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## TRIALS FOR TIMOR: DISPENSING TRANSITIONAL JUSTICE IN INDONESIAN COURTROOMS INSTEAD OF INTERNATIONAL TRIBUNALS

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Atrocities committed by the Indonesian military in East Timor pose a quandary for human rights advocates and transitional justice advocates both in Indonesia and the international community. In this paper, I argue that a domestic Indonesian court, rather than an international tribunal, best serves the interests of justice and of democratization. A careful analysis of Indonesia's political actors, comparative studies in transitional justice, and the structural impact of trials on emerging democracies reveals that a strong domestic court - backed by international influence - best consolidates rule of law. Furthermore, a successful locally-driven Indonesian initiative to try war criminals will shift the regional Asian debate over human rights. The debate over how to confront state crimes of the old authoritarian regime in Jakarta has substantial bearing on the emerging comparative literature in democratization, transitional justice, and international human rights regimes.

### INTRODUCTION

In September 1999, irregular militias unleashed a terror campaign on East Timor, which had just chosen independence from Indonesia in a United Nations-sponsored referendum. Hundreds of thousands of East Timorese were driven across the border into Indonesian West Timor, held in camps

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closed to international observers. Thousands more, their homes destroyed, fled to the hills where malnutrition and illness were rampant. Displaced people recounted tales of systematic rape, kidnapping of young men, and house burning to subdue the pro-independence majority in the province. Dili, the capital, was reduced to ruins. Dozens of homeless Timorese were massacred in a Suai church. Wherever the military or militias had numbers, they burnt and ravaged all public buildings and private dwellings in sight. The militias were armed, funded, trained, and directed by the Indonesian Armed Forces (hereafter abbreviated as TNI); and there is ample evidence that Indonesian troops directly committed many of the most atrocious acts of murder and destruction in the wake of the popular consultation, not even bothering to cloak themselves behind the supposedly autonomous militia (Human Rights Watch 1999a, 1999b, 1999c; Amnesty International 1999; United Nations 1999a, 1999b, 2000; Spencer 1999; Chandrasekaran 1999; UN Human Rights Chief Calls for East Timor War Crimes Trial 1999, Cole-Adams 1999; Holbrooke and Roth 1999).<sup>1</sup>

Should Indonesia hold domestic war crimes trials and prosecute top officials of the still-powerful military, running the risk of a coup or political instability during the first-ever months of democratic governance? Should the UN and Western powers including Japan push for an international tribunal? Would lustration (or some other law barring former officials from holding positions of public trust), purges, or a truth commission provide a satisfactory compromise to consolidate democratization without provoking a military backlash? On the basis of emerging international legal norms and experience with transitional justice, I argue that Indonesia's new government should try top war criminals domestically, appealing to the local culture of jurisprudence and rule of law. The domestic trial should meet Western judicial standards, and accomplish several political aims: strengthen domestic movements for civilian authority, human rights, and accountability; move the TNI further from politics and eliminate some of its most noxious leaders; and give both Asia and the West a chance to demonstrate that "Asian values" can lead to as satisfactory a war crimes trial as can Western ones. If Jakarta can successfully bring to heel the once-powerful military, mete out justice for war crimes, and heal the canker of impunity that has infected the state for four decades, Asian proponents of human rights and nations shedding authoritarian rule will gain valuable momentum. Indonesia, the world's largest democracy after India and the United States, can challenge the naysayers in Beijing, Singapore, and elsewhere who claim an Asian exemption to human rights

norms. Similarly, war crimes trials can lend strength to democratization movements from South America to Eastern Europe to Asia that face devilish dilemmas when making deals to relieve dictators of their power. Indonesia chose its first democratically elected president in October 1999, on the same day that it approved independence for East Timor. The body politic is just starting to face the question of how to shed more than 50 years of military and authoritarian rule. Justice for military abuses, then, is part of a larger question of how best to transition Indonesia away from a culture of authoritarian impunity, corruption, and state violence. East Timor's predicament - documented abuses with no consensus on the proper response - brings into sharp relief the disarray in the international justice and human rights communities. What role should international law and institutions play in abetting democratic regime changes, redressing grievances, and enforcing international norms?

The goal of this paper is not to predict the outcome of the struggle between democratic and authoritarian forces in Indonesia, but to present a case for why a domestic war crimes initiative will have deeper impact on political structures than an international one. I will briefly summarize the specific factors at work in East Timor and Indonesia and the international community's initial response to the October 1999 presidential elections. After a brief history of Indonesia's relationship with East Timor, I will describe five principal alternatives for addressing the violations - an international tribunal, a domestic tribunal, a truth commission, a military purge or some other form of lustration, and amnesty - and discuss why trials are needed in this case to foster a stable democratic polity. Next, I argue that East Asian cultural arguments about the regional inapplicability of international law and human rights do not apply in Indonesia's case, and that prosecution of war criminals by an Indonesian court would force a shift in the regional human rights discourse. Finally, I claim that a credible domestic tribunal in Indonesia, and at second best, an ad hoc international tribunal in East Timor, will most effectively serve the goals of justice, stability, reform, and reconciliation. In conclusion, I point to unanswered questions for those members of the international community concerned with the debate over how best to deal with past regime atrocities in the context of democratization.

### CONFLICTING INTERESTS

Legalists and orthodox human rights activists insist that trials must follow thorough documentation of atrocities; without full accountability, any rule of law and democratic institutions will at best rest on weak founda-

tions.<sup>2</sup> Realpolitik elements in the international community primarily concern themselves with regional stability, concentrating on such matters as creating a transitional authority and minimizing embarrassment and discontent within the still-powerful TNI. Other Asian countries, particularly China, Myanmar, and Cambodia, fear a regional precedent allowing international bodies to conduct unfettered investigations and try authoritarians. Most of their arguments stem from self-interest or fear of their own abuses being punished, although some legitimate arguments (most of which do not apply in the case of Indonesia and East Timor) claim that East Asia's economic circumstances and culture merit a different interpretation of international humanitarian law and human rights than is applicable in the West.

A suitable response to the TNI's actions in East Timor (and by implication, in Indonesia writ large) must address a bevy of concerns, political, moral, and legal. Indonesia's emerging democracy is fragile, and a direct external attack on the military (through an international tribunal, for example) could provoke instability or a coup and certainly would inflame extremist nationalists. Indonesian leaders want to consolidate recent democratic gains. The TNI wants to avoid purges, trials, or other forms of accountability that would delve into the violence, corruption, and culture of impunity that have characterized the government at least since 1965. Human rights activists and a large portion of Indonesia's newly awakened civil society want to formally end military involvement in politics, try former President Suharto for corruption and abuse of power, and document the torture, imprisonment, and killings committed by the state security apparatus under his and B.J. Habibie's rule. East Timor's priorities lie largely in acknowledgement and reconstruction. The small nation has little desire to irritate its massive neighbor and former ruler. Those who perpetrated most atrocities no longer reside in East Timor; the UN administration has set up indigenous courts that already have begun to try local militia members. There is little debate within East Timor itself over how to deal with returning militia members - all indigenous political leaders have endorsed local trials, and called on Indonesia to do the same (East Timorese Judges 1999, Paterson 1999). The Indonesian military's actions in East Timor violated not only international humanitarian law—Indonesia is a signatory of the Geneva Conventions and a member of the UN Commission for Human Rights since 1991—but also Indonesian law and military codes. The TNI until 1998 was not only the de facto but the legal guarantor of the Indonesian unitary state; it professes a belief in rule of law and ostensibly decries any

violence against unarmed civilians. As domestic and international furor mounts over TNI's orchestrating role in the East Timor rampage, the military officials responsible have defended themselves alternately by denying the crimes in question ever took place, saying they were merely upholding the civilian government's policy, or claiming the military responded to provocation by armed pro-independence guerrillas. For its part the newly-elected Indonesian government has established an independent human rights commission (Komnas HAM, or KPP HAM) to investigate crimes against humanity committed in East Timor.<sup>3</sup> President Abdurrahman Wahid, better known as Gus Dur, hopes to stave off an international criminal tribunal for East Timor, which would be regarded as a "national humiliation,"<sup>4</sup> by credibly holding accountable the powerful TNI leadership in domestic courts. Such a trial, he reasons, will bode well for future corruption investigations and judicial reform. Meanwhile the United Nations Security Council sent a Commission of Inquiry to East Timor in November and December 1999; the Commission called for international tribunal if Indonesia fails to prosecute TNI war criminals. In its report, the Commission detailed TNI complicity in several specific massacres following the referendum, and unequivocally recommended the establishment of an international tribunal (United Nations 2000).<sup>5</sup> TNI elements, and the militias they constructed, still pose a security threat in Timor, both for the Timorese themselves and for the international peacekeeping force that will remain in country at least through 2001.<sup>6</sup> Without a thorough, official, internationally sanctioned account of the TNI's behavior, democratic elements in Indonesia will find it difficult to challenge the military's political hegemony and build a credible rule of law. Asian nations are reluctant to support any move that appears as an imposition of "Western" values; however, strong traditions in Indonesian constitutional law and Muslim jurisprudence lend themselves to a conclusive reckoning for rights transgressors. Finally, there is little political support for a strong ad hoc criminal tribunal along the model of those operating for Rwanda and the former Yugoslavia so long as Indonesia can deal with the problem itself.<sup>7</sup> This model—allowing domestic courts a first pass at punishing war criminals, and only in the event of failure invoking the international right to stage a tribunal—follows that of the International Criminal Court.

Perhaps to make amends for past sluggishness in establishing tribunals for Yugoslavia and Rwanda, international leaders have vigorously challenged the TNI's disingenuous accounts of violence in Timor. The UN High Commissioner for Human Rights has published evidence of TNI

complicity and has driven a Commission of Inquiry that at the very least makes Jakarta's old guard squirm.<sup>8</sup> US demands for convincing trials and full accountability lend heightened urgency to liberalizing forces in the new regime. Economic reform and growth might top the domestic agenda in a country just recovering from the 1997 Asian financial crisis, but international pressure for civil liberties and transitional justice comes hand in hand with much-needed international aid. This instrumentalism corroborates all those elements in the body politic who support trials for prosecutors of all of Indonesia's "dirty wars" of the last four decades, even if their real motivation is simply to consolidate their own power base or drive the military old guard out of politics.

Indonesian rights activists and President Abdurrahman Wahid want a tribunal that avoids the embarrassment of TNI generals being hauled before a foreign court. In order to meet both international criteria and the requisite conditions for regime change, their tribunal must try all those officers guilty of violating the very laws the Indonesian state claims to uphold, now in better faith than in the past. Its legitimacy depends on Wahid's government maintaining integrity and independence from the military. If the preconditions for a fair and convincing trial are not in place, the international community should not allow a repeat of the tragic farces—bungled trials, blanket amnesties, and the like—that took place in the 1980s when Argentina and Brazil shed their dictatorships, or during the first war crimes trials of the century, when the victorious allies allowed Germany to prosecute its own officers in Leipzig in 1921. Failing a domestic tribunal that would purge the military of some of its most base elements, an international commission or tribunal, perhaps acting in tandem with the UN Transitional Authority in East Timor (UNTAET), should indict and try individual TNI personnel who orchestrated violence in East Timor. Politically such a solution would be a distant, but potentially effective, second best. It is doubtful that Indonesia and other Asian nations would recognize such a tribunal or that Indonesia would surrender senior TNI commanders to the tribunal without significant international pressure. However, with a limited mandate that drew primarily on Indonesian law rather than international conventions, such a tribunal could provide the impetus for democratizing forces in Indonesia to challenge continuing military impunity there.

An organic domestic initiative with popular support can much more effectively instill international norms than an externally imposed tribunal. As Judith Shklar points out, a political trial, promoting the "prospect of a tolerant society (Shklar 1986, 151)," must be considered within the

“total political environment (Shklar 1986, 146);” such a trial is useful if it eliminates politically obnoxious elements and bolsters positive political, ideological, and moral values. Skeptics of domestic trials fear a whitewash or miscarriage of justice, old-style politics wearing a new legalist mask. Such concerns are valid and safeguards must protect against this undesirable outcome.

Such a strategy does not contradict the construction of an international legal order, nor would it undermine the International Criminal Court (ICC). All international law is inherently political, and for broad institutions such as the ICC and a world-wide human rights regime to take root, a political consensus must form behind them (Bolton 1998, Nanda 1998). Proponents of war crimes trials and strictly legalistic notions of international justice must put aside dogmatism and enter into a constructive debate over how best to reach the common ultimate goal: global respect for fundamental human rights, both social and economic.

### **TROUBLED MARRIAGE: EAST TIMOR AND INDONESIA**

Indonesia invaded East Timor in December 1975, less than a year after the Portuguese colonial administration withdrew. The small territory was annexed in 1976, after a bloody resistance in which by some estimates nearly a quarter of the indigenous population of one million was killed or died of disease. Indonesia ruled its youngest province through a combination of repression, violence, and underdevelopment. Periodic civilian massacres (the most notorious being the 1991 Santa Cruz massacre, which was witnessed by foreign journalists) gained international attention and East Timor served as the human rights community’s proof that Indonesia’s anti-communist regime was not an ally the West should cultivate.

After President Suharto’s “New Order” collapsed with his May 1998 resignation, Indonesia began the slow and still tenuous transformation to democratic rule. His successor, B.J. Habibie, was not a military man (both of Indonesia’s presidents from independence in 1945 until 1998 were generals). Habibie’s democratic opening included reining in “special military operations” in several provinces, including East Timor, Aceh, Irian Jaya, and the Moluccas, where separatist aspirations and communal violence were apparently crushed by wholesale civilian massacres. His attempts to build democratic structures and gain international approval led to an unexpected decision in January 1999; instead of only giving East Timor the option of limited autonomy within Indonesia, Habibie declared the province could choose between autonomy or full independence. The military establishment furiously protested the decision and during the

entire lead-up to the UN-sponsored referendum in August 1999 worked to undermine security in East Timor.

While Indonesian politicians saw the referendum largely as a way to rid the country of an embarrassing blot on its international reputation, the military interpreted the potential “loss” of East Timor as a threat to the unitary state. Like the domino theory, their reasoning went that if East Timor were granted independence other provinces around the country, mainly Aceh, Riau, and Irian Jaya, would accelerate their own secessionist campaigns. By most independent accounts the East Timorese militia were created by Indonesian authorities. The TNI cooperated closely with these paramilitary units, training, arming, funding, and even commanding them. Presented as a spontaneous and organic East Timorese reaction to “unwanted” independence, the militias were to terrorize Timor into voting to remain part of Indonesia. Sustained violations of Indonesia’s own domestic laws, in addition to international humanitarian and human rights law, occurred throughout 1999. Civilians were raped, their homes burned down, and entire pro-independence regions were scorched and their inhabitants forced to flee to the hills (Emmerson 1999, Indonesian Government Inquiry 1999, New Evidence 1999).

After East Timor chose independence in August 1999, TNI and militia conducted a scorched earth campaign to leave the Timorese “nothing but rocks” with which to build their new state (Chandrasekaran 1999). Perhaps the military was enraged at the loss of the province, or more likely was sending a calculated message to other independence movements in Indonesia. Under fierce international pressure, Jakarta admitted it could not maintain security in the province and approved an Australian-led peacekeeping force for East Timor, withdrawing all TNI personnel. Later political developments in Indonesia proper changed the context dramatically. In October, Indonesia elected its first democratic president, Abdurrahman Wahid, a noted Muslim cleric. The People’s Constituent Assembly—the highest legislative body in the land—formally ceded Indonesian authority over East Timor. The Indonesian polity thus embarked on a delicate path away from authoritarian rule that faces countless pitfalls: a strong military with dubious interest in seeing democracy flourish; rampant nationalism; pressure from Muslim extremists to found a religious, rather than a secular, state; and finally, a weak judiciary and other civil institutions that must battle the military’s official dual function role and the rampant corruption in Indonesia (Harymurti 1999). Multilateral bodies have committed enormous financial resources to rebuilding Indonesia’s economy, hard-hit from the Asian financial crisis.



Most aid is contingent on serious attempts to root out corruption and shatter networks of patronage. Although Western aid to the TNI continued until the military's responsibility for atrocities in East Timor in September 1999 became undeniable, Western governments have a clear stake in Indonesia adopting a stable democracy. Western governments slapped military embargoes on Indonesia at the outset of the pillage in Timor. While the European Union is slated to resume assistance in January, the United States will not do so until all outstanding matters related to East Timor are resolved and the military demonstrates its allegiance to democratic civilian governance.

In January, UNTAET established an independent judiciary in Dili, with East Timorese judges and international advisers. Captured militia leaders and perpetrators of the infamous April 1999 Liquisa church massacre are expected to face trial in the near future. The first revenge attacks in East Timor also were reported in January, when several returning militia members were killed and others attacked (East Timor Militiamen Attacked 2000). In Jakarta, meanwhile, momentum for a domestic tribunal grew as the human rights investigative body for East Timor, KPP HAM, questioned top generals and former cabinet ministers throughout December and January. President Wahid announced that he would not shield anyone from trial, including former defense minister, TNI chief, and current Minister for Coordinating Affairs Wiranto.<sup>9</sup> In mid-January, he told reporters he planned to fire Wiranto from his cabinet post, while coup rumors floated about Jakarta.<sup>10</sup> The civilian government, itself a motley coalition of dissidents, Islamic nationalists, and sympathizers of the old regime, has for now steered a collision course with the military. By demanding a full reckoning of the military's record, and accountability for all top officials, Wahid aims to conclusively castrate the military and sideline it from politics. Whether there is adequate elite support to rewrite Indonesia's independence doctrine, which grounds both security and governance in the military apparatus, remains to be seen. So too does the military's willingness to accept a humiliating and public disenfranchisement with no reprisal.

### **OTHER RECIPES FOR TRANSITIONAL JUSTICE**

Indonesia's transition is a test lab for new democracies. Justice in this case is no abstraction; holding the past regime accountable serves to rewrite a constitutional order that for the time being still reserves more than 5 percent of the legislature's seats for military appointees and grants TNI broad structural powers. Nonetheless, "trials are only one part of the story

(Bass 1999, 2107);” a century’s experience in meting out transitional justice has yielded many alternatives for addressing violations such as the TNI’s, including truth commissions, purges or some other form of lustration, reparations, reports, and amnesty. Attorney General Marzuki Darusman in December 1999 backed a truth commission for crimes committed during the Suharto era, hoping Indonesia can “take care of these issues in batches” and then “get on with other business” like the economy (Richburg 1999).

Stanley Cohen enumerates the somewhat pernicious trade-off between truth, justice and political stability that confronts transitions to democracy in which the institutions of previous regimes remain strong (Cohen 1995). Five principal debates plague societies facing state crimes of previous regimes: knowledge, accountability, impunity, expiation, and reconciliation and reconstruction. New rulers can confront the past with a wide range of remedies. Echoing Shklar’s scathing realism, he sees separate concerns in the pursuit of law, justice, vengeance, and politics. Reconciliation and reconstruction—being political objectives—often demand action outside legal frameworks of accountability. And expiation, he writes, might require “more radical punishment than merely appointing a commission of inquiry, punishing a few selected offenders or demoting them from their jobs. Some kind of ritual cleansing is needed—lustration is one such method — to remove impure elements or ways of thinking so that they will lose their power (Cohen 1995, 12).”

Nonetheless, law can forestall atrocities and minimize impunity (Siegel 1998); forward-looking politicians see trials and other forms of justice or reconciliation not as a means to close the door on the past, but to prevent past atrocities from being repeated.<sup>11</sup> Truth commissions have gained currency largely because of the “Nunca Mas” projects in Argentina and Brazil and South Africa’s Truth and Reconciliation Commission. Priscilla Hayner’s 1994 comparative study of 15 truth commissions details the broad manner in which inquiries can consolidate progressive change and human rights norms. Truth commissions, she argues, mean nothing without a sincere commitment to change. Such commissions serve a useful purpose that transcends the essentially political drama of trials; truth-telling rewrites history and the national narrative, and under the proper circumstances can complement profound political and legal transformation. The record, however, is spotty; Hayner cannot identify a clear political diagnosis that implies the bedrock for an effective truth commission. “Establishing the truth,” Hayner writes, “can be critical to a society’s coming to terms with a period of widespread abuses (Hayner 1994, 655).”

This psycho-social exercise, however, “should go hand in hand with institutional changes—judicial, political, or military reform, for example—that can reduce the likelihood of repetition of such abuses in the future (Hayner 1994, 655).” As yet there is little social science research that explores whether truth-telling ultimately helps victims escape the past and nations their dark histories.<sup>12</sup>

Indonesia surely might benefit from a truth commission that supplements a domestic tribunal. While military and political leaders from the ancien regime should face trial for the worst human rights abuses and the most obscene corruption, a spate of lower-level official abuses deserves to be revealed without an exhausting legal process. On their own, however, truth commissions leave a bitter taste of impunity; witness Argentina’s belated efforts to seek indemnities from the generals nearly two decades after the fall of the junta.<sup>13</sup> South Africa opted for truth-telling instead of trials, brokering a deal with the Apartheid regime that arguably protected the African National Congress and Inkatha Freedom Party from compromising pasts as much as it did the white rulers.<sup>14</sup>

Amnesty deals open an expedient avenue by which to dispatch lurking shadows of the old regime and get on with politics. Many Latin American dictatorships, having lost credibility because of failed economic programs, negotiated blanket amnesties before yielding to civilian rule, as in Chile and Brazil. Critics of amnesty point to the culture of violence it leaves unpunished. Secret police and heavy-handed government never face a reckoning—a moral oversight that can have destructive consequences for the long-term development of a free and responsible society. Furthermore, general amnesties often eliminate the possibility even to uncover and document the truth of what happened during a painful period in a state’s history. This silence or forgetting can be as painful for the victims and the reformed state as the violence itself.

Truth, Lawrence Weschler writes, is “a mysterious, almost magical notion, because often everyone already knows the truth—everyone knows who the torturers were and what they did, the torturers know that everyone knows, and everyone knows that they know.” Rendering that knowledge explicit, he goes on to say, becomes so important because acknowledgement serves as its own form of justice and is often more vital to national reconciliation than justice itself (Weschler 1990, 4). Proponents of amnesty argue that states in transition—particularly those that like Indonesia still have much to fear from a megalithic military culture—cannot risk sacrificing the broader gains of democracy for the narrow satisfaction of truth-telling, investigations, and direct justice. Decision-

makers must craft policies that do not upset this fragile equilibrium. Amnesty, however, often comes at the cost of truth.

Inherited and discredited legal systems often cannot satisfy the need for justice during transitions. Naomi Roht-Arriaza and Lauren Gibson found in a 1998 study that the scope of amnesties shrinks as new regimes increasingly tie themselves to an international legal order that by definition mediates some degree of accountability. Courts in fragile democracies have no power “to buck an elite consensus or negotiated settlement that includes an amnesty. Historically weak, such institutions may well fear a backlash should they assert themselves too early in a process of transition (Roht-Arriaza and Gibson 1998, 884).” Amnesty, by their reckoning, is the least palatable alternative for emerging democracies simply too vulnerable to demand a better deal.

Indonesia has yet no reason to negotiate a blanket amnesty with the leftovers of New Order regime. The lustration formula applied in many of the former Soviet bloc nations disqualifies perpetrators of state crime from holding positions of public trust; it might eventually be considered a possibility for Indonesia. Czechoslovakia, for example, passed a law in 1991 barring any former security service collaborators from public sector employment, despite President Vaclav Havel’s personal opposition (Neier 1998). Lustration functionally disenfranchises political criminals and excises them from public life; but without truth, it accomplishes little in the way of preventing future repeat performances. In Eastern Europe, opponents of lustration have complained that the very nature of communist authoritarian regime forced a huge percentage of the general population to collaborate in some form or fashion, making a wide-net purge almost meaningless. In much the same vein, the inclusive manner in which Suharto’s New Order coopted almost the entire scope of civil society would render lustration a sure recipe for disaster. A strict definition of collaboration might recuse almost the entire educated and professional classes from public employment.

Trials, of course, pose their own problems. As Judith Shklar warned, justice is always political. And any time a legal instrument strives primarily to achieve a political goal, the values of justice and due process are bound to be perverted. For when we discuss “fair” trials for Jakarta’s generals, we tacitly assume that justice will entail some guilty verdicts and some sentences, despite the fact that we claim not to have prejudged the outcome. Hence, Shklar would call the trials I advocate for Indonesia political show trials—but she would give them her blessing if, like Nuremberg, they serve laudable political ends and impact the Indonesian

legal consciousness. The literature and vast case studies from Latin America, post-Soviet Europe, and South Africa echo the argument that justice serves political ends; a teleological or absolutist approach is inappropriate. In each transition, after assessing the relative strength of the past regime and the present lobby for change, one can make a calculus and determine how far one should push for justice—in effect, how high one should bet in the gamble for accountability. Michael Glennon wrote recently, “international justice can be pursued ad hoc, without a fully functioning legal system (1999),” bolstering the argument for a case-by-case decision on how to deal with state crimes rather than a fixed formula.

### CULTURE CLASH?

The question of how to try Indonesia’s political criminals is not simply a matter of transitional justice; the political dilemmas are embedded in a very specific domestic context, and form part of a regional debate over the profile of human rights in Asia. “East Asian particularism” argues that regional culture renders Eurocentric “international” definitions of humanitarian law irrelevant outside the West. Although this argument is mostly made in bad faith by parties or states that wish to avoid accountability, it contains some serious elements.<sup>15</sup> Authoritarian regimes cite their miracle economies to explain that Asian communitarian beliefs value economic and social rights more than the first-generation civil and political rights so cherished by groups like Amnesty International and Human Rights Watch. East Asia scholars point to two claims worth addressing; first, that East Asian cultural traditions can be invoked, rather than Western ones, to support some shared human rights values and second, that East Asian culture tolerates some civil, social, and economic codes that would be considered rights abuses by the West (Bell 1996).

Legalism, Judith Shklar wrote in her analysis of the Nuremberg and Tokyo trials, can only appeal to cultures that have some legalist tradition to call their own. Nuremberg was a success in large part because it hearkened to an ingrained German sense of legalism, reawakening existing but dormant sentiment. Tokyo, in contrast, was “a complete dud” because nothing in Japanese thought responded to the legalist ideology of the American victors. Japan’s legal tradition rested on situational ethics, so when the American prosecutor invoked natural law in his indictment of the Japanese for crimes against humanity and conspiracy to wage an aggressive war, he accomplished none of the cathartic political ends to which the Allies aspired. “The trial could not and did not dramatize anything for the Japanese,” Shklar writes. “The general view was that it was

a bit of a bore, but that the conquerors were behaving as one would expect conquerors to behave (Shklar 1986, 181).” Justice Radhabinod Pal, in his dissenting opinion at Tokyo, excoriated the Western prosecutors for equating justice to the pre-war status quo, which for much of Asia meant chafing under an often brutal colonial yoke (Pal 1953). In Pal’s opinion, the Tokyo judgment smacked of victor’s justice and ex post facto law. America could surely impose its notions of “universal” natural law, aggression, and conspiracy on the “annihilated” Japanese - but such definitions would have no weight, no sovereign legitimacy within the Japanese body politic (Pal 1953, 28).

Likewise, war crimes trials induced by Western pressure in the context of today’s global political economy might appear artificial and colonial. One can make the leap from justice imposed by an occupying U.S. army in 1946 to justice dictated by diplomats dangling IMF and World Bank aid packages before an economically shattered Asian nation’s eyes in the present era. Justice must appear impartial, and equally important, must reflect domestic conceptions of legalism. Otherwise, trials at worst reinforce nationalism and a sense of grievance against a West perceived as arrogant; at best, they blow over with no lasting effect at all. Demagogues, nationalists, and the defendants themselves can garner public sympathy by portraying themselves as patriots martyred by modern Western colonialism. General Wiranto in his initial refusal to appear before the human rights investigation committee told reporters that “the commission has revealed to the public it is excessive and has gone beyond the judicial process” (Indonesian Generals Denounce Probe 1999). Through proxies, he leaked accusations that KPP HAM was funded by foreign agents, and that attacking TNI leadership was unpatriotic and amounted to a refutation of Indonesia’s entire state policy under Suharto.

Not surprisingly, [the army generals] have reacted with defensiveness and indignation to the commission’s summons. In a blatant bid to curry support, they have accused the commission of being contaminated with the “virus” of Western-influenced human rights concepts, an anathema to their “healthy” sense of nationalism. Some of the active Army leaders even hinted that there was an international and national conspiracy to push the Indonesian Military into a corner (*What a Way of Thinking* 1999).

If natural law and universalism provide dubious foundations for human rights regimes, so too do cultural arguments make poor ammunition with which to oppose them. Amartya Sen summons a long history of tolerance and freedom in East Asia (which he points out contains 60 percent of the world’s population and by no means can boast a monolithic, continent-

wide set of values) to counter the cultural argument put forth by the likes of China and Singapore (Rosenthal 1999).<sup>16</sup> He also points out that no significant statistical evidence backs the Singapore Hypothesis articulated by Premier Lee Kuan Yew, that authoritarian rule most effectively chaperones economic success. By the same token, Sen admits that no statistical evidence correlates liberal democracy with growth either. Nonetheless, if there is such a thing as “Asian values,” they just as well support tolerance, freedom, and civil liberties as state’s rights, communal prosperity, and stability.

Indonesia’s own body of civil and Islamic law, along with military’s stated (if not observed) legal and moral code, closely mirror the West’s legal and human rights agenda.<sup>17</sup> “Just and civilized humanitarianism” comprised a basic tenet of the liberation constitution drafted in 1945 by Sukarno and Mohammed Hatta. The final document contained wide-ranging guarantees of human rights and civil liberties, borrowing heavily from the Universal Declaration of Human Rights (Schwarz 1994, 11). A tribunal based on indigenous custom and Islamic law can enforce the same “justice” as an international tribunal and yet carry far more legitimacy in the political space it seeks to affect. Furthermore, a tribunal that successfully prosecutes Indonesian war criminals in a manner consistent with local culture and custom will contribute a new voice to the regional discourse dominated by authoritarians who deploy culture as a shield for repressive practices.

Many of the current reform cabinet ministers have in the past praised Suharto’s stance that “freedom from poverty” is the most fundamental human rights and during early stages of economic development comes at the price of civil liberties. Juwono Sudarsono, an academic now acting as Indonesia’s first civilian defense minister, in 1993 said “no precepts of liberal democracy should stand in the way of the state performing essential tasks of state action, control, indeed of regulation (Schwarz 1994, 251).” In December 1999, Juwono acknowledged the military’s crimes but wanted to grant high-ranking officers immunity from prosecution, “as they were just carrying out state policy (Cooney 1999).” On the other hand, observers like Sidney Jones, who has spent a decade observing the region’s indigenous human rights movement at Human Rights Watch and now as UNTAET’s top human rights official, have seen a parade of Asian groups that advocate fundamental civil and political rights (Jones 1994, 1990). On human rights, Suharto “tried to set an Asia-versus-West tone,” Jones wrote after the 1993 Bangkok conference on human rights in Asia. “But as one after another of the Asian organizations spoke, it was clear

that the real confrontation was Asia versus Asia, and that the Asian governments should take note” (Jones 1993). That confrontation continues to this day.

Will legalism resonate with Indonesians? Only in the event that it does can trials be advocated as the most effective treatment for the New Order’s crimes and the terror in Timor. I believe Indonesian culture and nationalism can comfortably coexist with legalism. Indonesia’s rulers since independence have tended to administer through legal machinations; Suharto engineered a constitutional takeover in 1965 rather than an outright coup. Throughout his repressive regime, elections were staged with a great show of scrupulousness, and arrests, detentions, and crack-downs all bore some stamp of law. And despite widespread repression, civil society continued to generate non-governmental organizations, dissident groups, and human rights bodies that agitated for accountability, rule of law, civilian governance, and an end to corruption. For all these reasons, it seems likely that legalism perceived as indigenous will resonate within the body politic. Attorney General Marzuki has grown bolder since his original suggestion that a truth commission would suffice to deal with the TNI’s crimes; there is, in his view, a deep local imperative for an internationally acceptable trial:

KPP HAM was established to make the generals be tried in Indonesia. If not, they will be dragged before an international tribunal. I don’t defend [human rights abusers]. We defend our national system, because we have to prove whether or not it’s effective. We are trying to brush off the stereotype that justice systems in the third world are lousy, like how Westerners always see us. Perhaps an Indonesian court would issue a tougher verdict than an international tribunal (Interview of Attorney General Marzuki Darusman 1999).

### **AN INDONESIAN TRIBUNAL**

The Indonesian case is vital and illustrative because it presents a prime opportunity to harness an organic human rights and international law movement in an Asian nation. Although the political regime lags a bit behind popular will, there is a brewing and significant critical mass within the elite that wants to move Indonesia into the realm of liberalism. A successful resolution of TNI’s past—accompanied by the expulsion of the military from politics without any attendant instability or violence—allays the fear that human rights regimes can never take root in East Asian or Muslim nations. A credible domestic tribunal in Indonesia, and at second best, an ad hoc international tribunal, will most effectively serve



the goals of justice, stability, reform, and reconciliation. Legitimate domestic initiatives reinforce indigenous norms, strengthen rule of law, consolidate democracy, weaken the armed forces' stranglehold on power, and lastly, allow for some justice and righting of Indonesia's bloody record. In order for a Jakarta-run tribunal to achieve these stated ends, several preconditions must be in place.

The domestic tribunal's charter must grant it authority to indict and prosecute high-ranking officers, and must have sufficient backing from the new TNI leadership to guarantee the military will not retaliate by destabilizing the Indonesia's civil state. Its hearings must be open to the public. International observers can compare the Indonesian indictments with the findings of the UN Commission of Inquiry. While serving several moral and political purposes, including catharsis and the emasculation of the military, the court must not degenerate into a spiteful quest for retribution.

Western governments must continue to deny Indonesia military aid until all omens of a putsch have passed. Economic aid to Indonesia can bolster the Wahid government's legitimacy. Europe should follow America's lead in practicing preventive diplomacy, publicly promising reprisals if TNI upsets the democratic transition. In one of the bluntest US warnings ever, Richard Holbrooke on January 14, 1999 announced punishing international isolation and economic repercussions for Indonesia in the event of a coup. "Any Indonesian army officers, or any military officers who are thinking of military adventurism have forgotten that we are now in the twenty-first century, that the events of the past cannot be repeated. The damage to Indonesia would be unbelievable (Holbrooke 2000)." International policy makers should continue to issue such warnings, and reward the Indonesian state for its frontal assault on the military with economic and political incentives.<sup>18</sup>

If these conditions do not remain in place, the UN must push for the second best option to prosecute Indonesian war criminals - an ad hoc tribunal. This option would be in keeping with the complementarity doctrine embodied in the International Criminal Court charter, which gives primacy to local jurisdiction. Much like the tribunal for Yugoslavia, such a court could expect many of its indictments to be ignored and to face attack from East Asian governments. Still, the tribunal would enter TNI's atrocities into the public record and catalyze the widespread—if still insufficiently powerful—justice movement in Indonesia.

How does this proposed course of action compare with other transitions? Experience in transitional justice illustrates the pitfalls of challeng-

ing head-on a recently deposed military hierarchy. Regime change in Argentina and Brazil—both of whose military leaders, like Indonesia's, were discredited primarily by economic failures—suggests that justice sometimes must wait. Brazil's generals negotiated a virtual amnesty, leaving the successor democratic government little choice but to publish accounts and do no more. Argentina's newborn democracy attempted to try the generals, and backed down after the military rattled its sabers (Benomar 1993, 11). Studies of democratic transitions suggest two preconditions that enable a new democracy to exercise a free policy orientation: the authoritarian regime's legitimacy was rooted in ultimately discredited economic programs and the democratic polity can maintain unity upon taking power (Haggard and Kaufman 1995). We can assume that the ability to set policy independently parallels the ability to democratically provide justice. The ancien regime must be sufficiently discredited in order to be dispatched; otherwise, it will continue to serve as the lynchpin in any future governing coalition. Turkey's experience provides a warning. Also a Muslim country long dominated by a secular, nationalist military, civilian rule in Turkey has been punctuated by regular military coups since the 1970s. In the 1990s electoral democracy cohabited gingerly with a highly politicized military that continues to act with impunity in its internal campaign against Kurds, and continues to set foreign policy on key matters such as Cyprus. The comparison is enlightening; where the political elite has been unable to confront the military, it rules in name only, acting in practice as a shadow cabinet to the military chiefs of staff.

New factors give Indonesian democrats more reasons to hope than other post-authoritarian "third wave" democratizing governments in the 1980s and 1990s (Huntington 1991). First, the relative success of some eastern European nations in shedding communist state structures has strengthened the case of democracy advocates.<sup>19</sup> Second, the United States—in contrast to past tacit or open support of authoritarian militaries—has continued to withhold military assistance to Indonesia until the TNI withdraws from politics and surrenders top generals to domestic courts. Third, Indonesian pro-democracy forces have the support of major factions within the political and economic elite, although it remains to be seen whether their strength outweighs that of the old guard.

In this equation of trials, justice, and accountability, the military factor remains the last unknown. Indonesia has gambled that international pressure will keep the TNI in its barracks, despite coup rumors proliferating in Jakarta at the New Year. The logic is clear: only by firmly

disciplining top generals can Gus Dur win international trust and conclusively alter the Indonesian political cocktail. He has hedged his bets by securing US promises to isolate Indonesia in the event of a military takeover. A house built on the shaky foundations of impunity is no house at all, this reasoning goes, in line with the current human rights orthodoxy. Like any gambler, Gus Dur may lose.

Even the military's new head, Admiral Widodo, chosen by Gus Dur specifically because he was not from the ranks of the dominant army, has openly challenged the president's frontal assault:

TNI will give full moral support to the officers who will be summoned by the human rights investigation commission. I just want to say that TNI appreciates efforts to uphold the law. The summons of the generals should be done in accordance with the principles of presumption of innocence. They only implemented the state's orders (Can the Soldiers Still Call the Shots 2000).

Widodo refused to dismiss Brig. Gen. Sudjarat, the military spokesman who openly questioned the president's constitutional authority over the armed forces. President Wahid upped the ante—and proved his “constitutional authority”—by firing Sudjarat himself in early January. Nonetheless, Wiranto loyalists still dominate the strategic posts in army leadership, and the top-down changes in military headquarters might simply cause the army to bunker down and set its own political agenda (Dodd 2000).

Nonetheless, TNI already has ceded more structural power than experts predicted soon after Suharto's resignation, giving up half its seats in the People's Consultative Assembly and standing by as its political authority erodes.<sup>20</sup> Reformers with real power bases in the army (unlike the navy and air force officers recently promoted by the president), like Major-General Agus Wirahadikusumah, are still arguing for a radical revamp of the regional force command structure, which affords the military immense local power across the Indonesian archipelago. He and his allies might yet rise to the top of the hierarchy and over a period of years beat a strategic retreat. Long-time observers of the military like Takashi Shiraishi warn, however, that the military “has too much too lose, in terms of power, prestige, money, and self-esteem, both at the national and local level, if it agrees to relinquish” the political role it has had since independence. Even if Wahid manages to decapitate the old leadership, the TNI will retain enormous tactical, coercive, economic, and structural power, until the Constitution is rewritten and the military's territorial structures dis-

mantled. Trials will only be the first step in ending the specter of *dwifungsi*, the doctrine of dual function, that has kept the military at the forefront of Indonesian politics.

### THE BUMPY ROAD AHEAD

The debate over war crimes trials, transitional justice, and human rights regimes imaginably will continue so long as military and authoritarian governments exist. As more and more case studies develop, social scientists will be able to address vital questions whose answers could shape the policy response to new cases. Can newly elected democratic regimes calculate how far they can push structures of the old regime before igniting destabilizing backlash? How effective a deterrent are trials? Is immediate justice more effective in building stable democracies, or can accountability wait? Can we consolidate and spread the universal nature of human rights regimes and international law by changing superstructures (ICC, UN) or must regional-based solutions be implemented first? What incentives can lead powerful institutional actors to change behavior and punish high-ranking officials?

For now, advocates of an international legalist order and a universal human rights regime should concentrate their efforts on organic remedies tailored for each country seeking to redress the grievances of dead, dying, or discredited authoritarian regimes. The debate over justice, accountability, and retribution should move away from the disingenuous cultural relativism of claims such as East Asian particularism; the West can abet an elevation of the discourse through preventive diplomacy and by empowering indigenous human rights and legalist groups in transitional states. Indonesia provides a chance to rebuke the argument that individual, political, and civil rights are incompatible with Asian or Muslim culture. It also provides the chance to experiment with a domestic approach to war crimes (first those of the Indonesian Armed Forces in East Timor, and then the atrocities committed in Aceh and Irian Jaya); if successful, a domestic tribunal would provide a compelling counterexample to the post-World War I farce at Leipzig and the continuing attempts at a whitewash for the Khmer Rouge in Cambodia. New means of dealing with state criminals are emerging that not only instill proper norms and a respect for rule of law, but that symbolically punish perpetrators to a degree that slakes the thirst for vengeance and begins the reconciliation process. If Indonesia can successfully confront its culprits, with international support but no need for intervention in the form of an international tribunal, President Wahid will have presided over the opening of a new chapter in the young history of transitional justice and reckoning.

**Notes**

- 1 Numerous press accounts, official statements, and human rights reports recount this train of events, Jakarta's initial denials notwithstanding.
- 2 Punishing perpetrators of a previous regime serves two crucial purposes, according to its supporters: replacing a moral order that has broken down and strengthening fragile democracies, according to Luc Huyse (1995). Huyse suggests that the distinction between justice and reconciliation is much more complex than some proponents of absolute accountability portray. Advocacy groups often keep tribunals on the agenda when political players would prefer to consider more expedient options. Human Rights Watch, for example, criticized the INTERFET, the military operation in East Timor, for not arresting criminals, and demanded a mandate to "prepare criminal prosecutions" (Human Rights Watch and Amnesty International 1999). In the same month Human Rights Watch demanded a strong international tribunal to prosecute the Khmer Rouge in Cambodia.
- 3 Founded in 1993, Komnas exhibited surprising independence under Suharto. Human rights advocates still view the commission with some suspicion, but believe it capable of conducting a serious investigation (Human Rights Watch and Amnesty International 1999, Jones 1994).
- 4 Even the influential and pro-western human rights lawyer Todung Mulya Lubis, an outspoken critic of the Suharto regime's excesses, said that in the event of an international tribunal, "As a nation we will suffer painful humiliation." (*Humiliation Looms as UN Inquiry Begins* 1999).
- 5 China initially blocked deployment of peacekeepers and civil administrators because it opposed strong language supporting an investigation by the United Nations High Commissioner for Human Rights (Crossette 1999). However, both US and UN policy since has favored open criticism of the TNI and support for Indonesian prosecution, and failing that, an international tribunal (Holbrooke 1999).
- 6 Militia have exerted an especially nefarious influence in West Timor, where they have kept hundreds of thousands of refugees from returning to their homes, first through direct violence and now through a misinformation campaign alleging that INTERFET wantonly rapes and kills Timorese. At the most recent count, more than 100,000 refugees remained in camps near Atambua and Kupang, and UNHCR estimates that at least half want to return to East Timor (*Militias Launch War of Words* 2000).
- 7 China and Russia in particular on the Security Council oppose new tribunals. In recent policy statements such as Holbrooke's January 14, 2000 press conference, the US has taken an increasingly tough line, saying that if Indonesia proves incapable of serving justice to its generals, America will summon the political will to create an international tribunal.

- 8 Although Shklar disparages commissions of inquiry as “the most common substitute for action and decisions that might entail inconvenient changes of mind or habit (Shklar 1986, 135),” UN High Commissioner for Human Rights Mary Robinson is likely to use her political muscle to push for some accountability. The Commission for Human Rights resolution 1999/S-4/1 called on the Indonesian government to “bring to justice” all human rights violators. Robinson issued a scathing report on Sept. 17, 1999 detailing rampages against civilians by TNI units and accusing the military of killing dozens of people and “disappearing” tens of thousands more (United Nations 1999b).
- 9 Former Justice Minister Muladi is leading the defense team for top generals and former ministers like Feisal Tanjung, the coordinating minister for security, and his assistant, Dedy Garnadi, who pre-approved the plan to destroy East Timor if the province opted for independence. KPP HAM has questioned all the officials involved in the carnage, from local police and army commanders in East Timor to Jakarta’s top brass, including Gen. Wiranto. So far all questioning has been conducted behind closed doors (Cowan 2000).
- 10 Prabowo Subianto, an exiled hard-liner general and Suharto’s son-in-law, commonly assumed to have orchestrated street violence, riots, and army shootings of pro-democracy demonstrators in May 1998, visited Jakarta during the first week in January, igniting the rumors of an impending military takeover that both Indonesian and US officials were quick to deny.
- 11 “Governments of emerging democracies can learn ... from the Argentines and others how to introduce human rights safeguards to prevent the recurrence of state-sponsored human rights violations,” Jamal Benomar writes (1993). “As President Alfonsín put it, his chief aim was to prevent rather than to punish, and thus ‘to guarantee that never again would an Argentinean be taken from his home at night to be tortured or assassinated by agents of the state.’”
- 12 Of course, there also is little research exploring whether tribunals or war crimes trials effectively achieve national reconciliation either.
- 13 In August of 1999, an Argentinean won \$1 million compensation for the disappearance of his family in 1976 (Tarnopolsky 1999).
- 14 For recent appraisals of the TRC’s work, see Jeffery 1999, Johnson 1999, and Tutu 1999.
- 15 The strongest proponents of the Asian cultural argument in the 1990s were Suharto’s Indonesia, Malaysia, Singapore, China, and Burma.
- 16 Amartya Sen, “Human Rights and Asian Values” in Rosenthal 1999, 170-193.
- 17 Muslim tradition, regularly cited by anti-democratic forces in Indonesian politics, is no more monolithic than “Asian” culture. For a general survey on the constellation of human rights views within Islam, see Bielefeldt 1995.
- 18 President Wahid did not publicly support trying top generals until after his post-election visit to Washington, implying that he received tacit guarantees of US

protection before taking on TNI.

19 Tina Rosenberg (1995) argues that post-communist transitions cannot be compared to other transitions from authoritarian rule, since communist leaders ruled not through state violence but by compelling complicity from all sectors of society.

20 Takashi Shiraishi, "The Indonesian Military in Politics," in Schwarz 1999, 73-86.

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