Chasing shadows: Indonesian war criminals and Australian law

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Introduction

Writing about the Indonesian occupation of East Timor from 1975 to 1999 when "between 103,000 and 183,000 East Timorese civilians were killed or died of starvation" Dr Mark Byrne, (Senior Researcher with Uniya Jesuit Social Justice Centre till 2007), and Kath Gibson (who served an internship at Uniya in 2007), ask "is there anything that might be done in Australia to bring Indonesian military leaders to justice?" Byrne and Gibson provide a range of possible legal avenues that could be pursued and note that "holding perpetrators to account" is important to establishing "the rule of law within the emerging democracy of Indonesia".

Essay - Chasing shadows: Indonesian war criminals and Australian law

> For there really is, as everyone to some extent divines, a natural justice and injustice that is binding on all men, even on those who have no association or covenant with each other.
>
> *Aristotle, Rhetoric, Book 1*

Australia may be closer to East Timor than to New Zealand, but successive Australian governments did next to nothing while an atrocity unfolded just over the horizon. Between 103,000 and 183,000 East Timorese civilians were killed or died of starva- tion or other unnatural causes during the illegal

Indonesian occupation between 1975 and 1999.

Since the referendum in 1999 which led to independence in 2002, there have been several attempts to bring to justice those responsible for crimes against humanity in East Timor, including murder, rape, torture, forced disappearance and forced displacement. Probably the most effective were the Community Reconciliation Processes of the Commission for Reception, Truth and Reconciliation (CAVR in its Portuguese acronym), which dealt with nearly 1,500 minor crimes committed throughout the occupation period.

More serious crimes committed during 1999 alone were referred to the Serious Crimes Unit established by the United Nations. It charged 391 East Timorese militia members and officers of the Indonesian military (formerly ABRI, now TNI), but because Indonesia refused to hand over the 304 of its citizens and militia leaders living in Indonesia who had been charged, only East Timorese perpetrators were jailed.

Instead of cooperating with the UN, and to head off demands for an international war crimes tribunal, Indonesia set up its own Ad-hoc Human Rights Tribunal in Jakarta in 2002. It tried sixteen men but eventually resulted in the jailing of only one person, the East Timorese militia leader Eurico Guterres.

Finally, following the report of the UN Commission of Experts in 2005, which recommended the establishment of an international tribunal should Indonesia continue to reject calls for justice, the two governments set up the IndonesiaTimor Leste Commission of Truth and Friendship (CTF). It has been widely criticised for lacking legitimacy, as it will recommend amnesties from prosecution for those who tell the truth about events in 1999. In spite of this offer, the CTF's public hearings have become a forum for misinformation and denial, with most Indonesian witnesses blaming the UN, Australia and the East Timorese themselves for the violence that led to nearly 1,500 deaths and the destruction of about ninety per cent of East Timor's infrastructure.

The bitter experience of post-conflict nations around the world is that there must be some reckoning with the past in order for people and nations to move forward. In spite of the understandable efforts of the leaders of East Timor to forget the past and build friendships with their Indonesian counterparts, calls continue for action to address crimes against humanity.

Unfortunately, there is no strong support within the UN for an international criminal tribunal, or even for Indonesia to hand over the military officers and militia leaders indicted by the Serious Crimes process in Dili whom it continues to harbour. So East Timorese survivors and international supporters have resorted to other legal remedies.

In 1999 General Johnny Lumintang was Deputy Chief of Staff of the Indonesian army (the TNI), and had been a commander in East Timor. On 30 March 2000, just after he arrived in Washington DC, he was served with a writ alleging that he authorised a "planned campaign of terror, intimidation, kidnapping, murder, burning, rape and other vio- lations." He quickly left the country and did not return for the trial in 2001. The three East Timorese plaintiffs, who testified about "murdered family members, beatings at the hands of the TNI, forced expulsions, and property destroyed", were awarded damages of US$66 million. None of this money has been recovered to date.

The Lumintang decision followed the trial of Indonesian General Sintong Panjaitan,

> ...who was regional commander during the November 12, 1991 Santa Cruz massacre of over 270 East Timorese. In 1992, a court awarded $4 million in compensatory damages

> and $10 million in punitive damages to Helen Todd, the mother of [New Zealand citizen] Kamal Bamadhaj, the only nonEast Timorese killed that day.

These were civil rather than criminal trials, brought under the US Alien Tort Claims Act of 1789, which allows anyone in the US to sue for acts committed outside it "in violation of the law of nations or a treaty of the United States." This Act has been resurrected in recent decades to achieve a measure of justice for the victims of human rights abuses where no criminal trial was possible, even though an order for damages cannot be enforced unless the person involved visits or has economic interests in the US. No other nation has a law quite like the Alien Tort Claims Act. However, it reflects the underlying principle of international law, which is much stronger now than in 1789, that some crimes are so egregious that they create obligations on all nations to prosecute them. This leads to the principle of universal jurisdiction, which has been invoked in particular in Belgium and Spain in recent years to pursue human rights abusers including the former Chilean dictator Augusto Pinochet.

Is there anything that might be done in Australia to bring Indonesian military leaders to justice? In theory, under the principle of universal jurisdiction an Australian court could prosecute an Indonesian military officer who is in Australian custody or territory and who has been indicted for crimes against humanity in East Timor. However, under the Australian legal system they must also be crimes under Australian domestic law in order for prosecutions to have any chance of success. This still leaves several options which have not yet been tried in Australian courts.

Australian war crimes legislation

In spite of enacting a plethora of relevant pieces of legislation since World War II, Australia has a poor record for prosecuting war criminals. After a flurry of cases involving mostly Japanese suspects following the end of World War II, Australia became a haven for WWII-era criminals from Europe. In response to public pressure and media reporting of suspected cases a Special Investigations Unit was set up by the Hawke government in 1989. It studied nearly 850 cases from WWII, but closed down in 1992 after launching just three prosecutions, all of which failed. Since then not a single person has been prosecuted, in spite of allegations of the involvement of Australian citizens in war crimes in the former Yugoslavia in the early 1990s.

The War Crimes Act 1945 is not applicable to the Indonesian invasion of East Timor as it only applies to crimes committed in Europe between 1939 and 1945. Another option is the Crimes (Torture) Act 1988, which implements the UN Convention Against Torture. There are tests that must be applied before this legislation could be used. To date there have been no prosecutions brought under this Act. But it remains a possibility, should someone accused of torturing others after 1988 arrive in Australia.

A more promising course of action was brought to our attention by Professor Hilary Charlesworth. TheGeneva Conventions 1949, which are the main source of international law regarding war crimes, were incorporated into Australian law in the Geneva Conventions Act 1957. This Act was superseded after Australia ratified the Rome Statute of the International Criminal Court (ICC) in 2002, but it still applies to crimes committed before 2002. Under Sections 6 and 7 of this Act, an Indonesian military officer could be tried in an Australian court either for the "grave breaches" of humanitarian law specified in Article 147 of the Fourth Geneva Convention, which is in- tended to protect civilians caught up in an international war; or for violations of common Article 3 of the Conventions, which gives more limited protection to civilians in internal conflicts.

There are, though, several potential sticking points. For starters, the accused would have to be

either present in Australia or under Australian responsibility, and the action would need to be brought by the Director of Public Prosecutions of an Australian state or territory who is sympathetic to the case.

There is also debate about whether common Article 3 of the Conventions, which prohibits certain conduct in internal conflicts, creates individual criminal responsibility for internal conflicts, or merely State responsibility. In other words, can individual officers be held accountable for their actions, or only the Indonesian state? The recent Federal Court decision in the Sryyy case held that common Article 3 only imposed State responsibility. However, it is more likely that a landmark 1995 case in the International Criminal Tribunal for Yugoslavia, Prosecutor v Tadic would be upheld by the High Court. It confirms that individuals are criminally responsible for their actions.

Finally, the parties to the conflict must also have been parties to the treaty at the time the crimes were committed. Indonesia ratified the Geneva Conventions in 1958. Since East Timor did not become an independent nation until 2002, if the conflict is international in nature the other nation involved would be Portugal, the colonial power in East Timor. Portugal became a party to the Geneva Conventions in 1961.

Therefore the Geneva Conventions Act 1957 does apply to the conflict in East Timor. This remains an option should an Indonesian military officer appear in Australia or its territories or territorial waters, for instance on a military exercise or for training. The Defence Department apparently does human rights screenings of applicants for training, so those indicted are unlikely to slip through this net. Still, they would be vulnerable if they arrived on personal business.

The Balibo inquest and extradition

On 5 February 2007 the NSW Coroners Court began an inquest into the death of one of the "Balibo Five": Brian Peters, a British journalist who was resident in NSW at the time. Evidence from eye witnesses and intelligence officers confirmed that former ABRI commander Yunus Yosfiah, who went on to become a Major General in the TNI and Information Minister in the Habibie government, ordered the attack and may have led the shooting. While UN investigators recommended in January 2001 that he be prosecuted over these deaths, he has not been indicted by the Serious Crimes Unit in Dili. Yosfiah was summonsed to appear before the inquest but declined to appear.

Because he has not yet been charged with any offence, Younis cannot yet be extradited to Australia. However, if Deputy State Coroner Dorelle Pinch concludes that he should be charged with murdering Peters, she can refer the case to the NSW Director of Public Prosecutions (DPP). As war crimes are a federal offence, he would likely refer it to the Commonwealth DPP, who would decide whether to prosecute.

Whilst the extradition treaty between Australia and Indonesia was only adopted in 1995, Australia is still able to request extradition for offences committed before this time if the act was an offence under the laws of both Indonesia and Australia when it was committed. The treaty offers numerous escape routes if the Indonesian Government does not support Yosfiah's extradition, but if so it requires them to "submit the case to [Indonesian] authorities... for prosecution." The treaty also gives scope for political interference from the Australian side.

Other Australians died in East Timor during the Indonesian occupation, including journalist Roger East, who was killed on the Dili wharf on the first day of the full-scale invasion in 1975. The possibility therefore exists that other inquests could lead to requests for the extradition of military officers to stand trial for murder.

Civil action

It is also possible for an East Timorese now living in Australia to sue an Indonesian military officer for crimes committed in East Timor under civil rather than criminal law. Potential claims include assault, unlawful imprisonment and the destruction of property. Being a civil rather than criminal case, a successful prosecution would result in an order for damages rather than a custodial sentence.

This is similar to the Lumintang and Panjaitan cases referred to earlier. However, with no law equivalent to the US Alien Tort Claims Act, it would depend upon both the defendant and plaintiff being present in Australia or having interests here; on there being some connection between the original injury suffered in East Timor and the plaintiff's situation in Australia - for instance, if their experiences had left them with post-traumatic stress disorder and unable to work or engage in family life; and on the court determining that it is the most appropriate place (rather than, say, a court in Indonesia or East Timor) to bring the case.

This course of action is most likely to be pursued where an East Timorese now resident in Australia discovers that someone who had perpetrated a common law crime against him or her in East Timor is currently in Australia, or has financial interests here.

Administrative options

These legal avenues, while not impossible, are obviously fraught with difficulty, and are unlikely to provide relief to the many East Timorese who cannot access the Australian legal system. Their main value is as a way of highlighting the ongoing problem of impunity for crimes against humanity in East Timor. The secondary benefits are that they would restrict the movements of alleged perpetrators and put pressure on the Indonesian Government to take effective action to address this issue. They would also show that the Australian Government is serious about supporting justice for human rights abuses in our region, and about its own reputation in this area.

There are also a number of administrative measures the Australian Government could take to make life uncomfortable for these men. For instance, applicants for Australian visas now must answer the following question: "Have you, or has any member of your family unit included in this application, ever... committed, or been involved in the commission of war crimes or crimes against humanity or human rights?" Close monitoring of responses to this question, preferably in the public domain, would highlight whether anyone suspected of such crimes has applied for entry into Australia, and if so, whether their applications have been refused. Likewise, Australia could prevent those indicted but untried by the Special Panels for Serious Crimes from having economic interests in Australia or from travelling here. Australia could also take a lead in encouraging other governments to institute similar measures.

This is unlikely. Successive Australian governments were complicit in the invasion of East Timor, the recognition of Indonesian sovereignty, the coverup over the Balibo Five, the carve-up of the Timor Sea to extract the maximum possible economic benefit for Australia, and other acts which have undermined East Timorese independence and self-determination. The wording of the 2006 Lombok Treaty shows that the current Australian Government remains prepared to ignore human rights concerns in order to foster cooperation with Indonesia on "hard" security measures such as counter-terrorism, "people smuggling" and drug trafficking.

Conclusion

To push for Indonesian military officers to be held accountable for their crimes in East Timor is not

to be anti-Indonesian. It is also important for those East Timorese militia leaders who have not yet been tried to be brought to justice. And as Indonesian human rights groups confirm, holding perpetrators to account is another valuable step in the slow process of separating the military from government and of promoting respect for human rights and the rule of law within the emerging democracy of Indonesia.

Indeed, while they bear individual legal responsibility for their actions, the military officers accused of crimes against humanity were mostly acting under orders. There is clear evidence that the violence in 1999 was the deliberate outcome of a policy formulated at the highest levels of the Indonesian military - a policy of which the government was likely aware, if not approving.

In the absence within Indonesia not only of credible justice mechanisms but also of the offer of an apology and the offer of reparations for victims, other nations could help by taking steps such as implementing the recommendations relevant to them contained in the CAVR's Report; refusing military cooperation and arms sales with Indonesia; and supporting the International Solidarity Fund for Timor-Leste proposed by UN Secretary-General Kofi Annan in 2006.

It could also mean acting on the repeated calls for an international criminal tribunal along the lines of those for Rwanda and the former Yugoslavia. The current political climate within Timor-Leste and internationally makes it unlikely that a similar tribunal will be established in the near future. This is especially true now that the ICC has been established to deal with such crimes occurring after 2002. There are also serious doubts about the effectiveness of these tribunals given their cost, length, narrow focus, limited outcomes and deterrence value.

However, there will continue to be calls for a tribunal while the past remains an open wound for many East Timorese. In these circumstances, human rights lawyers and the community in general have no choice but to remain vigilant for any opportunity to pursue justice for the people of the world's newest nation.

Information about the author

Dr Mark Byrne was Senior Researcher at Uniya Jesuit Social Justice Centre until May 2007, and is currently somewhere in the outbakc on his motorbike.

This paper was written by Dr Byrne, while Uniya's Senior Researcher, using the research report written by University of Sydney law student Kath Gibson during her internship at Uniya in early 2007.

The full paper with footnotes can be found at the Uniya Web site.

Nautilus invites your response

The Austral Peace and Security Network invites your responses to this essay. Please send responses to the editor, Jane Mullett: austral@rmit.edu.au. Responses will be considered for redistribution to the network only if they include the author's name, affiliation, and explicit consent.

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