

# A gritty request, if we can stomach it

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As the coronial inquest into the killing of five journalists at Balibo draws to a close, the critical question is: what happens next? Despite four Australian inquiries and a United Nations investigation in 2001, no one has been brought to justice for the killings in East Timor in 1975. Over the past 30 years, Indonesia has refused to cooperate in establishing the truth, no more spectacularly than this week, when the Governor of Jakarta fled Sydney after refusing a request to appear at the inquest.

For a long time, the political sensitivities of Australia's relations with Indonesia prevented Australia from doing its best for the victims, despite sustained pressure from their families. Those sensitivities have hardly abated, as Australia contemplates its response to an anti-Australian reaction by some Indonesians, while juggling anti-Indonesian sentiment at home, all of which may yet take time to play out.

Unlike previous inquiries, the coronial inquest had the advantage of judicial powers to compel witnesses, including Australian officials and even a former prime minister, Gough Whitlam. Its judicial nature has encouraged confidence in its independence, after previous inquiries were dogged by perceptions of political interference. This alone may give comfort to the victims' families, quite apart from where the inquest leads.

Deliberately killing unarmed civilians is the most fundamental violation of the law of war. As the counsel assisting the coroner, Mark Tedeschi, QC, argued this week, on the evidence unearthed at the inquest, the killing of five journalists at Balibo by Indonesian forces looks terribly like a war crime. The coroner, Dorelle Pinch, must now decide whether she agrees.

While the coroner can make findings about a person's cause of death, she has no power to lay charges. If the coroner identifies a suspect, she may refer the case to the Commonwealth Director of Public Prosecutions, who must then independently evaluate the evidence and decide whether to prosecute. Prosecutors are likely to give considerable weight to the findings of an inquest, particularly one conducted as thoroughly as this one.

In considering whether to lay charges, prosecutors could make use of little-used 1957 federal war crimes laws, which brought the 1949 Geneva Conventions into Australian law. While the 1957 legislation was replaced by new laws in 2002 on the International Criminal Court (which only operates prospectively), it remains the law in effect in 1975.

The law allows Australia to prosecute war crimes wherever they occur and regardless of the nationality of the perpetrator or the victim. The Indonesian invasion of East Timor triggered an international armed conflict to which the Geneva Conventions applied, including the prohibition on killing civilians. There is no time limit on

prosecuting war crimes, even those which occurred more than 30 years ago. The legal difficulty for Australia is obtaining custody of the suspects. If they visited Australia on holiday or business, there would be no problem. Of course, suspected war criminals are extremely unlikely to board a jet to Australia any time soon.

Otherwise, Australia could ask Indonesia to extradite the suspects under a 1995 extradition treaty. The treaty allows extradition even for crimes committed before the treaty was adopted, and regardless of what the relevant crime was called in each country. Australian law did not prohibit ordinary murder overseas in 1975, but it did prohibit the war crime of wilfully killing civilians, and murder was a crime in Indonesia at the time.

The extradition treaty allows Indonesia to refuse to extradite its nationals - which it almost certainly would do - but if it refuses then it must submit the case to its prosecutors. A further problem is that Indonesian criminal law imposes a 15-year limitation on prosecutions for murder.

Whether the Indonesian courts have the stomach for prosecuting former ministers or military personnel remains to be seen. Despite the growth of Indonesian democracy and judicial independence, the rule of law remains fragile and judges are vulnerable to political pressure. The price of Indonesia's transition to democracy was an understanding that the military would be left alone. For this reason, it is preferable for suspects to be tried in Australia.

At the very least, an Australian extradition request would apply the force of law to Indonesia to finally do something: to extradite or to prosecute. The law offers the hope that the victims of war crimes will no longer be left to the vagaries of politics.

It may also cut through the uncomfortably cosy relationship between Indonesia and Australia, which abandoned both the Balibo journalists and the East Timorese people for so long.

Australia and Indonesia recently signed the Lombok security treaty, under which they agreed to co-operate on law enforcement. War crimes at Balibo may provide an early opportunity to test the willingness of both countries to cement their relationship, warts and all.