



Dr Ben Saul BA (Hons) LLB (Hons) *Sydney* DPhil *Oxford*, Barrister
Senior Lecturer and Co-ordinator, Master of International Law Program
Sydney Centre for International and Global Law

173–175 Phillip Street
Sydney NSW 2000
Australia

DX 983, Sydney
Tel: +61 2 9351 0354
Facsimile: + 61 2 9351 0200
Email: bsaul@usyd.edu.au

**LEGAL OPINION ON POSSIBLE WAR CRIMES PROSECUTIONS
ARISING FROM THE DEATHS OF FIVE JOURNALISTS AT BALIBO IN 1975**

This legal opinion considers whether there is any legal basis for proceeding with an Australian war crimes prosecution in relation to the deaths of five journalists at Balibo in Portuguese Timor on 16 October 1975. In particular, it considers

- A. Whether an armed conflict existed in Portuguese Timor at the time of their deaths to which international humanitarian law applied (pp 2-6);
- B. Whether the deaths may amount to war crimes under humanitarian law (pp 6-11);
- C. Whether Australian courts have jurisdiction to prosecute such crimes (pp 11-13);
- D. The NSW Coroner’s powers in respect of any suspected war crimes (pp 13-16);
- E. The applicable extradition processes (pp 16-22).

In summary, this opinion concludes that:

- A. An international armed conflict existed in Portuguese Timor from 7 October 1975 onwards, to which international humanitarian law applied;
- B. The deaths of the five journalists were “wilful killings” amounting to grave breaches of the 1949 Fourth Geneva Convention, in relation to which universal jurisdiction to prosecute exists under that Convention;
- C. Commonwealth criminal law in force in 1975 recognised such grave breaches as federal criminal offences and conferred criminal jurisdiction on State courts;
- D. The NSW Coroner has power to refer evidence concerning indictable offences, including such war crimes, to the NSW Director of Public Prosecutions;
- E. Pursuant to extradition arrangements between Australia and Indonesia, the pre-conditions for making a request to extradite Indonesians suspected of such war crimes are fulfilled, but Indonesian limitation periods, and discretionary grounds of refusal, may preclude the grant of an extradition request. Further research on the state of Indonesian law at the time is necessary to determine the issue.

A. THE EXISTENCE OF AN ARMED CONFLICT IN PORTUGUESE TIMOR

(a) The Applicable Law

1. The humanitarian law governing international armed conflicts applies if the conditions of common article 2 of the 1949 Geneva Conventions are met:

the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

2. An “armed conflict” must thus exist between at least two State Parties to the Convention, but there is no requirement that the parties formally declare or recognise the existence of the conflict. This departs from the earlier law of “war”, which presupposed such formalities and allowed States to deny the existence of an armed conflict by asserting that they were merely engaged in police actions and the like.
3. The existence of an armed conflict between States is a question of fact. The ICRC *Commentary* indicates that the drafters conceived of an armed conflict as follows:

Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims. Nor, incidentally, does the application of the Convention necessarily involve the intervention of cumbrous machinery. It all depends on circumstances.

4. Common article 2 also provides that the Conventions apply even to a partial occupation of territory met by no armed resistance.

(b) Application of the Law to Portuguese Timor in 1975

5. The Indonesian military invasion of Portuguese East Timor in 1975 triggered an international armed conflict to which the 1949 Geneva Conventions applied. At a minimum, that armed conflict commenced on 7 October 1975, when Indonesian forces

attacked Fretilin troops in the village of Batugade on the border between Indonesian West Timor (Irian Jaya) and Portuguese East Timor. Other jurists support that date as the commencement of an international armed conflict: see, eg, Suzannah Linton, “Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor” (2001) 25 Melbourne University Law Review 122.

6. While the armed conflict may have commenced earlier as a result of covert military operations by Indonesian forces inside East Timor, for present purposes the overt use of military force on a significant scale by Indonesian troops against military objectives within Portuguese East Timorese territory from 7 October onwards was sufficient to establish the existence of an international armed conflict. That attack was met with military resistance from Fretilin, and ongoing Indonesian operations continued to be met by military force on a significant and organized scale. The attack on Balibo on 16 October 1975 was part of a broader offensive on Maliana, and involved a large number of Indonesian troops (up to 2,000), and naval and artillery bombardments: see, eg, James Dunn, *Timor: A People Betrayed* (ABC Books, Sydney, 1996), 203-204.
7. While an earlier, non-international armed conflict may have existed between competing East Timorese forces, Fretilin and the UDT, any continuation of that armed conflict (which was doubtful by October 1975) would not prejudice the separate legal existence of an international armed conflict. The existence of concurrent non-international and international armed conflicts on the same territory is possible under humanitarian law. On the facts, the internal armed conflict appeared to have been decisively concluded prior to the Indonesian invasion, after Fretilin comprehensively defeated UDT forces.
8. It might be suggested that no international armed conflict existed because Indonesia was engaged militarily against Fretilin, not Portugal, and that therefore there was no conflict between two State Parties to the 1949 Geneva Conventions as required by common article 2. The Portuguese administration and forces had withdrawn to the island of Atauro as a result of civil conflict between competing East Timorese forces from mid-August 1975, effectively ending the work of the Portuguese Decolonisation Commission. Further, if the East Timorese were a “people” entitled to self-determination under international law, the Fretilin victory in the civil conflict and its

formation of government may indicate that East Timor had become a de facto independent State,¹ though not yet party to the 1949 Geneva Conventions.

9. That argument must be rejected. Since 1960 Portuguese East Timor was a non-self-governing territory within the UN framework, administered by Portugal. Following the change of regime in Portugal in 1974, the Portuguese authorities recognised the right of the East Timorese “people” to self-determination and had planned a universal secret ballot for 1976, to allow the population to express a free choice on its political future.
10. That initiative was overtaken by the UDT coup in August 1975 and the subsequent civil conflict between the UDT and Fretilin forces. That conflict signalled competing and contradictory claims by different parts of the East Timorese population, with the UDT arguing for integration with Indonesia and Fretilin seeking independence. The brief conclusion of that conflict immediately prior to the Indonesian invasion in October 1975 has never been regarded by the international community as a sufficient exercise of free choice by the East Timorese people as to their political status.
11. The Indonesian invasion of October 1975 was condemned in the UN General Assembly and Security Council and not recognised by any State (except, later, Australia): UNSC Resolutions 384 (22 December 1975) and 389 (22 April 1976); UNGA Resolution 3485(XXX) (12 December 1975). The resolutions recognised that Portugal remained the “administering power” in Portuguese Timor, called for its territorial integrity to be respected, and acknowledged the inalienable right of the East Timorese people to freely exercise their right to self-determination and independence.
12. The Indonesian occupation forces established a provisional government of pro-Indonesian political parties which appointed an unelected “Regional Popular Assembly”, which passed a resolution on 31 May 1976 in favour of East Timor’s integration into Indonesia. That process has never been recognised by the international community as a direct and free expression of the political will of the East Timorese

¹ See, eg, Peter Trotter, ‘Like Lambs to the Slaughter: The Scope of and Liability for International Crimes in East Timor and the Need for an International Criminal Tribunal’ (2001) 7 *New England International & Comparative Law Annual* 31.

people: see Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, Cambridge, 1996), 226-230.

13. As a result, the Indonesian invasion was an attack on Portuguese territory, thus precipitating an international armed conflict. It is not to the point that Portuguese forces abstained from the fighting or that Fretilin led the armed resistance. Indonesian forces were using military violence on Portuguese territory without Portugal's permission. It would be curious if the 1949 Geneva Conventions applied to occupations of territory which are not met by armed resistance (as in common article 2(2) of the Conventions), but they did not apply to unauthorised violence by one State on the territory of another, without permission, which happen to be met by non-State forces in that territory.
14. Accordingly, an armed conflict "may arise between two or more of the High Contracting Parties" within the meaning of common article 2 by virtue of military attacks by one State on the territory of another, even if there is no direct fighting between two States' armed forces.
15. Both Indonesia and Portugal were bound by the relevant international humanitarian law instruments in 1975. Indonesia acceded (without reservation) to the four 1949 Geneva Conventions on 30 September 1958. Portugal signed the four 1949 Geneva Conventions on 11 February 1950 and ratified them on 14 March 1961. A reservation upon signature, limiting the application of common article 3 to civil wars rather than all situations of armed rebellion, was withdrawn by Portugal upon ratification in 1961: United Nations Treaty Series, Vol 394, 1961, p 258.
16. In the alternative, it might be argued that Fretilin's declaration of East Timor's independence prior to the Indonesian invasion expressed the free choice of the East Timorese people on the question of self-determination. As such, the subsequent Indonesian invasion initiated an international armed conflict with the newly created independent State of East Timor (rather than with Portugal).
17. That argument is not persuasive. There is little evidence in State practice that the international community recognised the establishment of an independent East Timor at that time. As the UN resolutions above indicate, Portugal was still regarded as the

administering power of a non-self governing territory; and Fretilin's military victory alone was not sufficient to amount to a free and informed choice in determining self-determination. Further, in *Portugal v Australia* [1995] ICJ Reports 90, the International Court of Justice observed that East Timor remained a non-self governing territory, with its people entitled to self-determination, notwithstanding Indonesia's claims.

18. In any case, any independent East Timor had not yet had time to become a party to the 1949 Geneva Conventions, under which an armed conflict could be recognised, and the international law of State succession would not regard the new State of East Timor as inheriting any of the prior treaty obligations of Portugal.
19. Further, 1977 Additional Protocol I, recognising certain self-determination movements as parties to international armed conflicts under article 1(4), had no application to a conflict in 1975 which pre-dated that Protocol's entry into force.

B. THE COMMISSION OF WAR CRIMES IN INTERNATIONAL ARMED CONFLICTS

(a) The Applicable Law

(i) Immunity of Civilians from Military Attack

20. Where an international armed conflict exists, independent journalists are recognised as civilians entitled to the same protections as other non-combatants. In particular, it is a fundamental rule of humanitarian law that parties to a conflict must distinguish between civilians (including journalists) and combatants, and between civilian objects (including media equipment and installations) and military objectives. Attacks may only be directed against combatants and military objectives, while civilians and civilian objects must not be the object of attack.
21. Where journalists are situated amongst or near combatant armed forces which are legitimate military targets liable to attack, their incidental killing in the course of such attacks will not be unlawful, assuming the attacking forces otherwise comply with the principles of humanitarian law (including considering the civilian casualties anticipated

from launching an attack in relation to the overall military advantage). Like other civilians, journalists enjoy no absolute immunity from injury.

22. Civilians (including journalists) lose their protection against attack only if they take a direct part in hostilities, and then only for the duration of such participation. Taking part in hostilities does not imply that civilians are combatants entitled to the privileges and immunities of combatants, including POW status. It does, however, make such civilians legitimate military objectives for the duration of their participation in hostilities.
23. What it means to take a direct part in hostilities is not entirely settled. The ICRC *Commentary to 1977 Protocol I* (reflecting customary law earlier in 1975) indicates that hostile acts or direct participation in hostilities “means acts of war that by their nature or purpose struck at the personnel and matériel of enemy armed forces”.
24. Examples of direct participation given in some national military manuals include serving as guards, lookouts, intelligence agents or spies, while indirect contributions by civilians – which do not lead to loss of protection – include providing logistical support (such as carrying food or messages, transporting munitions, or selling goods) or expressing sympathy for a party: Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (ICRC, Geneva, 2004), 23. What is required is an immediate threat of actual harm to an adversary. However, civilians involved in some of these activities may be lawful incidental casualties of attacks on military objectives, such as against munitions convoys or factories in which civilians are working.
25. Further, it doubtful that a journalist who transmits military messages by radio for the benefit of a party takes a direct part in hostilities and thereby renders him or herself liable to attack. The better position is to regard the transmission equipment as a military objective, rather than qualifying the journalists as such as a target. Where journalists and their equipment have already been captured, the threat of transmission has been neutralized and no further military attack is necessary or lawful. Alternative means of neutralizing a target, short of lethal military operations, such as jamming transmissions, may be available in some cases.

26. Merely spreading propaganda does not amount to direct participation in hostilities: Alexandre Balguy-Gallois, “The Protection of Journalists and News Media Personnel in Armed Conflict” (2004) 86 *International Review of the Red Cross* 37. A media installation is similarly not a military target merely because it spreads propaganda, and attacking the media to undermine civilian morale is similarly impermissible: *Final Report to the ICTY Prosecutor on the NATO Bombing of Kosovo* (2000), paras 47, 55, 74-76; see also Reporters without Borders, “Propaganda-Oriented Media and International Humanitarian Law, Legal Memorandum, January 2003.
27. In practice, journalists who formally or informally accompany military units, or who wear military style dress, or who are near to military objectives, necessarily put themselves at risk of becoming incidental civilian casualties, notwithstanding their civilian status: ICRC *Commentary*, para 3269. Further, there are examples in practice of military forces genuinely mistaking camera lenses as weapons from a distance. Civilian immunity is not absolute in such circumstances and nothing in humanitarian law confers greater protection on journalists than other civilians.
28. There is a difficult question whether civilians, including journalists, are entitled to use force in self-defence when under military attack. Self-defence is not available to a person engaging in mutual combat: *Carl D O’Neal*, US CrT Military App, 18 Feb 1966, 16 USCMA 33; 36 CMR 189, 196. Thus journalists who decide to participate in hostilities cannot claim self-defence, and it is doubtful whether journalists at risk of being lawful incidental casualties of a military attack could resort to arms in self-defence.
29. However, it is arguable that self-defence is lawfully available to a journalist who is deliberately and unlawfully attacked by military forces in violation of international humanitarian law, where the journalist uses necessary and proportionate force in order to protect him or herself from such a war crime. Since international humanitarian law does not criminalise mere civilian participation in hostilities (other than in the limited circumstances of perfidy), the question will chiefly arise in national criminal prosecutions, although it may also be relevant in international criminal proceedings if the defensive response involved the commission of war crimes.

(ii) Journalists as Protected Persons

30. Depending on the circumstances, some journalists may be “protected persons” under article 4 of the 1949 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War if they

at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

31. Being “in the hands of a Party” does not require being within its physical custody, but is used in an “extremely general sense”, including merely being in the territory of a Party to the conflict or in occupied territory: *ICRC Commentary* to article 4.

32. However, the following civilians are not regarded as protected persons:

- Nationals of a State which is not bound by the Convention;
- Nationals of a neutral State who find themselves in the territory of a belligerent State, if their State of nationality has normal diplomatic representation in the State in whose hands they are;
- Nationals of a co-belligerent State, if their State of nationality has normal diplomatic representation in the State in whose hands they are;
- Accredited war correspondents entitled to POW status under article 4(A)(4) of the 1949 Third Geneva Convention.

33. Nationals of a neutral State present in occupied territory are protected persons regardless of whether their State of nationality has normal diplomatic representation with either the Occupying Power or the State whose territory has been occupied: *ICRC Commentary*.

34. Protected persons enjoy a range of humanitarian protections beyond the immediate protection from military attack outlined above. The most serious violations of the Convention are regarded as “grave breaches” of it (article 146) and constitute war crimes if committed against persons or property protected by the Convention (art 147):

wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful

deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

35. All State parties to the 1949 Fourth Geneva Convention are required to enact legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the Convention: art 146. Each State party is also required to search for such suspects and to bring them, regardless of their nationality, before its own courts: art 146. Alternatively, a State party may hand such persons over for trial to another State party which has made out a prima case against them: art 146. These provisions of the Convention establish a system of treaty-based universal criminal jurisdiction over terrorism.

(b) The Journalists at Balibo were Protected Persons

36. The journalists killed at Balibo in 1975 most likely qualified as protected persons under the 1949 Fourth Geneva Convention, as nationals of neutral States in occupied territory, that is, in an area controlled by Indonesia following its invasion, and irrespective of the existence of diplomatic relations between Indonesia and their States of nationality.
37. There may be a question whether Indonesia “occupied” Balibo at the time of the deaths. As a matter of law, “territory is considered occupied when it is actually placed under the authority of the hostile army”: 1907 Hague Regulations, art 42 (also reflecting customary law). If, for instance, the journalists were killed in cross-fire during hostilities between Indonesian and Fretilin forces, prior to Indonesia capturing Balibo, then no occupation had yet been established and the journalists could not be in the hands of any Occupying Power.
38. If, however, the facts establish that the journalists were killed after Indonesia had taken control of Balibo, then they were most likely in the hands of the Occupying Power and thus were protected persons. A military occupation can be established in the immediate aftermath of a hostile contest for control of territory, notwithstanding that full civilian or administrative structures of occupation have not yet been established to substitute for

indigenous ones. The 1949 Geneva Conventions are to be interpreted in favour of giving effect to their humanitarian purpose so far as is possible.

(c) The Deaths at Balibo Amounted to War Crimes

39. There is evidence to suggest that the deaths of the five journalists at Balibo resulted from their “wilful killing” by Indonesian armed forces, amounting to a grave breach of the 1949 Fourth Geneva Convention (pursuant to articles 146-147), and attracting individual criminal responsibility under international humanitarian law.
40. A “wilful killing” is one where death occurs as a result of an intentional act or omission which is not otherwise justified by some other rule of humanitarian law. It includes the intentional killing of non-combatants for whatever reason (including by failing to properly distinguish non-combatants from combatants, or launching indiscriminate attacks); the deliberate summary execution of a detainee without a fair trial, or the reprisal killing of civilians. Wilful neglect, gross negligence or recklessness is sufficient to satisfy the *mens rea* element of this war crime, as for domestic manslaughter.

C. AUSTRALIAN JURISDICTION TO PROSECUTE WAR CRIMES

41. Under Commonwealth law in 1975, grave breaches of the 1949 Geneva Conventions were crimes under federal law over which the Australian courts had jurisdiction. The Geneva Conventions Act 1957 (Cth), as then in force, provided in s 7(1) that:

A person who, in Australia *or elsewhere*, commits, or aids, abets or procures the commission by another person of, a grave breach of any of the Conventions is guilty of an indictable offence. [emphasis added]

42. In this section, grave breaches of the 1949 Fourth Geneva Convention are those listed in article 147 of the Convention: Geneva Conventions Act 1957 (Cth), s 7(2). As outlined above, such grave breaches include the war crime of wilful killing. Under the Act, as originally enacted, wilful killing carried a punishment of death or imprisonment for life or for any less term: s 7(4). Liability to the death penalty was removed by the Death Penalty Abolition Act 1973 (Cth), which substituted life imprisonment for such penalty.

43. Section 7 applies to persons regardless of their nationality or citizenship: s 7(3). There is thus no requirement that the alleged perpetrator be an Australian citizen. Nor is there any requirement that Australia be a Party to the international armed conflict in question, or that Australian citizens be victims of the war crime. The Act reflects the scheme of universal jurisdiction embodied in the 1949 Geneva Conventions, and s 6(2) of the Act expressly specifies that the Act has “extra-territorial operation according to its tenor”.
44. The Act vests federal jurisdiction to prosecute grave breaches committed outside Australia in the State and Territory Supreme Courts. Section 10(2) provides:
- The trial on indictment of an offence against this Act, not being an offence committed within Australia, may be held in any State and the trial on indictment of such an offence committed in a Territory may be held in any State or in that Territory.
45. Those State or Territory courts must be Supreme Courts: s 10(5). The jurisdiction of State Supreme Courts is subject to the conditions and restrictions in s 39(2)(a) and (c) of the Judiciary Act 1903-1955 (Cth) and that Act applies generally the war crimes offences: Geneva Conventions Act 1957 (Cth), s 10(3)-(4).
46. Offences under the Act must not be prosecuted in a court except by indictment in the name of the Attorney-General: s 7(6). Although not specified in the Act, this section arguably refers to the Commonwealth Attorney-General. Despite prosecutions proceeding in State and Territory courts, they are in the exercise of federal criminal jurisdiction and the use of the singular (“the” Attorney-General), in a sub-section following a reference to the Governor-General (s 7(5)) further indicate that the Commonwealth Attorney General must issue any indictment.
47. The Minister for Foreign Affairs may also play a role in any proceedings. If a question arises concerning the application of the 1949 Geneva Conventions under article 2 of the Conventions, a certificate from the Minister “certifying to any matter relevant to that question is evidence of the matter so certified”: s 8.
48. Part II of the Geneva Conventions Act 1957 (Cth) was repealed by the International Criminal Court (Consequential Amendments) Act 2002 (Cth), Schedule 3. However, the repeal of part of an Act does not affect its previous operation, including any liability

incurred or any investigation, legal proceeding or remedy arising under that Act, unless the contrary intention appears in the repealing statute: Acts Interpretation Act 1901 (Cth), s 8. The 2002 Act does not express any intention to preclude war crimes prosecutions arising under the 1957 Act and prior to its repeal in 2002. The Explanatory Memorandum to the 2002 Act confirms the parliament's intention that war crimes committed under Part II of the Geneva Conventions Act 1957 (Cth) prior to its repeal in 2002 can still be prosecuted under that Act as it was then in force.

D THE NSW CORONER'S POWERS CONCERNING INDICTABLE OFFENCES

(a) Procedure in Relation to Possible Indictable Offences

49. At the conclusion of an inquest, the coroner must record her findings as to whether the person died and (a) the person's identity; (b) the date and place of death, and (c) the manner and cause of death: Coroners Act 1980 (NSW), s 22(1). The coroner may also make such recommendations as are considered necessary or desirable in relation to the death (s 22A(1)). Ordinarily the record must not, however, indicate in any way or suggest that an offence has been committed by any person: s 22A(3).
50. A special procedure must be followed where indictable offences may be involved: Coroners Act 1980 (NSW), s 19. The procedure applies if, at any time during the course of an inquest, the coroner is of the opinion that, having regard to all the evidence given up to that time (s 19(1)(b):
- (i) the evidence is capable of satisfying a jury beyond reasonable doubt that a known person has committed an indictable offence, and
 - (ii) there is a reasonable prospect that a jury would convict the known person of the indictable offence,
- and the indictable offence is one in which the question whether... the known person caused the death or suspected death... is in issue.
51. In such circumstances, under s 19(1B) the coroner may continue the inquest and:
- (a) record under section 22(1) the findings of the coroner or, if there is a jury, the verdict of the jury, or
 - (b) after taking evidence to establish the death, the identity of the deceased and the date and place of death—terminate the inquest and, if there is a jury, discharge the jury.

52. The coroner is then required to forward to the Director of Public Prosecutions the depositions taken at an inquest to which this procedure applies, together with a signed statement specifying the name of the known person, and the particulars of the offence: s 19(2). Reference to the Director of Public Prosecutions here is implicitly a reference to the NSW statutory office holder: Interpretation Act 1987 (NSW), s 12(1)(a).
53. The Coroners Act 1980 (NSW) does not define the phrase “indictable offence” or expressly limit such offences to those arising under NSW criminal law. Ordinarily, “a reference to a locality, jurisdiction or other matter or thing is a reference to such a locality, jurisdiction or other matter or thing in and of New South Wales”: Interpretation Act 1987 (NSW), s 12(1)(b) (“Reference to New South Wales to be implied”). To the extent that the reference in the Coroners Act 1980 (NSW) to “indictable offence” is an implicit reference to subject matter *jurisdiction*, then it would ordinarily be construed as a reference to an indictable offence under NSW law.
54. However, the Interpretation Act 1987 (NSW), s 21 (“Meaning of commonly used words and expressions”) specifically defines a reference in any (NSW) Act to an “indictable offence” as “an offence for which proceedings may be taken on indictment, whether or not proceedings for the offence may also be taken otherwise than on indictment.” That definition does not limit the meaning of “indictable offences” to those under NSW law.
55. It is arguable that the specific definition of the commonly used expression “indictable offence” in s 21 of the Interpretation Act 1987 (NSW) is intended to displace the usual construction of “indictable offence” by implication. In particular, s 21 widens the meaning of “indictable offence” to include indictable offences under, at a minimum, both NSW and Commonwealth law. Within the federation, to the extent that NSW courts are vested with federal criminal jurisdiction, the meaning of “indictable offences” in NSW statutes must be understood as including that federal jurisdiction.
56. Consequently, the NSW Coroner’s statutory power to refer the particulars of an “indictable offence” to the NSW Director of Public Prosecutions includes the power to refer evidence concerning the possible commission of Commonwealth indictable

offences, including grave breaches of the 1949 Fourth Geneva Convention committed abroad, as arising under s 7 of the Geneva Conventions Act 1957 (Cth).

57. This construction is supported by other considerations. The NSW Coroner is empowered to inquire into deaths occurring outside NSW where the deceased has a relevant connection to NSW (Coroners Act 1980 (NSW), s 13C). Since NSW criminal jurisdiction is normally territorially limited, it would defeat the underlying purpose of the statutory scheme to limit the coroner's power to the investigation of NSW indictable offences, to the exclusion of federal indictable offences over which the Commonwealth has extended extraterritorial jurisdiction.

(b) The Prosecuting Authority

58. If it is accepted that the NSW Coroner has power to refer a Commonwealth indictable offence to the NSW DPP, some further considerations are warranted. Ordinarily, the Commonwealth Director of Public Prosecutions is responsible prosecuting Commonwealth indictable offences: Director of Public Prosecutions Act 1983 (Cth), ss 6 and 9. Similarly, the NSW DPP is responsible for prosecuting NSW indictable offences: Director of Public Prosecutions Act 1986 (NSW), ss 7(1) and 3.
59. There is a statutory basis for the Commonwealth DPP to be represented by a member of a State or Territory prosecuting authority: Director of Public Prosecutions Act 1983 (Cth), ss 15(1) and (3). Likewise, there is a statutory basis for the NSW DPP to be authorised to prosecute Commonwealth offences: Director of Public Prosecutions Act 1986 (NSW), s 24.
60. The Prosecution Policy of the Commonwealth provides that Commonwealth offences will "ordinarily" be prosecuted by the Commonwealth DPP, but there are exceptional cases where it will be more appropriate for State authorities to prosecute: para 3.11. In particular, where a person is charged with both State and Commonwealth offences, the Commonwealth DPP will consider such factors as (a) the relative seriousness of the State and Commonwealth charges; (b) the degree of inconvenience or prejudice to either the accused or the prosecution if the prosecution is split; and (c) any arrangements between the Commonwealth and State prosecutors for a joint trial.

61. In addition, State authorities may prosecute Commonwealth offences even in the absence of any State offences where “the balance of convenience dictates that a prosecution for a Commonwealth offence should remain with State authorities”: para 3.11. An example is “where a prosecution relates to a minor Commonwealth offence brought in a remote locality and it would be impracticable for a DPP lawyer to attend.”
62. Due to the seriousness and sensitivity of prosecuting federal war crimes offences, it is almost certain that the Commonwealth DPP would consider itself the most appropriate prosecutorial authority, particularly if any extradition process is involved. If the NSW Coroner referred evidence of a Commonwealth indictable offence to the NSW DPP, in turn the NSW DPP would be highly likely to refer the matter to the Commonwealth DPP. The Commonwealth DPP would then exercise its own discretion to prosecute in light of its own assessment of the evidence and its prosecution policies.

E. THE EXTRADITION PROCESS

63. Ultimately, custody of a suspect is necessary to proceed with any criminal trial. Where suspects in the Balibo deaths are identified as present in Indonesia, it would be possible for the Australian authorities to seek to extradite the suspects to Australia to face trial on the war crimes charges identified above.

(a) Dual Criminality: Indonesian Criminal Law

64. The Extradition Treaty between Australia and the Republic of Indonesia was signed at Jakarta on 22 April 1992 and entered into force on 21 January 1995: Australian Treaty Series 1995, No 7. The Extradition Treaty requires that persons shall be extradited for any act or omission constituting any of the offences enumerated in the Treaty and which are punishable by the laws of both countries by imprisonment of not less than one year: art 2(1). Of the offences listed in the Treaty, for present purposes the relevant offences include: “wilful murder, murder” (art 2(1)(1)) and “manslaughter” (art 2(1)(2)).
65. In determining whether an offence is an offence against the law of both States, “it shall not matter whether the laws of the Contracting States place the acts or omissions constituting the offence within the same category of offence or denominate the offence

by the same terminology”: art 2(3)(a). Thus Indonesian law need not have specifically recognised the war crime of wilful killing in 1975, as long as the basic offence of murder was a crime under Indonesian law at the time, in the circumstances at Balibo.

66. Indonesian criminal law derived from the 1918 Netherlands Indies Criminal Code, as amended upon Indonesian independence in 1946 and applied uniformly from 1958 throughout Indonesia. An English translation of the Indonesian Penal Code, as enacted in 1960 and in force to 1976, was published by the Indonesian Ministry of Justice in 1982: see www.unmiset.org/legal/IndonesianLaw/english/codes/Penal-Code-E.pdf.
67. Crimes punishable under the Indonesian Penal Code, then in force, primarily had a territorial application in Indonesia (art 2), such that the ordinary crimes of murder (art 340) or manslaughter (arts 338-339) had no extraterritorial application. Extraterritorial jurisdiction under the Code was limited, applying to specified crimes committed:
 - (a) by any person outside Indonesia against State security, the dignity of the Presidency, the currency, or air safety; and forgery and piracy (art 4(1)-(4));
 - (b) by Indonesian nationals outside Indonesia against State security, the Presidency, public order or public authority, marriage, or vessels: art 5(1)(1);
 - (c) by Indonesian officials outside Indonesia: art 7.
68. For present purposes, none of these provisions on extraterritoriality covers the killing of foreign nationals outside Indonesia by Indonesian armed forces.
69. However, one further provision provides a basis for establishing that the Balibo deaths were crimes under Indonesian criminal law. Indonesian criminal law also applied to an act committed by an Indonesian national outside Indonesia where such act is “deemed by the Indonesian statutory penal provisions to be a crime and on which punishment is imposed by the law of the country where it has been committed”: art 5(1)(2).
70. The effect of that provision is to extend extraterritorial jurisdiction over acts done by Indonesian nationals abroad which would normally only be offences if committed in Indonesia, in the circumstance where the legal system of the place of the commission of the act recognises such act as a crime. While further research is necessary, it is probable that murder was a crime under the penal law in force in Portuguese Timor in 1975.

71. The commission of an (otherwise criminal) act in the execution of an official order issued by the competent authorities is “not punishable” under the Indonesian Penal Code (art 51(1)) and thus superior orders is, to an extent, a lawful justification for a crime. However, an official order issued incompetently does not exempt the punishment, unless it was considered in good faith by the subordinate to be issued competently and its execution lied within the limit of his subordination: art 51(2).
72. Here, it is arguable that no order to commit a war crime may be competently issued, and further than no subordinate could have believed in good faith that its execution lied within the limits of his authority as a member of national armed forces. Further, members of armed forces do not enjoy State immunity for war crimes.

(b) Dual Criminality: Indonesian Military Law

73. In the alternative, it might be argued that Indonesian law also specifically criminalized war crimes in 1975, such that there is a direct correlation between Australian and Indonesian law for the purposes of the dual criminality rule. As outlined earlier, Indonesia was a party to the 1949 Geneva Conventions in 1975, which required it to criminalise grave breaches of those Conventions, wherever occurring.
74. Despite its obligation, in 1971, Indonesia reported to the International Committee of the Red Cross that it had not taken any legislative action to repress grave breaches of the 1949 Geneva Conventions: ICRC, *Respect of the Geneva Conventions: Measures Taken to Repress Violations*, Reports submitted to the XXth and XXIth International Conferences of the Red Cross (1971).
75. It was reported that the Indonesian Government decided in December 2005 to introduce the repression of war crimes into its Civil and Military Penal Codes: Umesh Kadam, “ICRC Report of International Humanitarian Law Activities in Asia-Pacific during 2005” (2005) 1 *Asia-Pacific Yearbook of International Humanitarian Law* 144 at 153.
76. Since 1934 there was a Military Criminal Law Book for Indonesia in force, inherited from the Dutch colonial power, comprising 150 articles: Captain Djaelani, “The Military Law System in Indonesia” (1973) 59 *Military Law Review* 177. The Book

creates criminal offences for military personnel, but further research is necessary to locate a copy of it. As a pre-1949 publication (but reissued in 1949), it would not refer to grave breaches of the 1949 Geneva Conventions as such, but it may establish war crimes or other criminal violations of the laws and customs of war. Such offences could provide a basis for dual criminality in the extradition context.

(c) The Relevant Time

77. Extradition may be granted under the Treaty irrespective of when the offence was committed, provided that it was an offence against the laws of both countries if it occurred prior to the entry into force of the Treaty: art 2(4). Thus, the deaths at Balibo were crimes under Australian and Indonesian law in 1975, extradition may be granted.

(d) Grounds for Refusal of an Extradition Request

78. Where the offence was committed outside the territory of the Requesting State by a non-national of that State (that is, Australia), extradition may be granted at the discretion of the Requested State (Indonesia): art 1(2). That is a decision for the Indonesian authorities which cannot be pre-empted on any legal basis.

79. While Indonesia has a right under the Treaty to refuse to extradite its nationals (art 5(1)), where it so refuses it must, at the request of Australia, submit the case to its own competent authorities for prosecution: art 5(2). If Indonesia does not have jurisdiction, then it must extradite the person: art 5(3).

80. A person must not be extradited under the Treaty if the offence is a “political offence” or, in the circumstances, an “offence of a political character”: art 4(1). The decision of the authorities in the requested State (ie, Indonesia) is determinative: art 4(2). There is no internationally accepted test for the defining “political offences”, although in many countries it is most common *not* to characterise war crimes as political offences. Further information is necessary on whether Indonesian law would regard war crimes as political offences in the circumstances.

81. The Treaty requires States to refuse extradition in a number of situations relevant to the present case, including where the person is exempt from prosecution in the requested State due to lapse of time, or where an act is only an offence against military law in the requested State: art 9(1)(a) and (b).
82. The latter ground is not applicable, since the killing of civilians was not merely an offence against military law or military discipline in Indonesia, but also amounted to a crime under the general criminal law. At the relevant time, the Indonesian military was subject to concurrent liabilities under military and civilian criminal law: see Captain Djaelani, “The Military Law System in Indonesia” (1973) 59 *Military Law Review* 177.² Article 92(3) of the Indonesian Penal Code explicitly considers members of the armed forces to be “officials” subject to the general criminal law.
83. Lapse of time may, however, provide a ground for the mandatory refusal of extradition. The right to prosecute lapses under the Indonesian Penal Code 15 years after the commission of crimes for which the penalty is capital punishment or life imprisonment: art 78(1)(4). Indonesia is not party to the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (754 UN Treaty Series 73, entered into force 11 November 1970), and that treaty has only 50 State parties and is not regarded as reflecting customary international law on the matter. It is unknown whether Indonesia has elsewhere removed limitation periods in respect of war crimes, or including any such crimes in military criminal law as mentioned above. The 1949 Geneva Conventions impose no limitation period for war crimes prosecutions, and the question is implicitly left to be answered by national implementing legislation.
84. The Treaty also provides discretionary bases for refusing extradition, including, relevantly, that extradition would be unjust, oppressive or incompatible with humanitarian considerations (considering, for instance, the age, health or personal circumstances of the person), or where the Requested State has decided in the public interest to refrain from prosecuting the person: art 9(2)(b) and (d). These are matters for the Indonesian authorities and provide wide discretionary grounds for refusal.

² Referring to the Military Criminal Law Book for Indonesia (1934) and the Military Disciplinary Law Book for Indonesia (1934), as supplemented by the Military Disciplinary Regulation (1949). While military criminal law operated as *lex specialis* to the civilian criminal law (at 178), that does not mean that liability “only” arose under military law as required for the refusal of extradition under art 9(1)(b) of the 1995 Extradition Treaty.

The Requesting Process in Australia

85. Any decision to request the extradition of Indonesian suspects would need to follow the usual Australian procedures for extradition requests, pursuant to the Extradition Act 1988 (Cth). In brief, the process could be initiated by the Commonwealth DPP and an arrest warrant sought. The Attorney-General (or, in practice, the Minister for Justice and Customs) makes the (judicially reviewable) decision whether to make an outgoing extradition request, through diplomatic channels, to the Indonesian authorities: s 40.
86. Under article 11 of the Extradition Treaty, an extradition request must be accompanied by the arrest warrant; a statement of offences and acts alleged; the text of the relevant law creating the offence as well as limitation periods; the applicable punishment; and an accurate description of the suspect's identity and any information which may help to establish the person's identity and nationality.
87. In urgent cases, the Commonwealth Attorney-General's Department, on receiving an arrest warrant from the Commonwealth DPP, may seek a provisional arrest through Interpol or directly from Indonesia.

(iv) Private Prosecutions

88. There is a right under Australian law to privately prosecute crimes: Crimes Act 1914 (Cth), s 13. The right is "a valuable constitutional safeguard against inertia or partiality on the part of authority" (*Gouriet v Union of Post Office Workers* [1978] AC 435 at 477, per Lord Wilberforce). This includes in circumstances where the DPP has not yet considered whether to prosecute a matter, or even where it has decided not to prosecute the matter.
89. Private prosecutions are subject to the statutory power of the Commonwealth DPP to take over such proceeding, including by discontinuing it once it is taken over: Director of Public Prosecutions Act 1986 (Cth), s 9(5). As matter of Commonwealth prosecution policy (para 4.10), the DPP will allow the private prosecutor to proceed unless (a) there is insufficient evidence to continue, (b) it is improperly motivated or an abuse of

process, (c) it would be contrary to the public interest, or (d) it would not be in the interest of justice to remain a private prosecution.

90. Relevantly, subjective public interest considerations may include “the maintenance of international relations”, a consideration which could weigh against the DPP allowing any private prosecution to proceed against suspects in the Balibo deaths. On the other hand, upholding international humanitarian law through the pursuit of war crimes prosecutions, as required under the 1949 Geneva Conventions, could equally be invoked as a factor in the maintenance of international relations.



Dr Ben Saul*

*Senior Lecturer and Barrister-at-law
Sydney Centre for International and Global Law
Faculty of Law, The University of Sydney*

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