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Introduction

Clinton Fernandes of the Australian Defence Force Academy outlines the history of successive forums for investigation of crimes committed in East Timor by Indonesian military forces and militia forces under Indonesian control between 1975 and 1999. After reviewing the work of courts and inquiries under UN, East Timorese and Indonesian auspices in some detail, Fernandes argues that

> “amnesties in the case of the Indonesian military’s crimes against humanity would strengthen the politics of impunity. The promise of international law is that the East Timorese government need not feel it has to confront the Indonesian military on its own; by requiring prosecutions, international law ensures that the government has the support of the international community. Prosecutions, not amnesties, are the most effective guarantee against future crimes against humanity.”

Essay: Indonesia and East Timor: Against Impunity, For Justice

In 1975, Indonesia illegally invaded East Timor, which had been declared a non-self-governing territory within the meaning of Chapter XI of the United Nations Charter. [1] The seizure of the village of Batugade on 7 October 1975 triggered an international armed conflict to which the 1949 Geneva Conventions applied. This seizure was met with military resistance by the East Timorese

people. On 7 December 1975, Indonesia mounted a full-scale invasion of East Timor. Subsequent conventional military operations continued to be met by organized military resistance.

During the 24-year occupation, there were numerous reports of killings, famine, war crimes and crimes against humanity. The question of East Timor remained on the UN's agenda for the duration, with the UN General Assembly reaffirming the people's right to self-determination.

The resignation of Indonesia's President Suharto on 21 May 1998 resulted in a re-opening of the issue of East Timorese self-determination. Suharto's successor, B.J. Habibie, agreed to allow the East Timorese to choose between independence and autonomy within Indonesia. An agreement was concluded with the UN and Portugal, the former colonial power in East Timor, whereby the East Timorese would vote on the question of independence. The ballot would be administered by the UN, but Indonesia insisted that it would retain sole responsibility for the maintenance of law and order. Meanwhile, the Indonesian authorities intensified a terror campaign under the guise of proxy forces, known as the 'militia', in order to compel the East Timorese to reject independence.

The UN Security Council established the United Nations Assistance Mission in East Timor (UNAMET), enabling the ballot to occur on 30 August 1999. On 4 September 1999, the results of the vote were announced; with 98% of registered voters participating, only 21.5% favoured special autonomy while 78.5% chose independence. The Indonesian authorities immediately carried out an ethnic cleansing campaign in East Timor, deporting approximately 250,000 people across the border into Indonesian West Timor. Approximately 70% of the buildings in East Timor were destroyed, vital infrastructure was crippled, and there were more than 1,400 killings, as well as acts of rape, looting and arson. Indonesia's first civilian defence minister, Juwono Sudarsono, unwittingly conceded that his country had committed state-sponsored terror, saying that senior military personnel 'were just carrying out state policy'. [2] Under mounting international pressure, the UN Security Council established a multinational force, the International Force – East Timor (INTERFET), with the power to restore security by force. [3]

Indonesia's National Commission on Human Rights

As Indonesian forces were leaving East Timor, Indonesia's National Commission on Human Rights (*Komisi Nasional Hak Asasi Manusia*, or Komnas HAM) established a special team known as the National Commission of Inquiry on Human Rights Violations in East Timor (*Komisi Penyelidik Pelanggaran HAM di Timor Timur*, or KPP-HAM). KPP-HAM was required to submit its findings to Komnas HAM, which would provide them to Indonesia's Attorney-General for further investigation.

The KPP-HAM team was composed of leading Indonesian figures such as Marzuki Darusman, Albert Hasibuan, Asmara Nababan, Kusparmono Irsan, HS Dillon, Munir, Todung Mulya Lubis, Nursyahbani Katjasungkana and Zoemrotin K Susilo.

It paid special attention to gross violations of human rights such as genocide, massacre, torture, enforced displacement, crimes against women and children and scorched earth policies. It was empowered to investigate whether and to what extent the apparatus of State and/or other bodies, national and international, were involved in these crimes. It examined only the last nine months from January 1999 until the departure of Indonesian forces in September that year, not the 24 year occupation.

KPP-HAM commenced its investigation on 23 September 1999. It completed its report on 31 January 2000. It found 'evidence of crimes that could be classified as crimes of universal jurisdiction including systematic and mass murder; extensive destruction, enslavement, forced deportations and displacement and other inhumane acts committed against the civilian population'. [4]

The report urged the parliament and the government to 'form a Human Rights Court with the authority to try the perpetrators of human rights violations and crimes against humanity' that occurred 'in the past as well as those that have occurred in East Timor to the present'. It urged the 'Government and the Attorney General' to ensure that crimes against humanity were investigated and punished 'whoever is the perpetrator', in a free and independent manner 'without any interference whatsoever'.

A subsequent study by an international Commission of Experts appointed by the UN Secretary General found that the KPP-HAM report was a 'genuine and impartial effort to inquire into serious human rights violations, reflecting the firm commitment of its members to establish the facts'. The Commission said that its inquiry procedures 'conformed to international standards relating to *pro justitia* inquiries'. [5]

The International Commission on Inquiry into East Timor

On 27 September 1999, the UN Commission on Human Rights condemned the 'widespread, systematic and gross violations of human rights and international humanitarian law in East Timor' and called upon the UN Secretary–General to establish an international commission of inquiry into the events of 1999. Accordingly, on 15 October 1999 the High Commissioner for Human Rights appointed an International Commission of Inquiry on East Timor. [6] The commission was mandated to 'gather and compile systematically information on possible violations of human rights and acts which might constitute breaches of international humanitarian law committed in East Timor' since 1999. [7]

This Commission reported that its members 'were confronted with testimonies surpassing their imagination'. [8] It concluded that there had been 'gross violations of human rights and breaches of humanitarian law', and that the Indonesian army and related militias had been involved in the violations. It recommended that the UN 'should establish an international human rights tribunal' to bring perpetrators of serious violations to justice.

Thematic Special Rapporteurs from the United Nations

From 4-10 November 1999, three United Nations thematic Special Rapporteurs visited East Timor. They were Asma Jahangir, special rapporteur on extrajudicial, summary or arbitrary executions; Nigel Rodley, special rapporteur on torture; and Radhika Coomaraswamy, special rapporteur on violence against women. Their visit was an unprecedented move, undertaken because of increasing reports of widespread violence and serious human rights violations in East Timor. [9]

The Special Rapporteurs recommended that the Security Council should consider the establishment of an international criminal tribunal in order to bring the perpetrators to justice. They called for prosecutions of those responsible, 'both directly and by virtue of command responsibility, however high the level of responsibility'. [10] They stated that an international criminal tribunal should be done preferably with the consent of the Indonesian government, but such consent should not be a prerequisite. Such a tribunal, they recommended, should have jurisdiction over all crimes under international law committed by any party in the Territory since the departure of the Portuguese in 1975.

The only qualification they attached to their recommendation was that the Indonesian government would have to take steps 'in a matter of months' to bring the perpetrators to justice.

The Ad Hoc Human Rights Court

Under pressure from its military, the Indonesian government took its cue from this qualification. In order to avoid responsibility, it announced the establishment of a so-called Ad Hoc Human Rights Court in Jakarta. Proceedings were commenced against 18 suspects from a total of 22 identified by KPP-HAM. Ten of these 18 were military officers, five were police officers, two were civilian government officials and one was a militia leader. All 18 defendants were indicted for failing to prevent crimes against humanity, rather than for committing such crimes.

The atmosphere in the courtroom was highly intimidatory. [11] Witnesses enjoyed no sense of security. One of the witnesses was made to sit beside militia figurehead Eurico Guterres, himself a defendant in another trial. Indonesian military personnel enjoyed free access to the witness waiting room. A so-called 'safe house' for witnesses had a sign placed outside it announcing that it was a witness safe house. Indonesian soldiers from the units accused of committing crimes against humanity attended the proceedings of the Ad Hoc Court en masse, some of them carrying weapons whilst in the courtroom. When they were eventually called to the witness stand, witnesses were questioned for hours without respite.

Throughout the proceedings, witnesses were ridiculed and intimidated, *including by the prosecution*. A witness who had suffered a serious disability during an attack was laughed at by members of the prosecution and the defence. In the public gallery were a platoon of Indonesian special forces personnel who had been bussed in for the occasion. These soldiers shouted words of warning and intimidation at the witnesses and the judges during the proceedings.

Numerous credible analyses [12] have demonstrated that the prosecution called witnesses who were manifestly unable to provide evidence that supported its case. It never attempted to show effective control or a superior-subordinate relationship between those who carried out the prohibited acts and those accused of having command responsibility. It made irrelevant closing submissions and made no attempt to show what the KPP-HAM Report had concluded, namely that the violence was a direct result of Government policy.

Judges received threats to their life both inside and outside the courtroom. Often, when a judge was about to deliver the verdict, armed soldiers in the courtroom would shout at them, leading them to be concerned about their own security. A judge in the Ad Hoc Court later conceded that the court had not made any significant contribution to strengthening the rule of law in Indonesia. The Ad Hoc Court was widely denounced as a sham. A Commission of Experts appointed by the UN Secretary General concluded that the proceedings were 'manifestly inadequate with respect to investigations, prosecution and trials, and … failed to deliver justice. The atmosphere and context of the entire court proceedings were indicative of the lack of political will in Indonesia to seriously and credibly prosecute the defendants'. [13]

Unsurprisingly, 12 of the 18 accused were acquitted at trial. All the others have since had their convictions overturned.

The Serious Crimes Unit

Another source of legal authority arose out of the United Nations Transitional Administration in East Timor (UNTAET), which was established on 25October 1999 by the UN Security Council. [14] UNTAET had the authority for all legislative and executive matters in East Timor, including the administration of justice. It established the Special Panels for Serious Crimes, the Serious Crimes Unit and the Defence Lawyers Unit (DLU).

There were formidable obstacles facing these institutions. Instead of conducting the prosecutions of suspected Indonesian war criminals at an international tribunal in an established venue such as The Hague, the Special Panels for Serious Crimes was established within the impoverished local structure of the Dili District Court. Similarly, the Serious Crimes Unit was established within the Office of the General Prosecutor, Dr Longuinhos Monteiro.

When the Serious Crimes Unit requested the Special Panels for Serious Crimes to issue warrants for Yayat Sudrajat (the military intelligence chief in East Timor) and Wiranto (the commander of the Indonesian military), the request was declined by a single judge of the Special Panels for lack of supporting evidence. The Serious Crimes Unit responded by filing supporting materials of 13,000 pages and 1,500 witness statements. The General Prosecutor publicly criticized the international judges on the Special Panels for failing to act on the arrest warrant against Wiranto, and signaled his intention to submit the warrant to Interpol. An international judge, Philip Rapoza, then issued arrest warrants for both Yayat Sudrajat and Wiranto on 10 May 2004. Dr Monteiro was then summoned to the office of President Gusmao and summarily informed that such actions would harm East Timor's relationship with its powerful neighbour, Indonesia.

The view of the government of East Timor was that it could not carry such a heavy diplomatic burden on its own, and that the UN should bear this responsibility. The situation confronting the government of East Timor is understandable; in a schoolyard, a bullied child with no other allies is often forced to come to terms with its tormentor. The main task for people of goodwill, then, is to create the conditions in which a future East Timorese government can realistically call for justice.

The Commission for Reception, Truth and Reconciliation

The most detailed attempt to examine what happened to the people of East Timor under the occupation remains the work of the Commission for Reception, Truth and Reconciliation in East Timor. The Commission, known by its Portuguese initials, CAVR (A Comissão de Acolhimento, Verdade e Reconciliação) was established as an independent statutory authority in July 2001 by the UN Transitional Administration in East Timor. It was mandated to inquire into human rights abuses committed by all sides between April 1974 and October 1999. [15] It was also mandated to facilitate reconciliation and justice for less serious offenses.

Its official report, *Chega!* (Portuguese for 'enough'), was written by national and international staff of the Commission working under the direction and supervision of the CAVR's seven East Timorese Commissioners. The full report is more than 2,500 pages long. The Executive Summary of the Report is about 200 pages long.

There were certain unique aspects to *Chega!*, which benefited from scientifically-defensible estimates of the number of East Timorese killed during the occupation. There had been numerous reports of mass killings and famine during the 24 years of Indonesian rule, but various apologists for the occupation had questioned estimates that up to 200,000 East Timorese may have perished. *Chega!* settled the matter definitively, thanks to the assistance of Benetech, a California-based nonprofit organization devoted to using technology in the service of humanity. Its Human Rights Data Analysis Group (HRDAG) worked with the CAVR to establish a firm foundation of fact, providing the most accurate and scientifically precise figures possible. It did so by building on a database of three independent sources: narrative statements, a retrospective mortality survey, and a census of public graveyards. [16] The first source consisted of approximately 8,000 narrative testimonies in which patterns of abuses such as arbitrary detentions, torture, rape and massive property destruction were reported to the CAVR. In turn, the CAVR developed a Human Rights Violations Database, thus enabling it to perform the functions of community socialization and the

promotion of truth-seeking, reconciliation and reception. The second source was a survey of 1,396 households that were randomly selected from East Timor's approximately 180,000 households. Each sampled household gave information about their residence pattern and household members and relatives who died during the occupation. While these mortality surveys are standard procedure in governmental statistics, no truth commission had previously conducted one. The third source was the graveyard census database, developed by visiting all public cemeteries in East Timor and recording the name, date of birth and date of death for every grave for which the information was available. The researchers established that there were approximately 319,000 graves in the sample, of which about half had complete name and date information. Once again, although this is standard procedure in the field of historical demography, no truth commission had previously conducted one.

Chega! concluded that the 'minimum-bound for the number of conflict-related deaths was 102,800 (+/- 12,000)'. It did not estimate an upper bound limit though it did speculate that the death-toll due to conflict-related hunger and illness could have been as high as 183,000.

Sarah Staveteig, a demographer at the University of California – Berkeley, applied standard demographic methods of indirect estimation and found that 'a reasonable upper bound on excess deaths during the period [was] 204,000 (± 51,000)'. Staveteig considered it 'likely that 204,000 is a conservative upper-bound estimate on excess mortality'. [17]

Crimes Against Humanity

Chega! found widespread evidence of 'crimes against humanity'. It is worth explaining briefly what this term means. Crimes against humanity are 'certain inhumane acts carried out within a specific context, namely as part of a widespread or systematic attack directed against a civilian population'. [18] They are of concern to the international community as a whole, and do not fall exclusively under national jurisdiction. Unlike war crimes, the law of crimes against humanity applies even when there is no armed conflict. It protects victims regardless of their nationality, and applies to actions directed primarily against civilian populations. Unlike the Genocide Convention, the law of crimes against humanity is not restricted to crimes committed against only 'national, ethnical, racial or religious' targets.

The legal formulation of 'widespread or systematic attack directed against any civilian population' is nowadays consistently regarded as defining a crime against humanity. The widespread or systematic test is disjunctive; only one or the other threshold requires satisfaction. For an attack to be regarded as 'widespread', no numerical limit needs to be specified. It is sufficient to point to a suitably large number of victims and a large-scale attack, both of which are determined on the facts of a particular case. For an attack to be regarded as 'systematic', it must have required a high degree of coordination, which can itself be deduced from such factors as continuous commission, patterns of violence, the perpetrators' access to resources, the existence of political objectives, and so on. In establishing the existence of an 'attack', the prohibited acts do not necessarily refer to a military attack but can include mistreatment of the civilian population. [19]

The formulation 'attack directed' means that the random criminal acts of multiple perpetrators is insufficient to show that a crime against humanity has occurred or is occurring. There must be an element of direction, or policy. The existence of a policy to conduct the widespread or systematic attacks can be inferred from the manner in which the acts occur; if random occurrence can be shown to be improbable, the policy element will be satisfied. Policy, then, is a low threshold and need not be that of a government, nor be formally adopted, expressly declared, nor even stated clearly and precisely. [20] The policy element can be satisfied by showing the unlikelihood of random occurrence.

If a person is accused of having committed a crime against humanity, it must be shown that he or she committed a prohibited act, that the act objectively fell within the broader attack, and that the accused was aware of this broader context. There is no requirement that the other acts committed during the attack be identical to the acts of the accused. For example, if an accused person is found to have committed enslavement in the execution of a killing campaign conducted by a State or organisation, the accused person is guilty of the crime against humanity of enslavement regardless of whether the State or organisation encouraged it; the widespread killing campaign ensures that the necessary contextual element has been satisfied. There is also a requirement that the accused must be aware of, or wilfully blind to, or knowingly take the risk of the 'broader context in which his actions occur', namely the attack directed against a civilian population. The accused need not share in the *purpose* of the overall attack; knowledge of the context, not of the motive, is the key.

When it comes to the Indonesian military in East Timor, the CAVR established that there was an underlying governmental or organisational policy that directed, instigated or encouraged these crimes.

The Indonesian authorities committed the following categories of Crimes against Humanity: sexual violence, torture, enslavement, deportation or forcible transfer, arbitrary imprisonment, murder and extermination.

Sexual violence

The crime of rape was outlawed by the Allied powers that occupied Germany after World War II. [21] The crime of rape was also outlawed in the Statutes of the International Criminal Tribunal for the former Yugoslavia (1993) and the International Criminal Tribunal for Rwanda (1994). In 1996, the International Law Commission prepared a draft Code of Crimes that proposed that the definition of rape be updated by adding 'enforced prostitution' and other forms of sexual abuses. The International Criminal Court (2002) modernised the definition by including in Article 7(1)(g) 'rape, sexual slavery, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity'.

The CAVR concluded that there was widespread evidence of sexual violence, a particularly heinous crime against humanity. Although there are cultural taboos against admitting such violations, it received hundreds of direct testimonies that showed that rape, sexual torture and other acts of sexual violence were widespread and systematic. The CAVR found that the Indonesian authorities' 'institutional practices and formal or informal policy' encouraged such behaviour. [22]

The evidence showed that 'the violations were commonly committed in a wide range of military institutions' and that 'military commanders and civilian officials knew that soldiers under their command routinely used military premises and equipment for the purposes of raping and torturing women and took no steps to deter these activities or to punish those involved'. In fact, 'the commanders and officials were in some cases themselves also perpetrators of sexual violence'. [23]

Sexual slavery was commonplace; East Timorese women were enslaved sexually 'without fear of reprisal, inside military installations, at other official sites and inside the private homes of women who were targeted'. [24] This, too, occurred with the 'knowledge and complicity of members of the Indonesian security forces, the police force, the highest levels of the civilian administration and members of the judiciary'. [25] The victims of sexual violence were not just East Timorese women; men too were raped.

Frequently reported examples [26] of sexual violence occurring inside official Indonesian military

installations include:

- mutilation of women's sexual organs, including insertion of batteries into vaginas and burning nipples and genitals with cigarettes
- use of electric shocks applied to the genitals, breasts and mouths
- gang rape by members of the security forces
- forcing of detainees to engage in sexual acts with each other, while watched and ridiculed by members of the security forces
- rape of detainees following periods of prolonged sexual torture
- rape of women who had their hands and feet handcuffed and who were blindfolded
- forceful plucking of pubic hairs in the presence of male soldiers
- rape of pregnant women
- forcing of victims to be nude, or to be sexually violated in front of strangers, friends and family members
- women raped in the presence of fellow prisoners as a means of terrorising both the victims and the other prisoners
- placing women in tanks of water for prolonged periods, including submerging their heads, before being raped
- the use of a snake to instill terror during sexual torture
- threats issued to women that their children would be killed or tortured if the women resisted or complained about being raped
- repeated rape by a multitude of (unknown) members of the security forces
- forced oral sex
- urinating into the mouth of victims
- rape and sexual violence indiscriminately inflicted upon married women, unmarried women, and young teenagers still children by law
- keeping lists of local women who could be routinely forced to come to the military post or headquarters so that soldiers could rape them. Lists were traded between military units.

Torture

The crime of torture was outlawed by the Allied powers that occupied Germany after World War II. [27] Torture is prohibited in numerous conventions including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention Against Torture, to which Indonesia acceded in 1998. Torture is also prohibited in the Geneva Conventions and Additional Protocols. The prohibition against torture is firmly established as a customary norm in international law. The definition contained in the Convention Against Torture (1984) requires that severe pain or suffering for the purpose of obtaining information or a confession be 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. The law recognises that rape can constitute a form of torture. [28]

From the invasion of 1975 till the end of the occupation in 1999, the Indonesian military committed widespread and systematic torture against the people of East Timor. The prohibition against torture

in this case amounts to *jus cogens*, since the procedural safeguards of Article 43 of the Geneva Convention IV (1949) for the internment of civilians were systematically disregarded. [29]

The following acts of torture were common: [30]

- Beating with fists or with implements such as a wooden club or a branch, an iron bar, a rifle butt, chains, a hammer, a belt, electric cables
- Kicking, usually while wearing military or police boots, including around the head and face
- Punching and slapping
- Whipping
- Cutting with a knife
- Cutting with a razor blade
- Placing the victim's toes under the leg of a chair or table and then having one or more people sit on it
- Burning the victims flesh, including the victim's genitalia with cigarettes or a gas lighter
- Applying electric shocks to different parts of the victim's body, including the victim's genitalia
- Firmly tying someone's hands and feet or tying the victim and hanging him or her from a tree or roof
- Using water in various ways, including holding a person's head under water; keeping a victim in a water tank for a prolonged period, sometimes up to three days; soaking and softening a victim's skin in water before beating the victim; placing the victim in a drum filled with water and rolling it; pouring very hot or very cold water over the victim; pouring very dirty water or sewage over the victim
- Sexual harassment, sexual forms of torture and ill-treatment or rape.
- Cutting off a victim's ear to mark the victim
- Tying the victim behind a car and forcing him or her to run behind it or be dragged across the ground
- Placing lizards with sharp teeth and claws (*lafaek rai maran*) in the water tank with the victim and then goading it to bite the softened skin on different parts of the victim's body including the victim's genitalia
- Pulling out of fingernails and toenails with pliers
- Running over a victim with a motor-bike
- Forcing a victim to drink a soldier's urine or eat non-food items such as live small lizards or a pair of socks
- Leaving the victim in the hot sun for extended periods
- Humiliating detainees in front of their communities, for example by making them stand or walk through the town naked
- Threatening the victim or the victim's family with death or harming a member of the victim's family in front of them

It should be noted that the prohibition against torture has long been contained in Indonesia's own

Criminal Code, KUHP (Kitab Undang-undang Hukum Pidana). Indonesian military personnel who committed torture and other crimes against humanity remain at large in Indonesia where they constitute an ongoing threat to Indonesia's own democratic transition.

Enslavement

The prohibitions against the crime of enslavement are contained in the 1926 Slavery Convention, the 1956 Supplementary Slavery Convention, the jurisprudence of the International Criminal Tribunal for the former Yugoslavia, [31] and Article 7(2) (c) of the Statute of the International Criminal Court. Enslavement is also outlawed in the Geneva Convention III (1949), the International Covenant on Civil and Political Rights, and the Forced or Compulsory Labour Convention 1930.

Enslavement is defined as 'exercising the powers attaching to the right of ownership' over one or more persons. It includes 'chattel slavery' i.e. the treatment of humans as chattel, and actions such as 'control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour'. [32]

The Indonesian security forces were found to have committed numerous acts of enslavement, including against children. Thousands of East Timorese were used as forced labour, including several thousand children. Children used as forced labour received no salary for their services. In some cases, soldiers treated these children as if they had rights of ownership over them, passing them on to other soldiers after their tour of duty ended. This treatment was a grave breach of Geneva Convention IV, Article 147 (willfully causing great suffering or serious injury to body or health). It was also a grave breach of Article 51 of Geneva Convention IV, which requires that an Occupying Power is obliged to pay a fair wage and ensure that the work is 'proportionate to their physical and intellectual capacities'.

The CAVR concluded that the enslavement of children by individual soldiers was known about at the highest levels of the Indonesian military structure. [33]

Deportation or forcible transfer

Deportation or forcible transfer is the forced, unlawful, displacement of persons from the area in which they are lawfully present. When such displacement occurs across an international border, it is known as deportation. When it occurs inside an international border, it is known as forcible transfer. Both forms are outlawed in Article 7 of the Statute of the International Criminal Court, in numerous human rights instruments, and in the jurisprudence of the International Tribunal for the former Yugoslavia.

The force involved does not have to be actual physical force; it also includes the threat of force or coercion, psychological oppression, or other means of rendering displacement involuntary. [34] The 'unlawful' element of this crime against humanity cannot be dodged by a government that arbitrarily enacts legislation declaring the displacement to be legal.

The Indonesian security forces were found to have subjected the population to repeated periods of displacement, often in massive numbers, between 1975 and 1999. In the lead-up to, during and after the independence ballot in 1999, the Indonesian security forces conducted a coordinated campaign of large-scale ethnic cleansing, forcibly displacing about 250,000 people to West Timor after the

ballot. This crime was so widely perpetrated that 55.5% of surveyed households reported one or more displacement events. [35] Most individual East Timorese alive today have experienced at least one period of displacement. Many have experienced several periods. The Indonesian military forced tens of thousands of people into resettlement camps in the 1970s and early 1980s. There, they were subject to a range of other crimes against humanity, including unlawful imprisonment, torture, murder, sexual violence and enslavement. People were displaced in a widespread and systematic manner, with food being used as a weapon of war. International humanitarian agencies were barred from entering East Timor until there were famines of 'catastrophic proportions'. [36] The CAVR concluded that a minimum of 84,200 people died as a result, and that the figure could be as high as 183,000.

Imprisonment (Arbitrary Arrest and Detention)

Imprisonment is a crime against humanity only if it is arbitrary. It was outlawed by the Allied powers that occupied Germany after World War II. [37] The UN Working Group on Arbitrary Detention specified three categories that encapsulate this crime:

1. deprivation of liberty in the absence of a legal basis;
2. deprivation of liberty as a result of the exercise of specified rights and freedoms (i.e. political prisoners); and
3. deprivation of liberty due to a violation of the international human rights norms relating to the right to a fair trial. [38]

In East Timor, the Indonesian security forces were found to have 'committed, encouraged and condoned widespread and systematic arbitrary arrest and detention'. [39] Tens of thousands of East Timorese were detained arbitrarily over the course of the occupation. The Indonesian authorities arrested people in every district, although the highest numbers of detentions occurred in the capital of Dili, which had the largest state prisons and the main interrogation centres. [40]

Murder and enforced disappearance

Murder is the unlawful and intentional causation of the death of a human being. It is a crime against humanity. Extermination – also a crime against humanity – is closely related. It means causing death within a context of mass killing. Extermination includes indirect means of causing death. The death tolls in East Timor have been discussed earlier in this paper, and will not be repeated in this section.

Enforced disappearance is the 'arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time'. [41] Enforced disappearance is outlawed as a crime against humanity in the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance.

The CAVR concluded that 'Indonesian military commanders ordered, supported and condoned systematic and widespread unlawful killings and enforced disappearances of thousands of civilians'. [42] The CAVR pointed to the 'vast number of these crimes, their coordinated nature across the territory of East Timor, the efforts of domestic and international non-government and domestic effort to inform the military and civilian authorities in Jakarta that these atrocities were happening, [and] the systematic failure of the Indonesian military and civilian leadership to prevent

and stop these acts which they must have known about'. It must be emphasized that this is an ongoing crime against humanity because – without providing information to the relatives of the disappeared – the Indonesian authorities continue to conceal the disappeared persons.

The Commission on Truth and Friendship

In March 2005, the Indonesian authorities made another attempt to evade an international tribunal, forming a Commission on Truth and Friendship (CTF) with the government of East Timor. The CTF had originally stemmed from an idea of Jose Ramos-Horta, who proposed a panel of eminent persons from Asia (i.e. not limited to Indonesia or East Timor). Indonesia responded by engineering the CTF, which had several crucial differences to the original proposal:

- It was entirely bilateral; only Indonesian and East Timorese commissioners would preside over it, meaning that there would be no opportunity for multilateral involvement.
- It would have no power to compel testimony (or even the attendance) of witnesses.
- It would have no power to compel people or institutions to produce any documentary evidence.
- It would have no institutional independence from the two states.
- It would be unable to determine individual responsibility.
- It would have the power to recommend amnesties. This was, obviously, a way of absolving those who bore greatest responsibility for the crimes.

Human rights organizations and other civil society groups in Indonesia, as well as those in East Timor, objected to this Commission. Its proceedings quickly descended into farce, with senior Indonesian leaders and officials claiming that the atrocities were everyone else's fault but their own. On one occasion, the behaviour of Indonesian co-chairman Benjamin Mangkoedilaga resulted in all East Timorese commission members remaining silent in protest.

Mangkoedilaga has form; in 1999, he presided over the so-called Peace and Stability Commission, which tried to provide a fig-leaf of legitimacy and neutrality to the Indonesian military's terror campaign against the independence ballot in East Timor. Mangkoedilaga and his colleagues fled East Timor even as the staff of the United Nations were being held hostage. He left on 3 September 1999, the day before the results of the ballot were announced, even though his Commission was supposed to monitor the situation there. Other members of the Commission left two days before he did. When asked about his performance at the time, he said, 'What could we do? We were instructed by the military authorities to leave the country'. [43]

According to an insightful analysis of the CTF, it may well be in violation of the Indonesian as well as the East Timorese constitutions. [44] The former requires Indonesia's House of Representatives to approve international agreements such as the CTF, and the latter requires ratification or approval followed by publication in the official gazette. Neither has occurred. It is hardly a secret, however, that the real aim of the CTF is the same as that of the Ad Hoc Human Rights Court – to absolve Indonesia's senior perpetrators of charges of war crimes and crimes against humanity. As Benjamin Mangkoedilaga acknowledged frankly, 'The important thing is to give trust to the invitees that our invitation will not lead to any trial or the setting up of any tribunal'. [45]

In this aim, both the Ad Hoc Human Rights Court and the Commission on Truth and Friendship have failed manifestly.

Against Impunity

The Indonesian authorities had been hoping that those acquitted would be able to avail themselves of the protection of the constitutionally-guaranteed *non bis in idem* principle, which prevents a person from being judged twice for the same criminal *conduct* (rather than the same *crime*).

Although the principle is widely recognized in international human rights law, there are in fact two exceptions – 'shielding' and 'due process'. The former applies where the proceedings had the purpose of shielding the defendant from genuine criminal responsibility. The latter applies where the proceedings were not conducted independently or impartially in accordance with norms of due process.

As Professor Diane Orentlicher's independent report to the United Nations on combating impunity makes clear:

> The fact that an individual has previously been tried in connection with a serious crime under international law shall not prevent his or her prosecution with respect to the same conduct if the purpose of the previous proceedings was to shield the person concerned from criminal responsibility, or if those proceedings otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person concerned to justice. [46]

Both exceptions apply to the Ad Hoc Human Rights Court, meaning that those acquitted are still able to face a credible court, despite the Indonesian authorities' efforts. Little wonder, then, that the United Nations refused to allow its personnel to testify before the Commission on Truth and Friendship. Little wonder, too, that Mangkoedilaga was disappointed by the UN's refusal.

Amnesties in the case of the Indonesian military's crimes against humanity would strengthen the politics of impunity. As the Statute of the International Criminal Court makes clear, 'the most serious crimes of concern to the international community as a whole must not go unpunished'. It points out that States are 'determined to put an end to impunity for the perpetrators of such crimes' and that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. [47] The promise of international law is that the East Timorese government need not feel it has to confront the Indonesian military on its own; by requiring prosecutions, international law ensures that the government has the support of the international community. [48]

Prosecutions, not amnesties, are the most effective guarantee against future crimes against humanity. Member of the Indonesian military who committed crimes against humanity in East Timor have since gone on to commit further atrocities elsewhere in Indonesia. Many have been promoted and, in some cases, posted to other conflict zones such as West Papua. For example, Brigadier General Mahidin Simbolon, a key player in the Indonesian military's campaign of state-sponsored terror in East Timor, was promoted to Major General and placed in command of West Papua. He was then appointed Inspector-General of the Indonesian army. Another commander of West Papua, Major General Zamroni, previously commanded Indonesian military operations in Aceh province when gross human rights violations were committed there. He was a senior figure in Indonesia's murderous special forces, Kopassus. Timbul Silaen, police chief in East Timor, was promoted and placed in command of the police in West Papua.

A culture of impunity prevails among the Indonesian military, undermining the legitimacy of the

elected government and generating distrust toward Indonesia's civilian institutions. Prosecutions would enable the Indonesian people to better respect the rule of law as part of Indonesia's democratic transition. They would send a message that no one is able the law, thereby deepening Indonesia's own democratic culture. This is why numerous Indonesian civil society groups have opposed amnesties and called for prosecutions for what their military did in East Timor. They recognize that most of the important pro-democracy initiatives that occurred in Indonesia during the 1990s occurred precisely because of the aftermath of events in East Timor such as the Santa Cruz massacre of 1991. Self-described 'supporters' of Indonesia who call for amnesties may be more accurately described as supporters of Indonesia's moral and political decay.

Endnotes:

[1] According to Article 73 of the UN Charter, this implies 'a sacred trust' to uphold 'the well-being of the inhabitants of these territories'.

[2] Interview with Jason Tedjasukmana, *Time* magazine, vol 155, no 8, 28 February 2000.

[3] Resolution 1264, 15 September 1999.

[4] Report of the Indonesian Commission of Investigation into Human Rights Violations.

[5] UN Doc. S/2005/458, May 26, 2005.

[6] It was composed of the eminent jurists Sonia Picado, Judith Sefi Attah, A.M. Ahmadi, Mari Kapi and Sabine Leutheusser–Schnarrenberger. Picado was a member of the Costa Rican Legislative Assembly and Vice – chairperson of the Board of Directors of the Inter- American Institute of Human Rights. Sefi Attah was Minister of Women's Affairs and Social Development of Nigeria and was a member of the Sub- Commission on the Prevention of Discrimination and Protection of Minorities (now called the Sub-Commission on the Promotion and Protection of Human Rights) from 1987 to 1997. Ahmadi is a former Chief Justice of India. Kapi was Deputy Chief Justice of Papua New Guinea. Leutheusser–Schnarrenberger is a former Federal Minister of Justice in Germany and a member of the German Bundestag (Parliament).

[7] Commission on Human Rights resolution 1999/S-4/1 of 27 September 1999.

[8] Para 34, Report of the International Commission of Inquiry on East Timor, 6 January 2000.

[9] Commission on Human Rights resolution 1999/S-4/1 of 27 September 1999.

[10] Situation of Human Rights in East Timor.

[11] This section relies on interviews with UN Trial Observers and NGOs monitoring the trials.

[12] D. Cohen, ‘Intended to Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta’, International Center for Transitional Justice Occasional Paper Series, August 2003; S. Linton, ‘Unraveling the First Three Trials at Indonesia’s Ad Hoc Court for Human Rights Violations in East Timor’, Leiden Journal of International Law 17, 2004; ‘Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in East Timor in 1999’, UN Doc. S/2005/458, May 26, 2005.

[13] Commission of Experts Report, p 88.

[14] Resolution 1272 of 1999.

[15] UNTAET Regulation 2001/10.

[16] Report by the Benetech Human Rights Data Analysis Group to the CAVR, *The Profile of Human Rights Violations in Timor-Leste, 1974-1999*, R. Silva and P. Ball, 9 February 2006.

[17] Sarah Staveteig, ‘How Many Persons in East Timor Went 'Missing' During the Indonesian Occupation?: Results from Indirect Estimates’, Interim Report IR-07-003, International Institute for Applied Systems Analysis (IIASA), Laxenburg, Austria.

[18] Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) defined the context as ‘when committed in armed conflict, whether international or internal in character, and directed against any civilian population’. Article 3 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) defined the context as ‘when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds’. Article 7 of the Statute of the International Criminal Court defines the context as ‘when committed as part of a widespread or systematic attack directed against any civilian population’.

[19] International Criminal Court Elements, Crimes Against Humanity, Article 7, paragraph 3.

[20] The International Criminal Tribunal for the former Yugoslavia, Tadic (1997) and Blaskic (2000).

[21] See Allied Control Council Law No. 10, which enabled domestic prosecutions of war crimes, crimes against humanity and crimes against peace.

[22] Chega! Executive Summary p 118.

[23] Chega! Executive Summary p 118.

[24] Chega Executive Sumary p 121.

[25] Chega! Executive Summary p 122.

[26] Chega! Executive Summary p 118-9.

[27] Allied Control Council Law No. 10.

[28] The International Criminal Tribunal for the former Yugoslavia, 10 December 1998 (*Furundzija*).

[29] The International Criminal Tribunal for the former Yugoslavia, 16 November 1998 (*Celebici*) and 26 February 2001 (*Kordic*).

[30] Chega! Executive Summary p 104-5.

[31] The International Criminal Tribunal for the former Yugoslavia, 22 February 2001 (*Kunarac*) and 15 March 2002 (*Krnojelac*).

[32] The International Criminal Tribunal for the former Yugoslavia, 12 June 2002 (*Kunarac*).

[33] Chega! Executive Summary p 127.

[34] Article 7(1)(d) of the Statute of the International Criminal Court.

[35] Chega! Executive Summary p 44.

[36] Chega! Executive Summary p 74.

[37] Allied Control Council Law No. 10.

[38] Report of the UN Working Group on Arbitrary Detention, UN Doc. E/CN.4/1998/44 para 8.

[39] Chega! Executive Summary p 96.

[40] Chega! Executive Summary p 97.

[41] Article 7(2)(i) of the Statute of the International Criminal Court.

[42] Chega! Executive Summary p 71.

[43] Aboeprijadi Santoso, Timor Leste 1999 or, how to sell lies, Jakarta Post, 1 May 2007.

[44] M. Hirst, Too much friendship, too little truth: Monitoring Report on the Commission of Truth and Friendship in Indonesia and Timor-Leste, International Centre for Transitional Justice, January 2008.

[45] Lindsay Murdoch, 'Apology and Truth may earn amnesty', Sydney Morning Herald, 15 January 2007.

[46] D. Orentlicher, Independent study on best practices, including recommendations, to assist states in strengthening their domestic capacity to combat all aspects of impunity, E/CN.4/2004/88.

[47] Statute of the International Criminal Court, Preambular Paragraphs 4-6.

[48] D. Orientlicher, Settling Accounts: The Duty to Prosecute Violations of a Prior Regime (1991) 100 Yale Law Journal 2537.

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