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A LEGAL ANALYSIS OF THE ALLEGATIONS OF CRIMES AGAINST HUMANITY IN EAST TIMOR IN 1999

Chrisbiantoro[1], Hudi Yusuf[2], Utami Yustihasana Untoro[3]
[1,2,3] Universitas Bung Karno, Jakarta, Indonesia
Email: chrisbiantoro@ubk.ac.id, hoedydjoesoef@gmail.com, utamiuntoro@ubk.ac.id

ABSTRACT

Allegations of serious human rights violations that occurred in Timor Leste after the 1999 Referendum became one of the black notes in Indonesia's history. At the time, Indonesia was facing serious accusations in the form of alleged Crimes Against Humanity, and an Ad Hoc Human Rights Court was established at the Central Jakarta District Court to prosecute the defendants in this case, but unfortunately the results of the trial were still far from the victims' expectations. Thus, it is important to conduct a more in-depth study of law and human rights from an academic perspective to get a complete picture of the legal construction of alleged crimes against humanity in Timor Leste. Moreover, serious human rights violations certainly require an in-depth legal analysis framework, not only the national legal framework but also the international legal framework and also precedents from previous international human rights crime tribunals. This is important, thus there are more references and analyzes that can provide an overview of human rights events that have occurred in Timor Leste, especially after the implementation of the 1999 Referendum.

KEYWORDS *Legal Analysis, Crimes Against Humanity, East Timor*

INTRODUCTION

After East Timor independence, the perpetrators of the alleged crimes against humanity, from the Indonesian military, police and former civilian administrators as well as member of the militia groups in the island, who were allegedly involved in the commission of crimes in East Timor during its fight for independence are not being held to account and impunity continues. Even though the United Nations (UN) Commission of Expert already issued a report recommending the re-examination of the cases, the Indonesian government is reluctant to cooperate with the process. The Ad Hoc Human Rights Court for East Timor failed to address the

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grievances of victims and decided that the crimes committed are not crimes against humanity.

This paper examines the allegations of crimes against humanity in East Timor in 1999. To support the examination, this paper has three main concerns. First, whether or not the crimes that occurred during a referendum in East Timor in 1999 constitutes crimes against humanity and whether or not the Indonesian government and East Timor have a duty to prosecute under international human rights law and international humanitarian law. Second, whether or not the crimes were committed pursuant to a state policy. Third, whether or not crimes againts humanity could be applied only to state actors or if it could also extend to non-state actors such as militia or paramilitary groups in the context of East Timor and Indonesia

This paper argues that the crimes which took place in East Timor during the referendum in the year 1999 constitutes crimes against humanity. In order to support this argument, this paper develops a supporting argument that the crimes in East Timor in 1999 meet criteria of widespread or systematic. There is a strong nexus between the Indonesia Military Forces (TNI), the Indonesian Police (Polri) and the militia groups of pro autonomy (called pro-Indonesia). Moreover, the nature of the crimes also meet the criteria of attack against the civilian population, with the intention and knowledge of such an attack, as listed under the elements of a crimes against humanity under international humanitarian law.

RESEARCH METHOD

This article is the result of normative legal research by examining a legal rule, principles and doctrines related to the problem in this research to produce an argument. Data collection was carried out using the study method librarianship by collecting legal materials and information in the form of materials primary, secondary and tertiary law. In order to get a clear explanation, the data is then arranged systematically and analyzed using descriptive methods.

Research Techniques: 1) Conduct data analysis, research through several bibliography, laws, several applicable laws and regulations and several opinions from lecturers and other experts; And 2) Document study, namely collecting research data not only focused on research subjects.

RESULT AND DISCUSSION

A Summary of the Facts

The allegation of crimes against humanity that occurred in East Timor in the year 1999 can be classified into three periods: first, before *the United Nations Mission in* East Timor (UNAMET) between January and May 1999. Second is the UNAMET period between June and August 1999. Third is post-ballot period between August 30 and October 1999.

Between the above periods, fifteen major human rights violations were committed in the country:

- Liquica Church Massacre (April 6, 1999);
- Cailaco Killings (April 12, 1999);
- Carrascalao House Massacre (April 17, 1999);

- The Killing of two students at Hera (May 20, 1999);
- Arbitrary Detention and Rape in Lolotoe (May-June 1999);
- Attack on Humanitarian Convoy (July 4, 1999);
- Murder of UNAMET Staff Members at Boboe Leten (August 30);
- Forcible Relocation and Murder of Refugees in Dili (September 5-6, 1999);
- Suai Church Massacre (September 6, 1999);
- Maliana Police Station Massacre (September 8. 1999);
- The Passabe and Maquelab Massacres (September-October, 1999);
- Rape and Murder of Anna Lemos (September 13, 1999);
- the Battalion 754 Rampage (September 20-21, 1999);
- Murder of Los Palos Clergy (September 25, 1999).

In general, these cases have some similarities: first, the perpetrators were the militia and they were supported by the Indonesian Military Forces. Second, the majority of victims were civilian population who supported independence option in the referendum. Third, The Indonesian Military, Police and local government were present and involved while the militias were attacking the civilian population in most of the districts in East Timor.

For instance, the massacre that took place in the *Suai* Church. The case occurred on September 6, 1999. The perpetrators of this massacre were the local militia groups namely *Laksaur Merah Putih*, *Mahidi* and the Indonesian Military and Police officers. The Church is located in the Covalima district of East Timor. This district was under control of the Military District Command (Kodim) of Covalima, the regency (civil administration) of Covalima and the District Police Office of Covalima. The militia groups entered the church and followed by the Military and Police. Subsequently, they "hacked, stabbed, and shot many people in their path"(…...) 200 people were killed in the massacre….The dead were among some 1.500 – 2000 people who had taken refuge at the old church …".

In response to the various human rights violations committed in East Timor, the international community and the United Nations pressured the Indonesian government to prosecute the offenders. In 1999, the government established an Ad Hoc Human Rights Court for East Timor . Between the year 2000 and 2002, the Ad Hoc Court tried twelve people, However, the Court only convicted lower ranking members of the Indonesian miliary, the former governor of East Timor and a leader of the militia group. However, the Indonesian Supreme Court reversed the ruling of the Ad Hoc Court. Due to the lack of capacity and lack of international monitoring, the judicial exercise was futile because in the end, all of the accused were acquitted and released. The Court did not consider any remedy for the victims.

Due to the failure of the Ad Hoc human rights court for East Timor and the Indonesian government to provide an effective remedy for victims, the United Nations (UN) Security Council issued a resolution number to examine the judicial process in East Timor regarding the trial of the alleged violators of crimes against humanity. The Secretary General formed a Commission of Expert to review the judicial work of the Ad Hoc East Timor Court.

Additionally, two extra – judicial bodies have been established to deal with the past human rights abuses. The first is the Timor-Leste Commission for Reception, Truth and Reconciliation (CAVR - the Portuguese acronym). It was established in 2001 and started to work in 2002 to December 2005. The Indonesian government is unwilling to accept the recommendation of the Commission and until now the Indonesian government has given neither remedy nor apology.

The second non-judicial process was establishment of the Commission of Truth and Friendship (CTF) by the Indonesian and East Timor governments. The CTF worked from 2005 to 2008, but it restricted itself by avoiding examination of the crimes which occurred in 1999. The CTF was established to know "the conclusive truth in regard to the events prior to and immediately after the popular consultation in 1999, with a view to further promoting reconciliation and friendship, and ensuring the non-recurrence of similar events."

Due to lack of the cooperation from the Indonesian government, the most responsible perpetrators behind the allegation of crimes against humanity in East Timor are still untouchable, for instance the former Indonesian military commanders, General Wiranto as a former of the Minister of Defence and Security between 1998 and 1999, and Lieutenant General Prabowo Subianto was Commander of Kostrad (Army Strategic Reserve Command). Both retired generals had effective control over the military and police officers in East Timor when the alleged crimes were perpetrated. Both of them are running for the next presidential elections in Indonesia on 2014.

Legal Framework of Crimes Against Humanity: IMT, ICTY, ICTR and ICC

Definition of Crimes Against Humanity under the Nuremberg Military Tribunal (IMT)

Before the Nuremberg Tribunal, the definition of crimes against humanity evolved in the history and conflicts as can be seen from the joint declaration of the French, British, and Russian governments, on May 24, 1915 during World War I in the case of Armenian population under the Ottoman Empire.

In Second World War, on October 6, 1945 the four countries, namely the USA, United Kingdom, the Soviet Union and France, signed the London Agreement (also called the London Charter) to prosecute former Nazi. Article 6 (C) of the London Charter defined crimes against humanity as:

> Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhuman acts committed against any 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.

The Nuremberg Tribunal became the first international tribunal, which tried crimes against humanity in relation with war crimes and crimes against peace. In the International Military Tribunal at Nuremberg, 22 high – ranking Nazi officials were convicted of war crimes, crimes against peace and crimes against humanity. The Nuremberg Charter did not incorporate the acts before 1939 because of the

requirement that crimes against humanity should be with war crimes or crimes against peace.

In 1948, the United Nations General Assembly (UNGA) established the International Law Commission (ILC), then, the UNGA decided, "To entrust the formulation of the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal to the ILC."

Definition of Crimes Against Humanity under the ICTY Statute and ICTR Statute

Article 6 (c) of the Nuremberg Charter influenced the statute in the creation of the International Criminal Tribunal for Yugoslavia (ICTY) Statute, in defining crimes against humanity. The influence can be seen from the definition of crimes against humanity in the Statute of ICTY, particularly in article 5;

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or international in character, and directed against any civilian population:

a) murder;
b) extermination;
c) enslavement;
d) deportation;
e) imprisonment;
f) torture;
g) rape;
h) persecution on political, racial and religious grounds;
i) other inhuman acts.

Article 5 of the ICTY Statute stresses that crimes against humanity can be committed in armed conflict. In this regard, the armed conflict can be internal or international armed conflict.

Moreover, unlike the ICTR, the ICTY under article 5 of the Statute does not require that the acts be committed in a widespread or systematic manner. Nonetheless, in *Tadic* case, the Trial Chamber stressed that widespread or systematic part of essential element of crimes against humanity. The Trial Chamber stated, "It is now well established that the requirement that the acts be directed against a civilian population can be fulfilled if the acts occur on either a widespread basis or in a systematic manner. Either one of these is sufficient to exclude isolated or random acts."

Moreover, the Statute of the International Criminal Tribunal for Rwanda (ICTR) in Article 3 states:

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

a) murder;
b) extermination;

c) enslavement;
d) deportation;
e) imprisonment;
f) torture;
g) rape;
h) persecutions on political, racial and religious grounds;
i) Other inhuman acts.

The ICTR Statute is clear that crimes against humanity can only be committed if it there are widespread or systematic attacks against any civilian population of any of the crimes mentioned in Article 3. Relation between attack and civilian group is one of the main requirement to develop allegation of crimes against humanity under the ICTR Statute.

In the case of Jean Kambanda, the former prime minister of the interim government of the Republic of Rwanda who was indicted by the ICTR and adjudged guilty of committing crimes against humanity of murder under article 3 (a) of the ICTR Statute and extermination under the article 3 (b) of the same statute. Additionally, he was also found guilty of genocide.

Another case is Jean – Paul Akayesu, former bourgmestre of Taba Commune in Gitarama Rwanda. Akayesu was found guilty of attacking civilians and he was indicted by the ICTR for crimes against humanity and genocide.

In order to make crime against humanity more clear, the trial chamber of the Akayesu Judgment, on September 2, 1998, established two essential element for crimes against humanity; " (i) the act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health. (ii) the act must be committed as part of widespread or systematic attack."

Definition of Crimes Against Humanity in the ICC

The establishment of the International Criminal Court (ICC) is strengthening the existence of a duty to prosecute crimes against humanity. In this regard, ICC provide two alternatives to prosecute crimes against humanity, firstly, ICC can prosecute the crimes through complementary principle. The Court can take over a case in a particular country that are unable or unwilling to prosecute. Secondly is the preamble of the ICC Statute clearly the duty to prosecute.

Article 7(1) of the Rome Statute of the International Criminal Court (ICC) specifically governs the definition of crimes against humanity.

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.

In relation with the definition of crimes against humanity under article 7, Mohamed Elewa Badar stated, "[..] the definition of this offense under the ICC statute reflects the development of customary international law requiring neither a nexus between crimes against humanity and armed conflict nor a requirement of a discriminatory intend."

State or Organizational Policy and Non-State Actors

Define a Policy in the Crimes Against Humanity

One of the significant factors that distinguish crimes against humanity from ordinary crimes is the element of state involvement with the crimes. Professor Suzannah Linton states, "If the East Timor prosecution for crimes against humanity are to succeed, it must be shown that attack on the civilian population were either part of Indonesian governmental policy, sponsored by it or at least tolerated by it." From Professor Linton point of view, it is clear that the attacks against civilians in relation with crimes against humanity are not spontaneous. Attacks must be supported by a plan or policy. However, how do we define the plan or policy? Is it part of the important element of crimes against humanity? In order to answer these questions, we consider Professor Bassiouni's point of view. He states, "the policy in the crimes against humanity implies unlawful policy [where] a state or government does not perform in the good faith in interpreting law and abuse its autority." This is a stand point that we can use to define policy in the alleged of crimes against humanity, the policy must be demonstrated in the negative meaning, namely unlawful policy or abuse of power.

The issue on plan or policy in the commission of crimes againts humanity can be traced back to the Nuremberg trials. Under article 6 (c) of the Nuremberg Charter does not specifically stipulate "policy" as a requirement to prosecute crimes against humanity. However, the Nuremberg judges stressed that the "policy of terror" and policy of persecution, repression, and murder of civilians."

Contemporary international criminal tribunals like the ICTY decided on a more flexible definition of plan and policy in the context of crimes against humanity. The Appeals Chamber in *Kunarac* clearly stated that "Neither the attack

nor the acts of the accussed needs to be supported by any form of "policy" or "plan". In the sense that the main element is that the intention of the attack was directed to goup of civilians and it was "widespread or systematic." From this pronoucement, it can be concluded that if the attack is systematic, there is no need to porve that there was a policy or plan behind it. Basiouni stresses that "policy or plan is not legal element of crime."

Regarding the alleged crimes against humanity committed in East Timor, the plan of the Indonesian Military Forces to influence the result of the referendum in supporting the option of pro-autonomy (pro-Indonesia) can be seen from the failure of the military to safeguard the ballot and the safety of the Timorese people.

The UN High Commissioner in its report expresses that before implementation of the referendum, the Military and Police failed to maintain peace and security in East Timor. The High Commissioner's report affirms that:

> "First, TNI soldiers and officers were integrally involve recruiting the militias in late 1998 and early 1999, and some actually served as militia members and leaders.
> Second, militia groups received training and guidance from TNI officers. That training was not carried out on the sly, or by a handful or rogue elements. On the contrary, it was a routine affair, done in accordance with well-established rules and procedure originating at TNI headquarters in Jakarta.
> Third, the TNI routinely conducted joint operations with militia groups, and provided backing and support for operations ostensibly conducted by the militias. High-ranking TNI officers knew that those operations were resulting in serious acts of violence. They also understood that such operational cooperation was in breach of the May 5 Agreement.
> Fourth, the TNI provided sophisticated modern weapons directly to some militiamen, and allowed other keep and use their weapons, contrary to the law. High – ranking officers knew that those weapons were being used to commit grave violations of human rights, but failed to take action against the perpetrators, or to end their access to weapons."

In other words, the military was pro-active in preparing and supporting the militia groups. The military had an intention to commit crimes by conducting joint operations with the militia.

Yet, in relation with the plan or policy, it is important to reflect whether or not the court has to prove wether or not there is a governmental policy or plan behind the attacks. How do we prove the policy is behind the attack? What will happen if the policy or plan is not clear but the attacks were widespread or systematic?

In the *Blaskic* case, the court proves that the plan or policy behind the attack only in the systematic crimes relly upon a policy. A lesson from this case is that the policy is not the main element to develop allegation of crimes against humanity. However, the *Kunarac* case is more helpful to define the relation between attack and policy, the Appeal Chamber emphasized, "the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime."

The Rome Statute, of the International Criminal Court (ICC) made it clear by defining state or organizational policy to end the confusion, under article 7 (2) (a) : "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."

In the case of Kenya, the Pre – Trial Chamber 1 in confirming the charges against Germani Katanga and Mathieu Ngudjolo Cui clarified what are the requirements of organizational policy. The Pre – Trial Chamber stressed:

> "In the context of a widespread attack, the requirement of an organisational policy pursuant to article 7 (2) of statute ensure that the attack, even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organised and follow a regular pattern. It must also be conducted in furtherance of a common policy involving public or private resources…..The policy need not be explicitly defined by the organisational group. Indeed, an attack which is planned, directed or organised – as oppossed to spontaneous or isolated acts of violence – will satisfy this criterion."

With respect to the definition of policy under the ICC Statute, Professor Antonio Cassese argued, "[…] practice simply tolerated or condoned by a state or an organization would not constitute an attack on the civilian population or widespread or systematic practice."

Non-State Actors Acting on Behalf of State

After World War II, non-state actors have been involved and "demonstrated" that they are able to commit serios crimes. Even though most of the non-state actors were only involved in the limited conflict, for instance the conflict at the national level, the acts of the non-state actors caused serious harm to the other civilian groups. Professor Willian A Schabas stresses, "[..] crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." Likewise, Professor Bassiouni states that to some extent State policy can be applied to non-state actors in the specific circumtance, namely "ommission to prevent." Both arguments affirm that crimes against humanity also can be conducted by non-state actors. The court can apply element of the crimes against humanity to prove their involvement.

The existence of non-state actors in the crimes against humanity is indicator that "…the progressive evolution of customary international law it is no longer required that the policy is the policy of a state." In *Kuperskic* case, in which the Trial Chamber stated:

> "While crimes against humanity are normally perpetrated by Stated organ, i.e., individual acting an official capacity such as military commanders, serviceman, etc., there may be cases where the authors of such crimes are individuals having neither official status or acting on behalf of a governmental authority. The available case-law seems to indicate that in these cases some sort of explicit or implicit approval or endorsement by State or governmental authorities are required, or else that is necessary for

the offence to be clearly encouraged by a general governmental policy or to clearly fit within such a policy."

With respect to the perpetrators of crimes against humanity, The Trial Chamber added that "having neither official status not acting on behalf of a governmental authority." Professor Schabas also emphasizes that perpetrators of crimes against humanity should not be limited only to state actors. He states, "It is now beyond any doubt that war crimes and crimes against humanity are punishable as crimes of international law when committed in non-international armed conflict. Non-State actors, who may be members of guerrilla movements, armed bands, and even provisional governments, are subject to prosecution on this basis." In this sense, the members of the militia who committed atrocities in East Timor can be prosecuted for crimes against humanity.

Crimes Against Humanity in East Timor

The Element of Widespread or Systematic

One of the important elements to develop legal argumentation about crimes against humanity is the element of widespread or systematic. As mentioned in the section three of this paper, the International Tribunal for Rwanda (ICTR) Statute article 3 requires that the acts committed are done in a "widespread or systematic" manner."

Widespread or systematic can be defined as follows: "widespread refers to the number of victims, whereas systematic refers to the existence of a policy or plan." In this sense in order to develop legal argumentation of crimes against humanity, it does not necessary mean that we should have two requirements namely systematic or widespread. The word "or" means you do not have to demonstrate both elements.

The nature of attack in the crimes against humanity is different with ordinary crimes, because crimes against humanity have a requirement that the attack must be committed in the context of a widespread or systematic attack against civilians groups or populations. A lesson from the *Kunarac* Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY), defines attack a commission of acts of violence. As previously mentioned, that element of widespread related to the number of victims. "The attack may be widespread due to the cumulative effect of a series of acts, or due to the effect of a single act of extra ordinary magnitude." In the context of East Timor, widespread can be seen from the number of victims and the geographic reach of the crimes which took place in thirteen districts. Likewise, widespread element can be argued due to the long period of the commission of the crimes, namely between April and September 1999.

In the context of East Timor, the CAVR, the Timor-Leste Commission for Reception, Truth and Reconciliation (CAVR - the Portuguese acronym), issued the number of people who have been victims in 1999. Additionlly, the CAVR also incorporated data from several NGOs, namely Amnesty International and Fokupers. In total, the CAVR states that, firstly, "based on statement count, number of victims are 8469. Secondly, based on individual count, the number of victims are 44247 people. Thirdly, based on fatal violation, the number of victims are 7276 people. Fourthly, based on non fatal violation, the number of victims are 36209."

Systematic refers to the organized crimes. Professor Bassiouni notes, "Widespread or systematic as included in the ICTR Statute emphasizes the policy element. (…) the word systematic reflects more of an existent policy whose proof is more likely to be of a more specific nature than that of widespread attacks (…)."A legacy of the ICTY, especially in the *Kunarac* Trial Chamber expressed that "the attack was systematic, but did not determine whether it was also widespread." Thus, it is clear that either widespread or systematic is enough to prove an allegation of crimes against humanity.

In the report of the International Law Commission in 1996, one of the main requirements to develop phrase systematic is a policy.

"The first alternative requires that inhumane acts be committed in a systematic manner meaning pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of human acts..the Nuremberg Tribunal emphasized that the inhumane acts were committed as part of the policy of terror and were in many cases….organized (and) systematic in considering whether such acts constituted crimes against humanity.'

Policy is evidence that we can use to prove whether an allegation of crimes against humanity has a systematic nature. Nonetheless, the relation between systematic and a policy can be questionable whether we have to prove that systematic crimes have to have policy or plan behind the allegation of crimes against humanity.

Guenael Mettraux stressed; "A systematic attack frequently has the potential, purpose, or reflect of reaching many people." From this point of view, it is clear that purpose or intention is very important to develop the argumentation of systematic.

With regard to the policy or plan of the allegation of crimes against humanity in East Timor, the UN High Commissioner on Human Rights in its report clearly stated "There is no doubt that the Indonesian authorities sought to influence the outcome of the popular consultation in favor of special autonomy." The way of the Indonesian government to influence the result of the referendum can be categorized as a plan or policy. Furthermore, the Indonesian Military forces, police and civil administrators of the island implemented the plan by aiding and abetting militia groups to commit sweeping operations against the civilians. During the sweeping operations, the militia groups committed crimes that allegedly constitute crimes against humanity. The militia killed, raped, tortured and forcibly evicted civilians and other unlawful acts. The Indonesian Security Forces were also directly involved in the carnage by backing and supporting the militia, and providing weapons to them.

We recall from section three of this paper that the Nuremberg Tribunal, the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Court for Rwanda (ICTR) define crimes against humanity in several ways, and that it can be committed through murder, extermination, torture, rape, forcible eviction and other inhuman acts. All of these crimes should be committed in a widespread or systematic manner to constitute crimes against humanity.

Murder and extermination. In the implementation of the referendum, one of the most serious crimes allegedly committed by the Militia and Indonesian Security

Forces is extrajudicial killing or murder. The UN Office of the High Commissioner for Human Rights (OHCHR) notes that "at least 1200 and perhap as many as 1,500" people were killed during the referendum.

*Deportation and forcible transfer***.** Before the referendum, 60000 people left their houses and after the the referendum 400,000 people became refugees. The main cause of displacement before the referendum was the action of militia against the civilian. The militia intimidated and committed terror in order to influence the result of the referendum. In addition, around 25,000 East Timorese crossed the border to Indonesia and to other islands to escape from the militia.

Torture and ill treatment. These crimes have been the horrible method of the Indonesian security forces to influence the result of referendum. Even such practices have existed before and they had been used to quash the opposition groups and other resistence groups in East Timor. As mentioned by the joint report of the UN Special Rapporteurs, in 1999 "torture in East Timor commonly occurred as preclude to murder or attempted to murder. ….As in the past, torture and ill-treatment in 1999 were also part of a strategy aimed at intimidating and terrorizing the population. …in the post – ballot period, it was used to force or convince the population to flee."

The CAVR notes that most of the target were from CNRT (National Council of East Timorese Resistance) and pro independent activists, student groups and clandestine networks and *Falintil* (Armed Forces of National Liberation of East Timor). Moreover, East Timorese people outside of these groups but against implementation of special autonomy were also targets of torture and ill treatment. The Commission stresses that police offices and military offices are commonplace for detention and practice of torture in 1999 as in previous years. For instance Torture occurred in Koramil (Military Subdistrict Command), Polsek (sector Police) and other military offices in East Timor.

Rape. It can be divided into two namely before and after ballot. Before the Ballot, which was between April and August 1999, gang rape occurred in most of the districts. Women of various ages had been the targets of rape and especially those who did not protected by their husbands or their fathers. Fokupers, a local human rights organization, documented that "18 cases of gender-specific violation committed in 1999 [..] included 46 cases of rape," particularly, after masacre at Liquica church on 6 April 1999 many women had been targets of rape.

One of the case examples is the rape of Ms. Ana Lemos that occurred on September 13, 1999. She was pro independence activist. "She was beaten, raped, and killed by the militia and the Indonesia Military Forces in early September 1999." The CAVR reported that rape, sexual slavery and sexual violence were tools used as part of the campaign designed to inflict a deep experience of terror, powerlessness and hopelessness upon pro-independence supporters.

The perpetrators who raped East Timorese women were not only from the Indonesian security forces but also from Falintil. The CAVR notes that the rapes which were conducted by the Indonesian security forces are more numerous than Falintil. In this circumtances, the Commission also notes four types of gender-based violence, namely "…stripping detainees naked during interrogation; burning and

electrocuting breasts and genitalia; forcing detainees to perform sexual acts on each other; and photographing detainees in humiliating poses, including while naked."

Attack Directed Against any Civilian Population

The Definition of Population

Attack against civilian population" means that the attack or acts were directly addressed to the civilian populations. One of the examples that can be used to define civilian population is the *Tadic* case. The Trial Chamber of *Tadic* case interpreted the definition of civilian population:

"The requirement in Article 5 of the Statute that the prohibited acts must be directed against a civilian population does not mean that the entire population of a given State or territory must be victimized by these acts in order for the acts to constitute crimes against humanity. Instead, population element is intended to imply crimes of a collective nature and thus excluded single or isolated acts which, although possibly constituting war crimes or crimes against national penal legislation, do not rise to the level of crimes against humanity."

Based on *Tadic*, the criterion of civilian population does not mean the entire population of the country.

In the context of East Timor, the majority of victims were supporters or sympathizers of independence and they lived in the same village and district with the pro-Indonesia supporters. The attack was only targeted to the pro-independence. "The total number of pro – autonomy supporters killed in 1999 was not more than 20 out of a total death toll of at least 1200." Indeed, the circumstance of the civilian population meets with the criteria in the *Tadic* case.

Moreover, in *Kunarac*, the Chamber stressed: "…It is sufficient to show that enough individuals were targeted in the course of the attack, or the that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian population, rather than against a limited and randomly selected number of individuals."

The Definition of Attack

Crimes against humanity have a specific nature and its nature is different with ordinary crimes. Crimes against humanity must be conducted in a manner of widespread or systematic attack against civilian population. The perpetrators cannot legitimize their attack to civilians; thus, the civilians cannot be attacked or subjected as a target. An attack is an independent violation under the laws of war, an attack pursuant to the definition of crimes against humanity is merely the vehicle for the offense of crimes against humanity. In other words the attack is not in itself a crime against humanity.

The attack against civilian should have an intention to kill or destroy the civilian population, thus the victims constitutes direct object of the attack. Victims in this regard do not imply "incidental victims" but should be the object of the direct attack. In the framework of crimes against humanity, the victims "must be civilian group and specifically targeted (…)."

The definition of attack pursuant to crimes against humanity is different with the law of war because crimes against humanity also can be conducted in time of

peace. In order to prosecute crimes against humanity, is not necessary to link it with a situation of war. For example the *Kunarac* case demonstrated that attacks not only during war or hostilities, but attack innocent civilian in time of peace is in accordance with the definition of attack in the crimes against humanity.

The Definition of Mens rea

Article 7 of the ICC Statute clearly provides definition of *mens rea*, "that criminal acts must be perpetrated in the knowledge." Mens rea can be seen from the presence and direct involvement of the Military and Police officers in most of the attack against civilian population is a strong proof that the Indonesian government has knowledge over the attack against civilian. To develop the argument of knowledge element in East Timor, we can refer to the *Blaskic* case. The Chamber noted that he took the risk of participating in the implementation of that attack." However, knowledge does not mean that perpetrators must know the entirety of the attack. Indeed, the presence of the Indonesian Military Forces and Police meet to the criteria of knowledge (*mens rea*) as they were not only knowledgeable and aware of what was happening in the island, they were complicit and also actively participating in the slaughter.

Are the crimes in East Timor constitute crimes against humanity?

In the fifteen major of human rights cases mentioned in the introduction of this paper, two will be elaborated in this section to further analyze the element of the crimes. These examples are important to answer the question whether or not the crimes that took place in East Timor between April 1999 and September 1999 constitute crimes against humanity.

Liquica Church Massacre, April 6, 1999. The Indonesian Military Forces and the militia groups conducted joint sweeping operation to influence the referendum. Approximately 2000 refugees and most of them women and children came to the Church and houses of local priest around the Church. Subsequently, the militia group, *Besi Merah Putih* (BMP) fired on the Church and houses. Ironically, the Military were present behind the militias. The Military did not do anything to stop or prevent the attack. According to Pastor Rafael who experienced the attack, "The shots were all directed towards the church, and those firing were not only police but also soldiers." This case demonstrates that the members of the Indonesian security forces were not only complicit in the commission of the crimes against the East Timorese, they were active participants in it. This pattern is the same as in the commission of the crimes in the country during the bloody fight of the Timorese people for their independence.

The major human rights cases that occurred between April 1999 and September 1999 obviously constitute crimes against humanity. The entire description of this paper discusses several elements of the crimes against humanity and these cases met the requirements or element to develop strong allegation of crimes against humanity.

Attack against civilians. The military and militias attacked civilian population, who were pro-independence supporters, to influence the result of the

referendum as evidenced by the various massacres and rapes and pillage they committed as mentioned in this paper.

Widespread or systematic. The fifteen cases took place in thirteen districts of East Timor. The attack against civilian was not only concentrated in one or two places but widely in the East Timor territory. Aside from the geographic reach of the commission of the crimes, the number of victims should also be considered. "Based on statement count, number of victims are 8,469. Based on individual count, the number of victims are 44,247 people. Based on fatal violation, the number of victims are 7,276 people. Fourthly, based on non fatal violation, the number of victims are 36,209."

Duty to Prosecute

As a member of the United Nations (UN) the governments of Indonesian and East Timor have an obligation under article 55 and 56 of the UN Charter to promote universal respect for human rights, fundamental freedom regardless of various backgrounds of people. Indonesia and East Timor are state parties to certain international human rights treaties. Indonesia ratified six important international human rights instruments, in which as a state party Indonesia has the obligation to protect and fulfill human rights, wherein one of its obligations is to address human rights violations that took place in East Timor 1999. East Timor has ratified seven international human rights instruments and two protocols. As state party to various human rights treaties, East Timor should advance the rights of it peoples to truth and justice by seeking a just solution to its erstwhile master, Indonesia.

CONCLUSION

The crimes that occurred in East Timor between April 1999 and September 1999 constitute crimes against humanity. The crimes in the year 1999 have some important elements: there were attack against civilian population and the attack was part of widespread or systematic crimes. Moreover, there were also strong allegation that the Indonesia Military Forces, the Indonesian Police and the local civilian government supporting the militia groups by recruiting, aiding and abetting are liable for the crimes. Indonesia has the duty to prosecute those who were liable for the crimes committed in East Timor. It should not shield people form the reach of justice and that East Timor should not be co-opted to a process of forgetting and denying its own people who sacrificed their lives to attain the freedom that they are now enjoying.

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