

9-1-2000

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Curtin, Philip J. (2000) "Genocide In East Timor? Calling for an International Criminal Tribunal for East Timor In Light of Akayesu," *Penn State International Law Review*: Vol. 19: No. 1, Article 8.
Available at: <http://elibrary.law.psu.edu/psilr/vol19/iss1/8>

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Comments

Genocide In East Timor? Calling for an International Criminal Tribunal for East Timor In Light of *Akayesu*

I. Introduction

A. *A Vote for Independence – and Its Aftermath*

Based on a series of agreements between the Governments of Indonesia and Portugal, and the United Nations (“U.N.”) Secretary-General, the population of East Timor participated in a referendum on August 30, 1999, concerning the independence of the territory from Indonesian rule.¹ Under the agreements, Indonesian security authorities were given responsibility for ensuring that the vote would be conducted absent violence or other forms of intimidation intended to influence the vote.² Additionally, the parties agreed that the absolute neutrality of the Indonesian military (TNI) and the Indonesian police was required to ensure the

1. *Report of the High Commissioner for Human Rights on the human rights situation in East Timor*, U.N. ESCOR, Commission on Human Rights, 4th Spec. Sess., Annex, at 1, U.N. Doc. E/CN.4/S-4/CRP.1 (1999) [hereinafter *Report of the High Commissioner*].

2. *Id.*

fairness of the vote.³ The U.N. Mission in East Timor (UNAMET) was formed and charged with organizing and conducting the popular vote.⁴ As a result of the agreement and subsequent preparation, the vote was conducted fairly and without major incident.

The results of the vote were announced on September 3, 1999, and it was determined that over seventy-eight percent of voters opted for an independent East Timor.⁵ The announcement of the voting results was met with an outbreak of violence by a number of militia groups, in which elements of the TNI were also involved.⁶ Among those targeted by the militia groups were people who supported the independence of East Timor, as well as U.N. and other international staff.⁷ Evidence shows that thousands of East Timorese were expelled or fled from the territory, that many were killed, and that property was destroyed.⁸

In response to the violence, on October 15, 1999, the High Commissioner for Human Rights announced the composition of an international commission of inquiry for East Timor.⁹ The purpose of the commission was to “gather and compile systematically information on possible violations of human rights and acts which may constitute breaches of international humanitarian law committed in East Timor since the announcement in January 1999 of the vote.”¹⁰ The commission concluded its investigation of the incidents in East Timor on December 14, 1999, with members of the commission stating that further investigation into “the allegations of atrocities should be continued with a view to bringing those responsible to justice.”¹¹ The Government of Indonesia

3. *Id.*

4. *Id.*

5. *Id.*

6. *Report of the High Commissioner, supra* note 1.

7. *Id.*

8. *Id.*

9. *High Commissioner For Human Rights Names International Inquiry Panel On East Timor*, U.N. Press Release (15 October 1999).

10. *Report of the International Commission of Inquiry on East Timor to the Secretary-General*, United Nations General Assembly, 54th Sess., Letter of Transmittal, Agenda Item 96, at 1, A/54/726, S/2000/59, (2000) [hereinafter *Report of the International Commission*].

11. *Id.* The International Commission of Inquiry seemed to advocate for the creation of a truth and reconciliation commission, similar to that in South Africa, and made no mention of an International Criminal Tribunal (ICT). The stance of the Commission may be related to the difficulty experienced by the ICTR (International Criminal Tribunal for Rwanda) and ICTY (International Criminal Tribunal for Yugoslavia) in prosecuting defendants; however, such difficulty should not end usage of the tribunals - particularly in light of the materials

vigorously protested the creation and the recommendations of the commission, and instead established its own commission of inquiry to investigate the crisis in East Timor.¹² The U.N. acceded to Indonesia's objection.

In the meantime, UNAMET restored some measure of peace to the island, despite continued resistance from militia groups.¹³ The TNI completely withdrew from the country, and the leader of the East Timorese independence movement, Xanana Gusmao, returned, opening the door for the rebuilding process to begin.¹⁴ Many feel that an important step in the rebuilding process would be to hold accountable those who perpetrated the violence in East Timor following the independence vote.¹⁵

B. Does East Timor Have Recourse Under International Law?

In recent years, developing nations lacking judicial resources to prosecute those who have perpetrated violence against the citizenry in a manner similar to that in East Timor have turned to the U.N.. Specifically, the U.N. has created separate International Criminal Tribunals for Rwanda and the Former Yugoslavia to prosecute individuals who allegedly committed genocide during civil wars in those countries.¹⁶ This Comment will explore issues concerning the

contained in note 17 *infra*.

12. See Letter dated 26 January 2000 from the Minister for Foreign Affairs of Indonesia to the Secretary-General, United Nations General Assembly, 54th Sess., Annex, Agenda Item 96, at 1, A/54/727, S/2000/65 (2000).

13. Doug Struck, *E. Timor Villages Go Up in Smoke As Army Retreats*, WASH. POST, Sept. 27, 1999, at A13.

14. Doug Struck, *U.N. Peace Force Tightens Grip on E. Timor Capital*, WASH. POST, Sept. 25, 1999, at A15.

15. See Report of the International Commission, *supra* note 10; see also *East Timor: Justice and accountability are long overdue*, Amnesty International News Release, ASA 21/202/99, October 28, 1999.

16. In addition to Rwanda's cooperation with the United Nations International Criminal Tribunal for Rwanda, the country has been conducting its own genocide trials, and has tried and passed judgement on 1,500 suspects. *Rwanda Suspends Cooperation on Genocide with U.N. Tribunal*, WASH. POST, Nov. 7, 1999, at A36.

On November 6, 1999, Rwanda suspended its cooperation with the Tribunal due to frustration over the progress of the trials. *Id.*

"These ad hoc tribunals are widely seen as trial runs for the permanent International Criminal Court endorsed by 120 nations at a conference in Rome in July [1998]." Bill Berkeley, *Judgment Day*, WASH. POST MAGAZINE, Oct. 11, 1998, at 10, 13.

The United States has opposed the ICC, but supports the tribunals. *Id.*

The ICC will come into existence after sixty States deposit their instruments of ratification of the Rome Statute of the International Criminal Court with the United Nations Secretary-General. It will be

establishment and mandate of an International Criminal Tribunal for East Timor. It will begin with the history of relations between East Timor and Indonesia leading up to the independence vote. The Comment will then describe the allegations of Indonesia's human rights violations in East Timor following the August 30 independence referendum. Next, it will provide a general overview of the process the U.N. established for promulgating an international criminal tribunal. In order to emphasize the bases for the creation of a tribunal, the Comment will explore the recent International Criminal Tribunal for Rwanda, with an analysis of the judgement from the trial of the first individual successfully tried and convicted of genocide by an International Criminal Tribunal, Jean-Paul Akayesu. Two questions are considered while exploring the case: what evidence was necessary to indict Akayesu; and how did the Tribunal interpret the evidence in the context of its mandate from the U.N.? From the answers to those questions, the comment will assess the viability of an International Criminal Tribunal for East Timor.

II. East Timor and Indonesia: Then and Now

A. *A Colonial Past Gives Way to Nationalism*

Timor is an island located to the north of Australia, within the Indonesian archipelago of over 1,000 islands.¹⁷ East Timor was settled by the Portuguese in the 1500s. The western part of the island was colonized by the Dutch as part of what came to be known as the Netherlands East Indies.¹⁸ In 1949, the Dutch ended their colonial rule of West Timor and Indonesia assumed control of that portion of the island.¹⁹ In 1974, following a transition of power

associated with the U.N. and will be funded by it and by State Parties inter alia. It will be composed of 18 judges who are nationals of the State Parties, and will be seated in the Hague. It will have jurisdiction over genocide, crimes against humanity, and war crimes, as well as the crime of aggression once that crime is defined. It will try individuals, irrespective of their official capacity, and not legal persons. It will complement national legal systems, and will accept complaints from the ICC Prosecutor, any State Party, and the U.N. Security Council.

The International Criminal Court (ICC) In A Nutshell, available at <http://www.icj.org/iccc/iccdoc/iccn.htm> (last visited Oct. 30, 1999).

17. Roger S. Clark, *Does the Genocide Convention Go Far Enough? Some Thoughts on the Nature of Criminal Genocide in the Context of Indonesia's Invasion of East Timor*, 8 OHIO N.U. L. REV. 321 (1981).

18. *Id.*

19. *Id.*

in Portugal, the Portuguese granted their colonies, including East Timor, the right of self-determination.²⁰ However, the Portuguese were not properly organized to proceed systematically with East Timor's decolonization, and a power vacuum emerged.²¹ One political party, Apodeti (Timorese Popular Democratic Association)²², supported by the Indonesians and intent on unifying the island of Timor, attempted to seize power in a coup in August 1975.²³ But Apodeti was defeated by another political faction, FRETILIN (Revolutionary Front of Independent East Timor)²⁴, which preferred independence.²⁵ Soon after FRETILIN took power the TNI invaded East Timor.²⁶

In the aftermath of Indonesia's invasion of East Timor, serious human rights violations were documented.²⁷ Observers of the situation estimated that perhaps almost half of East Timor's 1975 population was "wiped out by warfare, disease, and starvation."²⁸ International aid organizations, such as the International Committee of the Red Cross (ICRC), were forced to leave East Timor following the invasion and the Indonesians did not have the will or the resources to fill the void.²⁹ When the ICRC was allowed to return in October 1979, they described the situation in East Timor as among the worst they had ever seen.³⁰ Between 200,000 and 300,000 Timorese had been resettled in Indonesian-controlled camps, and the overcrowded conditions lead to the spread of disease.³¹ Hundreds of civilians had been executed in the East Timor capital of Dili during the early days of Indonesian occupation.³² Many of the most educated, and those with leadership ability, were reported missing and presumed killed.³³ Reports of the

20. *Id.*

21. *Id.*

22. *Formation of East-Timorese Political Associations*, at <http://www.uc.pt/timor/parties.html> (last visited Nov. 21, 1999).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. Clark, *supra* note 17, at 322.

28. *Id.*, citing Jack Anderson, Editorial, WASH. POST, Nov. 8, 1979, at 11 (D.C. Edition).

29. Clark, *supra* note 17, at 322.

30. *Id.*, citing ICRC BULL. No. 49 (Feb. 6, 1980).

31. Clark, *supra* note 17, at 323.

32. *Id.*, citing Kamm, *War-Ravaged Timor Struggles Back from Abyss*, N.Y. TIMES, Jan. 28, 1980, at A1.

33. Clark, *supra* note 17, at 323.

use of torture techniques in the prisons were widespread but Indonesian authorities did not permit access to the prisons.³⁴

Within two weeks of Indonesia's invasion of East Timor, a provisional Timorese government was established, consisting of members of the pro-Indonesian Apodeti party.³⁵ On May 31, 1976, an "Act of Integration" was held, with the provisional government convening a Regional People's Assembly.³⁶ The Assembly consisted of twenty-eight delegates, which, in a short ceremony conducted in Portuguese without translation, signed a petition asking then-President Soeharto of Indonesia to grant integration with Indonesia.³⁷ Journalists were flown in from Jakarta for a three-hour visit to witness the act, but were not allowed to leave the assembly building or speak to the delegates.³⁸ The integration of East Timor as the twenty-seventh province of Indonesia was finalized on July 17, 1976, when President Soeharto signed the Bill of Integration, which had been unanimously adopted by the Indonesian parliament two days earlier.³⁹ It was this act that Indonesia referred to when justifying the legality of its presence in East Timor.⁴⁰

In order to solidify its influence and presence in the territory, Indonesia launched a series of development projects in East Timor, including building schools, public health clinics, water supply systems and malaria eradication programs.⁴¹ In addition, Indonesia imported large numbers of Indonesian "transmigrants" from overpopulated islands in the archipelago, a move some alleged was meant to dilute and eventually obliterate the indigenous Timorese population.⁴²

B. Non-Violent Resistance to Unwanted Integration

Following East Timor's integration into Indonesia, the FRETILIN party led East Timorese resistance to Indonesian rule.⁴³

34. *Id.*

35. East Timor International Support Center, *Timor Today: History – Indonesianization*, at <http://www.easttimor.com/history/indonesianization.html> (last visited Nov. 29, 1999) [hereinafter *Timor Today: History – Indonesianization*].

36. *Id.*

37. *Id.*

38. *Id.*

39. *Timor Today: History – Indonesianization*, *supra* note 35.

40. *Id.*

41. Sam Oglesby, *Indonesia in a Corner*, WASH. POST, Sept. 12, 1999, at B7.

42. *Id.*

43. East Timor International Support Center (ETISC), *Timor Today: History – Resistance*, at <http://www.easttimor.com/history/resistance.html> (last visited Nov.

The first leader of the party was Nicolau Lobato, who died at the height of the initial push by Indonesia to rid East Timor of any resistance to Indonesian rule.⁴⁴ After Lobato's death, the resistance movement nearly died out as quickly as it had begun.⁴⁵ But Xanana Gusmao brought together the remaining soldiers and followers of FRETILIN, and formed a new national liberation army and a national political structure called "Conselho Nacional da Resistencia Maubere" or the "National Council of Maubere Resistance" (CNRM).⁴⁶ The Armed Forces of National Liberation of East Timor (FALINTIL) was created to engage in armed opposition to Indonesia's presence in the territory.⁴⁷ Gusmao also initiated the formation of the East Timorese clandestine movement.⁴⁸ The clandestine movement was a structured organization with an executive branch, and working cells throughout East Timor.⁴⁹ Its activities covered two broad areas: one, the supply of intelligence, food and medicine to the armed resistance; and the other, the organization of activities such as demonstrations which would bring the plight of the East Timorese to the outside world.⁵⁰

From December 1975 until January 1, 1989, East Timor was completely closed to journalists, visitors and outside influences.⁵¹ In order to attract international attention and support, the clandestine movement planned media "incidents".⁵² The first of these media "incidents" was a demonstration during Pope John Paul II's visit to the East Timor capital of Dili in October 1989.⁵³ The following year, a second demonstration, planned to coincide with the visit to Dili of the United States ambassador, was harshly curtailed in front of foreign diplomats and tourists.⁵⁴

Another group that played a key role in defending people's rights and publicizing the plight of East Timor internationally was the Catholic Church, specifically those priests, monks and nuns who

29, 1999) [hereinafter *Timor Today: History – Resistance*].

44. *Id.*

45. *Id.*

46. *Id.*

47. *Report of the International Commission of Inquiry on East Timor to the Secretary-General*, U.N. GAOR, 54th Sess., Letter of Transmittal, Agenda Item 96, at 1, U.N. Doc., at 9, A/54/726, S/2000/59 (2000).

48. *Id.*

49. *Id.*

50. *Timor Today: History – Resistance*, *supra* note 43.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

were themselves Timorese.⁵⁵ Led by consecutive Timorese Bishops of Dili, Martinho da Costa Lopes (1977-1983) and Carlos Ximenes Belo (1983 till today), the clergy assisted the East Timorese through documentation of human rights abuses, calls for a referendum on independence for East Timor, and protection given to East Timorese critics of Indonesian occupation.⁵⁶ Bishop Belo won the Nobel Peace Prize in 1997.⁵⁷

C. *The Quest for Independence Succeeds – With a Price*

The efforts of the CNRM and the Catholic Church eventually helped pressure Indonesia to agree to allow a referendum on independence for East Timor.⁵⁸ However, following the announcement on September 4 of the results of the August 30 referendum, in which eighty percent of the population voted for independence, there was an “eruption of killing and looting.”⁵⁹ Due to the ejection of many media and relief sources, specific details on the numbers killed during the rampage is not fully known.⁶⁰ Nevertheless, eyewitness accounts of the brutality emerged.⁶¹

One eyewitness, corroborated by those who survived the attack, told of acts that took place at a Roman Catholic compound on September 6, 1999.⁶² The churches of East Timor had become refuges for those fleeing the violence, and on this day hundreds of pro-independence families had sought such refuge.⁶³ Several hundred militiamen gathered outside the compound, and then proceeded to scale its fence and surround the church that stood within the compound.⁶⁴ Two priests went outside to assuage the militiamen, and each of them was murdered, the first by a machete and the second by gunfire.⁶⁵ The militiamen then searched out the senior priest of the parish and killed him.⁶⁶ The eyewitness stated

55. *Timor Today: History – Resistance*, *supra* note 43.

56. *Id.*

57. *Id.*

58. *Report of the High Commissioner for Human Rights on the Human Rights Situation in East Timor*, *supra* note 1.

59. Keith Richburg, *At Evil's Edge: Horror I Thought I'd Left Behind*, WASH. POST, Sept. 26, 1999, at B1, B5.

60. *Id.*

61. Rajiv Chandrasekaran, *A Killing Ground Without Corpses*, WASH. POST, Oct. 22, 1999, at A1, A30 [hereinafter Chandrasekaran].

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Chandrasekaran, *supra* note 61.

that the order to kill the senior priest was given by a man named Izidio Manek, a local militia leader, and he noted that several uniformed TNI soldiers were at the church.⁶⁷ The eyewitness said he told his family to flee, and when they left the compound, they were detained by militiamen, put on trucks and sent to a camp in Indonesia-controlled West Timor.⁶⁸ The inside of the church then erupted, and "it sounded like a war."⁶⁹ By the time it ceased, more than 20 bodies lie piled in front of the church.⁷⁰ By late October, investigators had recovered two sets of human remains on the site.⁷¹ Investigators believe that a majority of the bodies were likely burned or taken by truck to one of the many crocodile-filled lakes on the outskirts of the town of Suai, and dumped.⁷²

Other incidents of destruction and death wrought by the militias, aided by Indonesian soldiers, have been reported.⁷³ At the Salesian Sisters' convent in Dili on the night of September 4, nuns, who at that point were harboring 400 refugees, "watched as the militia moved from house to house."⁷⁴ The movements of the militia were systematic; at each house, the windows and doors were broken, couches, tables, chairs, clothing were stolen, and, finally, the house was set on fire.⁷⁵ The militias approached the convent seeking out those East Timorese who voted for independence, including Elvis Gusmao, cousin of independence leader Xanana Gusmao, but the nuns were able to keep the militiamen at bay.⁷⁶ As the shooting and fires continued, 400 more refugees streamed into the convent.⁷⁷ After four days hiding in the convent, many of the refugees fled to the nearby mountains.⁷⁸ At night, some of the men tried to sneak into town in an effort to find food, but faced gunfire from TNI soldiers who had taken up positions in houses surrounding the convent.⁷⁹ Two men were killed as a result.⁸⁰ A nun from the convent showed reporters the body of one of the

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. Chandrasekaran, *supra* note 61.

72. *Id.*

73. Doug Struck, *Surviving on Fibs and Faith*, WASH. POST, September 23, 1999, at A1.

74. *Id.* at A24.

75. *Id.*

76. *Id.*

77. *Id.*

78. Struck, *supra* note 73, at A24.

79. *Id.*

80. *Id.*

victims, and said that the TNI soldiers had placed the body of the other victim in a plastic bag and removed it as they departed the area.⁸¹

While accounts of these incidents are supported by physical evidence, investigators are finding it difficult to gather evidence corroborating other accounts.⁸² It has been reported, for example, that "the bodies of 47 people allegedly hacked to death with machetes were carted to the coast, placed in a boat, weighted down with sandbags and tossed into the sea."⁸³ By late October, three bodies had washed ashore.⁸⁴ Furthermore, U.N. officials believed that militiamen killed at least twenty-five people on September 6, in an attack on the house of Bishop Belo in Dili, where thousands of displaced people had gathered.⁸⁵ However, four nuns living in the bishop's yard said there was no massacre and that the militia had killed "only" one man there since the September 4 referendum.⁸⁶ Regarding another incident, local newspapers, quoting hospital sources, reported that fourteen people were shot and stabbed to death on September 5, in an attack on a building belonging to the Catholic diocese of Dili.⁸⁷ Again, an inspection by journalists and outside observers found no evidence of death.⁸⁸

The most distressing humanitarian situation continues to be the plight of the East Timorese who are still in camps in Indonesian-controlled West Timor.⁸⁹ The refugees are being intimidated from returning by armed militiamen who roam through the encampments at night.⁹⁰ For a time, aid workers were not

81. *Id.*

82. The Indonesians were quick to put the death toll at fewer than one hundred. Richburg, *supra* note 59, at B5. Specifically, General Wiranto, commander of the Indonesian armed forces, said, "it is not tens of thousands, or hundreds of thousands, as reported by the foreign media." Keith Richburg, *Indonesia Plays Down East Timor Killings*, WASH. POST, Sept. 21, 1999, at A14. Likewise, another top commander, Lt. Gen. Susilo Bambang Yudhoyono, rejected allegations that war crimes had been committed in East Timor and said the violence there was nowhere near as bad as other recent tragedies in Africa and the Balkans. *Id.* As of January 10, 2000, the death toll was 1,650. See Egan, *infra* note 92.

83. Chandrasekaran, *supra* note 61.

84. *Id.*

85. Keith Richburg, *Indonesia Plays Down East Timor Killings*, WASH. POST, Sept. 21, 1999, at A14.

86. Doug Struck, *Evidence of Mass Killings Scarce in E. Timor*, WASH. POST, Sept. 24, 1999, at A23, A24.

87. Richburg, *supra* note 85.

88. Struck, *supra* note 86.

89. Rajiv Chandrasekaran, *Most E. Timorese Have Not Yet Come Home*, U.N. Says, WASH. POST, Oct. 27, 1999, at A27.

90. *Id.*

allowed inside the refugee camps in the Atambua region of western Timor, but reports from people who escaped from those camps suggest food and water were minimal, people were sleeping in crowded, makeshift tents and were suffering frequent harassment from militia members.⁹¹ As of July 26, 2000, the United Nations Transitional Administration in East Timor (UNTAET) estimated that between 85,000 and 120,000 East Timorese were still within Indonesian borders, primarily in refugee camps in West Timor.⁹² What is known is that many of the people missing and presumed to be either in a refugee camp or dead are intellectuals and the most influential East Timorese.⁹³ As of January 10, 2000, the death toll based on bodies recovered and reports of grave sites was 1,650.⁹⁴

In addition to the human toll, property damage was widespread.⁹⁵ In Dili, fire destroyed the central business district, including all of the banks, markets and restaurants.⁹⁶ Similarly, throughout East Timor, large portions of other cities were destroyed: Maliana was eighty percent destroyed, Balibo was ninety-five percent destroyed, Liquica sixty percent destroyed, Glenois eighty percent destroyed and Suai ninety to ninety-five percent destroyed.⁹⁷ The population of Dili was reduced to about 70,000, from 175,000 before the outbreak of violence, and many of those people left were living in tents on the beach and in parks.⁹⁸

III. International Criminal Tribunals

In thinking about whether the U.N. should initiate proceedings against those Indonesian officials and militia members culpable for their actions in East Timor, it is important to examine the work of the International Criminal Tribunal for Rwanda (ICTR). The ICTR, as well as the International Criminal Tribunal for the former Yugoslavia (ICTY), “represent the first international attempt since the Nuremberg and Tokyo trials after World War II to prosecute

91. *Id.*

92. *Report of the Secretary-General on the United Nations Transitional Administration in East Timor*, S.C. Res. 1272, at 3, U.N. SCOR, U.N. Doc. S/2000/738 (2000).

93. Carmel Egan, *Mass Vanishing Remains a Mystery*, THE AUSTRALIAN, Jan. 10, 2000, at <http://www.easttimor.com/archives/1251.htm> (last visited Jan. 11, 2000).

94. *Id.*

95. Keith Richburg, *Rebuilding East Timor—From Scratch*, WASH. POST, Oct. 10, 1999, at A29.

96. *Id.*

97. *Id.*

98. *Id.* at A30.

individuals for war crimes, crimes against humanity and genocide.”⁹⁹ As such, they can provide the appropriate framework from which a case can be made to create an international criminal tribunal for East Timor. Before discussing the previous tribunals, however, it is appropriate to briefly examine the process of creating an international criminal tribunal.

A. *Formation of an International Criminal Tribunal*

The first step toward creation of an international criminal tribunal is empowering an international commission of inquiry to investigate the events in question.¹⁰⁰ The process of creating the commission in the case of East Timor was initiated by Portugal, which sent a letter to the High Commissioner for Human Rights, requesting her to convene a special session of the Commission on Human Rights.¹⁰¹ A majority of State members of the Commission must support the convening of a special session.¹⁰² The International Commission of Inquiry is then formed by a resolution of the special session of the Commission on Human Rights.¹⁰³ After receiving and reviewing the commission’s report, the Secretary-General may decide, based on the evidence provided therein, to present the report to the Security Council of the U.N..¹⁰⁴

The Security Council will then consider several factors prior to establishing a tribunal in addition to the report presented by the Secretary-General and the international commission of inquiry.¹⁰⁵ These factors include:

- a) whether the situation continues to constitute a threat to international peace and security;
- b) whether the particular circumstances of the situation mandate prosecution because it would contribute to the process of national reconciliation and to the restoration and maintenance of peace;

99. Bill Berkeley, *Judgment Day*, Wash. Post Magazine, Oct. 11, 1998, at W10, 12.

100. S.C. Res. 955, U.N. SCOR, 3453rd mtg., at 1, U.N. Doc. S/RES/955 (1994), available at <http://www.ictt.org>.

101. *Annotations to the Provisional Agenda*, U.N. ESCOR, Comm. on Hum. Rts., 4th Special Sess., Annex, at 1, E/CN.4/S-4/1/Add. 1 (1999).

102. *Id.*

103. *Report of the International Commission*, *supra* note 10.

104. *Id.*

105. S.C. Res. 955, *supra* note 100.

- c) whether prosecution would contribute to ensuring that such violations are halted and effectively redressed; and
- d) whether the need for international cooperation to strengthen the courts and judicial system of the particular country, and the necessity for those courts to deal with large numbers of suspects.¹⁰⁶

If the Security Council concludes, after assessing all the information in light of these factors, that the situation in East Timor constitutes a threat to international peace and security within the meaning of Chapter VII of the U.N. Charter¹⁰⁷, it may, via resolution, create an International Criminal Tribunal.¹⁰⁸

B. Source of Tribunal Power

The Statute of the Tribunal, which is annexed to the Security Council Resolution creating the tribunal, and the Rules of Procedure and Evidence, which are adopted by the Judges of the tribunal, govern the actions of the tribunal.¹⁰⁹ The tribunal for East Timor would be mandated to prosecute “persons responsible for genocide and other serious violations of international humanitarian law”¹¹⁰ committed in East Timor from January 1, 1999 through December 31, 1999.¹¹¹ The tribunal is empowered by the U.N. Security Council to pass judgement on persons who have allegedly

106. *Id.*

107. “Action with respect to threats to the peace, breaches of the peace, and acts of aggression,” U.N. CHARTER, chap. 7.

“In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39 [economic sanctions or military action], call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. U.N. CHARTER, art. 40. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. *Id.* The Security Council shall duly take account of failure to comply with such provisional measures.” *Id.*

108. Statute of the International Tribunal for Rwanda, Annex 5, ¶4, at 4, available at <http://www.ictt.org>.

109. International Criminal Tribunal for Rwanda, *The Prosecutor vs. Jean-Paul Akayesu*, Case No. ICTR-96-4-T (1998), at 4.

110. *Fact Sheet No. 1: The Tribunal at a Glance*, at <http://www.ictt.org/ENGLISH/factsheets/factshee.htm>, (visited Nov. 7, 1999).

111. These dates represent the time period within which the U.N. Commission on Human Rights requested the international commission of inquiry to investigate the alleged atrocities in East Timor. *Report of the International Commission, supra* note 10.

committed, *inter alia*, genocide, as it is defined in the Statute.¹¹² The maximum penalty is life in prison.¹¹³

The Statute provides that the tribunal has concurrent jurisdiction with national courts; however, the tribunal has primacy.¹¹⁴ The Statute stipulates that the prosecutor, who acts as a separate organ of the tribunal, is responsible for the investigation and prosecution of the perpetrators of violations of the Statute.¹¹⁵ Upon determination that a *prima facie* case exists to proceed against a suspect, the prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged.¹¹⁶ Thereafter, he or she shall transmit the indictment to a trial judge for review and confirmation, and a trial date is set.¹¹⁷

C. *Events Necessitating the International Criminal Tribunal for Rwanda*

On April 6, 1994, a plane carrying President Juvénal Habyarimana of Rwanda and President Cyprien Ntaryamira of Burundi crashed at the Kigali airport in Rwanda, killing all on board.¹¹⁸ The deaths of the two Presidents exacerbated long-standing tensions between Rwanda's Hutu and Tutsi populations.¹¹⁹ The tensions were rooted in Rwanda's colonial past, and were based on bigotry and distrust.¹²⁰ Reports in the Hutu-dominated media of a Tutsi conspiracy behind the downed plane further inflamed the tensions. These tensions led to widespread killings that had both political and ethnic dimensions, which began in the capital, Kigali, and spread to other parts of Rwanda.¹²¹ During the "three-month genocide," when members of the Hutu majority killed members of the Tutsi minority, it was reported that Tutsis were killed at a rate "three times as quickly as Jewish dead accumulated in Nazi Europe."¹²² "At least 500,000 Tutsis were killed between April and June 1994."¹²³ The International Criminal

112. *Akayesu*, *supra* note 109, at 6.

113. Berkeley, *supra* note 99, at 28.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Akayesu*, *supra* note 109, at 2.

119. *Id.* at 44.

120. *Id.*; see also Berkeley, *supra* note 99, at 14.

121. *Akayesu*, *supra* note 109, at 7.

122. Berkeley, *supra* note 99, at 10.

123. *Id.*

Tribunal for Rwanda (ICTR) was established in November 1994, in response to the killings.¹²⁴ The ICTR, which remains active, has issued twenty-eight indictments against forty-eight individuals.¹²⁵ The first defendant whom the ICTR fully and successfully tried and convicted was Jean-Paul Akayesu, who was found guilty of genocide and crimes against humanity on September 2, 1998.¹²⁶

D. The Indictment of Jean-Paul Akayesu

Jean-Paul Akayesu served as bourgmestre, a role similar to that of a mayor, of the Taba commune from April 1993 until June 1994.¹²⁷ As bourgmestre, Akayesu was charged with the performance of executive functions and the maintenance of public order within his commune, subject to the authority of the prefect (who is similar to a governor).¹²⁸ He had exclusive control over the communal police, was responsible for the execution of laws, regulations, and the administration of justice – and was subject only to the prefect’s authority.¹²⁹ Essentially, Akayesu was looked up to as the political leader of the commune; the political culture of Rwanda is such that his commands were final in the eyes of the people.¹³⁰

1. The Case Against Akayesu—The Prosecutor stated that at least 2000 Tutsis were killed in Taba between April 7 and the end of June 1994, while he was still bourgmestre.¹³¹ The Prosecutor claimed that the killings in Taba were openly committed and so widespread that, as bourgmestre, Akayesu must have known about them.¹³² Although he had the authority and responsibility to do so, Akayesu never attempted to prevent the killing of Tutsis in the commune in any way; nor did he call for assistance from regional or national authorities to quell the violence.¹³³

General evidence further showed that between April 7 and the end of June 1994, hundreds of civilians (hereinafter “displaced civilians”) sought refuge at the bureau communal.¹³⁴ The majority

124. *Akayesu*, *supra* note 109, at 2.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Akayesu*, *supra* note 109, at 2.

130. Berkeley, *supra* note 99, at 14.

131. *Akayesu*, *supra* note 109, at 10-11.

132. *Id.*

133. *Id.*

134. *Id.*

of these displaced civilians were Tutsi.¹³⁵ Several witnesses testified that, while seeking refuge at the bureau communal, female displaced civilians were regularly taken by armed local militia and/or communal police and subjected to sexual violence, and/or beaten on or near the bureau communal premises.¹³⁶ Displaced civilians were also murdered frequently on or near the bureau communal premises.¹³⁷ Many women were forced to endure multiple acts of sexual violence, which were at times committed by more than one assailant.¹³⁸ The witnesses further testified that these acts of sexual violence were generally accompanied by explicit threats of death or bodily harm.¹³⁹ The Prosecutor claimed that the displaced female civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence, beatings and murders.¹⁴⁰

The indictment alleged that Akayesu knew that the acts of sexual violence, beatings and murders were being committed and was, at times, present during their commission.¹⁴¹ In addition, the Prosecutor asserted that Akayesu facilitated the commission of the sexual violence, beatings and murders by allowing their commission to occur on or near the bureau communal premises.¹⁴² The Prosecutor claimed that by virtue of Akayesu's presence during the commission of the sexual violence, beatings and murders and by failing to prevent their commission, Akayesu encouraged these activities.¹⁴³

Further evidence was presented that Akayesu conducted house-to-house searches in Taba, during which residents, including Victim V, were interrogated and beaten with rifles and sticks in Akayesu's presence.¹⁴⁴ Victim U testified that Akayesu personally threatened to kill her husband and child if she did not provide him with information about the activities of the Tutsis he was seeking.¹⁴⁵

The indictment also stated that men who, on Akayesu's instructions, were searching for Ephrem Karangwa (then the police chief of Taba and a Tutsi)

135. *Id.*

136. *Akayesu*, *supra* note 109, at 10-11.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Akayesu*, *supra* note 109, at 10-11.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Akayesu*, *supra* note 109, at 10-11.

destroyed Ephrem Karangwa's house and burned down his mother's house. They then went to search the house of Ephrem Karangwa's brother-in-law in Musambira commune and found Karangwa's three brothers there. The three brothers . . . tried to escape, but . . . Akayesu blew his whistle to alert local residents to the attempted escape and ordered the people to capture the brothers. After the brothers were captured, . . . Akayesu allegedly ordered and participated in the killings of the three brothers.¹⁴⁶

Akayesu was also charged with taking eight "detained men from the Taba bureau communal and ordering militia members to kill them. The militia killed them with clubs, machetes, small axes and sticks. The victims had fled from Runda commune and had been held by Akayesu."¹⁴⁷

Furthermore, Akayesu allegedly "ordered the local people and militia to kill intellectual and influential people. Five teachers from the secondary school of Taba were killed on his instructions. The local people and militia killed them with machetes and agricultural tools in front of the communal."¹⁴⁸

Finally, Victim W testified that Akayesu picked her up in Taba and interrogated her about the whereabouts of the wife of the university teacher.¹⁴⁹ "When she stated she did not know, he forced her to lie on the road in front of his car and threatened to drive over her."¹⁵⁰ Likewise, Victim Z testified that Akayesu picked him up in Taba and interrogated him.¹⁵¹ "During the interrogation, men under Akayesu's authority forced Victims Z and Y to beat each other and used a piece of Victim Y's dress to strangle Victim Z."¹⁵²

2. *Genocide Defined Under the ICTR Statute*—Article 2 of the ICTR Statute defines genocide in the same terms used in Articles 2 and 3 of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter, "the Genocide Convention"), adopted by the U.N. General Assembly on December 9, 1948, which states

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

146. *Id.*

147. *Id.*

148. *Akayesu*, *supra* note 109, at 10-11.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group; and
- (e) Forcibly transferring children of the group to another group.¹⁵³

It is important to note, while applying the elements of the crime of genocide, that culpability does not require the actual extermination of a group in its entirety.¹⁵⁴ Rather, it is understood that genocide occurs once any one of the acts listed in the Genocide Convention is committed with the specific intent to destroy “in whole or in part” a national, ethnical, racial or religious group.¹⁵⁵ Therefore, genocide is distinct from other crimes because it requires special intent.¹⁵⁶ Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seek to produce the act charged.¹⁵⁷ The special intent in the crime of genocide lies in that portion of the convention that requires “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”¹⁵⁸ Thus, to find that the crime of genocide has been committed, it is necessary that one of the acts listed in the Genocide Convention be committed, and that the particular act be committed against a specifically targeted group, it being a national, ethnical, racial or religious group.¹⁵⁹

Of course, in assessing the perpetrator’s specific intent, it is well established that intent is a mental factor which is difficult, even impossible, to determine.¹⁶⁰ For this reason, the tribunal allowed

153. *Id.*

154. *Id.*

155. *Id.*

156. *Akayesu*, *supra* note 109, at 177.

157. *Id.*

158. *Id.*

159. *Id.* at 178.

160. *Id.* at 183.

intent to be inferred from a certain number of presumptions of fact, in the absence of a confession from the accused.¹⁶¹ Importantly, the tribunal deduced the genocidal intent inherent in a particular act charged from the general context of the perpetration of *other* culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others (emphasis added).¹⁶² Likewise, the tribunal said that there are other factors to be assessed when inferring the genocidal intent of a particular act.¹⁶³ These factors include the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups.¹⁶⁴

Furthermore, for any of the acts listed in the Genocide Convention to be a constitutive element of genocide, the act must have been committed against one or several individuals, because such individual or individuals were members of a specific group, and specifically because they belonged to this group.¹⁶⁵ The victim of the listed act is therefore a member of a group, chosen as such, which means that the victim of the crime of genocide is the group itself and not only the individual.¹⁶⁶ The perpetration of the act charged therefore extends beyond its actual commission, for example, the murder of a particular individual, to the realization of an ulterior motive, which is to destroy, in whole or part, the group of which the individual is just one element.¹⁶⁷

As to the first of the respective elements of the crime of genocide, the tribunal interpreted subsection (a) in accordance with the definition of murder given in the Penal Code of Rwanda, according to which “*meurtre*” (killing) is homicide committed with the intent to cause death.¹⁶⁸ While interpreting subsection (b), the tribunal took serious bodily or mental harm, without limiting itself

161. *Akayesu*, *supra* note 109, at 183. The ICTR previously accepted the guilty plea of Jean Kambanda on May 1, 1998 as the result of the indictment against him charging genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, crimes against humanity (murder) and crimes against humanity (extermination). ICTR, *Prosecutor v. Kambanda*, Case No. ICTR 97-23-A (Sept. 4, 1998), at <http://www.ictor.org> (last visited Nov. 20, 2000).

162. *Akayesu*, *supra* note 109, at 183.

163. *Id.*

164. *Id.*

165. *Id.* at 182.

166. *Id.*

167. *Akayesu*, *supra* note 109, at 182.

168. *Id.* at 178.

thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, or persecution.¹⁶⁹ As to subsection (c), the tribunal stated that the means of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or part, include, *inter alia*, subjecting a group of people to a subsistence diet, systematic expulsion from homes, and the reduction of essential medical services below minimum requirement.¹⁷⁰ For purposes of interpreting subsection (d), the tribunal believed that the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes, and prohibition of marriages.¹⁷¹ With respect to subsection (e), the tribunal held that, as in the case of measures intended to prevent births, the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.¹⁷² Finally, the tribunal stated that, in defining a national, ethnical, racial, or religious group, it wished to respect the intention of the drafters of the Genocide Convention, which was to ensure the protection of any stable and permanent group.¹⁷³

3. *How Did the Tribunal Interpret the Evidence in the Context of its Mandate from the United Nations?*—The tribunal was able to infer the genocidal intention of Akayesu from all his acts or utterances, and from the general context in which other culpable acts were perpetrated systematically against the same group, regardless of whether such other acts were committed by Akayesu or even by other perpetrators.¹⁷⁴ Alternatively, it found that Akayesu incurred individual criminal responsibility for the crime of direct and public incitement to commit genocide, which lies in the intent to directly lead or provoke another to commit genocide.¹⁷⁵ Thus, the tribunal was able to imply that he who incites to commit genocide also has the specific intent to commit genocide; that is, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.¹⁷⁶ The tribunal had already established that

169. *Id.* at 179.

170. *Id.*

171. *Id.* at 180.

172. *Akayesu*, *supra* note 109, at 180.

173. *Id.* at 181.

174. *Id.* at 245.

175. *Id.*

176. *Id.*

genocide was committed against the Tutsi group in Rwanda in 1994, throughout the period covering the events alleged in the Indictment.¹⁷⁷ The tribunal was able to infer beyond a reasonable doubt the genocidal intent of the accused from the following: the high number of atrocities committed against the Tutsi; the widespread nature of the atrocities, not only in the Taba commune but also throughout Rwanda; and the fact that the victims were systematically and deliberately selected because they belonged to the Tutsi group (with persons belonging to other groups being excluded).¹⁷⁸

Finally, with regard to rape and sexual violence, the tribunal held, for the first time in any international criminal proceeding, that they constitute genocide in the same way as any other act, as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such.¹⁷⁹ The tribunal determined that rape and sexual violence constitute infliction of serious bodily and mental harm on the victims, and are probably one of the worst ways of inflict harm on the victim, as he or she suffers both bodily and mental harm.¹⁸⁰ Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.¹⁸¹ The rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them.¹⁸²

Akayesu was convicted and sentenced to life in prison, the maximum penalty under the ICTR Statute.¹⁸³

IV. Should the United Nations Create an International Criminal Tribunal for East Timor?

Before discussing the need for a U.N.-sponsored tribunal for East Timor, it should be noted that the Indonesian government has insisted that there is no need for the U.N. to form an international criminal tribunal for East Timor.¹⁸⁴ Rather, the Indonesian

177. *Akayesu*, *supra* note 109, at 245.

178. *Id.*

179. *Id.*; see also Berkeley, *supra* note 99, at 13.

180. *Akayesu*, *supra* note 109, at 246.

181. *Id.*

182. *Id.*

183. Berkeley, *supra* note 99, at 28.

184. Edward Cowan, *Open doors to East Timor destruction inquiry*, JAKARTA POST, Jan. 12, 2000, available at http://www.easttimor.com/news_today/1271.htm (last visited Jan. 12, 2000).

government has established its own body, the Commission on Human Rights Abuses in East Timor (KPP HAM), which is conducting its own investigation of the matter.¹⁸⁵ The Indonesian government's objections are couched in terms of national sovereignty. Specifically, Indonesia notes that the events in question took place while East Timor was an integral part of Indonesia; therefore, Indonesian law alone should be applied.¹⁸⁶ Furthermore, Indonesia says that their judicial mechanism is capable of dispensing justice, in contrast to the International Criminal Tribunals for Yugoslavia and Rwanda, and national remedies should be exhausted before resorting to an international forum.¹⁸⁷

Almost all commentators familiar with the East Timor situation are skeptical of the willingness of KPP HAM to be thorough and unbiased in its investigation, and certainly do not feel that the perpetrators will be brought to justice in the absence of a U.N.-established tribunal.¹⁸⁸ In fact, the Government of Indonesia just recently agreed "in principle" to a number of requests made by UNTAET regarding deeper investigations into the events of last year, including interviews of 39 witnesses.¹⁸⁹ This development can be viewed either as a sign of Indonesia's willingness to thoroughly pursue prosecution of this matter, or a sign of continuing delay and intransigence by the Indonesian government.

Either way, the door should remain open for the creation of an International Criminal Tribunal for East Timor. To illustrate why, this analysis begins with a critical reexamination of the relationship between Indonesia and East Timor, and why that history spawned the violence that followed the announcement of the results of the vote for independence. The historical relationship may shed light on the specific intent of the Indonesian officials to allegedly encourage and support the violence, and may thus show their

185. *Id.*

186. *Letter dated 26 January 2000 from the Minister for Foreign Affairs of Indonesia to the Secretary-General*, U.N. GAOR, 54th Sess., A/54/727, S/2000/65, Jan. 31, 2000.

187. *Id.*

188. Cowan, *supra* note 194; see also Richard McGregor, *Lawyer track proof of Timor atrocities*, THE AUSTRALIAN, Jan. 10, 2000, <http://www.easttimor.com/archives/1252.htm> (last visited Jan. 11, 2000). A team of Australian lawyers, lead by a justice of a territory supreme court, went to East Timor to gather evidence to present to the U.N. in order to push for the creation of a tribunal. *Id.*

189. *Indonesia agrees to facilitate UN probes into post-referendum violence*, Nov. 3, 2000 press release, at <http://www.un.org/peace/etimor/news/n31100.htm> (last visited Nov. 8, 2000).

genocidal intent. Policy considerations, concerning political and economic issues, are very important to the decision on the creation of a tribunal for East Timor. A general overview of the elements of genocide, analyzed in the context of the information available to date on the consequences of the violence, is intended push the Security Council's decision-making process beyond policy concerns to the facts of the East Timor crisis.

A. *Historical Relationship in Light of the Violence*

An excellent analysis of Indonesia's political motivations in general, and in East Timor specifically, was prepared soon after violence erupted in East Timor by a retired U.N. staff member, who lived in Indonesia for many years.¹⁹⁰ He noted that Indonesia is "a creature of colonialism and would never have existed in its present polyglot form without the arbitrary and dictatorial hand of a foreign master for more than 400 years."¹⁹¹ He followed by saying that, since it became an independent country, "there has been constant fear by its political establishment that a country as vast and diverse as Indonesia could not in the long run survive as a single nation-state."¹⁹² In order to maintain their nation-state, political leaders used "a blend of brutality and economic progress" in order to maintain "stability at any price."¹⁹³

As noted above, Indonesia and East Timor began their relationship following Portugal's abdication of its colonial possessions in 1975.¹⁹⁴ Prior to 1975, Indonesia exhibited little if any interest in East Timor.¹⁹⁵ However, once Portugal essentially abandoned the eastern half of island, Indonesia, which controlled the western half of Timor, felt they had a "manifest destiny," if you will, to assume total control of the island.¹⁹⁶ Through a series of development projects and suppression of political opposition, Indonesia proceeded to implement its "blend of brutality and economic progress" in order to maintain "stability at any price" in East Timor.¹⁹⁷ The resistance movement was nearly destroyed, and media and humanitarian groups were denied admittance to the

190. Oglesby, *supra* note 41.

191. *Id.*

192. *Id.*

193. *Id.*

194. Clark, *supra* note 17.

195. Oglesby, *Indonesia in a Corner*, *supra* note 41.

196. *Id.*

197. *Id.*

territory.¹⁹⁸ When the media was allowed to return, and the resistance movement attempted to draw attention to the humanitarian crisis in East Timor by nonviolent means, their demonstrations were brutally repressed.¹⁹⁹ Finally, once Indonesia acceded to a referendum for East Timor, it responded to the people's vote for independence with more brutality.²⁰⁰

Out of this history, some parallels to the conditions in Rwanda before genocide occurred in that country can be discerned. Rwanda, too, is "a creature of colonialism," having been occupied by Belgium for many years.²⁰¹ The Belgians chose to educate only the Tutsi minority, whom they considered superior to the Hutus, who were conversely seen only as laborers and farmers.²⁰² Resentment over this treatment grew over the years among the Hutus, and although the two groups generally shared a common language and culture, their societies were separate.²⁰³ When the Rwandan President's plane crashed, those people bent on assuming power used long-held bigotry and paranoia to stir up fears that the Tutsis would seek to regain power and murder the Hutus before they could do the same.²⁰⁴ Because Rwandan culture demanded strict obedience and trust of those in command, the Hutus were easily convinced that they must kill the Tutsi in order to avoid being killed themselves.²⁰⁵

Given Indonesia's insecurity about being able to maintain its status as a single nation-state in light of numerous uprisings on other islands, a sound hypothesis as to the rationale behind unleashing the militias was the goal of "sending a message" to other islands in the archipelago. On the eastern Indonesian island of Ambon, at least 55 people have died in sectarian violence, and there is an ongoing insurgency on the island of Aceh.²⁰⁶ The TNI, acting through militia groups, likely felt they could intimidate East Timorese to vote against independence. In the event that strategy failed, they needed to take measures to ensure that their fragile control of the vast nation-state would be secure. The military

198. *Timor Today: History – Resistance*, *supra* note 43; *see also*, Clark, *supra* note 17.

199. *Id.*

200. Richburg, *supra* note 59.

201. Akayesu, *supra* note 109, at 44.

202. *Id.*

203. *Id.*

204. *Id.*

205. Berkeley, *supra* note 99, at 26.

206. Keith B. Richburg, *Indonesian Leader Tightens Grip on Military*, WASH. POST, Jan. 14, 2000, at A23.

wanted to warn other islands that, if they believed they could pressure the Indonesian government to grant them independence, there would be grave consequences.

It is plausible that the military stirred up the fears and paranoia of those East Timorese who were pro-Indonesia, much in the same way they supported such groups when East Timor was freed from Portuguese rule in 1975.²⁰⁷ They likely emphasized all of the economic benefits Indonesia had bestowed upon East Timor,²⁰⁸ and how all of that was being forgotten by those ungrateful souls who now sought independence. And while Indonesia may have a legitimate argument along those lines, the economic development was promulgated as a means of coercion and control of the East Timorese population.²⁰⁹ Therefore, just as coercion and control were central to the crisis in Rwanda, the violence in East Timor was the product of Indonesia's desire to maintain its control, through coercion, of not only the island but of its nation-state.

B. Security Council's Analysis of the Crisis

As stated earlier, the Security Council takes four factors into consideration as a threshold matter in determining whether or not to create an international criminal tribunal. The first of these, whether the situation continues to constitute a threat to international peace and security, is addressed by the fact that the militia groups continue to operate out of their bases in West Timor.²¹⁰ It is believed that as many as 120,000 East Timorese refugees are living in West Timor, and that they are being intimidated and threatened by the militia groups and prevented from returning home.²¹¹ One year after the independence vote, the Government of Indonesia finally announced plans for the disarmament of militias in West Timor, but attacks on UNTAET personnel continue.²¹² Furthermore, on other islands in Indonesia, the TNI is responding to calls for independence with the same

207. Clark, *supra* note 17.

208. Oglesby, *supra* note 41.

209. *Id.*

210. Colum Lynch, *U.S. Warns Against Coup by Military in Indonesia*, WASH. POST, Jan. 15, 2000, at A20.

211. *Id.*

212. *Indonesia to disarm militia in West Timor, Security Council told*, Sept. 20 press release, at <http://www.un.org/peace/etimor/news/n200900.htm> (last visited Nov. 8, 2000), and *Jakarta alone is responsible for ending West Timor attacks, Security Council told*, Sept. 29 press release, <http://www.un.org/peace/etimor/news/n291000.htm> (last visited Nov. 8, 2000).

brutal repression that it exercised in East Timor.²¹³ The creation of an international tribunal may serve to relieve Indonesia of the burden of investigating the situation, so that it can focus on the continuing chaos in the remainder of the country.

As to the second factor the Security Council will consider, its contribution to the process of national reconciliation and to the restoration and maintenance of peace, the status of the militia groups is a major matter.²¹⁴ By initiating the process of investigating the atrocities and, subsequently handing out indictments, a tribunal could make the leaders of the militia groups less willing to assert their presence in the country. For example, after the creation of the tribunal for Rwanda and issuing of indictments that followed, many of the most notorious of the perpetrators arrested were found hiding in other countries.²¹⁵ Such a result would encourage the numerous refugees in West Timor, and on other islands of Indonesia, to return to East Timor to stimulate the rebuilding process.

Furthermore, it is alleged that the militia groups had been responding to orders from TNI leaders.²¹⁶ In fact, for a time there was speculation that the TNI may have been poised to overthrow the Indonesian government in order to avoid an international investigation of the alleged atrocities in East Timor.²¹⁷ It would seem that, if the military had nothing to hide, they would not be concerned about the possibility of a U.N. tribunal. Since the military leaders were in fact concerned about the prospect of a deeper U.N. investigation, it is a strong sign that the situation in East Timor was more dire than the military leaders allowed.²¹⁸

Next, the Security Council will decide whether prosecution of the perpetrators would contribute to ensuring that the violations are halted and effectively redressed.²¹⁹ This consideration is closely tied to the fourth factor, whether there is a need for international cooperation to strengthen the courts and judicial system of the particular country, and the ability of those courts to deal with large numbers of suspects.²²⁰ The physical infrastructure of East Timor was almost completely destroyed in the violence following the

213. Richburg, *supra* note 206.

214. S.C. Res. 955, *supra* note 100; *see also supra* note 212.

215. *Fact Sheet No. 1*, *supra* note 110.

216. Lynch, *supra* note 210.

217. *Id.*

218. *See* Richburg articles *supra* note 82, regarding statements of TNI leaders to the media on the extent of the East Timor crisis.

219. S.C. Res. 955, *supra* note 100.

220. *Id.*

independence vote²²¹, and the political and economic apparatus of East Timor was strongly dependent on Indonesia.²²² It will take quite some time before East Timor becomes fully self-sustaining in these respects.²²³ Likewise, as one relief worker in East Timor said, "there are no laws yet in East Timor."²²⁴

Indonesia counters that, since East Timor was part of Indonesia at the time of the violence, Indonesian courts and law should be applied.²²⁵ Its national judicial mechanism is functioning and capable of dispensing justice, and national remedies should be exhausted before resorting to an international forum.²²⁶ For the time being, the U.N. has foregone the creation of an International Criminal Tribunal out of respect for Indonesia's sovereignty. However, the U.N. remains heavily involved in East Timor through UNTAET, and should continue to monitor Indonesia's efforts to bring the perpetrators of the September 1999 violence to justice.

Overarching the decision to allow Indonesia to prosecute the East Timor situation are policy considerations, tied closely to political and economic concerns. In essence, the political factors were explored in assessing the four factors, in that at the time of the decision, there existed the possibility that the TNI might attempt to overthrow the government. This crisis, though, seems to have passed, and the Wahid administration has relatively firm control of the Indonesian government. Also, the crisis in East Timor seemed to create a domino effect, such that other islands in the Indonesian archipelago are seeking independence for themselves.²²⁷ Perhaps another factor in the decision to allow Indonesia to prosecute is the fact that the U.N. has not acted against the major powers for attempting to repress independence movements, for instance, Russia's activities in Chechnya. The possible creation of a double standard would be unfair to Indonesia.

Deciding whether or not to proceed with a U.N. tribunal under such a political climate is linked with economic considerations for Indonesia and the western world. As the fourth most-populous country in the world, Indonesia presents a vast market for the

221. Richburg, *supra* note 95.

222. Oglesby, *supra* note 41.

223. Keith B. Richburg, *The Business of Rebuilding*, WASH. POST, Jan. 3, 2000, at A13.

224. S.C. Res. 955, *supra* note 100.

225. Letter dated 26 January 2000 from the Minister for Foreign Affairs of Indonesia to the Secretary-General, *supra* note 186.

226. *Id.*

227. Richburg, *supra* note 216.

corporations of America and western Europe.²²⁸ By upsetting the political structure in Indonesia, the doors of that vast market may close, meaning a lost economic opportunity. While it is always important to recognize political and economic ramifications on issues of international law, such considerations cannot be allowed to completely overwhelm the facts of the situation.

C. *Genocide in East Timor?*

In order for the Security Council to assess the political and economic considerations inherent in deciding whether to initiate an international criminal tribunal in light of the facts of the East Timor crisis, a brief review of the *Akayesu* case is helpful. Prosecution under genocide is not the only remedy available to an international criminal tribunal;²²⁹ however, because proving genocidal intent is difficult, it seemed to be the appropriate point of inquiry. Specifically, if a potential *prima facie* case for genocide can be established from a general inquiry of the situation, the U.N. Security Council may be persuaded to overlook political and economic concerns and create an international criminal tribunal.

As noted in the earlier analysis of the *Akayesu* decision, the Genocide Convention requires that certain acts be committed with the specific "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."²³⁰ Among the acts for which *Akayesu* was indicted were the failure to act to stop systematic rape and murder, as well as facilitation of those acts; ordering the killing of intellectuals and influential people; commencing house-to-house searches for such people; and threatening serious bodily harm to those who would not divulge the whereabouts of such people.²³¹ The tribunal was able to infer genocidal intent from all his acts or utterances, and from the general context in which other culpable acts were perpetrated systematically against the same group.²³² The ICTR pointedly announced for the first time that rape is now considered an element of genocide.²³³

According to the International Commission of Inquiry on East Timor, witnesses gave evidence that intimidation and terror were

228. Jim Hoagland, *Outside the Zone*, WASH. POST, Sept. 9, 1999, at A21.

229. Statute of the Tribunal, *supra* note 108.

230. *Akayesu*, *supra* note 109, at 177.

231. *Id.* at 10-11.

232. *Id.* at 245.

233. *Id.* at 246.

systematically used, and resulted in many killings and injuries.²³⁴ Also, women were the objects of sexual abuse and rape.²³⁵ Likewise, the commission was told of the destruction of evidence including removal of bodies from the site of killings.²³⁶ It is also clear that East Timorese were systematically removed from their homes and sent to refugee camps, and there is evidence that women and children were separated from men.²³⁷

Each of these alleged acts falls within the enumerated culpable acts of the Genocide Convention, as enunciated in *Akayesu*.²³⁸ The most important question to answer, then, is whether it is reasonable to conclude that these acts were “committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”²³⁹ The ICTR found that the Genocide Convention was drafted for the purpose of protecting any stable or permanent group.²⁴⁰ Certainly, the East Timorese would fall under such a denomination, beside the fact that they are a national and ethnical group distinct from the Indonesians.

In determining whether or not the aforementioned acts were committed with the intent to destroy, in whole or in part, the East Timorese, it is important to reemphasize the historical relationship between these countries. Indonesia maintained strict control of East Timor through a juxtaposition of development programs and brutal suppression of political expression, perhaps to avoid becoming a small, politically-insignificant country again.²⁴¹ They likely felt that the East Timorese were indebted to them for the economic and social programs Indonesia had bestowed upon East Timor, overlooking their heavy-handed tactics in quelling all dissenters.²⁴² The Indonesian government allowed the independence vote only after intense pressure from the outside world, and then when the East Timorese voted for independence, the response was violence by TNI-controlled militias. Specific attacks were made against individuals who were noted as being outspoken in the independence movement.²⁴³ It seems quite rational to conclude that

234. *Report of the International Commission, supra* note 10.

235. *Id.*

236. *Id.*

237. Chandrasekaran, *supra* note 61.

238. *Akayesu, supra* note 109, at 177.

239. *Id.*

240. *Id.* at 181.

241. Oglesby, *supra* note 41.

242. *Id.*

243. Struck, *supra* note 73.

the purpose of the militia attacks was to destroy, at least in part, the East Timorese for daring to desire freedom.

V. Conclusion

Based on Indonesia's history of brutal repression of East Timor and the specific intent of the Indonesian-military-controlled militia groups to destroy, at least in part, the East Timorese, it is appropriate for the U.N. Security Council to create an international criminal tribunal for East Timor. From the inception of their relationship, Indonesia used a system of economic coercion and violent control to maintain power in East Timor.²⁴⁴ The East Timorese were finally granted an opportunity to gain independence, and when they seized upon that opportunity, Indonesia, through the TNI and the militias, showed its disregard, and perhaps hatred, of East Timorese people and culture through violence. It is known that at least 1,650 people were killed, including many intellectuals and influential people²⁴⁵, and the largest towns of East Timor were at least sixty percent destroyed.²⁴⁶

The threat of a coup by the military in order to avoid a U.N. investigation was a real threat at the time the U.N. acceded to Indonesia's desire to prosecute the East Timor situation. A coup would have been disastrous to the country and the region, apart from its effect on a U.N. investigation. However, that threat seems to have passed, and the Wahid government has maintained balanced control over the past year. But outbreaks of brutal repression in a manner similar to that in East Timor are taking place in other islands in the archipelago, as more people rightfully seek their independence.²⁴⁷ If the appropriate people are not brought to justice under the Indonesian-run prosecution, Indonesia's twisted methodology of maintaining control of their nation-state will continue without remorse. A key question may be whether the world desires to maintain Indonesia as a single nation-state, or whether the individual nations of the archipelago can maintain a viable existence as independent countries. East Timor is the test case, and for the most part it is succeeding. In order to help East Timor reach independent viability, the U.N. should look beyond political and economic considerations to the facts of the crisis, and create an International Criminal Tribunal with the goal

244. Oglesby, *supra* note 41.

245. Egan, *supra* note 93.

246. Richburg, *supra* note 95.

247. Richburg, *supra* note 206.

of allowing East Timor and Indonesia to reconcile their past and move on to a new era of peace.

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