Practical Justice in *Doe v. Lumintang*: The Successful Use of Civil Remedies Against "an Enemy of All Mankind"[i]

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In a Washington D.C. courtroom on September 10, 2001, U.S. Magistrate Judge Alan Kay brought down a judgment for compensatory and punitive damages of more than U.S.$66 million against the defendant in the case of *Jane Doe et al v. Johny Lumintang*. Six East Timorese plaintiffs, known by their legal pseudonyms of Jane Doe and John Doe I–V, brought the civil suit against Lieutenant-General Johny Lumintang, the Deputy Chief of Staff of the Indonesian Army throughout most of 1999, "for designing, ordering, and directing a campaign of violence and intimidation against the people of East Timor which resulted in the wrongs suffered by the plaintiffs"[ii]. The U.S. District Court had jurisdiction over the case under the provisions of at least two U.S. laws, namely the *Alien Tort Claims Act 1789 (ATCA)* and the *Torture Victim Protection Act 1991(TVPA).*

The Development of the Case

Lumintang's name emerged early as a possible target of a suit following the Indonesian withdrawal from East Timor in late September 1999. The East Timor human rights group Yayasan HAK had discovered two crucial pieces of physical

evidence directly linking Lieutenant-General Lumintang to the planning of crimes against humanity in East Timor. The first was a telegram signed by Lumintang in June 1999 to the commander of the Udayana Military Region ordering him to prepare an evacuation plan in the event that the UN-supervised referendum on independence to be held two months later went against Indonesia. The second was an Army manual issued over Lumintang's signature on preparations for training in Indonesian Special Forces that made clear that terror, assassination, kidnapping and torture were regarded as standard operating procedure.

Although it was not known at the time, on the basis of the evidence of the telegram and the Secret Warfare Manual, Lumintang had in fact been named by Indonesia's own Investigative Commission into Human Rights Violations in East Timor (KPP HAM) as one of four senior Indonesian army officers responsible for the systematic character of the crimes against humanity in East Timor. The Investigative Commission recommended that he be investigated for crimes against humanity, together with Armed Forces Commander General Wiranto; the intelligence officer who directly supervised all East Timor operations in 1999 Major-General Zacky Anwar Makarim; and Major-General (ret.) H R Garnadi, who had recommended the "scorched earth" policy of withdrawal put into effect following the loss of the referendum. At the time of the hearings before Judge Kay, the KPP HAM report was still secret, and only an executive summary had been published, and then in an incomplete form that omitted Lumintang's name (though those of Wiranto, Anwar and Garnadi had become public). None of these men were subsequently brought to trial in Indonesia.

East Timor activists in the United States discovered that Lumintang was scheduled to deliver a talk in Washington D.C. at a public symposium of the United States-Indonesia Society in late March 2000. The news was passed on to East Timor, and the principal plaintiffs requested that the New York-based Center for Constitutional Rights (CCR) and the San Francisco-based Center for Justice and Accountability (CJA) commence proceedings against Lumintang on their behalf. An attempt to serve notice on General Lumintang dramatically at the symposium was thwarted for logistical reasons, but he was tracked to Dulles Airport[iii] and served while waiting to board his plane. Lumintang left the United States immediately and never returned.

Lumintang failed to appear or be represented at the Washington District Court hearing for liability in November 2000, and was automatically held to be in default, and hence legally responsible under U.S. law "for war crimes, crimes against humanity, gross violations of human rights".

The proceedings then moved to the next stage: the determination of damages, both compensatory and punitive. Three days of hearings were held before U.S. Magistrate Judge Alan Kay in Washington between March 27 and March 29, 2001. Three of the four living plaintiffs gave testimony, and the fourth presented video testimony. Five expert witnesses spoke for the plaintiffs.[iv] Since the defendant had

chosen not to appear or be represented, only lawyers for the plaintiffs were present at the hearings[v].

"Pak Johny will certainly be arrested"

Following the Kay judgment, both Lieutenant-General Lumintang and senior Indonesian ministers dismissed the case as a meaningless and biased trial *in absentia*, and gave every indication of ignoring the matter altogether. However, two months after the Kay judgment, the Indonesian government abruptly turned about face. Minister of Defense Matori Abdul Djalil criticized his predecessor's failure to provide Lumintang with legal support, and announced the formation of a legal defense team. With Lumintang at his side, Matori made the rationale for the about face quite clear: "If Pak Johny goes to America now he will certainly be arrested… This is not just for Johny's interest, but for the moral interests of all soldiers."

Foreign Minister Hassan Wirayudha acknowledged the obvious point that this move entailed recognition of the jurisdiction of the U.S. Court.[vi]

On March 28, 2002, Lieutenant-General Lumintang filed a *Motion To Set Aside Judgment* with Judge Kay through a Washington Law firm. The *Motion*, which was accompanied by a number of supporting documents from Lieutenant-General Lumintang and other Indonesian government and military officials, made two basic assertions. The first challenge was that the judgment was void due to jurisdictional failings. It alleged that the Court lacked personal jurisdiction over the defendant; that the defendant was never served with process; and that the Court lacked subject matter jurisdiction over the claims under the TVPA or the ATCA. Accordingly General Lumintang's failure to appear expressed to disrespect to the Court. The second claim was that Lieutenant-General Lumintang lacked command responsibility for the events specified.[vii]

Judge Kay was to hold oral argument on the *Motion* in mid-February 2003.

The Plaintiffs

The six plaintiffs included the following people, two of whom had been killed by Indonesian military forces in 1999:

Jane Doe, a fifty-six-year-old woman, lost her house in the 1975 invasion, and saw her home and community destroyed once more in September 1999. An Indonesian soldier neighbor warned her that she would be killed following the announcement of the ballot, and urged her to flee to West Timor. Her youngest son, who became *John Doe 1,* wanted to flee at the time of the ballot, but his mother pleaded with him to remain with the rest of the family. He left their village of Becora and she never saw him again. On September 6 they were forced to flee

by an Indonesian soldier seizing their house. She fled with the rest of her family to West Timor and later Flores, where she learned of her son's death. He had been shot in the leg and died in Dili.

John Doe 2, a shy, nervy, slightly built, prematurely aged thirty year-old man, lost his leg after he was shot by Indonesian soldiers in Dare on September 10 for carrying a packet of biscuits for the FALANTIL resistance, according to the soldiers who shot him.

John Doe 3 is a tall confident and articulate twenty-seven year-old human rights activist who was often threatened because of his work and kept under surveillance. In August 1999, his father, *John Doe 4*, was arrested, interrogated and threatened with death. His younger son, *John Doe 5,* was arrested some time later and nothing was ever heard of him again. In February 2000, *John Doe 4* received a letter from a militia member saying that he had witnessed *John Doe 5*'s torture mutilation, execution and burning. He was first shot in the legs and then stabbed repeatedly. While *John Doe V* was still alive, his Indonesian torturers cut his throat, hacked off his legs and hands, and burned his remains.[viii]

Civil Remedies for Crimes Against Humanity in U.S. Law

The initiative to sue Lumintang for damages in a U.S. civil court represented an alternative path to justice in the face of massive crimes against humanity in East Timor. After the violence of 1999, it was hoped that prosecutions of well-known major Indonesian and East Timorese suspects would take place either under the auspices of the United Nations or the newly elected democratic Wahid administration in Indonesia or, conceivably, in East Timor itself. A United Nations tribunal was not in fact formed, and the Indonesian prosecutions turned out to be almost farcical.

The use of civil remedies in U.S. courts offered a viable alternative, and one that did not depend on the vagaries of Indonesian or United Nations politics. Since 1979, a series of civil actions had been brought successfully under the *Alien Tort Claims Act* and the *Torture Victim Protection Act* based on the unusually broad jurisdiction these acts possess. The *Alien Tort Claims Act* specifies that "[t]he district courts shall have original jurisdictional of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States."[ix]

Civil remedies may include awards for compensatory damages for injuries, and punitive damages intended to express moral outrage for particularly egregious behavior and to deter future occurrences of similar actions. "In addition to any money damages that can be awarded, these cases are important to the victims and their families. Plaintiffs are allowed to tell their stories to a court, can often confront their abusers and create an official record of their persecutions. This in

turn could lead to a criminal prosecution. Filing these civil suits can empower the victims and give them a means for fighting back. It can also help them heal."[x]

The first successful application of the *Alien Tort Claims Act* in a human rights case occurred in the 1981 decision of the United States Court of Appeals for the Second Circuit, *Filartiga v. Pena-Irala*. In 1979, a young man named Joel Filartiga was tortured by Paraguayan police authorities because of his father's political activities. The torturer moved to the United States where, by chance, the victim's sister Dolly happened to see her brother's murderer, Americo Pena, on the streets of New York. The family then sued under the *Alien Tort Claims Act*.

In his summation to Judge Kay for the plaintiffs, Steven Schneebaum summarized the legal significance of *Filartiga:*

> *Filartiga against Pena* stands for two propositions: One, that treatment of citizens of a country by that country may be a matter of legitimate international concern and not just diplomatic but legal concern; and second, Judge Kaufman held that the law under which the case arose was the law of the United States because customary international law and conventional law are parts of the laws of our country. It has always been thus, but never before 1980 in the Second Circuit had the rules of international human rights law been brought into an American courtroom as the rule of decision.[xi]

Moreover, Schneebaum argued that *Filartiga* established for the first time in U.S. law the doctrine of individual legal responsibility for human-rights violations, as the first part of a

> movement of international law toward individual accountability. Individuals now at the beginning of our century may be said to have both rights and obligations in international law. Individuals are now properly said to be subjects of international law, they have what we used to call international legal personality. They may bear obligations, they are entitled to rights. And nations, countries, armies, do not violate human rights; people violate human rights; and the people who commit those acts of violation may be held personally accountable. That's new. It's new in the sense that it was the judgment at Nuremberg, it was the judgment in Yamashita, it was the judgment in other cases in which acts of war have entailed individual responsibility, but never before Filartiga had it been held that human rights norms and human rights violations also entail such responsibility.

The Court asserted its jurisdiction over Pena, even though he was a foreign national whose criminal activities took place outside the United States against non-US citizens. Jurisdiction under the *ATCA* is universal, based on the universally accepted right to be free from torture. "Indeed", wrote the Court, "for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind".

In the years after 1981, the range of potential defendants was widened, from actual perpetrator, to those with command responsibility who authorized or ordered the criminal action, and who failed to prevent it. Moreover the range of possible defendants expanded from the representatives or employees of states to include non-state actors: for example, in 2000 a jury awarded damages of U.S.$4.5 billion against the Bosnian Serb leader Radovan Karadzic, who was at the time a diplomatically-unrecognized leader. Foreign political groups may be sued, and in current cases, major United States and European corporations are being sued for their complicity in gross human rights abuses in Burma and Nigeria.[xii]

Lumintang and Command Responsibility[xiii]

The core of the case against Lumintang was that he was derelict in his execution of his responsibilities as a legally-appointed officer within the Indonesian Armed Forces. More precisely, the case against Lumintang rested on the facts that

- command responsibility in a regular army is a shared responsibility, and that therefore more than one person may be held responsible for criminal conduct;
- senior staff officers are not devoid of responsibility for supervision of operational activities;
- the legally prescribed role of the Army Deputy Chief of Staff within the formal establishment of the Indonesian Army ensured that Lieutenant-General Lumintang had a substantive ongoing connection with the planning, supervision and conduct of Indonesian army operations in East Timor;
- within this legally prescribed role, Lieutenant-General Lumintang had the authority and capacity to take action to limit or prevent criminal conduct by members of the Indonesian Army; and that
- Lieutenant-General Lumintang did not take any such steps.

Under the doctrine of command responsibility, commanders may be held responsible for certain actions even though the commander does not participate in the criminal actions.

The theory underlying the doctrine of command responsibility is that the commander is in the best position to prevent violations of humanitarian law; because commanders are in positions of great public trust and responsibility and are empowered to prevent or punish abuses, a heightened legal duty is imposed upon them. As emphasized by the Court in *Kadic v. Karadzic*, 70 F.3d 232, 242 (2nd Cir. 1995), "international law imposes an affirmative duty on military commanders to take appropriate measures within their power to control troops under their command for the prevention of atrocities".[xiv]

In fact, Judge Kay held Lumintang both directly and indirectly responsible for the human rights violations endured by the plaintiffs.[xv] Following the announcement of the damages judgment against him, Lieutenant-General Lumintang claimed that "[a]s a deputy Army chief of staff at the time, I was not directly involved in any decisions on East Timor".[xvi] In his affidavit supporting Lumintang's *Motion to Set Aside Judgment,* Brigadier-General Sihombing claimed that: "Under these laws and decrees the Chief [of Staff of the Army] has authority over administrative matters and does not have authority over operational matters of the Indonesian Army".

This line of argument is incorrect both in fact and in law, and its currency indicates either mendacity or ignorance of and contempt for universally-accepted principles of international law, to say nothing of morality. Most importantly, such claims are based on a misconception of the character of high command positions in relation to operational command, and of Lumintang's actual role[xvii].

Establishing Lumintang's responsibility for wrongs in East Timor involves both matters of fact and matters of law. To establish Lumintang's command responsibility, the plaintiffs needed to establish three things about his role in the 1999 events: that he was in a superior-subordinate relationship to the personnel who carried out gross human rights violations; that he knew or should have known about them; and that he either did not exercise his authority to prevent these violations of law or failed to punish the perpetrators of such acts or failed to punish the perpetrators of such acts.

Lumintang was appointed Deputy Army Chief of Staff on January 18, 1999, and remained in that position until November 4 of that year. Prior to this, Lumintang had been promoted to Lieutenant-General (three-star), the second highest rank in the Indonesian Armed Forces, making him part of the highest echelon of the Indonesian Armed Forces high command. In Lumintang's time as Army Deputy Chief of Staff, there were only two other three-star army generals serving in TNI and Army headquarters. Lumintang was outranked in the Army by only two full generals (four star): Wiranto (Armed Forces Commander) and Subagyo (Army Chief of Staff)[xviii]. As Deputy Chief of Staff of the Army, Lumintang was in plain terms one of the most important figures in the entire armed forces and, arguably, the third most important in formal terms after Wiranto and Subagyo; certainly in the top five.

The Indonesian Armed Forces is a legally-constructed, bureaucratically structured organization, with the roles of office-holders specified in documents issued under the authority of the Commander of the Indonesian Armed Forces. The position of Deputy Chief of Staff of the Army is one such office, and its duties and responsibilities have been clearly set out in Decisions of the TNI Commander. Following a major re-organization of the Armed Forces, the then TNI Commander, General Moerdani, issued a document entitled *Organization and Procedures of the Indonesian Army (TNI-AD), Decision of the Armed Forces Commander: Kep/08/P/III/1984.*[xix]

> The Army is formally organised into two levels, Army Headquarters and Army Principal Commands, the latter including the Army Strategic Reserve [Kostrad], Special Forces Command [Kopassus], and the Military Area Commands [Kodam], of which there were ten in 1999. The Deputy Army Chief of Staff is designated as the second position within the Lead Echelon of Army Headquarters, responsible to the Army Chief of Staff, who is himself responsible to the Armed Forces Chief of Staff[xx].

The legally specified duties and responsibilities of the Deputy Army Chief of Staff include the following:

> A. The Deputy Chief of Staff of the Army is the principal aide and adviser to the Army Chief of Staff who has the duty and obligation to lead, organize and guide staff and leadership bodies, central service and executive bodies (except the Military Academy and the Army Staff and Command School), as well as other duties as instructed by the Chief of Staff, with responsibilities as follows:
> 1. Making proposals and suggestions to the Chief of Staff on matters concerning his areas of responsibility.
> 2. Leading the Inspectorate-General, General Staff, Special Staff, Budget and Planning Staff, and formulating plans and programs for the execution of the Army's duties.
> 3. To ensure coordination is effected and maintained:
> a. between Army Headquarters Staff and Army field bodies and Commands;
> b. between Army Headquarters Staff and the Headquarters Staffs of other parts of the Armed Forces and Police;
> c. between Army Headquarters Staff and the Staff of Armed Forces Headquarters and the Staff of the Ministry of Defense and Security.
> 4. To coordinate, control and supervise the execution of Army decisions, plans and programs, as well as personnel, materiel and financial arrangements.
> 5. To coordinate, supervise and give direction to the Staff, Central Service and Executive bodies.[xxi]

Moreover,

> [w]henever the Chief of Staff is prevented from carrying out his responsibilities, he will be replaced by the Deputy Chief of Staff.

It is clear from this statement of duties that the Deputy Army Chief of Staff, were he executing his duties diligently, had a responsibility to know what was occurring in the Indonesian Army's most important zone of engagement: "to ensure coordination is effected and maintained between Army Headquarters Staff and Army field bodies and Commands"; "to coordinate, control and supervise the execution of Army decisions, plans and programs"; and "formulating plans and programs for the execution of the Army's duties".

In fact, the execution of these duties involves the Deputy Army Chief of Staff in close and regular contact with the three Army commands, knowledge of all their significant activities, collaboration in the planning of operations, and assessment of their efficacy and conformity with Army policy—and law.

One of the Deputy Chief's designated responsibilities is "leading the Inspectorate-General, General Staff, Special Staff, Budget and Planning Staff". The Army Headquarters manual specifies one particular duty of the Deputy Chief of Staff in relation to a part of the General Staff.[xxii]

> a. The Operations Staff is an Army General Staff body with the duty of assisting the Army Chief of Staff effecting the function of the General Staff in the area of the development and control of forces, which includes doctrine, organization, training, uplifting the combat performance of Army units, and the preparation and readying of Army forces….
> c. The Operations Staff is led by the Assistant for Operations to the Army Chief of Staff [Asops KasAD], who is responsible for the performance of the duties outlined above to the Army Chief of Staff, and in the day-to-day execution of these duties is coordinated by the Deputy Army Chief of Staff.

It is clear then that the position General Lumintang held in 1999 had formal responsibilities and powers that both required him and enabled him to know of the activities of combat units, and to exercise designated authority for certain aspects of their activities.

The suggestion that "staff" positions at a high level carry no responsibility for actions of combat units or involvement in their systematic and regular activities is quite specious. It is as if "administration" of an army is merely a matter of pushing paper and counting uniforms. This is an absurd view of complex legally constituted formal organizations. More importantly, it is in law irrelevant to the interpretation of command responsibility.

The Lumintang Telegram

Two pieces of physical evidence connect Lumintang quite concretely with criminal actions in East Timor, and both survived the planned destruction of evidence by the retreating Army. The first is a telegram sent from Army Headquarters on May 5, 1999 to the Commander of Military Area IX/Udayana, Major-General Adam Damiri. The telegram is from the Army Chief of Staff, but signed by Lumintang. The Chief of Staff is also listed as receiving a copy, suggesting that Lumintang signed and sent the telegram while standing in for the Chief of Staff. It begins by referring to a letter three weeks earlier "regarding the

order to anticipate situations that might arise with regard to the choice of options for the East Timorese people".

The addressees, which, in addition to the Kodam IX commander, include the Army Inspector-General, Assistants to the Army Chief of Staff, and the local Army commander in East Timor (Military Resort 164), are then ordered to:

1. Be ready to confront all possibilities in the choice of options for the East Timorese.
2. Prepare a security plan with the aim of preventing the outbreak of civil war including preventative action (creation of conditions), police actions, repressive/coercive actions as well as plans for moving back/evacuation [of East Timorese] if the second option becomes the choice.[xxiii]

Written in "telegraphic" shorthand form, the telegram is clearly part of an ongoing stream of consultations between Jakarta and Kodam IX headquarters in Denpasar about how to deal with the developing situation in East Timor. Details exist of a number of subsequent meetings between senior Indonesian officers (including recipients of the telegram), Indonesian civil authorities in East Timor and militia leaders discussing the implementation of the order. The end result was of course a massive and murderous re-location of hundreds of thousands of people, the great majority of whom were coerced or intimidated. The scale of the final operation was vast, involving more than one third of the territory's population, and requiring complicated and relatively highly coordinated logistical planning, using large numbers of Indonesian military personnel and equipment.

The telegram clearly orders the preparation of plans for evacuation in the event of a vote for independence and, in that respect, the most important aspect of the telegram is that it indicates Lumintang's official role as the instigator in the planning process that led to the mass forced re-locations. The telegram anticipates the need to create certain security conditions, with the aim of "preventing the outbreak of civil war". Given the level of terror obtaining in East Timor at that time as a result of undoubted Indonesian Army activities in concert with the militia it controlled, the meaning of that statement of aim is, to say the least, ambiguous.

The telegram also orders local commanders to use "repressive/coercive actions" *[tindakan represif/koersif]*. It has been argued that the original Indonesian phrase does not necessarily carry the brazen and brutal connotations of the English. However, in the context of a formal order to senior commanders conducting a semi-covert war, the sense is arguably much stronger. The actions to be carried out include standard terms listed in Indonesian Army officer training manuals—creating conditions (which would include social, political, military conditions), police actions (a term which in the context of New Order Indonesia could refer to some very harsh techniques), and "repressive/coercive actions". The three types of actions are, in context, comprehensive. Almost nothing is excluded.

Represif coupled with *koersif*, together with the other two recommended actions in the context of an ongoing war, would seem to mean something very close to its English meaning.

It is difficult to think of what stronger word would be used in an official written order in such a context to describe the activities that were already being conducted by the Army. The reality was that Indonesian Army activities were already extremely violent and, as Lumintang had good reason to know, likely to become more so. There is nothing in the telegram that indicates any limitation on the means to be used in creating appropriate conditions or the limits of "repressive/coercive actions". There were in fact none, and given the prior history of the Indonesian Army in East Timor, with which Lumintang was directly familiar, none could be expected[xxiv].

As early as June 12, a little more than a month after the Lumintang order to prepare an evacuation plan, there was evidence to indicate that the evacuations the Indonesian military had in mind were indeed coercive—in fact a forced evacuation and re-location.

> Yayasan Hak, an East Timorese human rights organization in Dili, reported on June 13, 1999 that sources within the Besi Merah Putih militia had leaked information that a plan to forcibly evacuate women and children to West Timor had been discussed at a meeting on June 12 in Liquica attended by the district head, … the commander of the BMP militia, and the head of the Liquica district military command.[xxv]

A week later another meeting of senior military officials and militia leaders was held at the Military Resort [Korem 164] headquarters in Dili, in order to draw up a two-track comprehensive plan to deal with the likelihood of losing the referendum.

The participants of this Korem 164 meeting included Task Force head General Zacky Anwar Makarim and his deputy Glenny Kairupan, Korem commander Colonel Tono Suratman, and several of the militia heads, and most importantly for the present purposes, Major-General Kiki Syahnakri, the Assistant for Operations to the Army Chief of Staff[xxvi]. In that position, Syahnakri reported directly on a day-to-day basis to the Army Deputy Chief of Staff, Lieutenant Johny Lumintang. Indeed, Syahnakri later acknowledged that it was he who had drafted the telegram that Lumintang signed on 5 May.[xxvii]

Lumintang is directly linked to the vast forced re-location and ethnic cleansing plan, both through the telegram that initiated the evacuation planning process and the activities of his immediate subordinate. Either Lumintang knew of Syahnakri's activities, and at least tacitly approved of them, if not positively directed them; or he did not know of them, and was hence derelict in his responsibility. In either case, under the well-developed doctrine of command responsibility, to say nothing of common moral duty, Lumintang was culpable in planning for major crimes against humanity.

The Secret Warfare Manual

The second piece of physical evidence that ties Lumintang's official activities to crimes against humanity in East Timor is unambiguous. An Army Secret Warfare manual of development guidelines issued over Lumintang's name as Deputy Army Chief of Staff was discovered in Dili after the Indonesian retreat.[xxviii] The manual is intended to systematize Army preparations for secret warfare, and the goals of training in particular. As the manual points out, the principal part of the Army using such secret warfare skills is the Special Forces Command *[Kopassus]*. The manual[xxix] specified exactly what techniques were to be taught to Kopassus personnel, and how they were to be examined on paper and in the field:

Tactics and Techniques of War of Nerves ["Strategy of Tension"][xxx]
Tactics and Techniques of Propaganda
Tactics and Techniques of Abduction
Tactics and Techniques of Terror
Tactics and Techniques of Agitation
Tactics and Techniques of Sabotage
Tactics and Techniques of Infiltration
Tactics and Techniques of Surveillance
Tactics and Techniques of Wiretapping/Bugging
Tactics and Techniques of Photo Intelligence
Tactics and Techniques of Psychological Operations

In signing the manual, which was developed precisely in accordance with the designated responsibilities of his office, Lumintang was signifying his understanding that terror, murder, disappearances and torture were standard operating procedure for one of three Commands under his authority in the Indonesian Army—as indeed they had been in practice for Kopassus in East Timor and elsewhere for many years[xxxi].

The signed manual demonstrates not only Lumintang's knowledge and approval of conduct treated as criminal throughout the world, but also his acknowledgment and acceptance of the fact that in the organization in which he held very senior rank and almost the highest legal authority, terror, murder, disappearances and torture are unexceptional desirable skills to be passed on to new Kopassus recruits in a rationalized manner. Nothing more clearly indicates the depth of the normalization of universally condemned standards of morality in the culture of impunity in which Lumintang spent his working life and which he was proud to represent. Lumintang was a good example of the Indonesian Army's idea of a model soldier—who found nothing unusual or disconcerting about organizing an education in terror and torture for trainees.

What Could Lumintang Have Done?

One requirement for demonstrating a dereliction in command responsibility is to show that Lumintang not only knew that criminal actions were taking place in East Timor within his own arena of designated responsibility, but that he failed to take appropriate actions to end or limit such practices. Apart from whatever understanding of military law Lumintang received from his extensive military education in Indonesian and the United States (the latter on three occasions), and his understanding of Indonesian law as Commandant of the Armed Forces highest educational institution, Lumintang had also been close to the disciplining of his predecessor as Commander of Korem 164, Brigadier General Rudolf Samuel Warouw by President Suharto over his responsibility for Santa Cruz massacre in 1991. In other words, Lumintang was perfectly aware that Kopassus actions in East Timor were criminal under Indonesian law, let alone international law, and that in the past, Indonesian officers had been held responsible by their superiors.[xxxii]

What could Lumintang have done as Deputy Army Chief of Staff in 1999? The one thing he could not do was directly order Kopassus, Kostrad and Kodam IX soldiers to stop these actions: that was a prerogative of the commanders of the three Commands. But there were in fact many other avenues open to him, a number of which were explicitly specified duties of his position. Lumintang could have attempted to stop or restrain the crimes being carried out in East Timor by:

- directly investigating widespread public allegations of extra-judicial killings, terror and torture in East Timor;
- initiating a review of these activities by his direct subordinate, the Inspector-General of the Army;
- informing his superiors that Secret Warfare training materials supplied by Army headquarters recommended the use of tactics and methods which were illegal under Indonesian and international law;
- initiating alternative non-criminal approaches to realizing TNI goals in East Timor by directing the Army General Staff and Operations Staff accordingly;
- drawing the attention of his immediate superior, Army Chief of Staff Subagyo, to what was occurring, pointing out its illegal character, its violations of military procedures and policy (which includes the upholding of Indonesian law), and its violations of a number of international treaties and agreements to which Indonesia was a party, including the May 5 Agreement with the United Nations and Portugal;
- making statements to this effect in military discussion forums, where, as a three-star general and former Commandant of the Staff and Command College, he would have been at the very least heard out;

- making statements in public and in the mass media, as did, for example, Major General Agus Wirahadikusumah; and
- Lieutenant-General Lumintang could have resigned his position or even his Army commission, and made the reasons for doing so public.

There is no evidence that Lumintang did any of these things, or any suggestion that he did anything comparable. In fact, he undertook no action whatsoever to restrain the criminal behavior of TNI personnel in East Timor about which he knew so much. Since he had the authority and capacity to attempt all of these actions, Lumintang's failure to act is singularly culpable. At no time did Lumintang behave with honor.

Some sympathizers of Lumintang, and indeed some serious observers of Indonesian politics, argue that Lumintang was effectively powerless. One argument is that, as a staff officer, Lumintang was not a commander and therefore had no responsibility for actions taken by troops under the command of others, and no way of intervening. This is clearly quite untrue on both counts.

A more serious argument is that as a matter of political fact, Lumintang was possibly quite unable to exercise the authority vested in him: to have spoken out against the crimes in East Timor; to have attempted, for example, to bring Kopassus to heel, would have evoked derision from his fellow generals at best, and at worst marginalization from policy-making, with dismissal probable. There is some merit in both these arguments. Having authorized and signed documents such as the Army Secret Warfare manual, for Lumintang to claim to have suddenly discovered evidence of TNI criminal actions would indeed have invited derision. Lumintang acted for many years as an uncomplaining part of the military bureaucracy and command structure that believed, apparently without even reflection, that it could commit crimes against humanity with impunity.

It is also true that Lumintang would most likely have faced a very hostile response, and that he would have been subjected to intense political pressure within the Armed Forces, and most likely forced out of power. This is true, but it is hardly a defense. It is not even the case that Lumintang could claim to have a history of having fought such policies from within, and hence have good reason to play a balanced hand, retreating to fight another day. There is no evidence to suggest Lumintang did anything of the kind.[xxxiii]

To be sure, Lumintang was not the worst of Indonesian officers responsible for the crimes against humanity in East Timor. He was not known as personally sadistic or having a predilection for torture. He was not known as the author of particularly extreme or harsh policies in his time as Korem commander in East Timor or Kodam commander in Irian Jaya, although normal TNI terror and extra-judicial killing happened on both watches. He was not part of the most dreadful unit in the Indonesian Army, Kopassus, and had no record of involvement in intelligence and covert operations. He was not a Prabowo, a Zacky Anwar Makarim, a Kiki Syahnakri, or a Mahidin Simbolon. Lumintang was a straight élite

Army infantry officer and, in the norms of Indonesian Army culture, a very good one, receiving well-deserved promotion to the highest echelon of the Indonesian Armed Forces.

But that is precisely the problem. When the standards of morality are set at the level of the torturer, the sadistic killer, and the terrorist in uniform acting under superior orders, we have already abandoned most claims to humanity. It is precisely because Lumintang is a good career officer, a straight élite infantry soldier apparently exempt from sadism, that his demonstrable dereliction of his specified duties as a member of the Indonesian high command and his failure to comply with broader duties under the standards of international law and common responsibility to humanity become so important.

The problem that Lumintang represents is the normalization of profoundly immoral and illegal military conduct in a culture of impunity that has taken root in the Indonesian Armed Forces. Those who seek to excuse his conduct by favorably comparing him to torturers and sadistic killers only demonstrate their acceptance of, and complicity in, that culture of impunity. Lumintang indeed represents, in Arendt's phrase describing Adolf Eichmann, "the banality of evil"[xxxiv].

The Bankruptcy of "Realism"

Some experienced analysts of Indonesian politics have attacked the suit against Lumintang as a political error. One prominent Australian specialist on the Indonesian military refused to assist the plaintiffs for two reasons. Firstly, because Lumintang was a staff officer and not a commander, he held no responsibility for crimes in East Timor; and secondly, because he considered Lumintang an important Army reformer, and that the suit would therefore do a disservice to the cause of human rights in Indonesia. As it happens, there is no evidence to mark Lumintang as an important political reformer beyond some late, muted enthusiasms for "democracy" after October 1999.

Matters of fact aside, the difficulty with this type of position is that it forever postpones issues of justice and the allocation of legal responsibility in favor of the alleged political utility of leaving criminals in place. The rule of law, domestic as much as international, is subordinated to the demands of political maneuvering. The analysis of Indonesian politics by foreign and Indonesian analysts alike has been dominated for half a century by such *realpolitik* thought patterns, and the quiet but persistent demands for adherence to law have been marginalized as both unrealistic and impractical. *Doe v. Lumintang*, together with the reports of the Indonesian and United Nations inquiries, marks the first effective incursion of thinking based on legally-binding universal moral norms expressed through international law into Indonesian politics.

This same pattern of political realist thinking is not only antipathetic to the rule of law and universal legal norms in politics: it is equally unsympathetic to the concept of individual accountability for gross violations of human rights. There is a deeply statist presumption at work here, one which is reluctant to acknowledge, as Schneebaum put it, that "nations, countries, armies, do not violate human rights; people violate human rights; and the people who commit those acts of violation may be held personally accountable".

The four living plaintiffs are most unlikely to see any of the U.S.$66 million awarded in compensatory and punitive damages. But they have been able to speak and be recognized in a court of the most powerful country in the world. Their story has been told and adjudged true. The man they accused of responsibility for wrongs against them has been judged to bear that responsibility. The size of the award is an attempt by the judiciary to express the depth of those wrongs.

But the award is not merely symbolic. Johny Lumintang, now a senior state manager (Secretary of the Department of Defense), can never again visit the United States without threat of demand for payment. This judgment will follow him wherever he goes, as will the fact of his cowardice in failing to appear in court.[xxxv]

Moreover, the fact that Lumintang was found liable means that many other Indonesian senior officers implicated in the East Timor crimes can visit the United States only at the risk—indeed the likelihood—of facing similar suits and even stronger cases. Prabowo, Wiranto, Zacky Anwar, Kiki Syahnakri, Mahidin Simbolon and their ilk can only safely enter the United States either on diplomatic passports or in secret.

Most importantly, the same risk will face future gross violators of human rights in the Indonesian Armed Forces. Precisely because Lumintang is not a Prabowo or a Zacky Anwar, the significance of the case for their future behavior of "normal" mainstream military professionals in Indonesia is enormous. Whether states or soldiers like it or not, the laws that express universal moral norms such as the *U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* in national law are now legally binding in every jurisdiction as customary international law.

The judgment in *Doe v. Lumintang* exactly expresses the generous and universalist intentions of the framers of the *Torture Victim Protection Act*: in the U.S. case, those universal norms are to have universal jurisdiction. The doctrine of universal jurisdiction for crimes committed by "the enemies of all human kind" in that Act was not accidental and is not unique.[xxxvi] In the future there will be more applications of the doctrine of universal jurisdiction. The establishment of the International Criminal Court is one such, establishing a system of state-prosecutions of crimes against humanity and war crimes. The *Pinochet* decisions, added to the limited but gathering successes of the International Criminal Tribunals for Rwanda and the former Yugoslavia, are auguries of what is to come.

The *Torture Victim Protection Act* and the *Alien Tort Claims Act* supplement universal jurisdiction with a rare empowerment of individual citizens in the face of state indifference to wrongs suffered. Prosecutions in the International Criminal Court, like the International Tribunals for Rwanda and the former Yugoslavia, will always be dependent on the will and consent of states. *Doe v. Lumintang* extends the existing possibilities of citizen-initiated civil remedies and the possibilities of practical justice against "the enemies of all humankind" in East Timor and Indonesia.

Notes

i. I would like to gratefully acknowledge the support and assistance of David Bourchier in my preparation for the trial hearings. Not only did he provide the bulk of the biographical material on which I was able to rely, but his devil's advocacy was immensely helpful. I am also grateful to Douglas Kammen, Judith Chomsky, Anthony DiCaprio, Jennifer Green, Irene Baghoomians, Russell Goldflam, Gerry Van Klinken and John Miller.

ii. *Findings of Fact and Conclusions of Law, Jane Doe et al v. Lumintang.* p. 1. The full judgment is available at http://www.etan.org/news/2001a/10lumjudg.htm.

iii. The fact that the notice was served at Dulles Airport, which is in the state of Maryland, rather than Washington D.C. itself, was one of the grounds cited by Lumintang in his *Motion to Set Aside Judgment* in March 2002.

iv. I appeared as an expert witness on Indonesian military issues.

v. The lawyers involved in the case were Anthony DiCaprio (CCR), Judith Chomsky (CCR), Jennifer Green (CCR), Steve Schneebaum of the Washington law firm Patton Boggs, Brian Hendricks of Patton Boggs, Susan Shawn Roberts (CJA) and Joshua Sondheimer (CJA).

vi. See "Dephan Bela Johny Lumintang Sesalkan Kurangnya Bantuan Hukum" [Minister of Defense defends Johny Lumintang, regrets lack of legal aid], *Koridor*, 29 November 2001; and "Defense Ministry to Provide Johny Lumintang with Legal Assistance", *Antara* (26 October 2001).

vii. Although Lieutenant-General Lumintang subsequently maintained that he had no substantial connection with the United States, and accordingly was not within the personal jurisdiction of the court, he in fact spent more than one year and one month in the United States between 1978 and January 2000, undergoing military training as a middle-ranking and then senior officer, and then carrying out consultations as Secretary of the Indonesian Department of Defense. Moreover, on each of the five visits, Lieutenant-General Lumintang's travel and accommodation expenses were paid for by the United States government. On his last visit in January 2000 to the US, when he was served notice, Lieutenant-General Lumintang was hardly just passing through Washington. He had meetings (in his capacity as Secretary of the Indonesian Department of Defense) with the most senior security and diplomatic and legal officials in the U.S. government, including the National Security Advisor, the Attorney-General and the Secretary of State.

viii. *Doe v. Lumintang, Judgment, Findings of Fact* paragraphs 25-98.

ix. *Alien Tort Claims Act* codified at 28 U.S. Code Section 1350.

x. Michael Ratner, *Civil Remedies for Gross Human Rights Violations*, http://www.humanrightsnow.org.

xi. *Doe v. Lumintang, Transcript of Trial*, 29 March 2001, 72. See also Ratner, *op.cit.*

xii. Michael Ratner, *Civil Remedies for Gross Human Rights Violations*, http://www.humanrightsnow.org.

xiii. The material presented in the remainder of this chapter develops the information and argument presented by myself in evidence. See *Doe v. Lumintang Transcript of Evidence*, 27 March 2001, 26-136. For an outline of Lumintang's military biography see his entry in chapter 6.

xiv. *Findings of Fact and Conclusions of Law, Jane Doe et al v. Lumintang.* 30.

xv. "In the present case, Defendant Lumintang is both directly and indirectly responsible for the human rights violations committed against the Plaintiffs. Lumintang had "direct" responsibility for these acts: as the third-ranking member of the Indonesian military, he—along with other high-ranking members of the Indonesian military—planned, ordered, and instigated acts carried out by subordinates to terrorize and displace the East Timor population, to repress East Timorese who supported independence from Indonesia, and to destroy East Timor's infrastructure following the vote for independence. Lumintang's signature on the May 5, 1999 telegram was sent to subordinates in the Indonesian army that furthered the events in East Timor in 1999. The June 30, 1999 manual that was issued over his signature advocated training tactics for use by Indonesian soldiers that violate international law and were the same tactics actually used by these soldiers both before and after the Popular Consultation. These official acts support a finding that Lumintang was directly involved in ordering, instigating or planning acts which led to the plaintiffs' injuries in this case. The defendant also had indirect command responsibility for the plaintiffs' injuries. In his position as Vice Chief of Staff of the TNI, and as a member of the TNI High Command, Lumintang (1) served as commander of subordinate members of the TNI in East Timor who perpetrated the acts of violence which injured the plaintiffs; (2) knew or should have known that subordinates in East Timor were committing, were about to commit or had committed widespread and systematic human rights violations; and (3) failed to act to prevent or punish the violations. Based on the principles of command responsibility, the Court finds that defendant may be held liable for the actions of his subordinates, including the abuses suffered by plaintiffs in this action." *Findings of Fact and Conclusions of Law, Jane Doe et al v. Lumintang*, 32-33.

xvi. "Johny denies responsibility over mayhem in East Timor", *Jakarta Post*, 6 October 2001.

xvii. For a comprehensive review of the question of command responsibility in international law, see Ilias Bantekas, "The contemporary law of superior responsibility", *American Journal of International Law*, 93, no. 3 (July 1999).

xviii. From the listings for 1999 in "Current Data on the Indonesian Military Elite: January 1, 1998-January 31, 1999", *Indonesia*, 67 (April 1999), the seven active duty Army lieutenant-generals were Sugiono (Chief of General Staff of the armed Forces), Bambang Yudhoyono (Chief of Staff of the Armed Forces for Social and Political Affairs), Arie Kuma'at (Head of the State Intelligence Coordinating Board), Agus Widjojo (Commandant of the Armed Forces Staff and Command School), Johny Lumintang (Deputy Army Chief of Staff), Maulani (Head of the State Intelligence Coordinating Board). In addition, there were a small number of one-star and two-star generals in the Air Force and Navy, but real power within TNI since the beginning of the New Order always lay within the Army.

xix. *Keputusan Panglima Angkatan Bersenjata Kep/08/P/III/1984 tentang Pokok-Pokok Organisasi dan Prosedur Tentara Nasional Indonesia Angkatan Darat (TNI-AD).*

xx. *Keputusan Panglima Angkatan Bersenjata Kep/08/P/III/1984 tentang Pokok-Pokok Organisasi dan Prosedur Tentara Nasional Indonesia Angkatan Darat (TNI-AD).* See also Robert Lowry, *The Armed Forces of Indonesia*, (St Leonards, NSW: Allen and Unwin, 1996) for a general study.

xxi. Lowry, *The Armed Forces of Indonesia*, 13-14.

xxii. Lowry, *The Armed Forces of Indonesia*, 18-19.

xxiii. A copy of the telegram was discovered in the headquarters of the Dili Military District Command [Kodim]. The text of the Indonesian language original and an English translation (from which the above is taken) has been published by Human Rights Watch. See "Text of Order to Develop 'Security Plan'", http://www.hrw.org/reports/1999/wtimor/westmr-04.htm.

xxiv. See Richard Tanter, "East Timor and the Crisis of the Indonesian Intelligence State", in *Bitter Flowers, Sweet Flowers: East Timor, Indonesia and the World Community*, ed. Richard Tanter, Mark Selden and Stephen R. Shalom (New York: Rowman and Littlefield; Sydney: Pluto Press), and Tanter, "The totalitarian ambition: the Indonesian intelligence and security apparatus", in *State and Society in Contemporary Indonesia*, ed. Arief Budiman (Clayton: Victoria: Centre of Southeast Asian Studies, Monash University), 215-288.

xxv. Human Rights Watch, "Evidence that the expulsions were the result of a coordinated Indonesian Army campaign", http://www.hrw.org/reports/1999/wtimor/westmr-03.htm#TopOfPage, citing Yayasan Hak, Laporan Harian Pelanggaran HAM No. 18/LH/YH-DA/VI 1999, June 17, 1999.

xxvi. Douglas Kammen "The Trouble with Normal: The Indonesian Military, Paramilitaries, and the Final Solution in East Timor" in *Violence and the State in Indonesia*, ed. Benedict R O'G Anderson (ed.) (Southeast Asia Program Publications, Southeast Asia Program, Cornell University, Ithaca, New York 2001) (also: Studies on Southeast Asia No.30). Kammen designates Syahnakri as ABRI Assistant for Operations at the time, but this is not correct. As Kammen points out, Syahnakri and Kairupan had served in Dili in 1995 at the height of the worst period of so-called "ninja" terror activities by the Army.

xxvii. "Alatas: There was nothing suddenly in the East Timor problem: TNI admitted that the troops were not yet ready", *Kompas* (January 6, 2000).

xxviii. Tentara Nasional Indonesia, Markas Besar Angkatan Darat, *Buku Petunjuk Pembinaan tentang Sandi Yudha TNI-AD*, Nomor: 43-B-01 (June 30, 1999). The manual was issued on June 30, 1999. Lumintang's signature is on the fourth page. There is no suggestion that the manual is not authentic.

xxix. Tentara Nasional Indonesia, Markas Besar Angkatan Darat, *Buku Petunjuk Pembinaan tentang Sandi Yudha TNI-AD*, Nomor: 43-B-01 (June 30, 1999): 35.

xxx. The phrase "strategy of tension" used by contemporary Italian neo-fascist terrorist groups is probably a more effective translation. See Geoffrey Harris, *The Dark Side of Europe: The Extreme Right Today*, (Edinburgh: Edinburgh UP, 1990), 107.

xxxi. Lumintang, in particular, knew from his own experiences in command positions in East Timor and Irian Jaya during the mid-1990s that such techniques were standard operating procedure for Kopassus. He arrived as Korem 164 commander in East Timor in 1993 after the Santa Cruz massacre. From 1996-1998 he was Chief of Staff and then Commander of Military Area Command [Kodam] VIII/Trikora for Irian Jaya and Maluku, a bitter period when Kopassus was particularly active in Irian Jaya.

xxxii. The editors of *Indonesia* argue that the Santa Cruz massacre was actually instigated by anti-Warouw officers within Korem 164 in an attempt to end his attempts to end their illegal actions by discrediting him. See "Current Data on the Indonesian Military Elite: July 1, 1989-January 1, 1992", *Indonesia*, 53 (April 1992): 98. See also Douglas Kammen, "Notes on the Transformation of the East Timor Military Command and its Implications for Indonesia", *Indonesia* 67 (April 1999): 64.

xxxiii. One possible defense of Lumintang's non-action that has been proposed is that the worst atrocities in East Timor were carried out by Kopassus troops, either alone or in conjunction with militia. To the extent that East Timor was a Kopassus-controlled region, it is argued, then the writ of Army headquarters did not extend to East Timor. Accordingly, Lumintang may well have been wringing his hands with frustration at the sight of Kopassus criminal actions. There are three problems with this position. The first is that there has been no evidence put forward to suggest that this was indeed Lumintang's attitude. The second is that, as a matter of fact, there were quite complicated and fluid relations of competition and cooperation between different units in East Timor in 1999. (See chapter 5 above.) But electronic intercepts by Australian military intelligence led those authorities to conclude that there was no breakdown in the Indonesian chain of command, however it was internally structured. (See chapter 7 below.) Lumintang's domain of authority as Deputy Army Chief of Staff covered troops of all three Army Commands operating in East Timor: Kodam, Kostrad, and Kopassus.

xxxiv. Hannah Arendt, *Eichmann in Jerusalem: A Study in the Banality of Evil* (New York: Penguin,1994).

xxxv. Lumintang's cowardice in failing to appear to answer the plaintiffs' claims in *Doe v. Lumintang* is of a piece with his general outlook and character. He has repeatedly denied any responsibility for what happened in East Timor, and has expressed neither regret nor remorse. Had Lumintang chosen to appear in court, counsel for the defense would have been able to argue a case explaining his denial of responsibility. Not only would the testimony of the plaintiffs and that of experts who appeared for them have been tested in court, but new and fuller information of the events of 1999 could have been presented in his defense. Apart from his own desire to avoid the public humiliation of explaining the inexplicable and to avoid the devastating gaze of his victims, Lumintang's choice to not appear has another important cause. Had he chosen to present a defense, U.S. civil legal procedures include "discovery" requirements, under which counsel for the plaintiffs could have required access to Indonesian military documents, which would without doubt have shown a much more complete picture of the planning for crimes against humanity than has been literally pieced together from very fragmentary and inadequate sources.

xxxvi. The attitude of the U.S. government to civil cases under the *Alien Torts Claims Act* and the *Torture Victim Protection Act* has almost always been equivocal at best, and hostile normally. The most important exception was the original *Filartiga* case, where the Department of Justice supported the plaintiffs' claims for U.S. jurisdiction as a way of implementing President Carter's human rights policy. Certainly there was no support for the plaintiffs' suit against Lumintang, nor had there been in *Kadic v. Karadzic*. As *The Economist* put it, "the executive branch [of the US] may be able to tolerate, for example, war crimes in Bosnia; the judiciary does not". (March 22, 1997).