

# WAS THE CONFLICT IN EAST TIMOR ‘GENOCIDE’ AND WHY DOES IT MATTER?

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*[In the intense mass media reporting of the post-independence ballot violence in East Timor in September 1999, frequent reference was made to the term ‘genocide’. The characterisation of the violence as genocide was driven by comments made by East Timorese independence leaders, human rights advocates, and journalists themselves. Yet very few commentators analysed whether the violence in East Timor — both before and after the independence ballot — satisfied the international legal definition of ‘genocide’ under the Genocide Convention. This article considers why it matters whether the conflict in East Timor should or should not be characterised as genocide, from practical and philosophical perspectives. It then assesses whether the violence against the East Timorese in the post-ballot period of September 1999, and the pre-ballot period from December 1975 to October 1999, can accurately be described as genocide under international law. The article concludes by discussing whether genocide was prohibited as a crime under domestic law in East Timor during the relevant periods. The probability that the violence in East Timor did not legally amount to ‘genocide’ under the international definition raises serious questions about the effectiveness of the Genocide Convention and the pressing need for its reform.]*

## CONTENTS

Ben Saul

Contents

- I Introduction
- II Distinguishing Genocide from other Crimes
- III Was the Violence in East Timor Genocide?
  - A Elements of the Crime of Genocide
    - 1 Membership of a Group
    - 2 Intention to Destroy the Group
  - B Definition of Acts Amounting to Genocide
- IV Can Genocide Be Prosecuted in East Timor?
- V Conclusion

## I INTRODUCTION

In the intense mass media reporting of the post-independence ballot violence in East Timor in September 1999, frequent reference was made to the term ‘genocide’. Around the world, newspapers as far afield as the Philippines, Hong Kong, Portugal, Spain, Mexico, Belgium, the Czech Republic and the United

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Kingdom, to name just a few, described the violence in terms of genocide.<sup>1</sup> In Australia, the *Sydney Morning Herald* prominently headlined one front page article 'Race against Genocide'.<sup>2</sup> The characterisation of the violence as genocide was driven in part by the comments of East Timorese independence leaders. After his release from house arrest, Xanana Gusmao, leader of the National Council for Timorese Resistance, claimed that genocide was occurring in East Timor because the Indonesian Armed Forces ('TNI') and its militia proxies were depopulating the territory.<sup>3</sup> Bishop Carlos Belo stated to CNN shortly before meeting the Pope that 'we can verify that there is a genocide, a cleansing' occurring.<sup>4</sup> Jose Ramos-Horta repeatedly warned of the likelihood of genocide if the UN observers pulled out of the region in the immediate aftermath of the ballot.<sup>5</sup> The UN Commission on Human Rights noted that in September 1999 Ramos-Horta pointedly compared the situation in East Timor to the Holocaust: 'the Jewish Holocaust had taken place for the same reasons as the holocaust in [his] own country — the powers that be in Europe were guided by realpolitik and pragmatism which turned Europe into a wasteland'.<sup>6</sup>

An assortment of human rights advocates similarly portrayed the conflict as genocide. The Executive Director of the Australian Council for Overseas Aid

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<sup>1</sup> Respectively: Anthony Smith, 'East Timor: A Nation Reborn', *Philippine Daily Inquirer* (Manila, the Philippines), 3 September 2000 <[http://www.inquirer.net/issues/sep2000/sep03/features/fea\\_main.htm](http://www.inquirer.net/issues/sep2000/sep03/features/fea_main.htm)> at 20 September 2001; 'Why We Must Act to Prevent New Kosovo', *Hong Kong Standard* (Hong Kong), 7 September 1999; Luis Delgado, 'Can UNAMET Withdraw?', *Diario de Noticias* (Madeira, Portugal), 7 September 1999; Prudencio Garcia, 'The Lesson of East Timor', *El Pais* (Madrid, Spain), 22 September 1999; Carlos Urzua, 'Occupied East Timor', *El Universal* (Mexico City, Mexico), 17 September 1999; Philippe Paquet, 'Five Years after Rwanda, Timor?', *La Libre Belgique* (Brussels, Belgium), 7 September 1999; 'Timor, A Hard Test for the World', *Mlada fronta Dnes* (Prague, the Czech Republic), 7 September 1999; John Aglionby, 'Militias "Intent on Genocide"', *The Guardian* (London, England), 6 September 1999, 1. See Kathleen Brahney (ed), United States Information Agency (Office of Research and Media Reaction), *East Timor: 'Daunting,' 'Dangerous' Period Ahead* (1999) <<http://www.fas.org/man/dod-101/ops/war/1999/09/www9924.htm>> at 20 September 2001.

<sup>2</sup> Hamish Macdonald, 'Race against Genocide', *Sydney Morning Herald* (Sydney, Australia), 7 September 1999, 1.

<sup>3</sup> CNN (Asia Now), *Diplomats Arrive in Jakarta for Emergency East Timor Talks* (8 September 1999) <<http://www.cnn.com/ASIANOW/southeast/9909/08/e.timor.01/>> at 20 September 2001. See also Xanana Gusmao, President of the National Council for Timorese Resistance, *The Direction of CNRT and East Timor* (Speech delivered at Leonda Reception Centre, Melbourne, 11 October 1999) <<http://www.c2o.org/maillinglists/aus4freetimor/msg00276.html>> at 20 September 2001.

<sup>4</sup> CNN (Asia Now), *UN Mission to Assess Bloodied East Timor Firsthand* (11 September 1999) <<http://www.cnn.com/ASIANOW/southeast/9909/10/etimor.04/>> at 20 September 2001.

<sup>5</sup> Quoted in CNN (Asia Now), *UN Hopes to "Thin Out" Staff in East Timor* (9 September 1999) <<http://asia.cnn.com/ASIANOW/southeast/9909/08/e.timor.05/>> at 20 September 2001.

<sup>6</sup> United Nations, *Special Session of Commission on Human Rights Hears from NGOs on Situation in East Timor; Adjourns until Monday*, Press Release, UN Doc HR/CN/99/69 (24 September 1999).

stated that 'Australia must not stand by and witness a genocide on its doorstep'.<sup>7</sup> At the UN Commission on Human Rights, Dr Sarah Pritchard, representing the International Work Group for Indigenous Affairs, referred to the 'crimes of genocide, crimes against humanity and war crimes which had been committed in East Timor'.<sup>8</sup> At the same Special Session of the Commission, the violence was also identified as genocide by other non-governmental organisations such as the Society for Threatened Peoples and the Association of World Education.<sup>9</sup> David Littman of the Association of World Education drew no distinction between the pre- and post-ballot periods in East Timor, interpreting events as a continuum of genocidal acts:

There had been — and there was still — a clear complicity to commit genocide. The same army killed half a million Indonesians for ethnic and political reasons in 1965–1966, then imprisoned many more. Ever since Indonesia's illegal annexation of East Timor in 1975, it was an established fact that over 200 000 East Timorese had been killed in the ongoing genocide.<sup>10</sup>

Other commentators qualified their interpretation of events in East Timor as genocide. The East Timor Action Network in the United States called the violence 'attempted genocide',<sup>11</sup> an opinion shared by at least one US Congressperson in the congressional debate on East Timor.<sup>12</sup> In the Security Council debate of September 1999, the Irish representative referred to 'allegations of genocide' rather than assuming that the commission of genocide or attempted genocide was factually established.<sup>13</sup> Nonetheless belief that the post-independence ballot violence in East Timor amounted to genocide was both popular and widespread.<sup>14</sup>

The frequent characterisation of the violence in East Timor as genocide has led many commentators to assume unquestioningly that genocide was in fact

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<sup>7</sup> Janet Hunt, Australian Council for Overseas Aid, *Intervene to Prevent Genocide*, Press Release (6 September 1999) <[http://www.acfoa.asn.au/media\\_releases/98\\_99\\_releases/6\\_Sept\\_ET.htm](http://www.acfoa.asn.au/media_releases/98_99_releases/6_Sept_ET.htm)> at 20 September 2001.

<sup>8</sup> *Special Session of Commission on Human Rights Hears from NGOs on Situation in East Timor*, above n 6.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> East Timor Action Network, *ETAN Emergency Action Alert Post-Referendum Alert #4* (13 September 1999) <<http://www.zmag.org/CrisesCurEvts/Timor/action4.htm>> at 20 September 2001.

<sup>12</sup> United States of America, *Congressional Record*, House of Representatives, 24 July 1999, (Mr Gejedson, Congressperson) H6041, during the House of Representatives debate on East Timor, discussing an amendment to State Department Authorization Bill (HR 2415) introduced by Representative Douglas Bereuter (R-NE) H6041 <<http://www.etan.org/et99/july/18-24/22house.htm>> at 9 October 2001. The amendment passed by voice vote without opposition.

<sup>13</sup> Ryan, Submission to UN Security Council on behalf of Ireland, 54 UN SCOR (4043<sup>d</sup> mtg), UN Doc S/PV.4043 (1999).

<sup>14</sup> Eg, an indicative search of a global internet search engine in June 2001 returned 1140 'hits' for a Boolean search combining the terms "'East Timor' ballot 1999 genocide', while a wider search on the terms "'East Timor' genocide' returned 16 500 hits: Google search <<http://www.google.com>> at 27 June 2001.

committed. Very few commentators have analysed whether the acts of violence committed in East Timor — both before and after the independence ballot of 1999 — satisfy the international legal definition of genocide under the *Convention on the Prevention and Punishment of the Crime of Genocide* ('*Genocide Convention*').<sup>15</sup> A number of political and historical works have argued that genocide was committed following the invasion of East Timor<sup>16</sup> — either by Indonesia or its militia agents — but there has been no rigorous juridical assessment of whether the violence legally amounted to genocide.<sup>17</sup> This article considers three questions. First, why it matters whether the violence should or should not be characterised as genocide. Second, whether acts committed against the East Timorese in the post-ballot violence of September 1999, and the pre-ballot period from December 1975 to August 1999, can be accurately defined as genocide under international law. Third, if such acts do satisfy the international definition, whether genocide was prohibited as a crime under the relevant law applying in East Timor during these specified periods.

## II DISTINGUISHING GENOCIDE FROM OTHER CRIMES

The term 'genocide' (a composite of the Greek terms for 'race' and 'killing') was coined by the Polish-American jurist Raphael Lemkin in the early 1940s to describe the intentional destruction of certain groups.<sup>18</sup> Lemkin was writing in the midst of the Holocaust, but was very conscious of earlier genocides: the two to three million Armenian victims of the Ottoman Empire's forced deportations of 1915, and the seven million victims of Soviet-forced famines in the Ukraine and Cossack lands in 1932–33.<sup>19</sup> The international legal meaning of genocide was derived (but departed) from Lemkin's work. Genocide is defined in article II of the *Genocide Convention* as the commission of certain prohibited acts 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'. The prohibited acts are:

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<sup>15</sup> Opened for signature 9 December 1948, 78 UNTS 277, art II (entered into force 12 January 1951).

<sup>16</sup> See, eg, Jim Aubrey (ed), *Free East Timor: Australia's Culpability in East Timor's Genocide* (1998); John Taylor, *East Timor: The Price of Freedom* (1999); James Dunn, *Timor: A People Betrayed* (1983); Arnold Kohen and John Taylor, *An Act of Genocide: Indonesia's Invasion of East Timor* (1979).

<sup>17</sup> For a (rare) legal analysis of whether the conflict in East Timor between 1975 and 1981 was genocide, see Roger Clark, 'Does the Genocide Convention Go Far Enough? Some Thoughts on the Nature of Criminal Genocide in the Context of Indonesia's Invasion of East Timor' (1981) 8 *Ohio Northern University Law Review* 321. For an analysis spanning 1975–99, see Peter Mares (Presenter) and Professor Ben Kiernan (Interviewee), Director of the Genocide Studies Program, Yale University, 'East Timor: Indonesia's Actions "Genocide" Says Expert', *ABC Radio National Asia Pacific*, 29 August 2001 <<http://www.abc.net.au/ra/asiapac/programs/s354635.htm>> at 3 October 2001.

<sup>18</sup> Raphael Lemkin, 'Genocide as a Crime under International Law' (1947) 41 *American Journal of International Law* 145, 147; Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (1944) 79.

<sup>19</sup> Norman Davies, *Europe — A History* (1997) 909, 964. See also Elizabeth Evatt, 'Armenian Genocide' (Speech delivered at Willoughby Town Hall, Willoughby, Australia, 25 April 1993).

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Article III of the *Genocide Convention* punishes a number of acts in addition to the crime of genocide itself, including: 'conspiracy to commit genocide'; 'direct and public incitement to commit genocide'; 'attempt to commit genocide'; and 'complicity in genocide'. The *Genocide Convention* expressly envisages only the punishment of natural persons, and is silent on the legal personality of, for example, corporations or political parties.<sup>20</sup> Along with war crimes and crimes against humanity, genocide has been declared the ultimate criminal act by the international community, a super-rule with the status of *jus cogens*, from which no derogation is permitted. Genocide is prohibited both by treaty and customary international law, and is widely considered a crime of universal jurisdiction.<sup>21</sup> States have the extraterritorial power to punish genocide wherever it occurs, regardless of nationality, subject to no defences and hindered by no statute of limitations.<sup>22</sup> Unlike many international treaties, the *Genocide Convention* makes both states and individuals responsible for acts of genocide,<sup>23</sup> and it permits the Security Council to authorise military intervention to stop genocide from occurring.<sup>24</sup>

The accurate identification of the categories of crime committed in East Timor is not merely of academic or technical interest. In practical terms, it is fundamentally important in designating the jurisdiction of any court or tribunal (domestic or international) responsible for hearing charges against perpetrators of violence in East Timor. It is crucial to the proper choice of charges by prosecutors themselves. It has implications for the double criminality rule in the context of extradition requests. At a broader policy level, if the violence in East Timor cannot accurately be described as genocide, questions necessarily arise about whether the international legal definition of genocide is in some way deficient or too narrow. Alternatively, the existing definition of genocide may purposefully contemplate a more severe category of crime than those crimes actually committed in East Timor. Assuming the legal concept of 'genocide' is a rational one, the use of the term is juristically reserved by the international

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<sup>20</sup> *Genocide Convention*, above n 15, art IV; Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice* (2000) 343.

<sup>21</sup> *Genocide Convention*, above n 15, art VI. See also *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15; *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v Spain)* [1970] ICJ Rep 3, 33–4.

<sup>22</sup> *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, opened for signature 26 November 1968, 754 UNTS 73 (entered into force 11 November 1970).

<sup>23</sup> *Genocide Convention*, above n 15, art IX.

<sup>24</sup> *Ibid* art VIII.

community to describe situations of violence which satisfy the high thresholds or elements of proof required by the definition — the existence of a specified group, an intention to destroy a group *as such*, and the commission of prescribed acts in furtherance of the intention to destroy a group.

Mischaracterising the violence in East Timor as genocide would falsely attribute a level of criminality to those events which is legally, morally and historically discordant, eroding the descriptive utility of the term. This might have serious consequences for sustaining an enduring historical memory of ‘real’ genocides, as well as bearing on the question of the effectiveness of future deterrence. Genocide is the ‘crime of crimes’,<sup>25</sup> reigning at the apex of international crimes in gradations of both legal severity and moral evil. The hyperbolic deployment of the term, whether in aid of commercial media sensationalism or — more understandably — in building support for a political or human rights cause, undermines the historical memory of ‘true’ genocides such as the Holocaust or those of the Armenians and Ukrainians. Falsely ascribing genocidal intent to situations, which cannot accurately be described as such, desensitises the linguistic tenor of ‘genocide’ and distorts our capacity to understand and compare historical instances of genocide against other forms of mass violence. Most importantly, it devalues the experiences of victims of ‘real’ genocides. Part of the dilemma is the different legal and popular uses of the term ‘genocide’. In common parlance, genocide has come broadly to refer to mass killings targeted against any group, not necessarily connected to the strict legal requirements of the *Genocide Convention*.

Conversely, it must be noted that deliberate avoidance of the term ‘genocide’ to describe a conflict when it *is* justified under the international definition, can equally degrade the legal utility of the term. Shawcross notes that during the Rwandan genocide of 1994, the major powers on the Security Council ‘continually shied away from any mention of genocide and the implications thereof’.<sup>26</sup> Since genocide is a crime of universal jurisdiction, publicly describing the violence in Rwanda as genocide would have obliged the Security Council to act decisively to ‘prevent and to punish’ it as required by the *Genocide Convention*.<sup>27</sup> Avoiding the term allowed the major powers to disavow responsibility, despite the view at the time of the US Defense Intelligence Agency that the violence in Rwanda was indeed an ‘organised effort of genocide’.<sup>28</sup> While the US may have been wary of committing US soldiers to Rwanda following the killing of US peacekeepers in Somalia in 1993, the failure to characterise ‘actual’ genocide as ‘legal’ genocide undermines the concept and its ultimate aims of prevention, punishment and deterrence.

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<sup>25</sup> *Prosecutor v Akayesu*, Case No ICTR-96-4-T (2 October 1998) [10], 37 ILM 1399, (‘Akayesu’).

<sup>26</sup> William Shawcross, *Deliver Us From Evil: Peacekeepers, Warlords, and a World of Endless Conflict* (2000) 115–16.

<sup>27</sup> *Genocide Convention*, above n 15, art I.

<sup>28</sup> Shawcross, above n 26, 118.

Philosophically it might be objected that it does not matter to a nominal person who has been killed whether they were killed for a genocidal reason, or as a result of a (comparatively) pedestrian murder in peacetime. At a physical level (or the level of *actus reus*), every intentional killing — including killing by capital punishment — produces the same outcome: a premature or aberrant death; a death against nature and against natural justice. However, the intention (or *mens rea*) behind a killing is of crucial philosophical importance to understanding, interpreting and remembering genocidal events, and preventing or deterring their repetition. A murder is an intentional destruction of a single individual, a grievous act which many consider horrifying beyond belief. However, a significant aspect of human identity involves social relations with others, and, in particular, the formation of group bonds based around commonalities such as race, ethnicity, language, gender, sexuality, religion, and so on.<sup>29</sup> The intentional destruction of a group is considered more heinous than murder in international law because it strikes both at the individual and the broader social organism of which he or she forms a part. Whereas murder is a crime affecting the integrity of a community, genocide attacks the very existence of the community.

An important qualification to this philosophical warning about the danger of misusing the term 'genocide' is that the international definition of genocide contains logical inconsistencies. The legal concept of genocide is not a rational or internally consistent one as the forgoing discussion has presupposed. The ambivalent partial inclusion and partial exclusion of concepts of cultural genocide from the *Genocide Convention*, and the limited range of groups protected, are inconsistencies which are greatly pronounced in the example of East Timor. This article argues that the definition of genocide should be rationally and logically expanded to encompass the idea of cultural genocide, in conjunction with expanding the range of groups protected to include groups based on political affiliation (among others). In the alternative, this article argues that a more radical jurisprudence should be developed around the existing concept of genocide, by carefully distinguishing the requisite element of intention to commit genocide from the purposive motive underlying genocidal acts.

### III WAS THE VIOLENCE IN EAST TIMOR GENOCIDE?

A preliminary step in analysing whether the post-independence ballot violence amounts to genocide is identifying the acts which took place. There is a significant level of international agreement among UN agencies, non-government organisations, governments and journalists about the what happened in the aftermath of the ballot. The earliest UN Assistance Mission to East Timor ('UNAMET') reports from September 1999 noted that 'militia members were

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<sup>29</sup> William Kymlicka, *Liberalism, Community and Culture* (1989) 207; A Margalit and Joseph Raz, 'National Self-Determination' (1990) 87 *Journal of Philosophy* 439, 448–9; Joseph Raz, 'Rights-Based Moralities' in Jeremy Waldron (ed), *The Morality of Freedom* (1986) 208.

terrorizing and murdering unarmed civilians; burning houses; displacing large numbers of people'.<sup>30</sup> UNAMET staff 'witnessed militia members perpetrating acts of violence in full view of heavily armed [Indonesian] police and military personnel who either stood by and watched or actively assisted the militia'.<sup>31</sup> The Report of the UN High Commissioner for Human Rights in September 1999 found 'overwhelming evidence that East Timor has seen a deliberate, vicious and systematic campaign of gross violations of human rights'.<sup>32</sup> Such violations included:

- 'wanton killings', including the targeting of pro-independence supporters, community leaders and members of the clergy;<sup>33</sup>
- 'deliberate and long-planned' forcible expulsions of between 120 000 and 200 000 people<sup>34</sup> (although later estimates were as high as 500 000 displaced people, or almost 60 per cent of the population, 250 000 of whom became refugees);<sup>35</sup>
- violence against, and the intimidation and torture of, students, intellectuals and activists;<sup>36</sup>
- rape of and sexual violence against women;<sup>37</sup>
- forced and involuntary disappearances, and separation of family members;<sup>38</sup>
- intimidation of and violence against displaced persons in displacement camps;<sup>39</sup>
- forced recruitment of young East Timorese men into the militias; and
- destruction and looting of property<sup>40</sup> (Human Rights Watch later estimated that 70 per cent of buildings in East Timor were destroyed).<sup>41</sup>

The Report of the UN High Commissioner for Human Rights recommended the establishment of an international commission 'to gather and analyse evidence

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<sup>30</sup> UN Commission on Human Rights, *Report of the High Commissioner for Human Rights on the Human Rights Situation in East Timor*, UN Doc E/CN.4/S-4/CRP.1 (17 September 1999) [14]. The mission went to Jakarta and Darwin to assess the situation from 10–13 September 1999.

<sup>31</sup> *Ibid* [16].

<sup>32</sup> *Ibid* [47].

<sup>33</sup> *Ibid* [19]–[28].

<sup>34</sup> *Ibid* [29]–[34]. The Report notes that the infrastructure for receiving the displaced in West Timor was built weeks *before* the ballot: at [29].

<sup>35</sup> Plan International Australia, *Plan's Development Bulletin: East Timor* (2000) 5 <<http://www.plan.org.au/pdf/devbull3.pdf>> at 20 September 2001.

<sup>36</sup> UN Commission on Human Rights, above n 30, [31].

<sup>37</sup> *Ibid* [35]–[36].

<sup>38</sup> *Ibid* [37]–[38].

<sup>39</sup> *Ibid* [39]–[44].

<sup>40</sup> *Ibid* [45].

<sup>41</sup> Human Rights Watch, *Justice for East Timor*, Press Release (2000) <<http://www.hrw.org/backgrounder/asia/timor/etimorback0330.htm>> at 20 September 2001.



of crimes committed'.<sup>42</sup> The UN Secretary-General duly established the International Commission of Inquiry on East Timor to compile information on possible violations of human rights and breaches of international humanitarian law committed in East Timor since January 1999.<sup>43</sup>

The inquiry went a step further than the preliminary assessment by the UN High Commissioner for Human Rights by identifying the acts of violence committed in East Timor as specific breaches of international human rights and humanitarian law. First, the Commission of Inquiry restated the acts which constituted 'gross violations of human rights and breaches of humanitarian law', including

systematic and widespread intimidation, humiliation and terror, destruction of property, violence against women and displacement of people. Patterns were also found relating to the destruction of evidence and the involvement of the Indonesian army (TNI) and the militias in the violations.<sup>44</sup>

The Commission also found evidence of killings and massacres, and the targeting of international staff and journalists.<sup>45</sup> Second, the Commission attributed responsibility for these acts to the TNI, special forces (Kopassus), and intelligence agencies for collectively recruiting, arming and training the militias.<sup>46</sup> Third, the Commission particularised the breaches of international law:

The violations include, but are not limited to, violations of the rights to life and to freedom from torture, cruel, inhuman or degrading treatment or punishment, violence against women, and violations of rights relating to freedom of assembly, association, opinion and expression, freedom from arbitrary arrest and exile, and freedom of movement and residence, and the right to own property[.]<sup>47</sup>

The Commission also stated that a range of so-called 'second generation' social, economic or cultural rights were violated in the aftermath of the ballot: 'further human rights were violated through the large-scale destruction, including the right to work, the right to an adequate standard of living, including food, clothing, housing and medical care, and the right to education'.<sup>48</sup> Notably absent from this extensive formulation of rights violated in the post-ballot violence is a reference to 'genocide'. The Commission was admittedly careful to state that potential violations of international law 'are not limited' to the violations it specified.<sup>49</sup> It is therefore plausible that the breaches listed by the

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<sup>42</sup> UN Commission on Human Rights, *Report of the UN High Commissioner for Human Rights*, above n 30, [11].

<sup>43</sup> UN Office of the High Commissioner for Human Rights, *Report of the International Commission of Inquiry on East Timor to the Secretary-General*, UN Doc A/54/726, S/2000/59 (31 January 2000).

<sup>44</sup> *Ibid* [123].

<sup>45</sup> *Ibid* [124]–[134].

<sup>46</sup> *Ibid* [140].

<sup>47</sup> *Ibid* [142].

<sup>48</sup> *Ibid*.

<sup>49</sup> *Ibid*.

Commission could have been committed in furtherance of an overriding genocidal intent. Nonetheless it is of some significance that genocide was not explicitly identified in the Commission's evaluation.

By contrast, Amnesty International adopted a more expansive interpretation of genocide in its October 1999 report on the violence. Amnesty defined crimes against humanity to include genocide, systematic or widespread murder, torture (including rape), forced disappearances, deportation and forcible transfers, arbitrary detention, political persecutions and other inhumane acts — whether committed in times of war or peace.<sup>50</sup> It is questionable whether Amnesty's analysis is entirely accurate on this point. Some commentators do regard genocide as a 'crime against humanity' broadly defined.<sup>51</sup> However, while genocide is universally regarded as an international crime, it is not usually considered to fall within the category of crimes against humanity.<sup>52</sup> Originally genocide was considered a crime against humanity in the indictments brought under the *Nuremberg Charter*,<sup>53</sup> yet it was not expressly included in the first list of crimes against humanity in positive international law.<sup>54</sup> It was not mentioned in the *Nuremberg Judgment*,<sup>55</sup> and it was later unanimously declared a separate international crime by General Assembly *Resolution 96(I)*.<sup>56</sup> Genocide was also not listed as a crime against humanity by the International Military Tribunal for the Far East at Tokyo or the Control Council Law Number 10 of Germany.<sup>57</sup>

There has never been a comprehensive international convention developed on crimes against humanity. There are, however, 11 international documents defining crimes against humanity, 'but they all differ slightly as to their definition of that crime and its legal elements'.<sup>58</sup> Crimes against humanity have been included in the *Statute of the International Criminal Tribunal for the Former Yugoslavia* and the *Statute of the International Criminal Tribunal for*

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<sup>50</sup> Amnesty International, *East Timor: Demand for Justice* (AI-index: ASA 21/191/1999, 28 October 1999) pt II(A).

<sup>51</sup> Robertson, above n 20, 228.

<sup>52</sup> M Cherif Bassiouni, 'Crimes against Humanity' in Roy Gutman and David Rieff (eds), *Crimes of War: What the Public Should Know* (1999) 107–8.

<sup>53</sup> *Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, 58 Stat 1544, 82 UNTS 280 ('Nuremberg Charter').

<sup>54</sup> Article 6(c) of the *Nuremberg Charter* provides:

Crimes against humanity: murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

<sup>55</sup> See 'Developments in the Law: International Criminal Law' (2001) 114 *Harvard Law Review* 1943, 2009.

<sup>56</sup> GA Res 96(I), 1 GAOR, UN Doc A/64/Add 1 (1946).

<sup>57</sup> Bassiouni, above n 52, 107.

<sup>58</sup> *Ibid.*

*Rwanda*,<sup>59</sup> which both expanded the range of such crimes to include rape and torture. The most recent and comprehensive restatement of international crimes is in the *Rome Statute of the International Criminal Court*.<sup>60</sup> The *Rome Statute* adds apartheid and forced disappearances to the list of crimes against humanity.<sup>61</sup> Although it has not yet entered into force, the *Rome Statute* defines 'genocide' in article 6 as distinct from 'crimes against humanity' as defined in article 7. According to Cherif Bassiouni:

To some extent, crimes against humanity overlap with genocide and war crimes. But crimes against humanity are distinguishable from genocide in that they do not require an intent to 'destroy in whole or in part', as cited in the 1948 Genocide Convention, but only target a given group and carry out a policy of 'widespread or systematic' violations. Crimes against humanity are also distinguishable from war crimes in that they not only apply in the context of war — they apply in times of war *and* peace.<sup>62</sup>

However, some confusion remains. One crime against humanity expressly prohibited under article 7(1) of the *Rome Statute* is 'extermination', 'when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. This appears similar to genocide in that it refers to the intentional destruction of a civilian population (encompassing and exceeding the more limited groups protected by the prohibition on genocide). Article 7(2)(b) of the *Rome Statute* defines extermination to include 'the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of *part* of a population'.<sup>63</sup> A 'part' of a population could include the groups protected under the *Genocide Convention* (national, ethnic, racial or

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<sup>59</sup> *Statute of the International Criminal Tribunal for Rwanda*, annex to SC Res 955, 49 UN SCOR (3453<sup>rd</sup> mtg), UN Doc S/Res/955 (1994), 33 ILM 1600, art 3; *Statute of the International Criminal Tribunal for the Former Yugoslavia*, annex to SC Res 827, 48 UN SCOR (3217<sup>th</sup> mtg), UN Doc S/Res/827 (1993), 32 ILM 1203, art 5.

<sup>60</sup> Opened for signature 17 July 1998, 37 ILM 999 (not yet in force) ('*Rome Statute*').

<sup>61</sup> *Ibid* art 7 states: '1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'.

<sup>62</sup> Bassiouni, above n 52, 108.

<sup>63</sup> Emphasis added.

religious groups), as well as potentially including a range of additional groups.<sup>64</sup> The result is that there is an overlap between genocide and crimes against humanity in so far as there is an intention to destroy a national, ethnical, racial or religious group which is part of a civilian population. This also means that groups not protected from intentional destruction by the *Genocide Convention* are protected by crimes against humanity. This overlap points out the tension in the limited range of groups protected by the *Genocide Convention*.<sup>65</sup>

Other human rights organisations have also contemplated whether genocide occurred in East Timor. Human Rights Watch was more cautious in its assessment than Amnesty International. Rather than prejudging the violence, Human Rights Watch stated that the national courts of East Timor and Indonesia have the primary duty to prosecute alleged crimes. Failing that, it recommended that an international criminal tribunal be established which

should be given jurisdiction not only over crimes defined in the Indonesian criminal code such as murder, battery, torture, kidnapping and rape, but also over crimes subject to universal jurisdiction under international law, including crimes against humanity.<sup>66</sup>

Similarly, the Indonesian Commission on Human Rights established an inquiry to investigate possible crimes of genocide, extrajudicial executions, rape, torture, and arson, leading to indictments before a new Indonesian human rights tribunal.<sup>67</sup> In September 1999 the Law Institute of Victoria encouraged Australia to pressure the Security Council to create a war crimes tribunal covering breaches of humanitarian law, genocide and other crimes against humanity in East and West Timor.<sup>68</sup> Clearly, bodies such as Human Rights Watch, the Indonesian Commission on Human Rights and the Law Institute of Victoria were aware of allegations of genocide. Each included the potential investigation or prosecution of acts of genocide within the ambit of their recommendations, without deciding that genocide had actually occurred.

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<sup>64</sup> An attempt to do just this is the Australian Democrats' Anti-Genocide Bill 1999 (Cth). Section 3 of the Bill includes 'a group based on gender, sexuality, political affiliation or disability'. The Bill was the focus of an Australian Senate Committee Inquiry: see Senate Legal and Constitutional References Committee, *Humanity Diminished: The Crime of Genocide — Inquiry into the Anti-Genocide Bill 1999* (2000) 13 <[http://www.aph.gov.au/senate/committee/legcon\\_ctte/anti\\_genocide](http://www.aph.gov.au/senate/committee/legcon_ctte/anti_genocide)> at 20 September 2001. The Government did not support the passage of the Bill.

<sup>65</sup> Discussed in detail below Part III(A)(1).

<sup>66</sup> Human Rights Watch, 'Justice for East Timor', above n 41.

<sup>67</sup> Human Rights Watch, *World Report 2000 — Indonesia and East Timor* (2000) <<http://www.hrw.org/wr2k/Asia-05.htm#TopOfPage>> at 20 September 2001. The Indonesian National Commission on Human Rights (Komnas HAM) established a Commission for the Investigation of Human Rights Abuses in East Timor ('KPP-HAM'), which made two visits to East Timor and several visits to West Timor at the end of 1999. It published an interim report in December 1999.

<sup>68</sup> M A McMurdo, 'The Future of International Human Rights Law with a Focus on East Timor' (Speech delivered on Human Rights Day for the Amnesty International Legal Network, Brisbane, 10 December 1999) <<http://www.courts.qld.gov.au/publications/articles/speeches/mcmurdo101299.htm>> at 20 September 2001.

This cautious approach has also been adopted by the UN Transitional Administration in East Timor ('UNTAET'). On 6 March 2000 UNTAET *Regulation No 2000/11* was promulgated to regulate the functioning and organisation of courts in East Timor during the period of the transitional administration.<sup>69</sup> Part II of the Regulation establishes a structure of eight District Courts throughout East Timor, while part III creates a Court of Appeal.<sup>70</sup> Of significance was the exclusive and universal jurisdiction conferred on the District Court in Dili over Serious Crimes committed between 1 January and 25 October 1999.<sup>71</sup> The Serious Crimes were defined to include genocide, war crimes, crimes against humanity, murder, sexual offences and torture.<sup>72</sup> *Regulation 2000/11* envisages the subsequent establishment by the Transitional Administrator of expert panels, composed of East Timorese and international judges, to exercise the exclusive jurisdiction conferred on the District Court in Dili.<sup>73</sup>

Such panels were established by UNTAET *Regulation No 2000/15* of 6 June 2000,<sup>74</sup> which requires the panels to apply the law of East Timor as promulgated by UNTAET and, 'where appropriate', to apply the recognised laws and principles of international law.<sup>75</sup> Part II of the Regulation reiterates in detail the international definitions of the various Serious Crimes, as enacted in the statutes of the two existing international criminal tribunals,<sup>76</sup> and establishes the regime of penalties.<sup>77</sup> Part III of the Regulation outlines the 'General Principles of

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<sup>69</sup> *Regulation No 2000/11 on the Organisation of Courts in East Timor*, UNTAET/REG/2000/11 (entered into force 6 March 2000), *Official Gazette of East Timor*, UNTAET/GAZ/2000/Add.1 ('*Regulation 2000/11*'), as amended by *Regulation No 2000/14*, UNTAET/REG/2000/11 (entered into force 10 May 2000), *Official Gazette of East Timor*, UNTAET/GAZ/2000/Add.2.

<sup>70</sup> Part II, ss 6–13, creates District Courts in Dili, Baucau, Los Palos, Viqueque, Same, Maliana, Ermera and Oecussi. Part III, ss 14–15, creates a Court of Appeal in Dili.

<sup>71</sup> *Regulation 2000/11*, above n 69, s 10.

<sup>72</sup> *Ibid* s 10.1. In June 2000 UNTAET created a corresponding Serious Crimes Prosecution Division under the General Prosecutor. This unit then incorporated an internationally staffed Serious Crimes Investigation and Prosecution Unit that was originally created during the early part of the year under the Office of Human Rights Affairs.

<sup>73</sup> *Ibid* s 10.3.

<sup>74</sup> *Regulation No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, UNTAET/REG/2000/15 (entered into force 6 June 2000), *Official Gazette of East Timor*, UNTAET/GAZ/2000/Add.3 ('*Regulation 2000/15*'). See also Bureau of Democracy, Human Rights and Labor, US Department of State, *Country Reports on Human Rights Practices 1999: Indonesia* (2000) <<http://www.state.gov/g/drl/rls/hrrpt/1999/index.cfm?docid=288>> at 20 September 2001. See generally Suzannah Linton, 'Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor' (2001) 25 *Melbourne University Law Review* 122.

<sup>75</sup> *Regulation 2000/15*, above n 74, s 3.1.

<sup>76</sup> *Ibid* ss 4 (genocide), 5 (crimes against humanity), 6 (war crimes), 7 (torture). Sections 8 (murder) and 9 (sexual offences) do not define those crimes but refer instead to the provisions of the applicable Penal Code in East Timor.

<sup>77</sup> *Ibid* s 10. Penalties for offences in ss 4–7 include maximum imprisonment of 25 years; a maximum fine of US\$500 000; and a forfeiture of proceeds, property and assets derived directly or indirectly from the crime. For murder and sexual offences, the penalties of the Penal Code in East Timor apply.

Criminal Law', including important procedural protections,<sup>78</sup> elements of criminal responsibility, the irrelevance of official capacity, the responsibility of commanders and superiors, a statute of limitations, the mental elements of crimes, grounds for excluding responsibility, mistake of fact or mistake of law, and superior orders and prescription of law.<sup>79</sup> While one Special Panel for Serious Crimes, with three judges, has operated since June 2000, a second Special Panel is to be established in October 2001.<sup>80</sup> Furthermore, UNTAET *Regulation No 2000/16* establishes the line of prosecutorial authority for Serious Crimes.<sup>81</sup>

*Regulation 2000/11* explicitly stated that the establishment of expert panels with exclusive jurisdiction over Serious Crimes 'shall not preclude the jurisdiction of an international tribunal for East Timor over these offences, once such a tribunal is established.'<sup>82</sup> Nevertheless, the panels may be viewed as a de facto international tribunal, which circumvents the procedural steps and diplomatic barriers otherwise required to create a formal international criminal tribunal. Although the District Court in Dili is eventually designed to function as part of an autochthonous judicial system, during the life of the UN administration in East Timor it partially remains outside of the control of the East Timorese. This is particularly so given the staffing of the three-member Special Panel on Serious Crimes by two international judges to one East Timorese judge.<sup>83</sup> The symbolic benefits of local rather than international prosecutions are inevitably diluted by the lack of East Timorese ownership of the judicial process. This problem is in many ways unavoidable during the transitional period, given the training requirements of East Timorese judges and lawyers, and will no doubt be resolved at the end of the period of transition.

The prosecution of Serious Crimes has proceeded slowly in East Timor. The first indictments for crimes against humanity were filed against 11 suspects on 11 December 2000<sup>84</sup> — more than 14 months after the September 1999 violence. Although some suspects were in detention in Dili, others were outside the jurisdiction and Indonesia refused UNTAET's extradition requests.<sup>85</sup> The US State Department noted that UNTAET's 'ability to employ fully this legal

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<sup>78</sup> Ibid ss 11 (*ne bis in idem*), 12 (*nullum crimen sine lege*), 13 (*nulla poena sine lege*).

<sup>79</sup> Ibid ss 14–21 respectively.

<sup>80</sup> UNTAET, 'Second Serious Crimes Panel to Be Established', *UNTAET Daily Press Briefing Media Notes*, 11 September 2001 <<http://www.un.org/peace/etimor/DB/db110901.htm>> at 3 October 2001.

<sup>81</sup> *Regulation No 2000/16 on the Organization of the Public Prosecution Service in East Timor*, UNTAET/REG/2000/16 (entered into force 6 June 2000), *Official Gazette of East Timor*, UNTAET/GAZ/2000/1/Add.3. Section 14 establishes a Deputy General Prosecutor for Serious Crimes to be in charge of the Department of Prosecution of Serious Crimes. This Department incorporates the internationally staffed Serious Crimes Investigation and Prosecution Unit that was originally created in early 2000 under the Office of Human Rights Affairs.

<sup>82</sup> *Regulation No 2000/11*, above n 69, s 10.4.

<sup>83</sup> *Regulation 2000/15*, above n 74, s 22.

<sup>84</sup> Bureau of Democracy, Human Rights and Labor, above n 74.

<sup>85</sup> Ibid.

mechanism and to begin prosecutions by year's end was constrained severely by insufficient staff and funding and by procedural and organizational disputes within UNTAET'.<sup>86</sup> The second indictments for crimes against humanity were filed against five people on 6 February 2001,<sup>87</sup> and the third indictments for crimes against humanity were filed on 2 May 2001 against two militia members.<sup>88</sup> Further indictments were filed in August 2001 against four militia members for crimes against humanity,<sup>89</sup> and in September 2001 against nine militiamen and two Indonesian soldiers for crimes against humanity allegedly committed in the Oecussi enclave in the period after the ballot.<sup>90</sup> It appears that all of the 11 accused, except one imprisoned in Dili, are 'at large' in Indonesia<sup>91</sup> and it is not clear if Indonesia will agree to extradition. The indictments include the first for crimes of 'extermination' allegedly committed in East Timor, but so far there have been no indictments for genocide. The first preliminary hearings for Serious Crimes occurred on 10 January 2001.<sup>92</sup> The first trial for Serious Crimes began on 6 February 2001,<sup>93</sup> the second trial for Serious Crimes on 13 February 2001, and the first trial for crimes against humanity began on 16 February 2001.<sup>94</sup> The first conviction for a Serious Crime occurred on 25 January 2001, when a militia member was sentenced to 12 years imprisonment

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<sup>86</sup> Ibid.

<sup>87</sup> UNTAET, 'UN Mission Files Second War Crimes Indictment for 1999', *East Timor — UNTAET News*, 6 February 2001 <<http://www.un.org/peace/etimor/news/01feb06.htm>> at 5 October 2001. The charges against one Indonesian army officer, one Indonesian public servant, two militia members and a village chief, included murder, rape, unlawful deprivation of liberty, inhumane and degrading treatment and persecution. The two Indonesians had not been apprehended.

<sup>88</sup> UNTAET, 'UN Prosecutor Files Third Indictment for Crimes against Humanity', *East Timor — UNTAET News*, 2 May 2001 <<http://www.un.org/peace/etimor/news/01may02.htm>> at 5 October 2001. The charges included murder and deportation.

<sup>89</sup> UNTAET, 'UN Charges Four East Timorese Militia with Crimes against Humanity', *East Timor — UNTAET News*, 8 August 2001 <<http://www.un.org/peace/etimor/news/01aug08.htm>> at 5 October 2001.

<sup>90</sup> UNTAET, 'East Timor: UN Mission Files Indictment for 1999 Crimes in Oecussi', *East Timor — UNTAET News*, 27 September 2001 <<http://www.un.org/peace/etimor/news/01sep27.htm>> at 5 October 2001. Charges included extermination, murder, inhumane acts, persecution, imprisonment or other severe deprivation of physical liberty, and the deportation or forcible transfer of population.

<sup>91</sup> Ibid.

<sup>92</sup> UNTAET, 'First Hearings Held on Serious Crimes Committed During 1999 Violence', *East Timor — UNTAET News*, 10 January 2001 <<http://www.un.org/peace/etimor/news/01jan10.htm>> at 5 October 2001.

<sup>93</sup> UNTAET, 'UN Mission Files Second War Crimes Indictment for 1999', *East Timor — UNTAET News*, 6 February 2001 <<http://www.un.org/peace/etimor/news/01feb06.htm>> at 5 October 2001.

<sup>94</sup> UNTAET, 'Second Trial for Serious Crimes Committed in 1999 Begins in Dili', *East Timor — UNTAET News*, 13 February 2001 <<http://www.un.org/peace/etimor/news/01feb13.htm>> at 5 October 2001. See also UNTAET, 'East Timor Court Holds Hearing into First Case of Crimes against Humanity', *East Timor — UNTAET News*, 16 February 2001 <<http://www.un.org/peace/etimor/news/01feb16.htm>> at 5 October 2001. Preliminary hearings began on 16 February 2001 and the case opened on 9 July 2001: see UNTAET, 'First Trial for 1999 Crimes against Humanity Opens in East Timor', *East Timor — UNTAET News*, 9 July 2001 <<http://www.un.org/peace/etimor/news/01jul09.htm>> at 5 October 2001.

for murder, following a plea bargain in which the maximum of 20 years imprisonment under the *Indonesian Penal Code* was reduced in exchange for the accused's cooperation in the investigation of other Serious Crimes.<sup>95</sup> By 3 October 2001, 11 people had been convicted by the Special Panel on Serious Crimes,<sup>96</sup> out of a total 13 trials.<sup>97</sup> Convictions included a 15 year sentence given to a militia member for murdering one of nine East Timorese UNAMET staff.<sup>98</sup>

The apparent slow pace of UNTAET justice must be understood in context. By the start of October 2001, around half of all serious crimes reported to the Department of Prosecution of Serious Crimes had been investigated.<sup>99</sup> The Special Panel for Serious Crimes had collected and considered 2265 witness statements in its first year or so of operation.<sup>100</sup> Prosecutors had submitted 31 indictments against 50 people to the Special Panel by early October 2001.<sup>101</sup> Although these figures may appear statistically small, they compare favourably with the similarly small numbers of prosecutions before the two international criminal tribunals for Rwanda and the former Yugoslavia, both of which have much larger budgets, have operated for vastly longer periods, and have jurisdiction over larger pools of perpetrators.<sup>102</sup>

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<sup>95</sup> UNTAET, 'East Timor Court Hands Down First Sentence for Post-Referendum Violence', *East Timor — UNTAET News*, 25 January 2001 <<http://www.un.org/peace/etimor/news/01jan25.htm>> at 5 October 2001.

<sup>96</sup> United Nations Foundation, 'East Timor: Commission Selection under Way; More', *UN Wire*, 3 October 2001 <<http://www.unfoundation.org/unwire/2001/10/03/current.asp#19002>> at 5 October 2001. See also UNTAET, 'Militia Member Sentenced for Maliana Murder', *UNTAET Daily Press Briefing Media Notes*, 2 October 2001 <<http://www.un.org/peace/etimor/DB/db021001.htm>> at 5 October 2001.

<sup>97</sup> UNTAET, 'Second Serious Crimes Panel to Be Established', above n 80.

<sup>98</sup> UNTAET, 'Militia Member Sentenced in Murder of Local UN Worker', *East Timor — UNTAET News*, 17 July 2001 <<http://www.un.org/peace/etimor/news/01jul17.htm>> at 5 October 2001.

<sup>99</sup> United Nations Foundation, 'Ramos Horta, McNamara Address Justice, Human Rights Issues', *UN Wire*, 2 October 2001 <<http://www.unfoundation.org/unwire/2001/10/02/current.asp#18925>> at 10 October 2001. As a part of these investigations the Serious Crimes Unit has conducted 259 exhumations and 198 autopsies: UNTAET, 'Second Serious Crimes Panel to Be Established', above n 80.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> See, eg, International Criminal Tribunal for the Former Yugoslavia ('ICTY'), *Fact Sheet on ICTY Proceedings* (2 October 2001) <<http://www.un.org/icty/glance/procfact-e.htm>> at 9 October 2001. By way of comparison, the ICTY was established in 1993 and in the eight subsequent years has tried 23 accused (12 of these remain on appeal, three await adjustment of sentences, six were sentenced and two were acquitted) and closed six cases (three indictments withdrawn and three accused died). A further 16 accused are at pre-trial stage, ten accused are currently at trial and six accused await judgment. The budget of the ICTY for 2001 was US\$96.4 million, with 1188 staff: ICTY, *ICTY Key Figures* (25 September 2001) <<http://www.un.org/icty/glance/keyfig-e.htm>> at 9 October 2001. By contrast, the entire UNTAET human rights section budget for East Timor in 2001–02 is US\$28 million; there are only nine lawyers to represent all defendants; complaints have been made about poor management, inadequate infrastructure and a lack of equipment; and there are only 46 staff in the Special Crimes Unit: Elizabeth Neuffer, 'Lagging Tribunal Is Called a Threat to a Viable East Timor', *Boston Globe* (Boston, USA), 2 September 2001 <<http://www.globalpolicy.org/security/issues/etimor/vote01/0902critic.htm>> at 9 October 2001.



Responsibility for prosecuting allegations of genocide also rests with Indonesia. The civilian human rights commission established by the Indonesian Parliament investigated alleged human rights abuses in East Timor and reported in January 2000.<sup>103</sup> It revealed the Indonesian military conspiracy to form and arm the militias, and fund them from East Timor's civilian administration budget.<sup>104</sup> It accused 33 leaders of crimes against humanity and demanded prosecutions, including findings of command responsibility against General Wiranto, five other generals, other senior military officers, the militia commanders, and the former civilian Governor of East Timor, Abilio Soares.<sup>105</sup> At the time of the post-ballot violence, Indonesia's existing criminal code did not criminalise many international human rights offences.<sup>106</sup> Under a human rights law enacted by Indonesia in 2000, the office of the Indonesian Attorney-General had 240 days to investigate cases of genocide or crimes against humanity.<sup>107</sup> It then had 70 days to begin prosecutions, with the period expiring on 23 February 2001.<sup>108</sup> Indonesian President Wahid subsequently signed a decree in early 2001 setting up a special tribunal for prosecuting crimes in East Timor. Although its jurisdiction initially appeared limited to crimes committed after the ballot, President Wahid confirmed in his visit to Australia in late June 2001 that the jurisdiction of the tribunal would extend to crimes committed before the ballot.<sup>109</sup> Wahid restated Indonesia's commitment to prosecutions:

They have to be brought to justice, and the law enforcement will take place in Indonesia. But of course it needs time because everything in Indonesia is slow ... so many obstacles that we have to face and, you see, improvements also in the law.<sup>110</sup>

The change of Indonesia's President on 24 July 2001 does not seem to have derailed Indonesia's commitment to prosecutions. Although current Indonesian President Megawati Sukarnoputri opposed East Timorese independence at the time of the ballot, she subsequently accepted the result and has not blocked moves initiated by her predecessor to commence prosecutions. Megawati has not, however, modified Wahid's decree to ensure that pre-ballot crimes can also be prosecuted. In August 2001 Chief Justice Benyamin Mangkudilaga, responsible for planning the Indonesian human rights tribunal for East Timor,

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<sup>103</sup> Robertson, above n 20, 433.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid. See also John Aglionby, 'Indonesia's President Says He Will Punish Ex-Army Chief', *The Guardian* (London, England), 1 February 2000, 15.

<sup>106</sup> Human Rights Watch, 'Justice for East Timor', above n 41.

<sup>107</sup> Lindsay Murdoch, 'Pressure for War Crimes Tribunal', *The Age* (Melbourne, Australia), 12 April 2001, 15.

<sup>108</sup> Ibid.

<sup>109</sup> Hamish Macdonald, 'Wahid Vow on Timor War Crimes', *Sydney Morning Herald* (Sydney, Australia), 27 June 2001, 10.

<sup>110</sup> Ibid.

stated that 35 Indonesian judges had been appointed to sit on the tribunal.<sup>111</sup> The Chief Justice also stated that he expected the first trials of the 23 suspects named by Indonesian prosecutors in the Attorney-General's office to begin in September 2001,<sup>112</sup> although by early October 2001 no trials had commenced. In early October 2001 the transitional Foreign Minister for East Timor, Jose Ramos-Horta, stated that he had 'serious doubts on Indonesia's commitment to justice', and that the Indonesian Attorney-General, M A Rachman, was 'unfit' for his role in overseeing the justice process and had failed to cooperate with East Timorese and UN officials.<sup>113</sup> The only ballot-related prosecutions to have occurred so far in Indonesia were the convictions of six men for participating in the killing of three United Nations High Commission for Refugees ('UNHCR') staff in West Timor in 2000. On 4 May 2001 the suspects were acquitted of murder but convicted of inciting violence and sentenced to between 10 and 20 months imprisonment.<sup>114</sup> The suspects were tried under Indonesia's domestic criminal laws, rather than under international criminal laws specifically incorporated into domestic law. There was, however, tremendous international dissatisfaction with the leniency of the sentencing,<sup>115</sup> which casts doubt on the legitimacy of the planned Indonesian human rights tribunal.

The slow pace of Indonesian justice prompted the National Council of East Timor, in late June 2001, to pass unanimously a resolution urging the UN Transitional Administrator, Sergio Vieira de Mello, to prosecute serious human rights violations in East Timor.<sup>116</sup> It is not clear whether the resolution contemplated including the crime of genocide within the jurisdiction of the proposed international tribunal. However by analogy with the two existing international criminal tribunals for Rwanda and the former Yugoslavia, it is probable that the Council intended to include genocide as a statutory crime. The Council also unanimously passed an amended *Regulation on the Establishment of a Commission on Reception, Truth and Reconciliation* in East Timor,

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<sup>111</sup> Agence France-Presse, 'Timor Trials on Their Way', *Sydney Morning Herald* (Sydney, Australia), 3 August 2001 <<http://www.smh.com.au/news/0108/03/world/world6.html>> at 5 October 2001.

<sup>112</sup> Ibid.

<sup>113</sup> United Nations Foundation, 'East Timor: Commission Selection Under Way; More', above n 96.

<sup>114</sup> UNTAET, 'Annan Calls Sentences in West Timor Killings "Wholly Unacceptable"', *East Timor — UNTAET News*, 4 May 2001 <<http://www.un.org/peace/etimor/news/01may04.htm>> at 5 October 2001.

<sup>115</sup> UN Secretary-General Kofi Annan was 'shocked' by the sentences which he said were 'incommensurate' with the crimes, and he stated that it was 'a blow to the international community's efforts to ensure the safety and security of humanitarian personnel and a wholly unacceptable response': *ibid.* UNHCR was 'deeply disturbed' and stated that the 'sentences make a mockery of the international community's insistence that justice be done in this horrific case ... [the] sentencing flies in the face of world opinion and is an affront to the memory of those humanitarians who have given their lives in the service of others': *ibid.*

<sup>116</sup> UNTAET, 'National Council Passes Reconciliation Regulation', *UNTAET Daily Press Briefing Media Notes*, 20 June 2001 <<http://www.un.org/peace/etimor/DB/Db200601.htm>> at 20 September 2001; see also M Dodd, 'And Justice for All: Dili Backs International War Crimes Tribunal', *Sydney Morning Herald* (Sydney, Australia), 22 June 2001, 11.

establishing: (1) 'a truth-seeking function inquiring into the pattern of human rights violations in East Timor committed within the context of the political conflicts in East Timor between 1974–1999'; and (2) 'a community reconciliation body to facilitate agreements between local communities and the perpetrators of non-serious crimes and non-criminal acts committed over the same period'.<sup>117</sup> People who comply with the procedures of the Commission are given immunity from further civil or criminal liability,<sup>118</sup> although the debate about the morality of amnesties remains a passionate one both within East Timor<sup>119</sup> and in contemporary legal scholarship.<sup>120</sup> UNTAET announced that it was seeking to appoint 40 national and regional commissioners to the Commission by 31 October 2001, including one representative of pro-autonomy supporters.<sup>121</sup>

Alternatively, a small number of civil suits for damages have proceeded in US courts against suspects involved in the violence. On 29 March 2001, a civil action was commenced in the US Federal Court against Indonesian General Johnny Lumintang (Vice-Chief of Staff of the Indonesian Army during the ballot violence, later Secretary-General of the Ministry of Defence) under the *Alien Tort Claims Act*<sup>122</sup> for compensatory and punitive damages for crimes against humanity, summary execution and torture.<sup>123</sup> Compensation was not, however, sought for acts of genocide. A precedent for this case was the 1992 US judgment for US\$14 million issued against Indonesian General Sintong Panjaitan for acts

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<sup>117</sup> UNTAET, 'National Council Passes Reconciliation Regulation', above n 116.

<sup>118</sup> Ibid.

<sup>119</sup> Jose Ramos-Horta has stated that '[t]here is a strong demand for justice, but also there is a strong feeling, sentiment ... for reconciliation ... How to reconcile the two is a test of leadership': see United Nations Foundation, 'Ramos Horta, McNamara Address Justice, Human Rights Issues', *UN Wire*, 3 October 2001 <<http://www.unfoundation.org/unwire/2001/10/02/current.asp#18925>> at 5 October 2001.

<sup>120</sup> See, eg, Truth and Reconciliation Commission of South Africa, *The Truth and Reconciliation Commission Report* (1998); Robert Rotberg and Dennis Thompson (eds), *Truth v Justice: The Morality of Truth Commissions* (2000); Alexandra de Brito, Carmen Enriquez and Paloma Fernández (eds), *The Politics of Memory: Transitional Justice in Democratizing Societies* (2001); Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (2000); Salvador Lozada, *Los Derechos Humanos y la Impunidad en la Argentina (1974–1999)* (1999); Geoffrey Robertson, above n 20, 238–247; Anthea Jeffrey, *The Truth about the Truth Commission* (1999). The statutes of the two international criminal tribunals expressly provide for the discretionary conferral of pardons 'on the basis of the interests of justice and the general principles of the law': *Statute of the International Criminal Tribunal for Rwanda*, above n 59, art 27; *Statute of the International Criminal Tribunal for the Former Yugoslavia*, above n 59, art 28.

<sup>121</sup> United Nations Foundation, 'East Timor: Commission Selection under Way; More', above n 96.

<sup>122</sup> 28 USC § 1350 (2000).

<sup>123</sup> East Timor Action Network, Center for Constitutional Rights and Center for Justice and Accountability, *Indonesian General to Go on Trial for Role in East Timor: Rights Abuses, East Timorese Plaintiffs Travel to US to Testify, Hearing to Assess Damages against General Lumintang*, Press Release (22 March 2001) <<http://humanrights.about.com/newsissues/humanrights/gi/dynamic/offsite.htm?site=http://www.etan.org/news/2001a/03general.htm>> at 20 September 2001. Counsel for the case were the Center for Constitutional Rights, the Center for Justice and Accountability and the law firm Patton Boggs.

committed in the Santa Cruz massacre of over 270 East Timorese on 12 November 1991.<sup>124</sup> Jose Ramos-Horta suggested that the families of the three UNHCR workers killed in West Timor in September 2000, and the family of a *Financial Times* journalist killed in East Timor in September 1999, should take action against the accused in the courts of their own countries.<sup>125</sup>

### A *Elements of the Crime of Genocide*

Against this background of international opinion about the commission of genocide, and related developments in the mechanisms for prosecuting such crimes, it is ultimately the responsibility of the relevant court or tribunal to decide whether genocide was committed in a particular case. Any assessment of whether genocide occurred must consider whether the elements of the crime of genocide have been made out beyond reasonable doubt. The proceedings relating to the establishment of the International Criminal Court sought to codify these elements of criminal responsibility. Although not expressly included in the *Rome Statute*, the Preparatory Commission for the International Criminal Court has prepared the *Finalized Draft Text of the Elements of Crime* under which each crime of genocide has the following elements:

- (a) specified conduct committed against one or more persons;
- (b) such person or persons belonged to a particular national, ethnical, racial or religious group;
- (c) an intention to destroy such a group in whole or in part; and
- (d) the conduct was part of a pattern of similar conduct directed against that group.<sup>126</sup>

The physical acts of violence committed in East Timor are not really in dispute. The decisive question is whether the actions of Indonesia, its army, agents or militias, or individual members of these organisations satisfy elements (b) and (c).

#### 1 *Membership of a Group*

The prohibited acts under article II of the *Genocide Convention* must be committed against an individual because of his or her membership in the group, and as a manifestation of the overall objective of destroying the group. The words ‘as such’ in the definition of genocide means the intention is to destroy, in whole or in part, the group, not merely one or more individuals who are coincidentally members of the group. The group itself — and its collective identity and perpetuation — is the ultimate target or intended victim of the crime

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<sup>124</sup> Ibid.

<sup>125</sup> United Nations Foundation, ‘Ramos Horta, McNamara Address Justice, Human Rights Issues’, above n 119.

<sup>126</sup> *Report of the Preparatory Commission for the International Criminal Court, Part II: Finalized Draft Text of the Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2 (2000).

of genocide.<sup>127</sup> Identifying the targeted group in East Timor is more difficult than it first appears. Was a religious, national, racial or ethnical group being targeted? For convenience, the semantic distinctions between racial and ethnical groups in the *Genocide Convention* can be conflated under a modern understanding of these terms, since both refer to a commonality rooted in inherited biological characteristics and supplemented by cultural bonds.

First, in relation to religious groups, according to East Timorese resistance leaders like Jose Ramos-Horta, the violence in East Timor was fundamentally unrelated to religious differences.<sup>128</sup> Although sporadic persecution of Roman Catholics did occur,<sup>129</sup> Catholic priests and nuns were not targeted for their religious beliefs so much as for their political objections to the Indonesian occupation. Thus they were not targeted as a religious group 'as such', but rather as political opponents who happened to be Catholic. This distinction may seem artificial in the sense that the principles of Catholicism require its followers to object to inhumane actions which violate their religious principles. That is, Catholic objections to the brutality of the Indonesian occupation were an expression of Catholic religious beliefs as opposed to an expression of political opposition. Yet this view is an inadequate explanation of Indonesia's violence in East Timor, since Indonesia targeted all political opposition in East Timor, regardless of whether their opponents were Roman Catholic, animist, or Muslim.

The second difficulty is whether it is possible to characterise a targeted group in East Timor as 'national'. While it is arguable that the violence and conflict in East Timor since December 1975 was essentially a political struggle for East Timorese independence, the drafters of the *Genocide Convention* deliberately excluded groups based on political affiliation from protection. A national group under the *Genocide Convention* refers more to a group based on existing political nationality or sovereignty, than to a cultural-national group (organised through a political movement) aspiring to statehood. The question of whether East Timor has over the past 25 years been: (a) an independent sovereign state; (b) a continuing colonial territory of Portugal; or (c) an annexed province of Indonesia is crucial to understanding whether the East Timorese were targeted for destruction as a national group. Portugal, the colonial power occupying East Timor up until the Indonesian invasion in December 1975, 'had proposed self-

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<sup>127</sup> See, eg, UN Economic and Social Council Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities (prepared by Benjamin C G Whitaker), *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, UN Doc E/CN.4/Sub.2/1985/6 (2 July 1985) [14]–[37]; *Attorney-General of Israel v Eichmann* (1962) 36 ILR 5 (noting that the special character of genocide is indicated by the criminal intention necessary, which is general and total: the extermination of members of a group as such).

<sup>128</sup> Jose Ramos-Horta, 'East Timor and the Region: The Opportunities and Perils Ahead' (Speech delivered at Scientia, University of New South Wales, Sydney, 30 May 2001) <[http://www.public-affairs.unsw.edu.au/media\\_releases/290501\\_JRH3.html](http://www.public-affairs.unsw.edu.au/media_releases/290501_JRH3.html)> at 20 September 2001.

<sup>129</sup> Gregory Stanton, *The Campaign to End Genocide, War Crimes, Genocide and Crimes against Humanity in East Timor: Options for a Criminal Tribunal* (2000) <<http://www.worldfederalist.org/ACTION/wfatimor.html>> at 20 September 2001.

determination for East Timor after a direct parliamentary election scheduled for 1976.<sup>130</sup> However, before an election could take place, faced with an imminent Indonesian invasion, the Revolutionary Front for an Independent East Timor ('FRETILIN'), the dominant political party to emerge from the East Timorese civil war in 1975,<sup>131</sup> declared an independent Democratic Republic of East Timor on 28 November 1975. The brief new administration before the Indonesian invasion arguably enjoyed popular domestic support.<sup>132</sup>

Internationally, however, East Timorese statehood was never recognised after 1975, although four former Portuguese colonies in Africa did immediately recognise East Timor as a state. On the other hand, Indonesian sovereignty of East Timor remained similarly unrecognised. Following Indonesia's 'war of aggression and annexation',<sup>133</sup> Australia in February 1979 was the only Western country officially to recognise Indonesian sovereignty over East Timor.<sup>134</sup> Portugal maintained that Indonesia's annexation of East Timor was unlawful.<sup>135</sup> The UN never formally recognised Indonesia's annexation. The General Assembly passed a resolution five days after the invasion objecting to it, requiring Indonesia to withdraw immediately, and upholding the East Timorese people's right of self-determination.<sup>136</sup> The General Assembly and Security Council both condemned the invasion as an illegal use of force,<sup>137</sup> and criticised the occupation as a violation of the human rights of the East Timorese.<sup>138</sup> (The

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<sup>130</sup> Robertson, above n 20, 425.

<sup>131</sup> The other political parties were the Timorese Democratic Union ('UDT') and the Timorese Popular Democratic Association ('APODETT'). The Association of Timorese Social Democrats ('ASDT') later became FRETILIN.

<sup>132</sup> James Dunn, the former Australian Consul to East Timor, reported immediately prior to the declaration of independence regarding the de facto government set up by FRETILIN that the 'administrative structure had obvious shortcomings, but it clearly enjoyed widespread support or co-operation from the population, including many former UDT supporters': Dunn, above n 16, 210.

<sup>133</sup> Robertson, above n 20, 426.

<sup>134</sup> Australia voted in favour of GA Res 3485, 30 UN GAOR (2439<sup>th</sup> plen mtg), UN Doc A/Res/3485 (1975), but abstained from voting on GA Res 31/53, 31 UN GAOR (85<sup>th</sup> plen mtg), UN Doc A/Res/31/53 (1976) and GA Res 32/34, 32 UN GAOR (83<sup>rd</sup> plen mtg), UN Doc A/Res/32/34 (1977). Australia then voted against GA Res 33/39, 33 UN GAOR (81<sup>st</sup> plen mtg) UN Doc A/Res/33/39 (1978) and recognised de jure the incorporation of East Timor into Indonesia on 14 February 1979.

<sup>135</sup> Thomas Grant, 'East Timor, the UN System, and Enforcing Non-Recognition in International Law' (2000) 33(2) *Vanderbilt Journal of Transnational Law* 273, 296.

<sup>136</sup> GA Res 3485, 30 UN GAOR (2439<sup>th</sup> plen mtg), UN Doc A/Res/3485 (1975). The vote was 72 to 10, with 43 abstentions. Prior to 1999, seven subsequent resolutions on East Timor had been passed by the UN General Assembly, the last in 1982. See Matthew Jardine, *East Timor: Genocide in Paradise* (1995) 36. The UN General Assembly condemned the occupation as a breach of the 1960 *Declaration on the Granting of Independence to Colonial Territories and Peoples*: Robertson, above n 20, 427. See also the *Western Sahara Case* (1975) ICJ Rep 12.

<sup>137</sup> GA Res 3485, 30 UN GAOR (2439<sup>th</sup> plen mtg), UN Doc A/Res/3485 (1975); SC Res 384, 30 UN SCOR (1869<sup>th</sup> mtg), UN Doc S/Res/384 (1975).

<sup>138</sup> UN Commission on Human Rights, *Situation of Human Rights in East Timor*, UN Doc E/CN.4/RES/1999/S-4/1 (27 September 1999); GA Res 35/27, 35 UN GAOR, (57<sup>th</sup> plen mtg) UN Doc A/Res/35/27 (1980); GA Res 37/30, 37 UN GAOR, (77<sup>th</sup> plen mtg), UN Doc A/Res/37/30 (1982).

Security Council, however, refused to condemn the invasion as aggression or as a breach of article 2(4) of the *UN Charter*.<sup>139</sup>

The General Assembly declared East Timor to be a non-self-governing territory under Chapter XI of the *UN Charter*,<sup>140</sup> with a recognised right of self-determination.<sup>141</sup> Indonesia's claim that East Timor's self-determination had been realised through the territory's integration into Indonesia<sup>142</sup> was never accepted by the international community, which continued to insist on the right of the East Timorese to self-determination.<sup>143</sup> The UN recognised that Portugal remained the 'administering Power' of East Timor following the Indonesian invasion.<sup>144</sup> Although the last General Assembly resolution on East Timor was in 1982,<sup>145</sup> the issue was still listed thereafter on the agenda of the General Assembly, and the issue remained active in other UN fora.<sup>146</sup> The question of East Timor's sovereignty was, however, not dealt with in *East Timor (Australia v Portugal)*,<sup>147</sup> when the International Court of Justice ruled by a majority of fourteen to two that it had no jurisdiction over the dispute, because to rule on Portugal's claims it would have to first rule on the lawfulness of Indonesia's conduct (Indonesia was not a party to the proceedings).

At least at the level of international diplomacy, it is difficult to accept that East Timor was regarded as a sovereign national group until September 1999. Although the international community may have recognised the East Timorese people's right of self-determination, it did not prejudge the outcome of the exercise of that right by accepting East Timorese independence as a fait accompli. Reflecting this pre-national status, Geoffrey Robertson describes the Indonesian invasion as 'an unlawful act of aggression intended to destroy the right of self-determination just as it was coming to fruition'.<sup>148</sup> Presumably, Portuguese sovereignty over the territory continued, despite its absolute inability to govern effectively.

The position after the independence ballot in September 1999 is possibly different, since 78.5 per cent of voters expressed a desire to become an independent state. Official East Timorese independence will not be declared

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<sup>139</sup> Robertson, above n 20, 426.

<sup>140</sup> GA Res 1542, 15 UN GAOR, UN Doc A/4684 (1961) [1].

<sup>141</sup> Grant, above n 135, 277, 298.

<sup>142</sup> Ali Alatas, 'East Timor: De-bunking the Myths around a Process of Decolonisation', *Indonesian News* (Indonesia), 20 March 1992, 1, 4.

<sup>143</sup> GA Res 31/53, 31 UN GAOR (85<sup>th</sup> plen mtg), UN Doc A/Res/31/53 (1976); GA Res 33/39, 33 UN GAOR (81<sup>st</sup> plen mtg) UN Doc A/Res/33/39 (1978) [1]; SC Res 384, 30 UN SCOR (1869<sup>th</sup> mtg), UN Doc S/Res/384 (1975); SC Res 389, 31 UN SCOR (1914<sup>th</sup> mtg), UN Doc S/Res/389 (1976) (unanimously condemning the invasion).

<sup>144</sup> GA Res 3485, 30 UN GAOR (2439<sup>th</sup> plen mtg), UN Doc A/Res/3485 (1975) [4]–[5].

<sup>145</sup> GA Res 37/30, 37 UN GAOR (77<sup>th</sup> plen mtg), UN Doc A/Res/37/30 (1982).

<sup>146</sup> Including the list of non-self-governing territories under Chapter XI of the *UN Charter*; before the Special Committee on the Situation with Regard to the Implementation of the Declaration of the Granting of Independence to Colonial Countries and Peoples; and through the office of the UN Secretary-General: see Grant, above n 135, 298.

<sup>147</sup> [1995] ICJ Rep 90.

<sup>148</sup> Robertson, above n 20, 427.

until the executive authority of the UN Transitional Administrator<sup>149</sup> expires, following: (a) the dissolution of the National Council of East Timor on 15 July 2001; (b) the holding of parliamentary elections scheduled for 30 August 2001; (c) the appointment of an 88-member constituent assembly by UNTAET (based roughly on the election results) on 15 September 2001; and (d) the adoption of a constitution for East Timor within 90 days of the assembly being appointed.<sup>150</sup> Yet in a substantive sense, the East Timorese can be understood to have overwhelmingly expressed their sovereignty by formally and popularly proclaiming themselves a national group in the September 1999 plebiscite supervised by the UN. In this sense, the right of self-determination has arguably been realised by a legitimate expression of national sovereignty. It is therefore arguable that acts of violence committed after the ballot (assuming the existence of the required intent) did constitute genocide.

Third, the characterisation of the East Timorese as a racial or ethnic group targeted for genocide is equally problematic. Although Indonesia was primarily responsible for the post-ballot violence and pre-ballot intimidation, most acts of violence against pro-independence East Timorese were physically carried out by militia members of most of whom were East Timorese. The issue is whether members of a group targeted for genocide can carry out genocide against other members of their own group.

Commentators on the Khmer Rouge violence in Cambodia in the late 1970s have used 'auto-genocide' to describe the intentional destruction of one's own group.<sup>151</sup> However, auto-genocide has no status in international law. It is doubtful whether the term accurately describes Pol Pot's terror in Cambodia. Many academic commentators now perceive the 'killing fields' as politically or ideologically motivated exterminations rather than racially or ethnically motivated genocide.<sup>152</sup> On the other hand, the Cambodian Genocide Program at Yale University and the US Congress have declared that the violence in Cambodia constituted genocide.<sup>153</sup> A General Assembly resolution of 1997 also envisaged the possibility that genocide occurred,<sup>154</sup> and in July 2001 the establishment of a UN-assisted tribunal to try suspected perpetrators of genocide in Cambodia was approved by both houses of the Cambodian legislature, and

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<sup>149</sup> Granted by SC Res 1272 (4057<sup>th</sup> mtg), UN Doc S/Res/1272 (1999).

<sup>150</sup> Mark Dodd, 'People to Have Their Say — But So Will the UN', *Sydney Morning Herald* (Sydney, Australia), 29 June 2001, 10.

<sup>151</sup> Shawcross, above n 26, 55.

<sup>152</sup> William Schabas, 'Cambodia: Was It Really Genocide?' (2001) 23 *Human Rights Quarterly* 470, 472–5. See generally Howard De Nike, John Quigley and Kenneth Robinson (eds), *Genocide in Cambodia: Documents from the Trial of Pol Pot and Ieng Sary* (2000).

<sup>153</sup> Schabas, above n 152, 474–5; *Cambodian Genocide Justice Act*, Public L No 103–236, §§ 572(a), 573(b)(4), 108 Stat 382, 486–7 (1994). The Act authorised an Office of Cambodian Genocide Investigation to develop a US proposal to establish an international criminal tribunal to prosecute genocide committed in Cambodia. The Act also declares that '[t]he persecution of the Cambodian people under the Khmer Rouge rule, the bulk of the Khmer people were subjected to life in an Asian Auschwitz, constituted one of the clearest examples of genocide in recent history'.

<sup>154</sup> GA Res 52/135, 52 UN GAOR (70<sup>th</sup> mtg), UN Doc A/Res/52/135 (1997).



later approved by the Constitutional Council, subject only to the approval of King Sihanouk.<sup>155</sup> As at October 2001, however, the Cambodian Government, among others, had become frustrated by the United Nations' delay in approving translations of the tribunal's enacting legislation, and in signing a memorandum of understanding on logistical and funding arrangements.<sup>156</sup> Only two Khmer Rouge members remain in custody (Ta Mok and Kang Kek Ieu) and both are eligible for release in early 2002 if no tribunal is in place by then.<sup>157</sup> The question of whether genocide occurred in Cambodia has been heavily debated, and would benefit greatly from judicial exposition. It remains to be seen whether the decades-long battle to bring the Khmer Rouge to justice will stumble in the home straight.

In the context of East Timor, the real question is whether violence by East Timorese against other East Timorese was provoked by 'racial' or 'ethnic' group membership 'as such', or whether it was, as in Cambodia, chiefly politically driven violence. In this context, the fault line of ballot-related conflict in East Timor probably runs between members of the same race or ethnicity with different political views, so that the violence cannot properly be characterised as targeted against a 'race' or 'ethnicity'. Many militia members willingly supported Indonesian policy, and perpetrated violence against their own racial or ethnic group without intending to destroy the militia members of East Timorese race or ethnicity. It is indeed difficult to state that the intention of these militia members was to destroy the entire East Timorese race or ethnicity. It is also arguable that a significant number of people of predominantly East Timorese race or ethnicity supported Indonesia politically, but were not active in the militias. For example, in June 2001 an official poll of the estimated 140 000 or so displaced East Timorese remaining in camps in West Timor showed that around 90 per cent of voters wanted to stay in West Timor, while only two per cent chose to return.<sup>158</sup> There are, however, doubts about the accuracy of this poll. It is unclear what proportion of these refugees were of Indonesian ethnicity (eg, Javanese) and what proportion were of East Timorese ethnicity. Even allowing for the possibility of coercion by militias in the West Timorese camps, it appears that a significant number of East Timorese may have continued to support Indonesia even after the post-ballot violence.

Matters are complicated by the demographic fact that, Indonesian settlers to one side, the East Timorese population is itself ethnically diverse, comprised of a variety of indigenous highland Antoni peoples, Malays, Makassarese, Melanesians, Papuans, Chinese, Arabs and Gujeratis,<sup>159</sup> who speak numerous

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<sup>155</sup> Associated Press, 'Cambodian Senate OKs Tribunal Law', *New York Times* (New York, United States), 23 July 2001.

<sup>156</sup> United Nations Foundation, 'Cambodia: Diplomats, Government Fear Further Delays for Genocide Trials', *UN Wire*, 3 October 2001 <<http://www.unfoundation.org/unwire/2001/10/03/current.asp#18958>> at 5 October 2001.

<sup>157</sup> *Ibid.*

<sup>158</sup> '90% of Refugees Vote to Stay in West Timor', *Asia Pacific ABC Radio Australia*, 8 June 2001 <<http://abc.net.au/ra/asiapac/summaries/2001/jun01.htm>> at 5 October 2001.

<sup>159</sup> John Pilger, *Distant Voices* (1994) 239.

languages.<sup>160</sup> In the pre- or post-ballot conflict, it was not apparent that any of these ethnic groups were particular targets of violence or intentional destruction as compared with the general population. The exception is the treatment of the ethnic Chinese during the initial phases of the Indonesian invasion in 1975–76. There is some evidence that the Chinese population ‘was singled out’ for systematic destruction, particularly in Maubara and Luiquiça on the north-west coast of East Timor.<sup>161</sup> This racial or ethnical group has the strongest claim against Indonesia for genocide at the time of invasion.

A contextual understanding of the conflict in 1999 reveals the inherent manipulation of the East Timorese militia members in the service of Indonesian policy. The militias are better understood as agents of Indonesia acting against other East Timorese. On this view, it remains possible to identify a broad racial or ethnical group intended for destruction by Indonesia (rather than by the militia agents themselves). Support for this view includes the fact that many young male East Timorese militia members were forcibly recruited and so did not freely consent to committing violence against their own people. In the eyes of Indonesia, once the militia had accomplished their task of destroying pro-independence East Timorese, theoretically there may still have existed an overriding intention ultimately to destroy the militia members.

Such a scenario is analogous to the use of Jewish collaborators in World War II concentration camps by the Nazis in furtherance of its policy to destroy the Jews. Jewish labour was used in administering or facilitating the Nazi exterminations, and many such Jewish collaborators were themselves disposed of when their utility was expended. Militia members would probably not have known of this final intention of Indonesia, if it existed at all. Of course, a distinction must be drawn between Jewish collaborators and East Timorese militias, since captive Jews faced imminent extermination if they refused to collaborate, whereas many East Timorese militia members served voluntarily. The analogy may, however, apply to militia members forcibly recruited on threats of violence or death to themselves or their families.

These difficulties in applying the *Genocide Convention* definition of group to the victims of violence in East Timor arguably supports a renegotiation of the range of groups protected under the international definition of genocide. There are strong policy and justice-based reasons for expanding the definition of group 50 years after the original *Genocide Convention* was drafted. Throughout the 20<sup>th</sup> century, a number of groups excluded from the *Genocide Convention* definition were targeted for destruction on political or social grounds. Unlike the broader groups protected from persecution under the *Convention Relating to the Status of Refugees*<sup>162</sup> and the *Protocol Relating to the Status of Refugees*,<sup>163</sup> the

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<sup>160</sup> Jardine, above n 136, 73.

<sup>161</sup> Pilger, above n 159, 253.

<sup>162</sup> Opened for signature 28 July 1951, 189 UNTS 150, ch 1 (entered into force 22 April 1954) (*Refugee Convention*).

<sup>163</sup> *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

*Genocide Convention* excludes groups based on 'political opinion' or membership of a 'particular social group'. Extermination of political groups has been one of the most common types of group destruction, including attacks against the Kurds by Turkey (in 1937) and Iraq (in 1988); against 1.2 million Cambodians by the Khmer Rouge (in the mid 1970s);<sup>164</sup> against kulaks (property owners) and other 'class enemies' of the state in the Soviet Union (in the 1920s and 1930s);<sup>165</sup> and against left-wing opponents of General Pinochet in Chile (in the 1970s–80s).<sup>166</sup> Indonesia itself set a precedent for 'political genocide' when up to 500 000 Communists, perceived Communists, ethnic Chinese and other political opponents were killed by General (later President) Suharto from 1965 to 1967 after he deposed President Sukarno.<sup>167</sup>

Similarly, at the Australian Senate Committee Inquiry into the Anti-Genocide Bill in 2000, human rights activist Rodney Croome described how homosexuals were exterminated in Nazi Germany, marked by the humiliating pink triangle which signified their imminent destruction as a group.<sup>168</sup> Under the international definition, such actions would not amount to genocide. Sadly, there is still significant opposition at an international level to protecting groups based on 'sexuality'. At the Rome Conference on the International Criminal Court, the Vatican and other 'homophobic Catholic and Islamic states' secured the inclusion of a definition clause for the crime of persecution which excluded homosexuals, lesbians and transsexuals from the concept of 'gender'.<sup>169</sup> Prejudice against homosexuality remains culturally or politically entrenched in a great many societies, with discrimination institutionalised in the many countries in which homosexuality is unlawful. In such a climate of hostility, it is unlikely that groups based on sexuality will attain international support for legal protection against genocide.

Historically, while the immediate impetus for drafting the *Genocide Convention* was the Holocaust, the crime of genocide was never intended to apply narrowly to protect a single group such as the Jewish people. This was so despite the insular approach adopted by Israel, where genocide is narrowly defined under domestic law (the *Nazi and Nazi Collaborators (Punishment) Law 5710 (1950)*) as a crime only 'against the Jewish people'.<sup>170</sup> The Israeli approach is explicable, and perhaps understandable, in light of the historical persecution of Jews in Germany and elsewhere. However, it is also possible that Israel's failure

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<sup>164</sup> Robertson, above n 20, 42.

<sup>165</sup> Executive Council of Australian Jewry, Submission No 9A, *Submissions to the Senate Legal and Constitutional References Committee Inquiry into the Anti-Genocide Bill 1999* (2000) 111.

<sup>166</sup> Robertson, above n 20, 229.

<sup>167</sup> Estimates of the total number of people killed range from 300 000 to 1 million people: Pilger, above n 159, 245.

<sup>168</sup> Rodney Croome (Co-Convenor, Australian Council for Lesbian and Gay Rights), Submission No 35, *Submissions to the Senate Legal and Constitutional References Committee Inquiry into the Anti-Genocide Bill 1999* (2000) 147.

<sup>169</sup> Robertson, above n 20, 338; see *Rome Statute*, above n 60, art 7(3);

<sup>170</sup> See also Senate Legal and Constitutional References Committee, above n 64, 10.

to protect other groups is a response to the fear that Israeli actions against displaced Palestinian people may amount to genocide<sup>171</sup> — an unsurprising conclusion in a state whose highest court once sanctioned the use of torture by the Israeli security services against suspected terrorists.<sup>172</sup>

Underlying the drafting of the *Genocide Convention* was the assumption that crimes against groups involving an element of choice or mobility, such as political affiliation, constituted the lesser crimes of persecution or extermination rather than genocide.<sup>173</sup> As the International Criminal Tribunal for Rwanda ('ICTR') stated in the *Akayesu* judgment:

[A] common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.<sup>174</sup>

In the *Rutaganda* judgment, the Trial Chamber of the ICTR interpreted group membership under the *Genocide Convention* in light of the original intention of the drafters:

It appears, from a reading of the *travaux préparatoires* of the Genocide Convention, that certain groups, such as political and economic groups, have been excluded from the protected groups, because they are considered to be 'mobile groups' which one joins through individual, political commitment. That would seem to suggest *a contrario* that the Convention was presumably intended to cover relatively stable and permanent groups.<sup>175</sup>

Yet there was always something artificial about the distinction between stable and unstable, or permanent and impermanent groups. For example, religious group membership — protected by the *Genocide Convention* — obviously involves elements of choice as much as it contains immutable characteristics. Conversely, gender seems to contain immutable characteristics and yet is not a protected group under the *Genocide Convention*. Further, group membership by reason of sexuality and disability is often not based on choice, instead involving

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<sup>171</sup> At the Rome Conference on the Establishment of the International Criminal Court in July 1998, Israel voted against the adoption of the *Rome Statute* in protest against the decision to include forced settlement of occupied territory as a war crime: see Robertson, above n 20, 328–9.

<sup>172</sup> *Muhammad Abd al-Aziz Hamdan v General Security Service* [1996] H CJ 804/96 (Israeli Supreme Court, sitting as the High Court of Justice, President Barak, Heshin and Matza JJ, 14 November 1996). See also Winfried Brugger, 'May Governments Ever Use Torture? Two Responses from German Law' (2000) 48 *American Journal of Comparative Law* 661, 661. The Israeli Supreme Court subsequently ruled that torture was unlawful: *Public Committee against Torture in Israel v State of Israel* [1999] HC 5100/94 (Israeli Supreme Court, sitting as the High Court of Justice, President Barak, Deputy President Levin, Or, Mazza, Cheshin, Kedmi, Zamir, Strasberg-Cohen and Dorner JJ, 6 September 1999) <<http://www.court.gov.il/mishpat/html/en/verdict/judgment.rtf>> at 11 October 2001.

<sup>173</sup> *Prosecutor v Rutaganda*, Case No ICTR-96-3-T (6 December 1999), 39 ILM 557 [569] ('*Rutaganda*'). See also *Prosecutor v Musema*, Case No ICTR-96-13-T (27 January 2000).

<sup>174</sup> *Akayesu*, Case No ICTR-96-4-T (2 September 1998), 37 ILM 1399 [511].

<sup>175</sup> *Rutaganda*, Case No ICTR-96-3-T (6 December 1999), 39 ILM 557 [57]. See also *Prosecutor v Musema*, Case No ICTR-96-13-T (27 January 2000) [162].

elements of immutability, whether socially constructed or genetically inherited. The exclusion of political groups from protection under the *Genocide Convention* arguably had less to do with the impermanence of political beliefs — itself a questionable precept given the deep-seated political convictions of many people — than the need to compromise to obtain the Soviet Union's approval, and to appease the many countries who feared that their own policies of political repression would constitute genocide.<sup>176</sup>

The core argument in favour of expanding the definition, is the idea that in the half century since the adoption of the *Genocide Convention* international human rights law has recognised the protection needs of a range of increasingly visible group identities.<sup>177</sup> Such groups lived below the radar of international concern at the end of World War II, but have gained prominence in the past fifty years as human rights advocates have mobilised and publicised the needs of groups outside the scope of the original *Genocide Convention*.

In recent years there has been increased support for expanding the range of groups protected in the *Genocide Convention*. Some delegates at the Preparatory Committee on the Establishment of an International Criminal Court called for the extension of the definition of genocide to include social and political groups.<sup>178</sup> Such calls took place in the context of an expansive approach taken by the Preparatory Committee to adopting the crime of persecution as a crime against humanity. Groups protected from the crime of persecution were stated to include 'any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender ... or other grounds that are universally recognised as impermissible under international law'.<sup>179</sup> In Australia, the Democrats' Anti-Genocide Bill 1999 (Cth) proposed enacting a domestic crime of genocide which would protect groups 'based on gender, sexuality, political affiliation or disability'<sup>180</sup> in addition to the groups protected in the *Genocide Convention*. A number of submissions to the Senate Committee inquiry contemplated supporting an expanded definition, including those from the Human Rights and Equal Opportunity Commission, the Centre for Comparative Genocide Studies and the Australian Council for Lesbian and Gay Rights, while other submissions (for varying reasons) were more cautious, including those of the Law Council of

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<sup>176</sup> 'Developments in the Law: International Criminal Law', above n 55, 2011.

<sup>177</sup> See, eg, *Convention on the Elimination of all Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13, (entered into force 3 September 1981); *Declaration on the Rights of Disabled Persons*, GA Res 3447(XXX), 30 UN GAOR (Supp No 49), UN Doc A/10034 (1975); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). For a useful discussion of the policy arguments for and against expanding the definition of genocide to include additional groups, see Senate Legal and Constitutional References Committee, above n 64, 29–35.

<sup>178</sup> United Nations, *Preparatory Committee for the Establishment of an International Criminal Court Discusses Definitions of 'Genocide', 'Crimes against Humanity'*, Press Release, UN Doc L/2762 (25 March 1996).

<sup>179</sup> *Rome Statute*, above n 60, art 7(1)(h).

<sup>180</sup> Anti-Genocide Bill 1999 (Cth) s 3.

Australia and the Executive Council of Australian Jewry.<sup>181</sup> The Senate Committee itself expressed no view on an expanded definition.<sup>182</sup>

Unfortunately, there is little movement in international law towards encompassing emergent social, economic or political groups in relation to the very specific crime of genocide. The Diplomatic Conference on the establishment of the International Criminal Court adopted unaltered the *Genocide Convention* definition of genocide.<sup>183</sup> The *travaux préparatoires* of the *Rome Statute* state clearly that the definition of genocide was ‘literally taken’ from the *Genocide Convention* without amendment.<sup>184</sup> This conservative approach was possibly due to a fear that renegotiating the definition would have resulted in some states withdrawing their existing consent to the *Genocide Convention*.<sup>185</sup> By analogy, such a fear may be well-founded, given that Australia has indicated its desire to ‘renegotiate’ (or undermine) the *Refugee Convention*<sup>186</sup> — a pillar of protection for members of persecuted groups, which has stood alongside the *Genocide Convention* for half a century. In any event, the definition in the *Rome Statute* confirms the approach taken under the statutes of the two international criminal tribunals in the 1990s. Article 4 of the *Statute of the International Criminal Tribunal for the Former Yugoslavia*<sup>187</sup> and article 2 of the *Statute of the International Criminal Tribunal for Rwanda*<sup>188</sup> both replicate the *Genocide Convention* definition. It appears that the 1948 definition of genocide is here to stay, along with the logical inconsistencies in its definitional framework.

International judicial interpretation of the *Genocide Convention* is somewhat more ambiguous on the question of expanding the groups protected from

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<sup>181</sup> Senate Legal and Constitutional References Committee, above n 64, 29–31. See also Law Council of Australia, Submission No 29, *Submissions to the Senate Legal and Constitutional References Committee Inquiry into the Anti-Genocide Bill 1999* (2000). The author of this article discloses that he was the primary author of the Law Council’s submission to the Senate Committee Inquiry.

<sup>182</sup> Senate Legal and Constitutional References Committee, above n 64, 52–3. The Committee ultimately made two recommendations: (1) ‘that the Parliament formally recognise the need for anti-genocide laws’; and (2) ‘that the Bill be referred to the Attorney-General for consideration’. The non-committal, deferential second recommendation of the Committee was a missed opportunity to particularise the content of domestic anti-genocide legislation and thus to move the debate about genocide protection forward.

<sup>183</sup> *Rome Statute*, above n 60, art 6.

<sup>184</sup> UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Part 2: Jurisdiction, Admissibility and Applicable Law*, UN Doc A/CONF.183/C.1/L.53 (6 July 1998).

<sup>185</sup> Centre for Comparative Genocide Studies, Submission to the Senate Legal and Constitutional References Committee Inquiry, above n 64, 29.

<sup>186</sup> Reported in Paul McGeough, ‘Global Scorn for Ruddock Refugee Curbs’, *Sydney Morning Herald* (Sydney, Australia), 9 July 2001, 1; and Paul McGeough, ‘Australia in the Dock over Its Treatment of Refugees’, *Sydney Morning Herald* (Sydney, Australia), 9 July 2001, 7.

<sup>187</sup> Annex to SC Res 827, 48 UN SCOR (3217<sup>th</sup> mtg), UN Doc S/Res/827 (1993), 32 ILM 1203.

<sup>188</sup> Annex to SC Res 955, 49 UN SCOR (3453<sup>rd</sup> mtg), UN Doc S/Res/955 (1994), 33 ILM 1600.

genocide than the three international statutes. In *Akayesu* the ICTR found that the Tutsi victims of Hutu-perpetrated genocide were not an ethnical group within the terms of the *Genocide Convention*, since Hutus and Tutsis shared a common culture and language — the defining characteristics of an ethnical group.<sup>189</sup> However, the accused in that case was nonetheless found guilty of genocide on the basis that he intended to destroy Tutsis as members of a 'stable' and 'permanent' group, whose membership is 'determined by birth'.<sup>190</sup> The decision has been described as having 'significantly expanded the kinds of populations that will be protected' by the *Genocide Convention*,<sup>191</sup> effectively adding a new category of protected group beyond those specified.<sup>192</sup>

Subsequent genocide judgments in the two international criminal tribunals have interpreted the range of protected groups more narrowly, and more consistently with the technical language of the *Genocide Convention*.<sup>193</sup> The precedent value of the *Akayesu* judgment is thus unclear. In *Rutaganda* the ICTR noted that 'at present, there are no generally and internationally accepted precise definitions' of the concept 'group' for the crime of genocide.<sup>194</sup> The Trial Chamber stated further that 'each of these concepts must be assessed in the light of a particular political, social and cultural context'.<sup>195</sup> But the ambiguity identified by the Chamber was located in the identification of membership of groups already enumerated in the *Genocide Convention*, not in whether the term 'group' should be extended to additional groups based on stable or permanent characteristics. The Chamber was chiefly interested in whether group membership (in that case, Tutsis were found to constitute an ethnical group) was subjectively or objectively determined, with regard to local contexts:

[M]embership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to the said group. Nevertheless, the Chamber is of the view that a subjective definition alone is not enough to determine victim groups, as provided for in the Genocide Convention.<sup>196</sup>

It is clear therefore that there is far from persuasive international support for expanding the range of groups protected by the *Genocide Convention*. This is so despite the illogicality of the restricted choice of groups currently protected. By protecting only national, racial, ethnical and religious groups from genocide, the *Genocide Convention* privileges these group identities over all others, deeming

<sup>189</sup> *Akayesu*, Case No ICTR-96-4-T (2 September 1998), 37 ILM 1399 [170], [513].

<sup>190</sup> *Ibid* [511].

<sup>191</sup> Paul Magnarella, 'Some Milestones and Achievements at the International Criminal Tribunal for Rwanda: The 1998 Kambanda and Akayesu Cases' (1997) 111 *Florida Journal of International Law* 517, 531.

<sup>192</sup> 'Developments in the Law: International Criminal Law', above n 55, 2020.

<sup>193</sup> *Ibid*.

<sup>194</sup> *Rutaganda*, Case No ICTR-96-3-T (6 December 1999), 39 ILM 557, [56].

<sup>195</sup> *Ibid*.

<sup>196</sup> *Ibid* 568–9. See also *Prosecutor v Musema*, Case No ICTR-96-13-T (27 January 2000), [162].

them somehow more worthy or more fundamental to human psychology than any others. This assumption may have held sway in a pre-1950 era when human identity was chiefly organised through dominant (and highly problematic) narratives of nation, race and religion. In the 21<sup>st</sup> century, however, identity is more fragmented and dispersed across a variety of psychological registers, particularly given widespread disillusionment with the meta-narratives of race, nation and religion, and the violence such narratives invoked — and provoked — throughout the 20<sup>th</sup> century.

## 2 *Intention to Destroy the Group*

Assuming that the East Timorese did comprise a *Genocide Convention* group, the element of intention would require particular scrutiny. The *Rutaganda* decision stated that

[g]enocide is distinct from other crimes because it requires *dolus specialis*, a special intent. Special intent of a crime is the specific intention which, as an element of the crime, requires that the perpetrator clearly intended the result charged.<sup>197</sup>

Further, the ICTR noted that '[t]he *dolus specialis* is a key element of an intentional offence, which offence is characterized by a psychological nexus between the physical result and the mental state of the perpetrator'.<sup>198</sup> The requisite criminal intention for genocide is clearly a higher level of intention than for ordinary crimes. By contrast, a 'general intent requirement is easier to establish, requiring only proof that the foreseeable consequences of an act are, or seem likely to be, the destruction of the group'.<sup>199</sup> As an Australian Senate committee inquiry into the proposed Australian anti-genocide legislation noted,

[t]he intent requirement has proved a significant hurdle for groups seeking to pursue genocide claims, with governments defending claims brought by their indigenous populations invariably invoking the absence of intent in order to deny the existence of genocide.<sup>200</sup>

Despite the requirement of special intent, the ICTR has adopted a flexible approach mitigating the strictness of the requirement. In *Akayesu* it was held that:

[I]ntent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore,

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<sup>197</sup> *Rutaganda*, Case No ICTR-96-3-T (6 December 1999), 39 ILM 557, [59].

<sup>198</sup> *Ibid* [61].

<sup>199</sup> Senate Legal and Constitutional References Committee, above n 64, 8.

<sup>200</sup> *Ibid* 7.



the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.<sup>201</sup>

Moreover, in the *Kayishema and Ruzindana* judgment, it was held that

intent can be inferred from either words or deeds and may be demonstrated by a pattern of purposeful action. In particular, the Chamber considers evidence such as ... the methodical way of planning, the systematic manner of the killing.<sup>202</sup>

The need for a 'pattern of purposeful action' clearly excludes the concept of 'negligent genocide' and inaction or carelessness does not amount to genocide.<sup>203</sup>

In the case of East Timor, the mental requirement for all Serious Crimes, including genocide, is specified by *Regulation 2000/15*.<sup>204</sup> The Regulation requires that the material elements of Serious Crimes must be committed with both intent and knowledge. Intent requires that a person meant to engage in conduct, or meant to cause a consequence or is aware that it would occur in the ordinary course of events. The Regulation does not distinguish the level of intent required to prove a crime of genocide from the intent required for other Serious Crimes. It is silent on whether genocide requires the special intent suggested by the jurisprudence of the international criminal tribunals and the writings of jurists. It is likely that the general provision in the Regulation applying the recognised law and principles of international law to the prosecution of Serious Crimes would clarify the intention element of genocide as a special intention,<sup>205</sup> and make it consistent with established interpretation.

It is important to note that discerning an intention to destroy a group does not depend on the intention succeeding against the entire group. A failure to destroy a group does not mean genocide did not occur. It is sufficient that an intention to destroy a group as such existed and acts were undertaken in furtherance of that intent, with knowledge of the likely consequences. Thus the argument of one commentator that the 'scale' of the alleged atrocities in East Timor in 1999 tended to suggest that genocide was 'not applicable' is misleading.<sup>206</sup> Estimates of the numbers of East Timorese killed in the 25 years prior to the ballot range up to 200 000.<sup>207</sup> There are no firm estimates of the number killed in the period surrounding the ballot. The US State Department estimated that at least 250 were

<sup>201</sup> *Akayesu*, Case No ICTR-96-4-T (2 October 1998), 37 ILM 1399, [523].

<sup>202</sup> *Prosecutor v Kayishema & Ruzindana*, Case No ICTR-95-1-T (21 May 1999) [93].

<sup>203</sup> Senate Legal and Constitutional References Committee, above n 64, 39. For the opposite view, see Andrew Mitchell, 'Genocide, Human Rights Implementation and the Relationship between International and Domestic Law' (2000) 24 *Melbourne University Law Review* 15.

<sup>204</sup> *Regulation 2000/15*, above n 74, s 18.

<sup>205</sup> *Ibid* s 3.1.

<sup>206</sup> Nathan Hancock, Law and Bills Digest Group, *A War Crimes Tribunal for East Timor?* (1999) <<http://www.aph.gov.au/library/pubs/rn/1999-2000/2000rn10.htm>> at 20 September 2001.

<sup>207</sup> Stanton, above n 129. For a discussion of the accuracy of this figure, which was accepted by the Foreign Affairs Committee of the Australian Parliament in 1993, see Pilger, above n 159, 234.

killed; Amnesty International suggested there were ‘many hundreds’ killed, ‘although the exact number was not known’; the UN High Commissioner for Human Rights claimed there were ‘many’ killed; the International Commission of Inquiry stated there was ‘death in large numbers’; and Human Rights Watch stated that ‘best estimates’ were that ‘over one thousand’ civilians were killed.<sup>208</sup>

Discerning the intention of Indonesia, its army and its agents requires an examination of the circumstances of the Indonesian invasion and occupation between December 1975 and September 1999. The violence immediately preceding and following the independence ballot cannot be considered a historically discontinuous event limited to 1999. The facts of the invasion and occupation have become relatively well known in recent years. Following the Indonesian invasion in early December 1975, by mid-February 1976 there were reportedly as many as 60 000 East Timorese dead.<sup>209</sup> On 31 May 1976 Indonesia appointed a legislative assembly of ‘prominent citizens of East Timor’, which declared that East Timor wanted to become part of Indonesia.<sup>210</sup> In July 1976 President Suharto formally declared the ‘integration’ of East Timor into the Unitary State of the Republic of Indonesia as its twenty-seventh province. East Timorese resistance to the Indonesian occupation continued with differing degrees of success for the entire period, during which Indonesia launched a variety of oppressive strategies against both the Armed Forces for the National Liberation of East Timor (‘FALINTIL’) guerrilla resistance and East Timorese civilians.

The intention of Indonesia towards the East Timorese over this period can be inferred from its actions more than from its formal statements of policy. The conflict can basically be described as a military one between Indonesian forces and the East Timorese resistance for political and territorial control of East Timor. Depending upon the status of East Timor as an Indonesian territory, independent state or defunct Portuguese colony during this period, the conflict is either an internal armed conflict or an international armed conflict under international law. Amnesty International considers the conflict to be an ‘international armed conflict’ for the purposes of applying the *Geneva Conventions*, due to East Timor’s status as a non-self-governing territory.<sup>211</sup> The UN has notably never recognised Indonesian sovereignty over East Timor.<sup>212</sup> As a result, Amnesty suggests that ‘war crimes’ or ‘grave breaches’ of the *Geneva Conventions* were committed (along with breaches of parallel rules of customary

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<sup>208</sup> Respectively: Bureau of Democracy, Human Rights and Labor, above n 74; International Secretariat, Amnesty International, *Annual Report 2000* (2001); UN Commission on Human Rights, *Report of the UN High Commissioner for Human Rights*, above n 30, [3]; UN Office of the High Commissioner for Human Rights, above n 43, [125]; Human Rights Watch, *Unfinished Business: Justice for East Timor*, Press Release (2000) <<http://www.hrw.org/background/asia/timor/etimor-back0829.htm>> at 20 September 2001.

<sup>209</sup> Jardine, above n 136, 35.

<sup>210</sup> Ibid.

<sup>211</sup> Amnesty International, *East Timor: Demand for Justice*, above n 50, pt I.

<sup>212</sup> Stanton, above n 129.

international law).<sup>213</sup> In particular, breaches of the crimes specified in the *Fourth Geneva Convention*<sup>214</sup> and *Additional Protocol I*.<sup>215</sup> Alternatively, Amnesty argues that 'even if the conflict were considered a non-international armed conflict, the prohibitions of common article 3 of the *Geneva Conventions*, which are war crimes, would apply'.<sup>216</sup>

In relation to the categorisation of the conflict as internal or international, it must be noted that the *Geneva Conventions* offer less protection for civilians in internal conflicts.<sup>217</sup> There remains considerable ambiguity in international

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<sup>213</sup> UN Security Council, *Final Report of the Commission of Experts*, UN Doc S/1994/674 (27 May 1994) pt II.

<sup>214</sup> *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950). The breaches included:

wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a civilian population, compelling a protected person to serve in the forces of a hostile power, or wilfully depriving a protected person of the rights to a fair and regular trial, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Amnesty International, *East Timor: Demand for Justice*, above n 50, pt II(B).

<sup>215</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [Protocol I]*, opened for signature 8 June 1977, 1125 UNTS 3, (entered into force 7 December 1979). The breaches included:

[L]aunching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects; launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects; the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; unjustifiable delay in the repatriation of prisoners of war or civilians; and practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination.

Amnesty International, *East Timor: Demand for Justice*, above n 50, pt II(B).

<sup>216</sup> Amnesty International, *East Timor: Demand for Justice*, above n 50, fn 26:

Common art 3 prohibits the following acts against civilians and combatants who have laid down their arms or been rendered *hors de combat*: (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) Taking of hostages; (c) Outrages upon personal dignity, in particular humiliating and degrading treatment; (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

<sup>217</sup> The *Geneva Conventions* and *Additional Protocol I* almost exclusively govern international conflicts. Common art 3 prohibits violations of human dignity including murder, torture, ill-treatment, and hostage-taking in international and internal conflicts. But *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [Protocol II]*, opened for signature 8 June 1977, 1125 UNTS 609, 16 ILM 1442 (entered into force 7 December 1978) ('*Additional Protocol II*') provides few other protections for internal conflicts compared with the protections provided by the Conventions for international conflicts, and liability for war crimes only exists for international conflicts.

humanitarian law about which of three sets of rules govern internal conflicts between armed opposition groups and government forces. Different rules may apply depending upon the classification of internal conflicts as peace<sup>218</sup> or war,<sup>219</sup> whether armed opposition forces are under responsible command and exercise territorial control,<sup>220</sup> and whether the conflict is internal, international, or an ‘internationalised internal conflict’.<sup>221</sup> While there has been some clarification of some of these issues in the statutes of the two international criminal tribunals and the *Rome Statute*,<sup>222</sup> there remains some uncertainty. The classification of the conflict as internal or international does not, however, affect the question of whether genocide occurred in East Timor, because genocide is prohibited absolutely — anywhere and at all times.

The immediate military objective of Indonesia throughout the period was to secure territorial and political control of East Timor. The continuing Indonesian military presence was arguably a response to the resistance of the FALINTIL intended to suppress the East Timorese opposition to Indonesian rule, but *not* intended physically to destroy the population. The Indonesian occupation did, however, extend far beyond a limited military engagement against an armed resistance force. Indonesia frequently pursued the equivalent of a ‘scorched earth’ policy targeted against the civilian population as a whole. For example, between September 1977 and March 1979 the Indonesian army (ABRI) forcibly relocated the rural population to coastal areas and pursued the FALINTIL inland, a policy that became known as ‘encirclement and annihilation’ and involved the use of chemical defoliants.<sup>223</sup> In mid-1981 the army launched an offensive known as the ‘fence of legs’, which forced 80 000 East Timorese males from eight to 50 years old to walk in a line across the countryside in front of ABRI troops, to protect the troops from FALINTIL attack.<sup>224</sup> These ‘total war’

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<sup>218</sup> Eg, violent domestic tensions including riots, sporadic violence, mass arrests, police actions, or the deployment of military forces against civilians.

<sup>219</sup> Eg, protracted, low level armed conflict.

<sup>220</sup> If a state has disintegrated and there is an absence of effective government, a conflict is governed by *Geneva Conventions* common art 3, which also governs state conflict with armed internal opposition. But if the armed opposition is organised under responsible command and exercises territorial control, common art 3 is supplemented by *Additional Protocol II*.

<sup>221</sup> This is especially so where foreign states intervene on the side of domestic opposition forces, as in Bosnia or Angola. The ICTY in *Prosecutor v Tadic*, Case No IT-94-1 (7 May 1997), 36 ILM 913, 920–1, found that the major principles of international humanitarian law apply to both internal and international armed conflict, but it is still unclear whether all principles apply uniformly. Foreign states are responsible for the actions of a faction in a civil war if the faction is a de facto agent of the foreign state, or was ordered by the state to commit certain acts.

<sup>222</sup> *Statute of the International Criminal Tribunal for Rwanda*, above n 59, art 4 creates jurisdiction over serious violations of common art 3 and *Additional Protocol II*; the ICTY has interpreted its jurisdiction flexibly to cover violations of common art 3, and other violations of the laws and customs of war in internal conflicts; *Rome Statute*, above n 60, art 8(f) criminalises many acts committed in internal conflicts.

<sup>223</sup> Jardine, above n 136, 51–3.

<sup>224</sup> *Ibid* 54–5.

offensives greatly disrupted agricultural production, leading to food shortages and malnutrition.<sup>225</sup>

In addition to examining its military activities, the intention of Indonesia towards the East Timorese can also be discerned from its social policies. At the level of national policy, the preamble of the 1945 *Indonesian Constitution* outlines the five basic principles, known as the *Pancasila*, of the Indonesian State.<sup>226</sup> The principles include belief in one supreme God, humanitarianism, nationalism expressed in the unity of Indonesia, consultative democracy and social justice.<sup>227</sup> These principles are obviously inconsistent with the state-sanctioned commission of genocide. The framers of the *Pancasila* deliberately resisted the demands of Muslim nationalists who sought an Islamic identity for Indonesia: 'although the Pancasila includes the principle of belief in a 'supreme being', use of the term Maha Esa, rather than Allah, was designed to encompass diverse religious groups: Christians, Hindus, and Buddhists as well as Muslims'.<sup>228</sup> The official state ideology does not authorise the destruction of minority religious, ethnic or racial groups, whose identities may differ from the dominant Muslim Javanese:

Pancasila established a culturally neutral identity, compatible with democratic or Marxist ideologies, and overarching the vast cultural differences of the heterogeneous population. Like the national language, *Bahasa Indonesia*, which Sukarno also promoted, the Pancasila did not come from any particular ethnic group and was intended to define the basic values for an 'Indonesian' political culture.<sup>229</sup>

However, the practices of the Indonesian Government in East Timor were remarkably at odds with its stated national policy towards accepting group pluralism and cultural difference. The true intention of Indonesia towards the East Timorese can be partly inferred from its social policies in the province. One commentator has referred to the forcible 'Indonesianisation' of East Timor through a series of 'civilising' policies.<sup>230</sup> These foremost included the physical control of the population through forced relocations to displacement camps, which held almost 319 000 people by July 1979.<sup>231</sup> Resettlement villages were employed deliberately to destroy 'the traditional forms of social organisation, placing people from the same villages, clans or hamlets in different resettlement

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<sup>225</sup> Ibid.

<sup>226</sup> The five principles were announced by General Achmed Sukarno, in a speech known as 'The Birth of the Pancasila' (Speech presented to the Independence Preparatory Committee, 1 June 1945). For more information on Indonesian political history, see, eg, Yayasan Orphans International Indonesia, *Indonesian Political System* <<http://www.geocities.com/orphansinternational/Indonesia/4-politics.html>> at 5 October 2001.

<sup>227</sup> *Indonesian Constitution* preamble.

<sup>228</sup> United States Library of Congress, *Indonesia — A Country Study: The Pancasila and Political Parties* (1992) ch 1.

<sup>229</sup> United States Library of Congress, *Indonesia — A Country Study: Pancasila the State Ideology* (1992) ch 4.

<sup>230</sup> Jardine, above n 136, 57.

<sup>231</sup> Statistics from the Australian Council for Overseas Aid, cited in *ibid*.

villages, so that an organised resistance would be less likely to develop'.<sup>232</sup> Forcible relocation persisted up until about 1986,<sup>233</sup> and emerged again as a feature of the violence in 1999. Population control was augmented by the voluntary migration of Indonesians to East Timor, with about 100 000 Indonesians living there by 1992 (out of a total population of 750 000), as well as by more limited official transmigration schemes.<sup>234</sup> Thus John Pilger describes Indonesia's population policy in East Timor as genocidal since it was 'designed to unravel the fabric of Timorese life and culture and eventually to reduce the indigenous population to a minority'.<sup>235</sup> There have also been allegations of forcible birth control, including family planning and forced sterilisation of women.<sup>236</sup> Further policies included economic control of former Portuguese colonial enterprises (such as coffee and sandalwood production), the system of land ownership, and former ethnic Chinese businesses.<sup>237</sup> Control of the education system was a further feature of the occupation, including instruction in Pancasila, the national ideology, participation in Pramuka, the state controlled scout movement, and inculcation in military culture and Indonesian arts, language and music.<sup>238</sup>

Does Indonesia's attempt to achieve total military, social, economic and cultural control over East Timor constitute genocidal intent? Clearly there was an intention by Indonesia, evidenced from its practices in the territory, to assimilate the East Timorese into the national culture and institutions of Indonesia. This intention necessarily entailed the concomitant destruction of the fundamental characteristics of East Timorese identity, as expressed through that group's social, cultural, political and economic practices, formations and traditions. Yet an intention to destroy the cultural characteristics of a group falls short of the intention required by the *Genocide Convention* to destroy the group physically itself. There is a distinction between an intention to repress a group and an intention to destroy its members. If Indonesia's intention was to eliminate the East Timorese people, there would need to be evidence of a more systematic policy of intentional extermination, analogous, for example, to the Nazi gas chambers, the forced famine in the Ukraine, or the Armenian deportations. The experience of the East Timorese, however horrific, probably falls short of this legal requirement. This is so despite the fact that a very large number of East Timorese — up to 200 000 — have been killed since 1975: 'not even Pol Pot succeeded in killing, proportionally, as many Cambodians as the Indonesian[s] ... killed in East Timor'.<sup>239</sup> The killings were a manifestation of Indonesia's

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<sup>232</sup> Ibid 58.

<sup>233</sup> Pilger, above n 159, 277.

<sup>234</sup> By 1989 only about 500 families had transmigrated under official government transmigration schemes: Jardine, above n 136, 63–4.

<sup>235</sup> Pilger, above n 159, 274.

<sup>236</sup> Jardine, above n 136, 62.

<sup>237</sup> Ibid 59–61.

<sup>238</sup> Ibid 61–2.

<sup>239</sup> Pilger, above n 159, 233.

intention to control East Timor politically and territorially rather than an expression of an intention to exterminate its people. If Indonesia's intention had been physical extermination, it would clearly not have taken time attempting 'to civilise [the] backward people'<sup>240</sup> of East Timor through its various propaganda and re-education campaigns. Put another way, the killings were incidental to the overriding intention of controlling the population rather than *being* the overriding intention.

On the other hand, one legal commentator has drawn the important distinction between 'motivation' and legal 'intention' in the context of Indonesia's actions in East Timor.<sup>241</sup> Ben Kiernan stresses that the physical elimination of the East Timorese people was not Indonesia's motive for intervening in East Timor. Rather, Indonesia's motive was to conquer East Timor and repress its people. Indonesia's intention was, by contrast, to destroy the independence movement, by physical means if necessary. That intention was manifest because it was reasonably predictable that the consequences of Indonesia's actions would be the destruction of many East Timorese. For Kiernan, although physical destruction was targeted specifically at politically active East Timorese, they nonetheless formed part of the broader national group. This characterisation of the targets of intentional destruction as a national rather than a political group is necessary to activate the protection of the *Genocide Convention*. The difficulty with this reasoning, as discussed in the previous section, is that independence supporters were more likely targeted for political reasons rather than for their nationality or ethnicity, *as such*.

An important caveat is the idea that, at least in the case of East Timor, political consciousness was arguably an inherent part of the national or ethnic identity of most East Timorese as a group, notwithstanding the existence of some East Timorese pro-autonomy supporters. Consequently, the intentional destruction of the political group arguably strikes at the national or ethnic group, thus constituting genocide under the *Genocide Convention*. This implied reading of the *Genocide Convention* definition, along with the careful differentiation of the legal intention to destroy a group from the purposive motives underlying actions affecting such groups, opens up a more radical jurisprudence around the existing concept of genocide. It also removes the necessity to attempt a risky renegotiation of the Convention definition. It remains to be seen whether the courts will adopt this more fertile approach, or whether, in the words of Kirby J, in the special leave application to the High Court of Australia in the Full Federal Court case of *Nulyarimma v Thompson*,<sup>242</sup> such an approach would amount to 'pushing the envelope of the definition of genocide'.<sup>243</sup>

<sup>240</sup> Indonesian military commander in East Timor in 1982, cited in *ibid* 275.

<sup>241</sup> Mares and Kiernan, above n 17. A similar distinction has been made in Australia in relation to the Stolen Generation, although the courts have not considered the argument: see Matthew Storey, '*Kruger v The Commonwealth: Does Genocide Require Malice?*' (1998) 21 *University of New South Wales Law Journal* 224.

<sup>242</sup> (1999) 165 ALR 621.

<sup>243</sup> Transcript of Proceedings, *Nulyarimma v Thompson* (Special Leave Application, C/181999, High Court of Australia, Gummow, Kirby and Hayne JJ, 4 August 2000) (Kirby J).

B *Definition of Acts Amounting to Genocide*

The difficulty of characterising Indonesia's actions as genocide under the international definition raises the lingering question of whether 'cultural genocide' should also be prohibited under international law. The issue of cultural genocide was controversial during the framing of the *Genocide Convention*, when it was initially included in draft article III to prohibit 'any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial or religious group',<sup>244</sup> without necessarily physically destroying the group. During the drafting of the *Genocide Convention*, the Arab and communist delegations were in favour of including an article on cultural genocide, but 'the nations from both Americas were wedded to their respective policies of [indigenous] assimilation and, therefore, opposed both provisions'.<sup>245</sup> The western European delegations, which controlled the balance of votes, supported the connection between cultural and physical genocide in the recent aftermath of Nazism, but argued that such a connection should be made in the *Universal Declaration of Human Rights* ('UDHR')<sup>246</sup> rather than the *Genocide Convention*. Although these delegations voted for the deletion of cultural genocide on the basis that they would later support a provision in the UDHR, they did not fulfil this promise as a result of Cold War pressures and politics.<sup>247</sup> Ultimately, reference to culture was deleted from the *Genocide Convention*<sup>248</sup> and the prohibited acts enumerated in article II deliberately to refer only to genocide on physical and biological grounds.<sup>249</sup>

One aspect of cultural genocide was, however, retained in the final wording of the *Genocide Convention*. The forced transfer of children from one group to another was categorised as physical genocide in the final text, even though it had been included in the 'cultural genocide' provision of the Draft Convention.<sup>250</sup> As the Venezuelan delegate stated in the General Assembly in 1948:

The forced transfer of children to a group where they would be given an education different from that of their own group, and would have new customs, a new religion and probably a new language, was in practice tantamount to the destruction of their group, whose future depended on that generation of children

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<sup>244</sup> Ad Hoc Committee of the Economic and Social Council, *Ad Hoc Committee Draft: Second Draft of the Genocide Convention*, UN Doc E/AC.25/SR.1 (1948).

<sup>245</sup> A Morsink, 'Cultural Genocide, the Universal Declaration and Minority Rights' (1999) 21 *Human Rights Quarterly* 1009, 1009.

<sup>246</sup> *Universal Declaration of Human Rights*, GA Res 217A, 3 UN GAOR (183<sup>rd</sup> plen mtg), UN Doc A/Res/217A (1948).

<sup>247</sup> Morsink, above n 245, 1009–10.

<sup>248</sup> 'Cultural genocide' was removed from the text of the Convention during the UN General Assembly [Legal] Sixth Committee's (83<sup>rd</sup> meeting) revision of the Ad Hoc Committee of the UN Economic and Social Council's draft: see Storey, above n 241, 228. The claimants in the Australian High Court case of *Kruger v Commonwealth* (1997) 190 CLR 1 unsuccessfully argued that the *Genocide Convention* encompassed acts of cultural genocide.

<sup>249</sup> Robertson, above n 20, 229. See also International Law Commission, *Draft Code of Crimes against the Peace and Security of Mankind*, UN Doc A/46/10 (1991).

<sup>250</sup> Storey, above n 241.



... [I]f the intent of the transfer were the destruction of the group, a crime of genocide would undoubtedly have been committed.<sup>251</sup>

This is not the only tension in the characterisation of the prohibited acts in the *Genocide Convention* as physical in nature. Causing 'serious mental harm' to members of the group also seems to fall short of the concept of 'physical destruction'. Apart from the impact of forms of psychological torture, 'mental harm' could result from the destruction of a group's cultural characteristics, where those characteristics are central to the group's sense of identity and self-worth. On this view, it is possible to consider manifestations of the 'Indonesianisation' in East Timor as acts of serious mental harm intended to destroy the group.

There is also tension in another aspect of the acts listed in article II of the *Genocide Convention*. It is plausible to argue that the depopulation strategy pursued by Indonesia against the East Timorese amounted to 'deliberately inflicting conditions of life calculated to bring about its physical destruction in whole or in part'. Out-populating the East Timorese in their own land through migration and transmigration programs, forcibly relocating East Timorese within the territory, and expelling East Timorese people to West Timor (in the post-ballot conflict) were ultimately intended to destroy the essence of East Timorese social and group life. *Rutaganda* supports this interpretation, since it noted that this aspect of genocide encompassed 'methods of destruction by which the perpetrator does not necessarily intend to immediately kill the members of the group' but which are ultimately aimed at their physical destruction, including, among others, 'systematic expulsion from their homes'.<sup>252</sup>

In any event, it is persuasively arguable that 'cultural genocide' more broadly was committed in East Timor, since Indonesia intentionally destroyed East Timorese group identity by forcibly assimilating the East Timorese into Indonesian institutions, politics, economy, culture and social life. Indonesia denied East Timor even limited political autonomy, forced the East Timorese to surrender all control over domestic affairs, and destroyed traditional social patterns through forced relocations, breaking up family and village units, and resettling Indonesian migrants. In this sense, there is little real difference in outcome between acts of cultural genocide and acts of aggressive territorial and political control which similarly destroy a group's social characteristics.

There has been little judicial scrutiny or interpretation of the definition of genocide over the last fifty years. The first verdict on the crime of genocide by an international body was *Akayesu*.<sup>253</sup> *Rutaganda* did envisage some of the specific actions potentially falling within the prohibited acts in article II of the *Genocide Convention*:

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<sup>251</sup> Cited in Human Rights and Equal Opportunity Commission, *Bringing them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997) 271.

<sup>252</sup> *Rutaganda*, Case No ICTR-96-3-T (6 December 1999), 39 ILM 557, [52].

<sup>253</sup> *Akayesu*, Case No ICTR-96-4-T (2 October 1998), 37 ILM 1399.

- ‘*serious bodily or mental harm*’ includes ‘acts of bodily or mental torture, inhumane or degrading treatment, rape, sexual violence and persecution’, and ‘need not entail permanent or irremediable harm’;
- ‘*deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part*’ should be construed “as methods of destruction by which the perpetrator does not necessarily intend to immediately kill the members of the group” but which are ultimately aimed at their physical destruction, such as a subsistence diet, systematic expulsion from their homes and deprivation of essential medical supplies below a minimum vital standard’;
- ‘*measures intended to prevent births within the group*’ includes ‘sexual mutilation, enforced sterilisation, forced birth control, forced separation of males and females, and prohibition of marriages’, and ‘may be not only physical but also mental’;
- ‘*forcible transfer of children*’ includes direct acts of forcible physical transfer, ‘but also acts of threats of trauma which would lead to the forcible transfer of children’.<sup>254</sup>

These interpretations are significant because they marginally dilute the strict *Genocide Convention* requirement of an intention physically to destroy the group (excluding the prohibitions on forcible transfer of children and causing serious mental harm). In the final analysis, however, unless the prohibited acts of ‘causing serious mental harm’ or ‘deliberately inflicting conditions of life’ encompass the types of acts committed in East Timor described above, or genocide is interpreted in future to include cultural genocide, it is unlikely that a charge of genocide could be made out, beyond reasonable doubt, in relation to events in East Timor.

#### IV CAN GENOCIDE BE PROSECUTED IN EAST TIMOR?

Assuming, however, that the elements of genocide were satisfied in a particular case, the question arises as to whether genocide was prohibited under the law applicable in East Timor at the time the events were committed. Although this again raises the question of the international legal status of East Timor, for the purposes of this section it is sufficient to address whether genocide was a crime under Indonesian or Portuguese law during the period. Indonesia has never signed or ratified the *Genocide Convention*, nor has it criminalised genocide domestically. Genocidal acts committed in East Timor under Indonesian sovereignty are accordingly not punishable. Portugal only acceded to the *Genocide Convention* on 9 February 1999, and genocide is now prohibited in domestic law by s 239 of the *Portuguese Penal Code 1982*. It is clear therefore that looking to domestic Indonesian or Portuguese law to prosecute genocide during the Indonesian occupation is of little practical

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<sup>254</sup> *Rutaganda*, Case No ICTR-96-3-T (6 December 1999), 39 ILM 557, [51]–[54].

assistance, assuming the absence of the passage of retrospective laws in the future.

Ultimately, the existence of a prohibition on genocide in Indonesian or Portuguese law is irrelevant to the ability to prosecute genocide under an international tribunal. The crime of genocide has been universally condemned since the General Assembly's declaration against genocide in *Resolution 96(I)* of 11 December 1946.<sup>255</sup> The General Assembly subsequently approved the *Genocide Convention* in Paris on 9 December 1948, reflecting the willingness of the international community to give precise legal force to the crime. The Convention entered into force on 12 January 1951. Since those founding prohibitions more than fifty years ago, the punishment of genocide by states has been *jus cogens*, a non-derogable preemptory norm of international law.<sup>256</sup> The provisions of the treaty were concurrently accepted as parallel norms of customary international law, through widespread state practice and the requisite *opinio juris*.<sup>257</sup> World opinion remains firmly resolved in its commitment to prohibition.<sup>258</sup>

There is some debate, however, about the precise point at which genocide became recognised as an international crime.<sup>259</sup> It was definitely not an international crime until after World War II,<sup>260</sup> despite some arguments to the contrary.<sup>261</sup> Genocide did not appear as a crime in article 6(b) of the *Nuremberg Charter*. Most jurists choose either General Assembly *Resolution 96(I)* of 1946 or the *Genocide Convention* as the defining moment when genocide became an international crime.<sup>262</sup> Because genocide has been a universally condemned crime possibly since 1946 or at least since 1948, prosecuting individuals accused of genocide in East Timor during that period would not result in injustice or unfairness. The grave criminality of genocide has been so widely recognised that no individual could have acted under any assumption to the contrary, or mistaken the criminal character of their actions after 1948.

Moreover, the general international principle that there can be no punishment of crime without a pre-existing law (*nullum crimen sine lege, nulla poena sine lege*) would not be infringed in the context of an international tribunal, since international law has recognised the crime for the duration of this period. In the judgment of the Nuremberg International Military Tribunal in 1946, it was

<sup>255</sup> Above n 56.

<sup>256</sup> See UN Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc S/25704 (3 May 1993) [45].

<sup>257</sup> See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15.

<sup>258</sup> See, eg, *Rome Statute*, above n 60, art 6.

<sup>259</sup> *Polyukhovich v Commonwealth* (1991) 153 CLR 501, 587 (Brennan J).

<sup>260</sup> See Kunz, 'Editorial Comment: The United Nations Convention on Genocide' (1949) 43 *American Journal of International Law* 738, 742; Green, 'Canadian Law, War Crimes and Crimes against Humanity' (1988) LIX *British Year Book of International Law* 217, 225–6; M N Shaw, 'Genocide and International Law' in Yoram Dinstein (ed), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989) 797.

<sup>261</sup> See Lemkin, *Axis Rule in Occupied Europe*, above n 18, 150.

<sup>262</sup> See Shaw, above n 260, 799; Kunz, above n 260, 742; Green, above n 260, 225.

observed that the principle of non-retrospectivity 'is not a limitation of sovereignty', but rather a 'principle of justice'.<sup>263</sup> The Tribunal found that the defendants must have known that their acts of aggression violated existing principles of international law, such that it would be 'unjust' if their wrongs 'were allowed to go unpunished'.<sup>264</sup> The Tribunal's finding related specifically to the crime of 'aggressive war', which was shown to have been prohibited by pre-existing treaties. This finding may have been different had it related to other crimes which were not already part of international law at the time of their commission.<sup>265</sup> In any event, it would be unjust not to punish perpetrators of genocide after the crime of genocide entered into international law, when offenders were aware, or can be imputed to have been aware, that their actions were criminal. As the US Ambassador-at-Large for War Crimes Issues has stated:

We are concerned about the implications of the recent adoption by the Indonesian People's Consultative Assembly of a constitutional amendment that includes the right of protection from prosecution for any act which was not a crime when committed. We recognize that the universal concept of 'ex post facto' is an important due process right. But neither that principle nor this amendment should prevent the anticipated Human Rights Court in Indonesia from trying violations of international humanitarian law embodied in treaties and customary law to which Indonesia is unquestionably bound.<sup>266</sup>

## V CONCLUSION

There is a broad popular misconception that the conflict in East Timor since 1975 and the violence surrounding the independence ballot in 1999 constituted genocide. The common meaning of genocide is distinct from the international legal meaning, the latter requiring the specific elements of criminal responsibility to be proved. At face value, the misdescription of conflicts as genocide in circumstances where the elements of the international crime are not made out has the potential to devalue the experience of victims of true genocides, undermine the moral categorisation of conduct according to the depth of its evil, diminish the declaratory and exhortative value of the global prohibition on genocide, and damage efforts to preserve a genuine historical memory against a global culture of forgetting. On the other hand, the logical inconsistencies in the definition of 'groups' protected by the *Genocide Convention*, and the ambiguity surrounding the partial inclusion and exclusion of 'cultural genocide', make it very difficult to erect boundaries around the existing international definition to protect its moral force from degradation and diminution.

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<sup>263</sup> Lawrence Egbert, 'Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences' (1947) 41 *American Journal of International Law* 172, 217.

<sup>264</sup> *Ibid.*

<sup>265</sup> D J Harris, *Cases and Materials on International Law* (5<sup>th</sup> ed, 1998) 744.

<sup>266</sup> David Scheffer, 'The Global Challenge of Establishing Accountability for Crimes *against* Humanity' (Remarks delivered at the Centre for Human Rights, University of Pretoria, Pretoria, 22 August 2000).

The threshold obstacle to characterising the violence in East Timor as genocide is that the targets of the violence probably do not constitute a recognised group under the *Genocide Convention*. The major exception is the killings of the ethnic Chinese in 1975–76. Nevertheless if group political consciousness — targeted for destruction — was an inherent part of national identity in East Timor, then it is also possible that the East Timorese targeted for destruction were impliedly part of a group protected under the *Genocide Convention*. Assuming that the definition of group was satisfied, it is unlikely that there was a genocidal intention to destroy the group as such. There is, however, a counter interpretation which distinguishes intention from motivation and, in so doing, opens up the possibility that the intention element was satisfied by the nature of atrocities committed in East Timor. Assuming an intention to destroy existed, it would, however, be arguable that the repressive Indonesian occupation caused serious mental harm to members of the group, while the depopulation strategy deliberately inflicted on the group 'conditions of life calculated to bring about its physical destruction in whole or in part'. The conflict in East Timor most accurately qualifies as genocide against a 'political group', or alternatively as 'cultural genocide', yet neither of these concepts are explicitly recognised in international law.

As a consequence, redress for the violence in East Timor will inevitably take the form of prosecutions for non-genocidal breaches of crimes against humanity, war crimes, and other gross violations of human rights. Without a robust domestic process inside Indonesia for addressing the crimes committed in East Timor, Indonesian justice will remain as opaque as the shadowy figures of the Javanese puppet play — with serious implications for democracy in Indonesia itself. The standard of justice required has been elaborated by the International Commission of Inquiry on East Timor:

Future action with regard to the violations of human rights in East Timor should be governed by the following human rights principles: the individual's right to have an effective remedy for violations of human rights, which includes the State's responsibility to investigate violations, prosecute criminally and punish those responsible; the individual's right to reparation and compensation for violations of human rights from the State responsible for the violations; the need to act against impunity in order to discourage future violations of basic human rights.<sup>267</sup>

Where this is not forthcoming, the only recourse is the establishment of an international criminal tribunal, a proposal on which the international community has dragged its heels. A novel proposition would be to give such a tribunal jurisdiction over political or cultural genocide, although prosecuting alleged perpetrators from the conflict in East Timor in such a legal experiment would raise serious civil liberties concerns in relation to the general limitation on retrospective punishment.

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<sup>267</sup> United Nations Office of the High Commissioner for Human Rights, above n 43, [148].

It has been written that it is no longer possible to write poetry after Auschwitz.<sup>268</sup> It *must* nonetheless remain possible to understand acts of overwhelming violence in the limited terms of legal language — to describe and hopefully to deter genocide in a single word which properly intimates its horror. The means to achieve this is to reform the definition of genocide to prohibit all kinds of intentional group destruction — whether biological, physical or cultural — and then to guard this reformed definition from misapplication or misdescription, and hence from degradation of its moral force. As former UN Secretary-General Dag Hammarsköld wrote: ‘In the last analysis, it is our conception of death which decides our answers to all the questions that life puts to us’.<sup>269</sup>

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<sup>268</sup> Theodor Adorno, *Prisms* (Samuel and Shierry Weber trans, 1967) 34.

<sup>269</sup> Dag Hammarsköld, *Diaries* (1951).