative personnel, equipment, and buildings. It could be provided through a voluntary Fund for East Timor Justice raised by donors at the request of the Secretary General, the High Commissioner for Human Rights, or the U.N. Development Fund. A new branch of the U.N. Center for Human Rights or UNDP -- a U.N. Judicial Emergency Corps -- could be created to administer the program.

PROS:

- A U.N. program for such emergency judicial relief has long been needed and this would finally create it.
- U.N. assistance could provide considerable help to East Timor in rebuilding its judicial system. The aid would leave behind a long-term legacy for East Timor.
- This option will leave trials in the hands of the East Timor courts, but will provide international assistance to them.

CONS:

- Creation of a new U.N. program will be slow and will get bogged down in the infamous U.N. bureaucracy and personnel system.
- U.N. assistance will come with high costs -- many expensive consultants. (They may, however, be worth the price.)
- Even with U.N. material and personnel assistance, East Timor's courts will still need the backing of the U.N. Security Council to force arrests of Indonesian military officers and militiamen now protected in Indonesian territory. (Indeed, even with Security Council backing, such arrests may prove elusive.)

7. Trial in East Timor with multilateral assistance.

The new government of East Timor or the transitional authority could request multilateral assistance, including internationally respected judges, prosecutors, court administrators, defense attorneys, and security personnel. Such assistance need not come through the U.N., but could come through bilateral and multilateral aid.

PROS:

- International assistance would be solicited and organized by the East Timorese, according to their own priorities.
- Assistance could help the East Timorese get their courts functioning much more quickly than they could without it.
- Trials will be in East Timorese courts with international assistance.
- The U.N. bureaucracy will not impede the program.

CONS:

- The assistance program will lack the coordination that UNDP or other U.N. agencies provide.
- The program will not build a base for future emergency judicial aid programs in other countries, as would a U.N. program.
- East Timor's courts will still lack the authority to arrest, extradite and try Indonesian army personnel and militias hiding in Indonesia.

8. Trial outside East Timor by a national court.

Those who have committed war crimes, genocide, and crimes against humanity in East Timor could be tried by a court in a nation with universal jurisdiction over such crimes. Among such countries are Germany and Canada. They could also be tried by a nation whose citizens (Australia) have in the past been murdered by Indonesian troops if command responsibility could be linked to Indonesian officers. That would only be possible, however if their national law asserts extra-territorial jurisdiction over such crimes. (Most common law systems do not, so Australia's probably does not.)

PROS:

- Trial in a foreign national court would not require creation of a new tribunal, and would permit detention and imprisonment in that country.
- With Australian troops leading the peacekeeping forces, arrest is a real possibility. Those detained could be immediately sent to Australian jails.
- An existing national court might be able to try the accused more quickly and more cheaply than an international tribunal.

CONS:

- The Indonesian army and militia's crimes were violations of international law. The international community should try them, rather than pushing the responsibility off onto a single state.
- Only a few states assert universal jurisdiction over genocide and crimes against humanity. No Asian states do.
- Trial of Asians in a White nation will be seen as another instance of "white man's justice" and colonial domination.

- It may be politically difficult to find a government willing to conduct the trials in its national courts, because of the expense of trial and of imprisonment, and for other reasons. Such obstacles proved insuperable in the effort to find a nation to imprison and try Pol Pot.
- Unless a foreign national court's authority were reinforced by Chapter VII powers of the U.N., it would lack authority to compel production of evidence, witnesses, arrests, and other necessary elements for fair trial of Indonesian military personnel.

Impact of an International Tribunal on the Indonesian Transition to Democracy

An International Tribunal to try those who have committed war crimes in East Timor is likely to have, on balance, a quite positive impact on the Indonesian transition to democracy.

- Democratic forces in Indonesia can only be strengthened by placing the Indonesian army on notice that it is no longer above the law.
- It will alert hardliners like General Prabowo to the fact that the era of impunity is over, and that a new role for the military in Indonesian society is imperative.
- It will send the Generals who committed the war crimes scurrying for cover, while those who had relatively clean hands will gain an advantage.
- The Tribunal will publicly expose the evidence of what the Indonesian army did in East Timor, and some of the evidence will get through to the Indonesian people despite the propaganda of denial that always follows genocide and war crimes of this magnitude. There will be popular disbelief at first, and rejection of the Tribunal, but as the evidence piles up, its weight will be felt, and the historical record will become clear. The process of public consciousness and recognition is the first step in coming to terms with such massive crimes.
- A military coup in Indonesia is not likely to be set off by any International Tribunal. The loss of East Timor, itself, is the shock to the Indonesian system that might set off such a coup, and it has not occurred. An International Tribunal is a minor disturbance by comparison. The same democratic forces that brought elections will not tolerate a coup.
- If the Indonesian army chooses to cooperate with the International Tribunal, it will give the army a way to punish some of its worst thugs and to rid itself of some of its war criminals.
- The Tribunal will expose and help break the connection between the Army and para-military militias that are recruited and armed by the Army, not just in East Timor but in other parts of Indonesia.
- Arguments that a Tribunal (or a peacekeeping force) would upset Indonesian "stability" ignore the fact that "stability" is usually the first excuse for military repression. It is the apologia for military coups d'état.
- A Tribunal will help bring long-term stability to Indonesia by bringing justice in a situation that Indonesian (and East Timorese) courts cannot handle.

Impact of an International Tribunal on the Future of East Timor

An International Tribunal will help East Timor at a crucial moment in its history, when it has just become independent, but because of the crimes of the Indonesian army and militias, has been left shattered. East Timor is wounded, yet is expected to get up from its stretcher and walk.

- An International Tribunal will help East Timor give justice to those who have been the victims of these crimes, and to do so fairly, without a spirit of revenge.
- A Tribunal will thus be a first step toward national reconciliation, because there can be no long-term peace without justice.
- The Tribunal will place militias on notice that they will be brought to trial. Combined with an effective peacekeeping and police force, it will be a deterrent to further violence.
- The Tribunal can hold its trials in Dili, and can be an exemplary model of the rule of law.
- The Tribunal will be a tangible statement by the international community that it supports the rule of law in an independent, democratic East Timor.