

Forthcoming in the **AsiaPacific Issues series from the East-West Center, Honolulu.**

**SEEKING JUSTICE ON THE CHEAP: IS THE EAST TIMOR TRIBUNAL
REALLY A MODEL FOR THE FUTURE?**

by David Cohen

In response to the spectacle of ethnic cleansing, mass executions, concentration camps, systematic torture, mass rape and sexual enslavement in Bosnia and Rwanda, the Security Council created the first ad hoc international criminal tribunals since Nuremberg and Tokyo. While during the Cold War the political stalemate on the UN Security Council had inhibited such responses to grave humanitarian crises, the new political constellations of the early 1990s ushered in a new era of co-operation to achieve international justice. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have now been trying cases for eight years—cases that have contributed enormously to the development of international humanitarian law.¹ Trials are also underway before a UN sponsored tribunal in East Timor but there the results to date, as well as the prospects for the future, are far more questionable.

It was inevitable that the establishment of the ICTY and ICTR would lead to demands for further attempts to call to account those responsible for other serious, large-scale violations of international humanitarian law. While the Security Council has lacked the political will to respond in all such cases (e.g., Sudan or Congo), they did move to establish tribunals for Cambodia, Sierra Leone, and East Timor. Because of the expense and duration of the trials before the ICTR and ICTY, however, the Security Council has become increasingly reluctant to fund new international tribunals of this scale.² The new model seems to have become smaller-scale operations with far fewer personnel, involving international "hybrid" tribunals, negotiated by

¹ For one of the most recent assessments of the ICTY and ICTR see E. Neuffer, **The Key to My Neighbor's House: Seeking Justice in Bosnia and Rwanda** (New York 2001) 165-314.

² The annual budgets of the ICTY and ICTR are each approximately 100 million dollars. The ICTY, for example, has 1100 persons on its staff.

treaty between the UN and a national government.³ East Timor is the first place where such trials have actually taken place.

For the past five years the United Nations has been negotiating with the Cambodian government to create a joint UN/Cambodian hybrid tribunal to finally try some of those leaders responsible for the genocide of the Pol Pot regime in 1975-79, in which more than 1.5 million Cambodians perished. A new international/national hybrid tribunal has also been created by the United Nations for Sierra Leone. Despite delays due to funding problems, it will begin operations in late Fall 2002, prosecuting cases involving the systematic murder, mutilation, rape, torture, and enslavement of civilians by the rebels during the civil war. In other instances governments have sought to forestall the UN from creating a tribunals by acting preemptively at the national level. Thus, the Indonesian government itself, since March 2002, has been conducting trials before Ad Hoc Human Rights Tribunals of military and political figures implicated in the murders, widespread destruction, and massive forced deportations in East Timor in 1999 (**see box**).

While there is no question that the trials conducted by the ICTR and ICTY constitute a major watershed, it is also true that significant challenges remain—challenges that are best assessed from a regional perspective by considering the work of the UN hybrid tribunal in East Timor.

East Timor

Following the UN's announcement of election results in East Timor in September 1999, Timorese militias, armed and supported by Indonesian army and security forces, perpetrated widespread violence resulting in the deaths of substantial numbers of civilians, widespread rape, destruction, and looting of property, and forced mass displacement of civilian populations. On January 31, 2000, the UN made public the report of the UN International Commission of Inquiry on East Timor. The report documented the systematic and widespread nature of the terror and

³ "Hybrid" refers to the fact that the tribunal is composed of a combination of international and domestic judges and prosecutors.

violence in East Timor (requirements for establishing that the violence constituted crimes against humanity) and recommended the establishment of an international tribunal under UN auspices.

The conclusions of this report were supported by the account of Indonesia's own investigation, conducted under the auspices of the Indonesian Human Rights Commission. Action on the proposal for an international tribunal, however, was deferred in response to Indonesian undertakings to investigate the violence in East Timor and bring charges before appropriate domestic tribunals. As Kofi Annan put it at the time, "The main thing is to send a message that crimes against humanity and such gross violations against human rights will not be allowed to stand and that those responsible will be held accountable." If Indonesia pursues such prosecution, he went on, "there will be no need for the Council or the UN to set up another tribunal to compete with one set up by the Indonesian government that is going to do exactly the same thing."⁴ To what extent the message sent by Secretary General Annan was "received" is made clear by from current developments in Indonesia.

Although action on an international tribunal for Indonesia was deferred, the UN did proceed to make prosecutions in East Timor itself possible. On October 25, 1999, the Security Council authorized the establishment of the UN Transitional Authority for East Timor (UNTAET, Resolution 1272). UNTAET created a judicial system for East Timor virtually from scratch. In March 2000 UNTAET promulgated a regulation (No. 2000/11) that, among other things, set up a system of district courts for East Timor. Section 10.1 gives the Dili District Court exclusive jurisdiction over genocide, war crimes, crimes against humanity, murder, sexual offences, and torture, if those crimes were committed between January 1, and October 25, 1999. Section 10.3 provides for the establishment of special panels to exercise this exclusive jurisdiction. These Serious Crimes Panels, "shall be composed of both East Timorese and international judges." By June 2000 more than 50 militia members were being held in UN custody for alleged crimes arising out of the transitional violence. In early December 2000, then

⁴ India Times, February 15, 2000.

UN Chief Prosecutor for East Timor, Mohamed Chande Othman (formerly a chief ICTR prosecutor) handed down the first indictments for crimes against humanity. Tellingly, the only defendants the Tribunal was able to obtain custody of were relatively low-level militia leaders. Top-level officials and Indonesian military indictees were, and still remain, at large, mostly in Indonesia.

The hybrid Serious Crimes Panel, composed of two international and one East Timorese judges, began hearing these cases in early 2001. In the first such case to be completed, a panel of three judges, from Burundi, Italy, and East Timor, sentenced a 22 year-old militia member to 12 years in prison on a single count of murder. The verdict was greeted in East Timor with evident dissatisfaction, particularly at the failure to prosecute higher-level perpetrators for crimes against humanity. Even the East Timorese judge on the tribunal, Maria Perreira, voiced her concern: “Every individual must be responsible for his crimes. But speaking as a Timorese and not as a judge, I think this system is not fair. Is it fair to prosecute the small Timorese and not the big ones who gave them orders?”⁵ One prosecutor was quoted as responding to this criticism by saying, “There’s tons of evidence. But we haven’t gone out and gotten it yet.”⁶ Aniceto Guterres, head of the East Timor Human Rights Foundation, scarcely veiled his contempt: “This man participated in one of the worst massacres and all they come up with is one count of murder.... The evidence is everywhere. Perhaps they are not up to the job.”⁷

UNTAET took seriously such criticisms, and those of organizations like Amnesty International, and greatly improved the efficiency of the prosecution.⁸ It must be noted that high-level perpetrators have still not been brought into custody. Judged by quantitative criteria, however, the East Timor tribunal has been remarkably successful in comparison with the far more lavishly funded ICTY and ICTR. To date 15 trials have been completed, one of them the first major crimes against humanities case in which the Judgment was handed down in December

⁵ NYT, March 4, 2001.

⁶ Human Rights Watch, *East Timor: Trial Welcome but Justice Still Elusive in East Timor* (26 January 2001).

⁷ Ibid.

⁸ See, e.g., Amnesty International, *East Timor: Justice past, present, and future* (27 July 2001).

2001 (against Joni Marques et al.).⁹ Altogether 23 defendants have been convicted, none acquitted on all charges. Two other cases have been disposed of, and three major crimes against humanity cases with multiple defendants have been underway since March but are proceeding at a snail's pace due to a variety of problems. In places like the ICTR the East Timor tribunal is being discussed as a model for future hybrid proceedings. How inappropriate such conclusions are may be seen by briefly considering the qualitative features of UN justice in East Timor.

While the prosecution has been re-organized, more adequately funded, and staffed with highly competent and experienced personnel, the Tribunal itself and the Public Defenders unit are in a sorry state. They lack adequate funding, staff, experienced personnel, and virtually every other resource necessary to conduct trials that meet international standards. A few examples should suffice to indicate the scale of the problem.¹⁰

The budget for 2001 of the Tribunal was approximately \$6,300,000 (the ICTR and ICTY each have annual budgets of about \$100,000,000; the Sierra Leone hybrid tribunal, \$20,000,000).¹¹ Of this, \$6,000,000 was allocated to the Prosecution unit, \$300,000 to the Tribunal itself. Almost all of this latter figure represents the salaries of the international judges. The judges have no law clerks, research assistants, secretaries, trained administrators, court reporters, or proper facilities for legal research. They are housed three to an office, answer their own phones and, when I first visited the Tribunal, were engaged in moving their furniture.

The Tribunal has no Case Manager or any official responsible for managing the calendar. Speculation about when and if hearings will take place is a favorite topic of discussion among prosecutors, defense counsel, and NGOs. Defendants have frequently not been brought from jail on the mornings when trials are scheduled to begin because no calendar is published and no one

⁹ For an account of this case, see Judicial System Monitoring Programme, *The General Prosecutor v Joni Marques and 9 Others: A JSMP Trial Report* (March 2002).

¹⁰ See also, Judicial System Monitoring Programme Thematic Report #1, *Justice in Practice: Human Rights in Court Administration* (November 2001).

¹¹ The budget figure for the UNTAET tribunal was provided to me by officials in the office of the Special Representative. No one in the Prosecutor's office, the Serious Crimes Panel, or the Public Defender's office had any information about their budgets.

had notified the appropriate officials. International humanitarian law is scarcely mentioned in the trials or in the Judgments of the tribunal despite its obvious relevance. Needless to say, under such conditions it has been difficult to recruit and retain the kind of experienced international judges and jurists who are willing to sit on the bench at the ICTY in The Hague.

The Timorese judges have had no prior judicial experience of any kind. The tribunal has not been able to fill its allocated panels and the Appeals Chamber has not had enough judges to hear cases for the last 18 months. Currently five judges are rotating between two trial panels (each must be composed of two international and one Timorese judges) in an attempt to conduct multiple trials at the same time. This of course means constant interruption of each individual proceeding. The Lolotoe Massacre Case, for example, which began in early February, resumed in March after a three-week recess to allow other trials to go forward. Judges' vacations have prevented significant further progress on this or any other case since mid-May. One of the international judges has now tendered his resignation so the trials in which he is participating will have to begin anew.

As severe as these problems are, the situation in the Public Defenders unit is, astonishingly, even more desperate. No one in either the Public Defenders' office or UNTAET could tell me whether or not the Public Defenders had a budget or, if so, what it was. That they are desperately short of both funds and personnel is apparent to all. The lack of financial, technical, and human resources has influenced all aspects of the defense function of the Tribunal.

The Timorese members of the unit have no trial experience or expertise in criminal law, and no background in International Humanitarian Law. At the time of my visit only one of the international public defenders had such experience. None are professional criminal defense counsel with the kind of experience one would expect to find at the ICTY or ICTR. Because the Public Defenders office is responsible for the entire East Timor judicial system in addition to the Special Panel for Serious Crimes, they are woefully understaffed. This heavy caseload, together with their lack of budget, investigators, and interpreters, has meant that they have been unable

adequately to prepare cases for trial. Unlike the prosecution, they have no budget to cover the expenses of bringing witnesses to Dili for trial. For all of these reasons the defense did not call a single witness in *any* of the first 14 trials. The prosecution has not sought to take advantage of these inadequacies, but has repeatedly tried to help novice defense counsel by coaching them about how to make motions or objections. While laudable, this is hardly of solace to those convicted or to the credit of the UN.

One might respond to these manifest difficulties by arguing that this would all get sorted out on appeal. Since there are no transcripts from any of the trials completed so far it is hard to see how this could be the case. Without an official record of the trial how can defense counsel make a case and how can the Appeals Chamber review it? (Apart from the fact that there is no functioning Appeals Chamber anyway.) No one I spoke with in UNTAET, the Tribunal, or the Prosecution was able to answer this question. The unanswered question is how 13 trials were allowed to proceed to verdict without a transcript or audio recording of the proceedings?

There is now a system in place to provide audio/video recordings of the trial. It was first used in the Marques Case, the first major crimes against humanity trial. The Tribunal, however, possesses no software to use these hundreds of hours of recordings nor have transcripts been made from them. So even though there is now a recording of the proceedings it is not usable by counsel or by the Appeals Chamber. There are also very serious problems regarding translations (the tribunal's interpreters for its 5 languages are not professionally trained) that affect both the fairness of the trial and the adequacy of the audio record. Why were these very serious translation issues not addressed before trials were permitted to proceed? The UNTAET answer is that these were the only resources available. But how can an organization with the resources and experience of the UN content itself with such an answer?

How has this situation been allowed to occur and what can be done to alleviate these problems? To be fair, in early 2002 UNTAET recognized that it had placed too much emphasis on the effectiveness of the prosecution and not enough on the judicial and defense functions. The

problems detailed here have been clearly recognized in the Special Representative's office and steps were taken to remedy them. There are at least three reasons to worry, however, about how effective such efforts will be:

First, East Timor became independent on May 20, 2002, and though the Special Panel will continue through 2003, UNTAET will now be in a less advantageous position to reform the Tribunal's operations. Second, although the problems are recognized there remains an ambiguity in UNTAET thinking about the standard that the tribunal must meet. Because it is a hybrid tribunal and was created by the UN as part of the Dili District Court there is a tendency to excuse its shortcomings on these grounds. (Note, however, that unlike the Sierra Leone or proposed Cambodian tribunals, the East Timor operation is solely a UN creation.) One very senior official in the prosecution office told me that the tribunal did not have to meet international standards because it is a domestic tribunal and "domestic" standards apply. What "domestic" standards, when the only justice system in East Timor is that created by the UN? What one fears is that "domestic standards" actually means that East Timor doesn't require the kind of expensive justice being dispensed at the ICTY and ICTR. It is worth remembering that the UN flag flies over all of the tribunals' offices, its members wear UN ID badges, and all Judgments and other documents go out under letterhead with the UN seal. It does not bode well for future hybrid tribunals if the UN uses their unique status as an excuse for not meeting the very standards it as an institution is supposed to embody.

Finally, there is considerable obstruction within the East Timorese Ministry of Justice that is inhibiting efforts to reform the tribunal. To a significant degree this has to do with a political agenda designed to make Portuguese (and not Tetun, the main Timorese dialect, or English) the official and working language of the judicial system. On this basis, for example, experienced international defense counsel with NGO funding have been blocked by the Minister

of Justice from joining the Public Defenders office because they were from English speaking countries (e.g., Britain or Australia).¹²

Beyond the problems only briefly sketched above, what has long been clear is that without the cooperation of Indonesia the UNTAET tribunal is, from the larger perspective, doomed to failure. The mandate of international tribunals, whether hybrid or not, is to bring to account those *most responsible* for the crimes so as to contribute to justice, reconciliation, and reconstruction within the country. The basic problem is that although much of the evidence concerning the atrocities themselves is in East Timor, the key high-level defendants and witnesses who can testify about the complicity of civilian authorities and the higher command levels of the Indonesian Army are in Indonesia. For example, in the Passabe crimes against humanity cases (one of 10 priority cases) only one of the 11 defendants is in custody. In January 2002 a joint UNTAET-Indonesian working group began to meet monthly to facilitate cooperation. Thus far, despite Indonesian commitments for cooperation, results have been meager.¹³ Indonesia continues to refuse to extradite defendants or compel witnesses to appear. Now that East Timorese militia leader Eurico Gutteres is on trial in Jakarta, along with 17 other defendants, for crimes against humanity (including murder, extermination, and persecution) this lack of cooperation has become even more flagrant. Gutteres is not in hiding, but is at large in Jakarta, regularly attending, along with many of his former militia followers, the Indonesian trials concerning East Timor.¹⁴ A brief overview of the Jakarta trials will indicate that it is unlikely that the interests of justice and accountability will be well served in these proceedings.

¹² Examples of such obstructionism by the Minister of Justice could be multiplied. This kind of neo-colonialism does not bode well in a country where the new Portuguese speaking governing elite has made Portuguese one of the two official languages but more than 95% of the population do not speak or understand it.

¹³ See also, *Memorandum of Understanding between the Republic of Indonesia and UNTAET regarding cooperation in Legal, Judicial, and Human Rights related matters* (6 April 2000).

¹⁴ This has been widely reported. I myself saw him in the courtroom in Jakarta on May 22-23, 2002.

Box: Indonesia's Show Trials

Even if the East Timor tribunal were to correct its myriad problems, the goal of bringing to justice those most responsible for the bloodshed is largely doomed to failure without Indonesian cooperation. Despite promises to the contrary, that cooperation has not been forthcomingⁱ.

The key high-level suspects in the militia and government are in Indonesia. But Indonesia has refused to extradite defendants or compel witnesses to appear. The ready excuse for this refusal is that Indonesia is now conducting its own trials before the Ad Hoc Human Rights Tribunals in Jakarta.ⁱⁱ These were created under an Indonesian law of 2000 that for the first time makes military and civilian leaders accountable for human rights violations. Significant indictments of relatively high-ranking Indonesian and Timorese military and civilian leaders have been handed down. To date, however, the results have not been promising.

For example, in a trial that began March 19, 2002, four Indonesian military officers and one police official were accused of crimes against humanity. The indictment alleged their "command responsibility" for the Suai Church Massacre, in which as many as 200 people are believed to have been killed. All were acquitted last week. The one conviction to date, that of East Timor Governor Abilio Soares, for "widespread and systematic" murder and persecution as crimes against humanity resulted in only a three-year sentence. This verdict left international observers puzzled, as under the Indonesian law governing the Tribunals the minimum sentence for these crimes is 10½ years.

Rather than a serious attempt to convict those who orchestrated the killing in East Timor, the Jakarta trials seem more like political theater playing to three audiences. Domestically, they aim at whitewashing the role of the Indonesian army (TNI). Internationally, they pander to the United Nations – which has threatened Indonesia with a true international tribunal – and the United States – where Congress has recently been considering whether to resume military aid to Indonesia.

Inverse situation. The judicial situation in Jakarta is the inverse of that in Dili, with a very timid prosecution overshadowed by a well-funded and vigorous defense. Moreover, the indictments were cast in such weak terms that they read almost like defense arguments and were

cast in terms that made it impossible to convict the defendants of the most serious crimes.ⁱⁱⁱ The prosecution's choice of witnesses has been equally self-defeating. In May, prosecutors called subordinates of the two defendants who testified that Soares and Silaen – each of whom have 10 attorneys working on their behalf – knew nothing of the violence as it was occurring and took immediate and appropriate measures afterward. This pattern has been repeated in the 9 other trials now underway. Almost none of the Timorese witnesses called by the prosecution appear. As a result, most of the prosecution's evidence comes from TNI and police officers who support the defendant's case rather than the allegations in the indictment.

Shifting the blame. Equally disturbing, the tribunal's indictments and the prosecution's presentation of the cases support the notion widely accepted in Indonesia that the violence was a spontaneous product of civil war, initiated in many cases by pro-independence groups, and that both sides were equally responsible. This not only unjustly absolves the Indonesian military and security forces but it undercuts the notion central to an allegation of crimes against humanity: that of widespread, systematic criminality reflecting a government policy. Even more egregious, the Tribunal's judgment in the Abilio Soares case lists as a mitigating factor that the violence was in part due to the "deceit and discrimination" practiced by the UN (UNAMET) during the 1999 referendum. TNI witnesses have also regularly blamed the UN, often to the loud applause of TNI officers and former militia members packing the courtroom.

Australian electronic intercepts have made clear that the highest levels of the Indonesian military orchestrated the violence^{iv} but such evidence is unlikely to find its way into the Jakarta courtroom. The prosecution has not sought to indict any high-ranking Indonesian figures, such as General Wiranto, commander of the armed forces at the time. Based on the proceedings so far, the Jakarta tribunals seem unlikely to achieve truth, justice, or reconciliation. But it is also doubtful that the world could muster the political will to act if credible results are not achieved. Indonesia is not a political backwater like Rwanda or Sierra Leone but a major regional power whose allegiance in the war on terrorism is coveted.

As a result, there will be strong pressure to label the results of the trials in Jakarta as minimally sufficient. If, however, the present trend continues and only a few Timorese and no TNI

officers are convicted, even the most ardent supporters of a full resumption of military ties will be hard put to argue that this demonstrates the kind of accountability for the TNI which the Leahy amendment envisages. Indonesia appears to be gambling that American interest in putting the issue of accountability to rest is great enough that one or two token convictions with light sentences will be enough. If this is the case, then it is likely that despite the trials in Dili and Jakarta justice will never be meted out to those most responsible for the tragedy in East Timor.

[end box]

Policy Recommendations

1. The deeply flawed process in East Timor makes clear that the UN should not proceed “on the cheap” so as to avoid the excessive expenditures of the ICTR and ICTY. In doing so it does an injustice to those individuals convicted without a fair trial and undermines the very standards of the justice and the rule of law that the tribunals are supposed to advance.
2. Wherever the UN works to establish a hybrid tribunal it should set up both prosecution and defense under direct UN administrative control so as to ensure adequate defense resources and a “level playing field.” This is the model used at the ICTR and ICTY and it should be followed everywhere the UN engages itself. The experience of East Timor reveals all too well the risks of allowing the tribunal or the defense function to become the hostage of local politics to the detriment of the right of each defendant to a fair trial and an adequate defense under international standards.
3. The UN should not commit itself so deeply to achieving a tribunal that it is willing to compromise the integrity of an institution to which it attaches its name. Conversely, it should not threaten to establish an international tribunal (as it has done with Indonesia) unless it is prepared to follow through. Such threats in situations where they are scarcely credible only weaken the ability of the UN to apply leverage in such situations. The

- experience in East Timor and Jakarta indicate that whether a minimally credible tribunal is better than none at all is the real issue that the UN has been unwilling to address openly.
4. The idea of hybrid tribunals is not necessarily fundamentally flawed but has not thus far shown itself capable of achieving credible results. Above all, the UN must not, as it has in East Timor, use the hybrid status of the tribunal to justify its failure to meet international standards of judicial fairness and integrity. The case of the Jakarta trials also indicates that national tribunals face very serious problems of meeting international standards.
 5. If the UN is to proceed with hybrid tribunals, even after solving the problem of adequate funding it must find a mechanism to ensure that it can attract and retain judges, prosecutors, investigators, and defense counsel of international standard. What justification can there be that a tribunal to which the UN lends its name provides outstanding international defense counsel to Rwandan or Serb defendants and novice law school graduates with no trial experience to Timorese accused of similar crimes? Likewise, defendants have a right to expect that UN appointed international judges will have similar experience and expertise regardless of where the tribunal sits.

About the Author

David Cohen is a professor of Rhetoric and Classics at the University of California, Berkeley and an adjunct fellow at the East-West Center. He is director of the UC Berkeley War Crimes Studies Center. His recent publications include articles on transitional justice, international tribunals, and issues of responsibility in WWII war crimes trials in Asia and Europe. His interests include comparative legal history, ancient Greek law, and war crimes trials from WWII to the present. In pursuing these latter interests, in 2001 he founded the Berkeley War Crimes Studies Center which is collecting, analyzing, and making available to the public documents from all of the WWII war crimes trials as well as contemporary tribunals. He is currently working on a book which traces the trajectory from the WWII trials to the new tribunals and the International Criminal Court.

He can be reached at:
 Telephone: (510) 642-6614
 Email: djcohen@socrates.berkeley.edu

ⁱ See also, *Memorandum of Understanding between the Republic of Indonesia and UNTAET regarding cooperation in Legal, Judicial, and Human Rights related matters* (6 April 2000).

ⁱⁱ The best available account of the trials is by the International Crisis Group, *The Implications of the East Timor Trials*. See also the reports of ELSAM at <http://warcrimescenter.berkeley.edu>.

ⁱⁱⁱ Translations of the indictments can be found at <http://warcrimescenter.berkeley.edu>.

^{iv} For the story of the Australian intercepts see Far Eastern Economic Review, "Calling the Shots" (April 11, 2002).