

2000

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Barbara Cochrane Alexander

American University Washington College of Law

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Recommended Citation

Alexander, Barbara Cochrane. "East Timor: Will There Be Justice?" Human Rights Brief 8, no. 1 (2000): 5-7.

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East Timor: Will There Be Justice?

by Barbara Cochrane Alexander*

On August 30, 1999, in a United Nations-sponsored referendum, the people of East Timor affirmatively voted for independence from Indonesia. The pre- and post-bal-
loting period, however, was marred by violence. Militia forces favor-
ing integration with Indonesia, supported by members of the
Indonesian military, committed grave breaches of international
human rights law. Based on the evidence gathered, which included
reports of widespread intimidation and terror, killings and mas-
sacres, displacement of people, forced expulsion of approxi-
mately one-fourth of the entire population, rape and sexual
harassment of women, disappearances, and destruction of prop-
erty, the International Commission of Inquiry on East Timor
(Commission of Inquiry) concluded that the East Timorese were
victims of a premeditated and systematic campaign of crimes
against humanity.

Currently, there are three potential prosecuting authori-
ties: the Indonesian government; the United Nations Transi-
tional Administration in East Timor (UNTAET), which has
served as East Timor's transitional government since October
1999; and a United Nations-sponsored international human
rights tribunal operating in Indonesia, East Timor, or any other
relevant jurisdiction. As of November 2000, the Indonesian
government was moving forward with its plans to prosecute
under its criminal code, UNTAET was moving forward with its
attempts to indict and prosecute, and a United Nations-spon-
sored international human rights tribunal has not been estab-
lished. To date, the individuals responsible for these crimes have
not been prosecuted, primarily because Indonesia has neither
the legal capacity nor the political will to do so. Moreover,
Indonesia has thus far refused to extradite suspects to East
Timor at the request of UNTAET.

Background

East Timor was a Portuguese colony until early 1975 when
Portugal began the process of de-colonization. The people of
East Timor held local elections to declare their independence.
Concerned with this move toward independence, neighboring
Indonesia began laying the groundwork for a coup d'etat,

**The Indonesian government has
demonstrated a lack of political will to
prosecute the alleged perpetrators.**

which occurred in August 1975. Civil war subsequently broke out
between those East Timorese favoring integration with Indone-
sia and those opposed to integration. Ultimately, in December
1975, the Indonesian military invaded East Timor to ensure its
dominance in the region and made the territory Indonesia's 27th
province. Effectively, Indonesia's invasion interrupted East
Timor's decolonization, which remained incomplete until the
1999 referendum.

In June 1998, after decades of violence and civil unrest,
Indonesia proposed limited self-rule for East Timor and the UN
subsequently incorporated this proposal into a draft constitu-
tional framework. In October 1998, the UN presented the
framework to Indonesia and Portugal. On January 27, 1999, then-
president Habibie of Indonesia announced that if the people
of East Timor voted to reject limited self-rule, the Indonesian
government would rescind the integration law between East
Timor and Indonesia. Thus, the East Timorese had two options:

accept limited self-
rule and remain
integrated with
Indonesia, or reject
limited self-rule in
favor of total inde-
pendence from
Indonesia.

In May 1999,
Indonesia, the inter-
national de facto
sovereign of East
Timor, and Portu-
gal, the UN-recognized administrator of the East Timorese
non-self-governing territory, signed the "5 May Agreements,"
which proposed "popular consultation" for the East Timorese
people. The parties understood "popular consultation" to mean
a fair campaign and a popular ballot to determine East Timor's
political status.

In order to facilitate this "popular consultation," the UN
Security Council formally established the United Nations Mission
in East Timor (UNAMET) to assist the Indonesian government
in securing a peaceful and credible ballot process. Citing intimid-
ation and violence, UN Secretary-General Kofi Annan post-
poned voter registration. When the vote finally occurred on
August 30, 1999, more than 430,000 registered voters, out of a pop-
ulation of 700,000, cast their ballots.

In the months leading up to the referendum, Indonesia
faced the potential loss of sovereignty over East Timor. Pro-
integration militia, located in East Timor and supported by
members of the Indonesian military, intimidated and terrorized
the East Timorese population. According to the Commission of
Inquiry, pro-integration militia committed systematic and mass
murder, forcibly displaced East Timorese, sexually assaulted
women, and destroyed 60-80 percent of the territory's public and
private property. On September 3, 1999, UN Secretary-General
Kofi Annan announced that 78.5 percent of the East Timorese
population voted to reject Indonesia's special autonomy proposal
in favor of a full transition to independence. The violence
immediately escalated further. Some of the worst violence
occurred in the month following the referendum.

Initially, the international community recognized the impor-
tance of Indonesia establishing its own commission to investi-
gate alleged crimes against humanity committed by its citizens
and military. Yet Indonesia has thus far failed to prosecute any
suspects, provoking international dispute over how best to
achieve accountability and justice. Additionally, UNTAET has
established the Special Panel for Serious Criminal Offenses at
the District Court of Dili (Special Panel). For different reasons
than the Indonesian government, the Special Panel also has
failed to prosecute any alleged suspects. These potential pros-
ecuting authorities, as well as the proposed international tri-
bunal, face legal and political obstacles.

Indonesian Obstacles to Prosecuting Crimes Against Humanity

Lack of Political Will

In early 2000, Indonesia's Commission of Inquiry into Human
Rights Violations in East Timor (KPP-HAM) reported the names
of 33 people—including militia leaders, police officers, and
senior military officers—whom it believed to be directly or indi-
rectly responsible for the pre- and post-referendum violence in



East Timorese show their support
for the 1999 referendum.

East Timor International Support Centre

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East Timor. Since that time, however, the Indonesian government has demonstrated a lack of political will to prosecute the alleged perpetrators. Following months of investigation during which the 33 suspects were questioned, Indonesian investigators indicated their intention to indict 19 individuals. By September 2000, the Indonesian government had released a provisional list of the 19 individuals to be indicted. This provisional list did not, however, include the names of those believed to be most responsible, such as General Wiranto, a senior Indonesian military official believed to have ordered the alleged crimes against humanity.

Shortly thereafter, Indonesian Attorney General Marzuki Darusman announced that he would prosecute 22 suspects, including senior military officials and militia members. Darusman noted, however, that trials would begin only after the Indonesian parliament enacted legislation establishing a special domestic human rights tribunal to hear the cases. Darusman expressed his expectation that such legislation would be enacted in December 2000, yet that appears to be a remote possibility. Further, even if such legislation were enacted, there is no indication that such a tribunal will apply anything but Indonesian law, which is inadequate to address these crimes. In addition to its unwillingness to prosecute domestically, the Indonesian government has made clear it would not cooperate with an international human rights tribunal should a tribunal be established. A primary reason for Indonesia's opposition is that an international tribunal would inevitably apply international humanitarian and human rights law instead of applying the Indonesian Criminal Code, which Indonesia would prefer.

There are certain crimes, such as forced displacement of persons, which cannot be prosecuted at all under the Indonesian Criminal Code.

Legal Obstacles

In addition to the Indonesian government's lack of political will to initiate prosecutions, a number of legal obstacles preclude the effective prosecution of the perpetrators. Two obstacles in particular pose the greatest threat to effective prosecutions. First, the Indonesian People's Consultative Assembly (MPR) passed a constitutional amendment in August 2000 (Article 28(I) of the Indonesian Constitution) enshrining the principle of non-retroactivity in Indonesian law. Second, the Indonesian Criminal Code does not contain provisions for collective responsibility.

The principle of non-retroactivity prohibits a government from prosecuting its citizens for acts that were not crimes under domestic law when they were committed. Article 28(I) of the Indonesian Constitution reads, "the right not to be charged on the basis of retroactivity is a basic human right that may not be breached *under any circumstances*" (emphasis added). Thus, even if the Indonesian Parliament were to enact legislation recognizing crimes against humanity, such legislation could only apply prospectively. In other words, Indonesia would still be precluded from prosecuting those individuals who committed grave human rights abuses leading up to and immediately following the referendum in East Timor.

It is important to evaluate Indonesia's constitutional amendment on non-retroactivity in the context of customary international law. According to Article 15(1) of the International Covenant on Civil and Political Rights (ICCPR), "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed." Article 15(2), however, provides that "[n]othing in [Article 15] shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was

committed, was criminal according to the general principles of law recognized by the community of nations." Article 15 of the ICCPR is considered customary international law. Further, Article 53 of the United Nations Convention on the Law of Treaties stipulates that norms of customary international law are non-derogable and "can be modified only by a subsequent norm of general international law having the same character." Under customary international law, crimes against humanity are "criminal according to the general principles of law recognized by the community of nations" and thus constitute an exception to the principle of non-retroactivity. By amending its constitution to include an unconditional principle of non-retroactivity, Indonesia therefore violated customary international law.

In addition to the constitutional amendment, the Indonesian Criminal Code also precludes such retroactive prosecutions. Article 1 of the Indonesian Criminal Code provides that an offense can only be prosecuted under a law that existed at the time the offense was committed. Yet when the pre- and post-referendum violence occurred in East Timor, there were not, and still are not, any provisions in the Code for crimes against humanity. Thus, it is likely that Indonesian-led prosecutions would be

limited to prosecuting alleged suspects for "ordinary crimes" as defined in Indonesia's Criminal Code. For instance, it is likely that systematic mass murder would be tried under Article 340 of the Indonesian Criminal Code, which deals with premeditated murder and is punishable by the death sentence or life imprisonment, and torture would

be tried under Article 355, which deals with premeditated attempts to cause serious injuries and is punishable by a maximum sentence of 12 years in prison. A more disturbing scenario is that there are certain crimes, such as forced displacement of persons, which cannot be prosecuted at all under the Indonesian Criminal Code.

Additionally, the Indonesian Criminal Code does not contain any provisions for collective responsibility which is an internationally-recognized legal principle underlying crimes against humanity. The Indonesian government has yet to revise its domestic law to include provisions that would facilitate the prosecution of senior police and military officials for the crimes against humanity committed by those under their command. Although Indonesia has indicted some senior military officials and militia leaders, it is unclear when and how they will be prosecuted. Failure to prosecute those in command contravenes the principle of collective responsibility, which the international community has recognized since the Nuremberg trials as a general principle of modern international law. More recently, the statutes of the ICTY and ICTR recognize the principle of collective responsibility. Article 7(3) of the ICTY Statute enumerates the following principle: because the act "was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof." Article 6(3) of the ICTR Statute, which applies to non-international conflicts, mirrors Article 7(3) of the ICTY Statute.

The principle of collective responsibility includes a number of elements: a duty to exercise authority over subordinates; equality of responsibility with the subordinate; actual knowledge that the subordinate planned or carried out the unlawful conduct, or in the absence of actual knowledge, sufficient information to enable the superior to conclude that the subordinate

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planned or executed such conduct; and failure on the part of the superior to take the necessary steps to prevent the crime. Ultimately, the superior is responsible if he or she orders a subordinate to commit, or attempt to commit, a crime against humanity or war crime.

East Timorese Prosecutions

East Timor has attempted to conduct prosecutorial investigations of its citizens and militias. These investigations, however, have been hampered by a lack of cooperation on the part of the Indonesian government. Indonesian resistance to East Timorese prosecutions contravenes the April 6, 2000, *Memorandum of Understanding Regarding Cooperation in Legal, Judicial and Human Rights Related Matters*, signed by Indonesian Attorney General Darusman and Chief of UNTAET, Sergio Vieira de Mello. For example, Indonesia has refused to comply with UNTAET's extradition requests to return East Timorese suspects that fled to Indonesia after the violence. To justify its refusal to extradite, the Indonesian government, as well as pro-integration groups, have asserted the following arguments: to do so would undermine Indonesian sovereignty; East Timor is not yet a sovereign nation; and there is no extradition agreement between Indonesia and East Timor.

Faced with an impatient international community, and the increasing likelihood of an international human rights tribunal, Indonesia agreed, in early November 2000, to allow East Timorese prosecutors to question 39 witnesses. This agreement followed the Indonesian government's offer to allow East

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Timorese investigators to question Eurico Guterres, leader of the East Timorese Aitarak militia group. It remains unclear, however, when Indonesia will, in fact, permit East Timorese investigators to travel to Indonesia to carry out these questionings.

International Human Rights Tribunal

UN Secretary-General Annan has met with Indonesian President Wahid and Vice-President Sukarnoputri to explain, among other things, the UN Security Council's intention to establish an international human rights tribunal if Indonesia fails to prosecute the perpetrators of the East Timorese violence. As early as February 2, 2000, the Commission of Inquiry issued a report recommending that the UN "should establish an international human rights tribunal consisting of judges appointed by the United Nations, preferably with the participation of members of East Timor and Indonesia." The Commission of Inquiry explained that the tribunal "would sit in Indonesia, East Timor and any other relevant territory to receive complaints and to try and sentence those accused." Conceivably, the tribunal's temporal jurisdiction would cover events beginning in January 1999. Furthermore, the tribunal would be empowered to prosecute and sentence individuals "regardless of the nationality of the individual or where that person was when the violations were committed." As of November 2000, however, the Security Council has not exercised its Chapter VII powers to establish such a tribunal.

One obstacle to the establishment of an international human rights tribunal is the anticipated opposition of China and perhaps other Security Council members. International pressure could be applied to prevent China from vetoing an international human rights tribunal. Should a tribunal overcome such political obstacles and be established, it would have two distinct advantages for East Timorese seeking justice. First, an international human rights tribunal has the ability to prosecute under international law those directly and indirectly responsible for the commission of crimes against humanity. Second, an international human rights tribunal can provide capable and impartial judges. Consequently, an international human rights tribunal offers East Timor the most promising hope for accountability.

Conclusion

All evidence thus far indicates that Indonesia has neither the legal capacity nor the political will to prosecute crimes against humanity and bring senior-level police and military officials to justice. After meeting with Secretary-General Annan in early November 2000, Indonesian Attorney General Darusman promised that trials would begin no later than February 2001. It remains to be seen whether prosecutions will begin. Further, for months the Indonesian government thwarted East Timor's investigations and prosecutions by refusing to cooperate, specifically by withholding evidence and access to witnesses located in Indonesia. Finally, should Indonesia refuse to cooperate with an international human rights tribunal, such a tribunal likely would experience the same frustrations and inefficacy as the East Timorese investigations and attempts to prosecute. The three prosecutorial options for justice in East Timor all face obstacles, and each leaves unanswered the question—will there be justice? ☹

** Barbara Cochrane Alexander is a J.D. Candidate at the Washington College of Law and a staff writer for the Human Rights Brief.*

Summer 2001

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