

PLAYING HIDE AND SEEK WITH INTERNATIONAL JUSTICE: WHAT WENT WRONG IN INDONESIA AND EAST TIMOR

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I. INTRODUCTION

In discussing the justice processes used in Indonesia and East Timor to hold individuals accountable for serious violations of international law committed in East Timor, it is important to emphasize that the problems are rooted in politics not the rule of law. Political influence is what I’m going to focus on because it goes to the core of the problems in Indonesia and East Timor and provides a painful example of what can happen when a justice process becomes deeply politicized.

Indonesia is a case study of what can go wrong when a country is prematurely entrusted with the responsibility to try individuals for crimes it is nowhere close to acknowledging. Indonesia also provides an important example for the International Criminal Court and the principle of “complementarity,” and the real problems that can be encountered when an offending state is given first (and perhaps only) crack at prosecuting offenders it really wants to protect, not prosecute.

And, I’m going to talk about East Timor—a case study of what can happen when a legal system is created on a rickety foundation, in which genuine political will and necessary resources are lacking and make the process vulnerable to influence and manipulation for broader geo-political interests. East Timor is also a place where cries for justice from the population are loud—they want Indonesian leaders to be held accountable, and yet East Timor’s political leaders prefer to override these demands in favor of what they *hope* will become a strong economic and political relationship with the country’s former occupier.

At the end of my talk, I would like to have persuaded some of you to contact the United Nations Secretary-General and to ask him to establish a high-level international review panel of between three and five judges and international law experts to review not what happened in East Timor (the crimes are well-documented), but to review what did not happen and to make recommendations for redressing these omissions.¹

II. BACKGROUND

East Timor occupies half an island; the other half, West Timor, is part of Indonesia's vast archipelago. East Timor had been a Portuguese colony from the 16th century but in July 1975, Portugal finally withdrew. Five months later, on December 7, after months of fighting among various Timorese political parties, Indonesia launched a full-fledged attack, which resulted in the territory's occupation by Indonesian forces for the next twenty-four years. East Timor was and remains almost 95% Catholic and the population speaks a local language, Tetum, and over thirty very distinct local dialects, but also relies heavily on Bahasa Indonesian (learned during the occupation).²

During Indonesia's twenty-four-year occupation, as much as one quarter of East Timor's population of about 800,000 was killed by security forces or died as a result of starvation or abusive conditions. Torture, rape, disappearances and other forms of degradation and domination were prevalent throughout the period. The Timorese fought a guerilla war with an underground political movement aimed at securing its independence.

In 1998, the political tides in Indonesia changed and its longtime authoritarian President Suharto resigned May 20, 1998, amid sustained popular and violent protests. Vice President Habibie was sworn-in the same day and one month later, he reopened the subject of East Timor by offering to grant it limited autonomy. This offer quickly led to renewed negotiations between Indonesia and Portugal (with East Timor's pro-independent movement represented by the Portuguese delegation), and by late January 1999, President Habibie indicated that Indonesia would withdraw from East Timor if the people voted against increased autonomy, in favor of independence. Yet, as political agreements were being negotiated, the Indonesian security services began to train and equip local militias to intimidate and terrorize the population.

1. A fax can be sent to United Nations Secretary-General Kofi Annan at 212 963-4879. The estimated cost for a three-person panel to operate with staff support and travel to the region over a nine-month period is approximately \$700,000.

2. Portuguese and Tetum were adopted as East Timor's official languages following its independence but as a practical matter, Bahasa Indonesia is widely used. The issue of language has created tension especially between the ruling elite, many of whom spent substantial time in Portugal or Mozambique during the occupation and do not speak Bahasa, and the younger generation who do not speak Portuguese.

On May 5, 1999, a series of three agreements were signed. The first agreement outlined the terms of a popular referendum in which the people of East Timor could vote for more autonomy within Indonesia, or reject the offer of autonomy, placing East Timor on the path toward independence.³ A United Nations presence was contemplated under either outcome to ensure a smooth transition from the vote to implementation. The second agreement addressed security concerns and gave Indonesian police sole responsibility for maintaining law and order while calling on the armed forces and police to maintain neutrality.⁴ The third agreement set forth modalities for conducting the vote, including a referendum target date of August 8, 1999.⁵

These landmark agreements included a tight timeline for United Nations action. On June 11, 1999, the Security Council established UNAMET (United Nations Mission in East Timor) and rapidly deployed a small contingent of personnel to register voters, ensure the popular referendum would be conducted in a free and fair manner, and provide an objective assessment of the security situation.

Security matters were a serious concern and hundreds of East Timorese were killed as Indonesian security forces formed local militias to intimidate citizens who favored independence. In 1999, there were two periods of heightened violence instigated by Indonesian security forces and militias. The first period began in late January 1999 and culminated in April 1999 before the May 5 agreements. It was evidenced by murder, torture, rape and displacement. The second period began right after the referendum vote on August 30 when violence was at a low, but constant boil for five days. Then on September 4, 1999 when the referendum results were announced and more than 78% of the population opted for independence, violence exploded. For the next two weeks, the Indonesian military unleashed its security forces and home-grown East Timorese militias in an impressively synchronized offensive that United Nations employees described as nothing short of a “scorched earth” policy.⁶

3. Agreement Between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor, May 5, 1999, Indon.-Port.-U.N., available at http://www.un.org/peace/etimor99/agreement/agreeFrame_Eng01.html (last visited Jan. 21, 2004).

4. East Timor Popular Consultation Agreement Regarding Security, May 5, 1999, Indon.-Port.-U.N., available at http://www.un.org/peace/etimor99/agreement/agreeFrame_Eng04.html (last visited Jan. 21, 2004).

5. Agreement Regarding the Modalities for the Popular Consultation of the East Timorese through a Direct Ballot, May 5, 1999, Indon.-Port.-U.N., available at http://www.un.org/peace/etimor99/agreement/agreeFrame_Eng03.html (last visited Jan. 21, 2004). Voter registration was set back by three weeks due to security issues at the beginning of the process. This subsequently pushed back the date of the referendum to Aug. 30, 1999.

6. *Indonesia's Scorched Earth Policy Levels East Timor* (Australian Broadcasting Corporation, Sept. 27, 1999), available at <http://www.abc.net.au/7.30/stories/s55114.htm> (last visited Jan. 24, 2004); Associated Press, *U.N. Official In E Timor Says World Community Miscalculated*, Nov. 18, 1999, available

By the time the 1999 violence ended, about 80% of the territory's infrastructure was destroyed, hundreds of thousands of people were displaced including nearly 200,000 who were pushed across the border into West Timor, around 1,300 were dead, women had been raped and the entire population was absolutely terrorized. I first went to East Timor one year later, in September 2000, and I was shocked by the near total destruction of not only the capital Dili but also other towns and villages I visited. This easily compared to the worst devastation I saw during the wars in Croatia and Bosnia, Vukovar and the frontline areas in Sarajevo and Mostar.

III. ESTABLISHING THE INDONESIAN *AD HOC* HUMAN RIGHTS COURT

As a result of this gratuitous violence and Indonesia's brutal and retaliatory actions, there was hot discussion in capitals around the world and among human rights advocates and lawyers as to how Indonesia could be held to account for the serious violations of international law perpetrated by its forces and persons acting under its authority. At that time, the focus was on crimes committed in 1999 when the violence was perceived as an enormous slap to the international community after, against better judgment the Indonesian military had been entrusted to do what it said it would do—provide security. At the time, many talked about establishing another *ad hoc* international criminal tribunal similar to those of the former Yugoslavia and Rwanda to try top-level Indonesian offenders. However, there was little political appetite. Those Tribunals were expensive, relatively slow moving, and politically cumbersome to negotiate. Where, for example, would a Tribunal for East Timor be seated? What would be its temporal jurisdiction? Would it go back to the time of occupation and possibly, implicate the United States, or would it go back further to crimes committed during East Timor's brief civil war and point to individuals now in positions of power? It was also an election year in the United States and pushing for an international *ad hoc* criminal tribunal to try Indonesian generals would likely have created a political backlash from Indonesia's powerful United States lobby.

Predictably, the idea of an *ad hoc* court was not popular with the Indonesian military and political leaders. They said they would not send their generals to a foreign court and that they could be trusted to try them themselves along with others responsible for the violence. So, late in 1999 after Indonesia had withdrawn from East Timor and the United Nations had begun to establish its mission to help the territory recover and move toward statehood, the

at <http://www.etan.org/et99c/november/14-20/18unoffi.htm> (last visited Jan. 24, 2004); Ian Timberlake, *The Man Who Organized the Timor Vote Looks Back With Few Regrets*, AGENCE FRANCE PRESSE, Nov. 21, 1999; Marian Wilkinson National Affairs Editor, *Exposed: Indonesia's Scorched Earth Plan*, SYDNEY MORNING HERALD, Jan. 31, 2000.

international community embraced the idea of creating two parallel justice systems. One, in Indonesia to try high-level Indonesian officials and another in East Timor, under United Nations-auspices as part of the United Nations' transitional administration, to focus primarily on East Timorese offenders. It seemed at the time to be the most viable political solution.

And this could have been a rather elegant solution, given genuine political will. However, Indonesia was defiant and manipulative all along the way. Throughout the process, it acted only when pressured and then only did the bare minimum to deflect pressure until the next time—they took a hide-and-seek approach to delivering justice. Mostly, Indonesia did the hiding and the international community did the seeking, but sometimes the international community hid, too.

First, Indonesia tried to avoid establishing a judicial process all together, but pressure was applied, and the *ad hoc* Human Rights Court in Indonesia was established. Then, the mandate was severely restricted to cover only crimes committed *after* August 1999. Again, pressure was applied, and the mandate was expanded to include two distinct months (April and September) of 1999 and three municipalities (not all thirteen). One strategy reportedly used by the Secretary-General with the Indonesians was to tell them that if their process were a failure there would be more pressure on the United Nations to sponsor its own tribunal. The underlying message, of course, was for the Indonesians to do just enough to prevent any momentum from building for another *ad hoc* international court.

When Indonesian prosecutors finally issued indictments, eighteen individuals were charged, including some important military and police commanders, but notably lacking from the list was General Wiranto, Defense Minister and Commander of the Indonesian Armed Forces during the relevant time (and now a Presidential candidate).⁷ His indictment had been anticipated after he was identified by Komnas-HAM, a governmental human rights body, as being most responsible for the violence in 1999 in an excellent report issued on January 31, 2000.⁸ When trials finally began in 2002 there were many problems, among which, witnesses and judges were intimidated by the presence of military officers and militia members in the gallery who made menacing comments; Indonesian prosecutors, some believing that the military were heroes, failed to present all available evidence; prosecutors often recommended below-minimum standard sentences; judges were poorly trained, lacked resources and were unable to exert adequate control in the courtroom.

7. National Journal Group, *Ex-Indonesian Military Chief Wiranto Seeks Presidency*, U.N. WIRE, Aug. 7, 2003; Abdul Khalik, *Key BNI Suspect Arrested*, JAKARTA POST, Nov. 20, 2003.

8. Action in Solidarity with Asia and the Pacific, *Indonesian Commission of Investigation into Human Rights Violations Report*, Jan. 31, 2000, <http://asia-pacific-action.org/southeastasia/easttimor/resources/reports/comnaset.htm> (last visited Jan. 21, 2004).

In the end, the trials also produced a distorted legal record of events. The official court record portrays the violence in East Timor as a purely East Timorese conflict in which Indonesia benevolently intervened to separate two fighting parties. After the first two verdicts were announced in August 2002, the Secretary-General felt compelled to release a statement and clarify that there had not, in fact, been irregularities in the United Nations' vote-counting which Indonesian judges, prosecutors and defendants stated had contributed to the widespread violence.⁹ At the same time, the United States also issued a statement in which it pronounced its disappointment that "prosecutors in these cases did not fully use the resources and evidence available to them from the United Nations and elsewhere."¹⁰ In the verdicts of the six people charged, five were acquitted and one was convicted. Those acquitted were all members of Indonesia's security services, four in the army and one in the police.¹¹ The conviction was of the former civilian governor of East Timor, Abilio Soares, who himself was Timorese, not Indonesian. He was sentenced to three years for murder and persecution as crimes against humanity.

Of the eighteen individuals tried by the Indonesian Human Rights Court, twelve were acquitted, and six convicted with shockingly low sentences. All convicted remain free pending appeal even though only one has actually filed an appeal. The last trial resulted in the three-year sentence of General Damiri who at the time oversaw all military operations for East Timor from his base in Bali. Not only did the *prosecution* recommend he be acquitted but he missed four consecutive hearings during his trial—he was busy with other matters. Where? In Aceh province, where he was overseeing the government's brutal clampdown on pro-independence supporters.¹² He, too, remains free pending an appeal, which has not been filed.

9. Press Release, U.N. News, *Anna Speaks Out Against Allegations of Irregularities in U.N.-Backed East Timor Vote*, Aug. 25, 2002, available at http://www.unnews.co.kr/pdf/pdf_011/0111.pdf (last visited Jan. 21, 2004); Press Release, U.N. News, *Secretary-General Endorses Human Rights Commissioner's Concerns Over Indonesia Tribunal* (Aug. 8, 2002), available at <http://www.un.org/News/Press/docs/2002/sgsm8338.doc.htm> (last visited Jan. 21, 2004).

10. Reuters, *U.S. Criticizes Prosecutors in East Timor Trial*, Aug. 19, 2002, available at http://www.jsmp.minihub.org/News/20_8_02.htm (last visited Jan. 24, 2004).

11. Five indicted for Suai Church massacre, Herman Sedyono, Lieutenant Colonel former Bupati (District Chief) of Covalima District; Liliek Kushadianto, Lieutenant Colonel former commander Suai District Military Command; Ahmad Syamsudin, Captain and former chief-of-staff of Suai District Military Command; Sugito, Lieutenant and former Commander of Suai Military Sector Command; Colonel Gatot Subiyaktoro, Lieutenant and former police chief of Suai; see International Center for Transitional Justice, *Intended to Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta: app. 1*, <http://www.ictj.org/downloads/intendedtofailwithannexes--final.pdf> (last visited Jan. 24, 2004).

12. *Indonesian General on Aceh Duty Again Skips His Trial for Rights Abuses*, AGENCE FRANCE PRESSE, May 22, 2003; LaksamanaNet, *White Flag from Prosecutors*, June 8, 2003, available at <http://www.laksamana.net/print.cfm?id=5507> (last visited Jan. 24, 2004).

IV. THE SPECIAL PANELS IN EAST TIMOR

I am reluctant to be too critical of the East Timorese judicial process because for a long time it seemed like a hopeful and novel approach to resolving some of the tough issues, and there have been some very dedicated people working to ensure the process moved ahead and victims were heard. Two years ago I would have been extremely upbeat, today I am less so. But there is some good news coming out of the trial process in East Timor although the people of East Timor are still far from achieving the justice they deeply desire and deserve.

Despite being chronically under-resourced, the prosecution unit set up in East Timor under United Nations direction has accomplished a lot in its short and difficult life. As of December 2003, the Unit has filed 81 indictments with the Special Panels charging a total of 369 people. Of those indicted, 281 accused remain at large and are presumed to be in Indonesia, including across the border in West Timor. Forty-six accused have been convicted and sentenced to terms ranging between four and thirty-four years, one has been acquitted.¹³

In October 1999, the United Nations established its transitional administration to help East Timor on its way toward independence (which it declared in May 2002). In March 2000, the United Nations' mission in East Timor passed a regulation that listed crimes over which the District Court in Dili, East Timor's capital, would have exclusive jurisdiction. It listed genocide, war crimes, crimes against humanity, and certain "ordinary" crimes (namely murder, sexual offenses and torture).

The Regulation stipulated that special panels of judges, composed of both East Timorese and international judges, could be established to hear these cases. It also clarified that forming such panels did not preclude the jurisdiction of an international tribunal for East Timor in the event such a tribunal was established.

Three months later, in June 2000, the Special Panels were formed. They are composed of one East Timorese and two international judges. There are now two such panels and they have jurisdiction to try the serious crimes mentioned above committed prior to October 25, 1999, the date the United Nations' mission was established.

The temporal jurisdiction of the panels is an example of one-way accountability efforts in East Timor have been undermined. While the panels have the authority to look back at crimes committed before October 25, 1999, the prosecution unit has repeatedly focused on crimes committed solely in 1999, claiming it only has jurisdiction over this period. The United Nations' hired

13. *Tim Alfa Militiamen Found Not Guilty of 1999 Murder of Los Palos King but Convicted of Violence Against Property or Persons* U.N. Serious Crimes Unit Press Release, (Dec. 15, 2003) (on file with author).

personnel in the Unit decided early on that it would investigate ten priority cases focusing on serious events that occurred in 1999. In 2003, the Unit completed its investigations and indictments on these cases. But rather than pursuing some of the pre-1999 cases, the Unit has now busied itself with indicting crimes that occurred in *every* district in 1999, regrettably ensuring it has no time or resources to look back in time.

The Unit estimates that 1,300 people were killed in 1999 and that at least one individual could be indicted for each murder. But to what end? What, in fact is the purpose of indicting hundreds of individuals if a serious effort is not made to ensure they end up in custody? This has been another anomaly to the process in East Timor. Even though the United Nations' transitional administrator for East Timor managed early on to secure a Memorandum of Understanding (MOU) with the Indonesian government to cooperate with the Unit and to extradite people to East Timor, no pressure was ever applied and the MOU became meaningless after the first United Nations mandate expired at the time East Timor gained its independence.

In February 2003, the prosecution received its biggest disappointment when, after years of work, it issued its highest-level indictment against eight top-ranking Indonesians, including General Wiranto.¹⁴ Of those indicted, five had been nominally prosecuted in Indonesia's *ad hoc* Human Rights Court, including two who were acquitted and three who were sentenced to between three and five years by the Indonesian court. The United Nations immediately distanced itself saying it was not a United Nations' indictment but one issued by the East Timorese government.

The Unit was devastated by this response, since the Secretary-General himself in April 2002, just ten months earlier, in his report to the Security Council stated that the Serious Crimes Unit would "focus its investigations on ten priority cases and on those persons who had organized, ordered, instigated or otherwise aided in the planning, preparation and execution of the crimes."¹⁵

14. In addition to General Wiranto, the following individuals were indicted by the Serious Crimes Unit on Feb. 24, 2003: Major General Zacky Anwar Makarim, Head of Special Team of the Indonesian Armed Forces (TNI); Major General Kiki Syahnakri, Commander of the Martial Law Operations Command in East Timor; Major General Adam Rachmat Damiri, Commander of the Regional Military Command IX covering East Timor, Colonel Suhartono Suratman, Commander of the Sub-Regional Military Command 164 in East Timor until Aug. 13, 1999, Colonel Mohammad Noer MUIS, Commander of the Sub-Regional Military Command 164 in East Timor from Aug. 13 1999, Lt. Colonel Yayat Sudrajat, Commander of the Tribuana VIII Task Force and Commander of the Intelligence Task Force Sub-Regional Military Command 164 in East Timor, Governor Abilio Jose Osorio Soares, Governor of East Timor; see East Timor Action Network, *Crimes Against Humanity Charges for Former Indonesian Minister of Defense, Top Indonesian Military Commanders and East Timor Governor*, Feb. 25, 2003, available at <http://www.etan.org/et2003/february/23-28/28info.htm> (last visited Feb. 7, 2004).

15. *Report of the Secretary General on the United Nations Transitional Administration in East Timor*, U.N. SCOR, S/2002/432, at 12 (Apr. 17, 2002).

Given the clarity of this statement it was a surprise to the Unit, the East Timorese government and those of us advocating justice for East Timor, when the Secretary-General's office backed away from its previous support.

Despite its best efforts, there are several indications that the Unit has continued to face tremendous political pressure from the United Nations, friendly governments, Indonesia and even the East Timorese government, to curb the Unit's work. Being a United Nations-established and United Nations-supported body it relies entirely on allocations made to it. The United Nations' current mandate expires in May 2004 and discussions are underway about the level to which the Unit will continue to receive support. In October 2003, it appeared almost certain the mandate of the Prosecution section and judges panels would be extended. It is less clear now.

V. CONCLUSION

Indonesia and East Timor have a lot to teach us about how things can get off track if political interests trump the genuine desire to uncover the truth and hold individuals accountable for serious international crimes. The same potential for abuse and manipulation exists within the International Criminal Court, which relies heavily on the principle of "complementarity," the principle that gives States first chance to investigate and prosecute individuals believed to be responsible for serious violations of international law. Holding such trials is difficult under any circumstances, but it is particularly difficult for countries emerging from years of bitter-armed conflict and oppression.

It is critical that no one hide behind a country's promises if there is no reason to believe the promise is being made in good faith. It is not difficult to judge sincerity—actions do speak louder than words. No one was surprised that Indonesia made a mockery of the justice process it established but you will still find people who say, "but we cannot *really* judge the process until all the appeals have been completed." Well, what if the appeals are never filed, should we continue to deceive ourselves into believing for the next five, ten, fifteen years that Indonesia is on the brink of making good on its broken promises?¹⁶ Misplaced trust in such circumstances is damaging on multiple levels. There is a real fear that half-measures in justice only sow the seeds of future dissent by producing a false historic record and creating deep-seated resentment and anger

16. On December 2, 2003, the South China Morning Post reported that Eurico Guterres, head of the notorious Aitarak militia in East Timor, had recently formed a militia in Papua despite his 10-year conviction by the Indonesian *ad hoc* Human Rights Court. Following his conviction, he has remained free pending an appeal, which has not been filed. Further, the article revealed that Timbul Silaen, former Indonesian chief of police in East Timor in 1999 whose acquittal by the Jakarta court was widely criticized, will head up the police in Papua, replacing outgoing police chief, Budi Utomo. See Marianne Kearney, *Timor's Guterres Forms Papua Militia*, SOUTH CHINA MORNING POST, Dec. 2, 2003, available at http://iasnt.leidenuniv.nl:8080/DR/2003/12/DR_2003_12_03/2 (last visited Jan. 24, 2004).

among the victimized populations. Serbia is a good example. Policy makers currently point to Serbia as a perfect candidate for national trials, yet neither the government, nor its citizens are yet willing to acknowledge any serious level of responsibility for the wars that tore through that region in the 1990's.

Such actions also undermine confidence (including investor confidence) in not only a country's legal system but in its political system and in its ability to deal fairly and create a stable environment over the long-term.

To try to offset some of the damage done in Indonesia and East Timor, there is a push, as I mentioned at the beginning, to create a high-level review commission comprised of between three and five judges and international law experts to review the legal processes employed in Indonesia and East Timor.

It was an effort initiated here in New York by the International Center for Transitional Justice, Human Rights Watch, Etan, Amnesty International and others working with Sergio de Mello, East Timor's first transitional administrator, who was also guiding this process. Since his unfortunate death in Iraq, the effort to form the commission has moved to the Secretary-General's Office, but it has not been received energetically.

Frankly, evidence indicates that the Secretary-General and many other political leaders, including the United States administration, would like to see justice for East Timor and Indonesia taken off the table especially given the war on terrorism and Indonesia's important role in that fight. We must ensure this does not happen. It is challenging to weigh immediate political exigencies with the long-term commitment required in seeing through a justice process. Holding abusers accountable for serious violations of international law has become a tool political leaders can use. Once employed, there must be a long-term and steady commitment to seeing the process through—anything short, sends a confusing message and provides an opportunity for hardliners to undermine the peace process, obfuscate the truth, and ultimately create future instability.

In one of Judge Patricia Wald's cases before the United States Court of Appeals for the D.C. Circuit, she eloquently warned that "pragmatism should not be allowed to trump principle or the soul of a nation will wither."¹⁷ Here I believe we are considering the essence of international justice and the risk of undermining its credibility over the long-term by politicizing the process. The United Nations sees a role in justice for itself in the future but the organization must do right by the processes it has already begun in order to ensure a solid foundation is established upon which we can build with confidence.

17. *Steffan v. Perry*, 41 F.3d 677, 721 (D.C. Cir. 1994).