Practical Justice in Doe v. Lumintang:
The successful Use of Civil Remedies Against "an Enemy of All Mankind"

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From: Hamish McDonald, James Dunn, Gerry van Klinken, David Bourchier, Douglas Kammen, Richard Tanter, and Desmond Ball, Masters of Terror: Indonesia's Military and Violence in East Timor in 1999 (Canberra: Strategic and Defence Studies Centre, March 2002).

In a Washington D.C. courtroom on September 10, 2001, US Magistrate Judge Alan Kay brought down a judgment for compensatory and punitive damages of more than $66 million against the defendant in the case of Jane Doe et al versus 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, before 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. The US District Court had jurisdiction over the case under the provisions of at least two US laws, namely the Alien Tort Claims Act 1789 (ATCA) and the Torture Victim Protection Act 1991 (TVPA).

East Timor activists in the US discovered that Lieutenant-General Lumintang was scheduled to deliver a talk in Washington DC 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 and served while waiting to board his plane. Lumintang left the US immediately and has 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 US law for war crimes, crimes against humanity, and 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 US 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: myself, appearing as an expert witness on Indonesian military issues; Arnold Kohen of the Humanitarian Project and biographer of Bishop Carlos Belo; Theodore Folke, an UNTAET film-maker, attesting to the extent of physical destruction visible in videos presented in evidence; Ian Thomas, an American cartographer and remote sensing specialist, testifying on the extent of deliberately lit fires in September 1999; and

Estella Abosch, social worker and member, Advocates for Survival of Torture and Trauma. Since the defendant had chosen not to appear or be represented, only lawyers for the plaintiffs were present at the hearings, led by Steven Schneebaum, Anthony DiCapio and Judith Chomsky.

The six plaintiffs included the following people:

Jane Doe, a 56-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 30 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 27 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 heard of him. 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 5 was still alive, his Indonesian torturers cut his throat, hacked off his legs and hands, and burned his remains.

<u>Civil remedies for crimes against humanity in US law</u>

The initiative to sue Lumintang for damages in a US 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. None of these came to pass because the political leadership of each state body felt disinclined or unable to prosecute.

The use of civil remedies in US 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 the 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. 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.
The first successful application of the Alien Tort Claims Act in a human rights case occurred 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, 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.

Moreover, Schneebaum argued that for the first time Filartiga established 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 $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 US and European corporations are being sued for their complicity in gross human rights abuses in Burma and Nigeria.

Lumintang and command responsibility

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. Under the doctrine of command responsibility, commanders may be held responsible for certain actions even though the commander did 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."

In fact, Judge Kay held Lumintang both directly and indirectly responsible for the human rights violations endured by the plaintiffs. Following the announcement of the damages judgment against him, Lieutenant-General Lumintang claimed that "as a deputy Army chief of staff at the time, I was not directly involved in any decisions on East Timor." Lumintang and his supporters have maintained that as a headquarters staff officer he had no command responsibility for what took place in East Timor, that he had no involvement in crimes committed in East Timor, and that he was not in a position to influence what took place. Accordingly, it is argued, it is both factually and legally wrong to impute any responsibility to Lumintang.

This position 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.

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 Lumintang's 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.

Lumintang was appointed Deputy Army Chief of Staff on January 18, 1999, and remained in that position until November 4 of that year. Sometime during his previous appointment as Commandant of the Armed Forces Staff and Command School from November 1998 to January 1999, 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 at the time. Lumintang was outranked in the Army by only two full generals (four star): Wiranto (Armed Forces Commander) and Subagyo (Army Chief of Staff) [xv] . 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 organisation, 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-organisation of the Armed Forces, the then TNI Commander, General Moerdani, issued a document entitled Organisation and Procedures of the Indonesian Army (TNI-AD), Decision of the Armed Forces Commander: Kep/08/P/III/1984. [xvi]

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 [xvii] .

The 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, organise 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 Defence 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. [xviii]
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.

Moreover, the execution of these duties involves the Deputy Army Chief of Staff in close and regular contact with the three Army commands, involves 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 Chiefs 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 [xix] :
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, organisation, 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 in terms of formal responsibility, 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 □estaff□f positions at a high level carry no responsibility for actions of combat units or involvement in their systematic and regular activities is in fact completely specious, and in law irrelevant to the interpretation of command responsibility.
It might be argued that whatever the formal de jure specification of the Deputy Army Chief of Staff□fs authority, the actual position the incumbent found himself in was quite different, and that he did not in fact have the specified powers and responsibilities. Through a long-established principle of international law, this argument has been rejected, especially in cases where there were no military impediments to the officer meeting his responsibilities.

The Lumintang telegram

In fact, there are two pieces of physical evidence that connect Lumintang quite concretely with criminal actions in East Timor, and which 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 □eregarding the order to anticipate situations that might arise with regard to the choice of options for the East Timorese people□f. 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. [xx]

Written in □etelegraphic□f 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□fs 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□fs 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 □epreventing the outbreak of civil war□f. 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. As one respected colleague with far better command of Indonesian than myself put it to me, *represif* does not carry all of the sinister connotations of 'repressive' in English, and that it is often used in official documents to refer to legal action of the part of an authority [xxi] .

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 likely 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 [xxii] .

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 organisation 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, Leonido Martins Rebeiro; Manuel Sousa, commander of the BMP militia; the head of the Liquica district military command and other BMP leaders. [xxiii]
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. A key part of the plan was the partitioning of East Timor and the forced re-location of the local population in the western districts ‑ and potentially their later re-population with loyal non-East Timorese.
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 [xxiv] . In that position, Syahnakri reported directly on a day-to-day basis to the Army Deputy Chief of Staff, Lieutenant Johny Lumintang.

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□fs 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□fs official activities to crimes against humanity in East Timor is unambiguous. An Army Secret Warfare manual of development guidelines issued over Lumintang□fs name as Deputy Army Chief of Staff was discovered in Dili after the Indonesian retreat. [xxv] The manual is intended to systematise 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 [xxvi] 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 [□eStrategy of Tension□f] [xxvii]
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 [xxviii] . The signed manual demonstrates not only Lumintang□fs knowledge and approval of conduct treated as criminal throughout the world, but also his acknowledgment and acceptance of the fact that in the organisation 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 rationalised manner. Nothing more clearly indicates the depth of the normalisation 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 himself was not known as a torturer or particularly cruel field commander. He had a model career as a fast-rising elite infantry officer, receiving rapid promotion in the 1990s, appointment to a series of coveted Strategic Reserve Command posts and territorial commands in three of core security concern at the time: the Greater Jakarta region, East Timor, and Irian Jaya. Lumintang was a good example of the Indonesian Army□fs idea of a model soldier – who found nothing unusual or disconcerting about organising 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 US (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. [xxix]

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:

l directly investigating widespread public allegations of extra-judicial killings, terror and torture in East Timor;
l initiating a review of these activities by his direct subordinate, the Inspector-General of the Army
l initiating alternative approaches to realising TNI goals in East Timor by directing the Army General Staff and Operations Staff accordingly;
l 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 UN and Portugal;
l making statements to this effect in military discussion forums, where, as a 3-star general and former Commandant of the Staff and Command College, he would have been at the very least heard out;
l making statements in public and in the mass media, as did, for example, Major General Agus Wirahadikusumah; and
l 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 behaviour 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□fs failure to act is singularly culpable. At no time did Lumintang behave with honour.

Some sympathisers 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 marginalisation from policy-making, with dismissal probable. There is some merit in both these arguments. Having authorised 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 defence. 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. [xxx]

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 elite 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, the terrorist in uniform acting under superior orders, then we have already abandoned most claims to humanity. It is precisely because Lumintang is a good career officer, a straight elite 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 normalisation 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 favourably comparing him to torturers and sadistic killers only demonstrate their acceptance of and complicity in that culture of impunity. Lumintang indeed represents, in Arendt□fs phrase describing Adolf Eichmann, the banality of evil [xxxi] .

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. Secondly this specialist declined because he considered Lumintang an important Army reformer, and that therefore the suit would 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 □edemocracy□f 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 favour 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 manoeuvring. 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 marginalised 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 □enations, 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□f.
□@
The four living plaintiffs are most unlikely to see any of the $66 million awarded in compensatory and punitive damages. But they have been able to speak and be recognised 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 aw ard 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 Defence), 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. [xxxii]
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 behaviour of □enormal□f 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 UN 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 US case those universal norms are to have universal jurisdiction. The doctrine of universal jurisdiction for crimes committed by □ethe enemies of all human kind□f in that Act was not accidental and is not unique. [xxxiii] In the future there will be more of such 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 □ethe enemies of all humankind□f in East Timor and Indonesia.

Postscript: □gPak Johny will certainly be arrested□h

Two months after the Kay judgment, the Indonesian government abruptly abandoned its position of ignoring the Doe v. Lumintang judgment. Speaking to a parliamentary committee on late November, Minister of Defence Matori Abdul Djalil criticised his predecessor□fs failure to provide Lumintang with legal support, and announced the formation of a legal defence team within his ministry. With Lumintang at his side, Matori made the rationale for the about face quite clear: □gIf Pak Johny goes to America now he will certainly be arrested□c This is not just for Johny□fs interest, but for the moral interests of all soldiers.□h The previous day, Foreign Minister Hassan Wirayudha acknowledged the obvious point: that this move entailed recognition of the jurisdiction of the US court.. No details were forthcoming of the form of legal intervention contemplated by the Ministry of Defence team. [xxxiv]

While accompanied by familiar dismissals of the judgement itself, and complaining of Lumintang□fs lack of representation in the proceedings (by his own choice), the two senior ministers – and Lumintang himself – were making clear that in their eyes Doe v. Lumintang was opening an effective, if however limited, challenge to the culture of impunity in the Indonesian military.

[i] Findings of Fact and Conclusions of Law, Jane Doe et al v. Lumintang. p. 1. The full judgement is available at http://www.etan.org/news/2001a/10lumjudg.htm (accessed 7.10.01).
[ii] The Center for Constitutional Rights were counsel for the plaintiff in Todd v. Panjaitan (No. 92-12255, slip op. (D. Mass. Oct. 26, 1994)) in a successful civil suit against Major-General Sintong Panjaitan for his role in the Santa Cruz killings in Dili in 1991.
[iii] 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 was able to rely, but his devil□fs advocacy was immensely helpful. Douglas Kammen also contributed material and forced me to rethink certain positions. Judith Chomsky, Anthony DiCapio and Jennifer Green worked patiently to ease my transition from the security of academic prevarication to a presenter of usable evidence. I am grateful to them all. Anthony DiCapio read the chapter closely and suggested numerous improvements. Russell Goldflam, Gerry Van Klinken and John Miller provided helpful commentary. Needless to say, any errors remain my own.

[iv] 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).

[v] Doe v. Lumintang, Judgement, Findings of Fact paragraphs 25 – 98.

[vi] Alien Tort Claims Act codified at 28 U.S. Code Section 1350

[vii] Michael Ratner, Civil Remedies for Gross Human Rights Violations, http://www.humanrightsnow.org, (accessed 7.10.01).

[viii] Doe v. Lumintang, Transcript of Trial, March 29, 2001, p. 72. See also Ratner, op.cit.

[ix] Ratner, op.cit.

[x] 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, March 27, 2001, pp. 26-136. For an outline of Lumintang□fs military biography see his entry in David Bourchier and Gerry Van Klinken, □eTNI Officers Implicated in the East Timor Violence in 1999□f in this book.

[xi] Findings of Fact and Conclusions of Law, Jane Doe et al v. Lumintang. p.30.

[xii] □gIn 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 that were 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.□h Ibid, pp32-33.

[xiii] □eJohny denies responsibility over mayhem in East Timor□f, The Jakarta Post, October 6, 2001.

[xiv] For a comprehensive review of the question of command responsibility in international law see Ilias Bantekas, □eThe contemporary law of superior responsibility□f, American Journal of International Law, v.93, no. 3, July 1999.

[xv] From the listings for 1999 in □eCurrent Data on the Indonesian Military Elite: January 1, 1998 – January 31, 1999□f, 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□fat (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.

[xvi] Keputusan Panglima Angkatan Bersenjata Kep/08/P/III/1984 tentang Pokok‑Pokok Organisasi dan Prosedur Tentara Nasional Indonesia Angkatan Darat (TNI‑AD).

[xvii] See Robert Lowry, The Armed Forces of Indonesia, (St Leonards, N.S.W:Allen and Unwin, 1996) for a general study.

[xviii] Ibid., pp. 13-14.

[xix] Ibid., pp. 18-19.

[xx] 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 □eText of Order to Develop □eSecurity Plan□f, http://www.hrw.org/reports/1999/wtimor/westmr-04.htm (accessed 6.10.01).

[xxi] David Bourchier to Richard Tanter, 18.3.01.

[xxii] See Richard Tanter, □eEast Timor and the Crisis of the Indonesian Intelligence State□f, in Richard Tanter, Mark Selden and Stephen R. Shalom (eds.), Bitter Flowers, Sweet Flowers: East Timor, Indonesia and the World Community, (New York: Rowman and Littlefield; Sydney: Pluto Press), and

Tanter, □eThe totalitarian ambition: the Indonesian intelligence and security apparatus□f, in Arief Budiman (ed.), State and Soviet in Contemporary Indonesia, (Clayton: Victoria: Centre of Southeast Asian Studies, Monash University), pp.215-288.
[xxiii] Human Rights Watch, □eEvidence that the expulsions were the result of a coordinated Indonesian Army campaign□f, http://www.hrw.org/reports/1999/wtimor/westmr-03.htm#TopOfPage (accessed 7.10.01), citing Yayasan Hak, Laporan Harian Pelanggaran HAM No. 18/LH/YH-DA/VI 1999, June 17, 1999.
[xxiv] Douglas Kammen□eThe Trouble with Normal: The Indonesian Military,

Paramilitaries, and the Final Solution in East Timor□f in Benedict R.O'G. Anderson (ed.), Violence and the State in Indonesia, 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, 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.
[xxv] Tentara Nasional Indonesia, Markas Besar Angkatan Darat, Buku Petunjuk Pembinaan tentang Sandi Yudha TNI-AD, Nomor: 43-B-01, 30 Juni 1999. The manual was issued on June 30, 1999. Lumintang□fs signature is on the fourth page. There is no suggestion that the manual is not authentic, and indeed it is precisely the kind of development and training document that Lumintang□fs office was authorized to produce. Language, style and layout, in addition to Lumintang□fs authorization and signature all attest to its authenticity.
[xxvi] Ibid , p.35.
[xxvii] The phrase □estrategy of tension□f 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 U.P., 1990), p.107.
[xxviii] Lumintang in particular knew from his own experiences in command positions in East Timor and Irian Jaya in 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. There is a suggestion that as Kodam commander Lumintang clashed with then Kopassus commander Prabowo Subianto Djojohadikusomo over the latter□fs operations in Irian, but the key conflict seems to have been over the clash of lines of authority between the Military Area Command and the free-roaming Special Forces Command.
[xxix] 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 □eCurrent Data on the Indonesian Military Elite: July 1, 1989 – January 1, 1992□f, Indonesia, 53 (April 1992), p. 98. See also Douglas Kammen, □eNotes on the Transformation of the East Timor Military Command and its Implications for Indonesia□f, Indonesia 67 (April 1999), p. 64.

[xxx] One possible defence of Lumintang□fs 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. There first is that there has been no evidence put forward to suggest that this was indeed Lumintang□fs 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 analyses elsewhere in this book.) 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 Desmond Ball, Silent Witness in this book.) To the extent that is so, then Lumintang□fs stated domain of authority as Deputy Army Chief of Staff covered troops of all three Army Commands operating in East Timor: Kodam, Kostrad, and Kopassus.

[xxxi] Hannah Arendt, Eichmann in Jerusalem: A Study in the Banality of Evil, (NewYork: Penguin,1994).

[xxxii] Lumintang□fs cowardice in failing to appear to answer the plaintiffs□f 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 defence 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 defence. Apart from his own desire to avoid the public humiliation of explaining the inexplicable and to avoid the devastating gaze of his victims, Lumintang □es choice to not appear has another important cause. Had he chosen to present a defence, US civil legal procedures include □ediscovery□f 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.

[xxxiii] The attitude of the US 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□f claims for US jurisdiction as a way of implementing President Carter□fs human rights policy. Certainly there was no support for the plaintiffs□f suit against Lumintang, nor had there been in Kadic v. Karadzic. As The Economist put it, □ethe executive branch [of the US] may be able to tolerate, for example, war crimes in Bosnia; the judiciary does not.□f (March 22, 1997).

[xxxiv] See □gDephan Bela Johnny Lumintang Sesalkan Kurangnya Bantuan Hukum□h [Minister of Defence defends Johny Lumintang, regrets lack of legal aid], Koridor, 29 November 200; available at http://www.indopubs.com/earchives/0002.html; and □gDefense Ministry to Provide Johny Lumintang with Legal Assistance□h, Antara, October 26, 2001.