

Doe v. Lumintang

Decided Sep 13, 2001

Civil Action No. 00-674 (GK)(AK).

September 13, 2001

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ALAN KAY, UNITED STATES MAGISTRATE
JUDGE

This is an action for, *inter alia*, torture, wrongful death, summary execution, assault, battery and intentional infliction of emotional distress brought by citizens of East Timor Jane Doe and John Does I-V, on their own behalf and on behalf of their deceased relatives. Major General Johny Lumintang, an Indonesian military officer, is named as the defendant, in his position of Vice Chief of Staff of the Indonesian military, for designing, ordering, and directing a campaign of violence and intimidation against the people of East Timor which resulted in the wrongs suffered by the plaintiffs. Jurisdiction in this case is founded upon the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, the Torture Victim Protection Act ("TPVA"), Pub.L. No. 102-256, 106 Stat. 78 (1992), codified as 28 U.S.C. § 1350 note, and principles of supplemental jurisdiction, 28 U.S.C. § 1367.

This case is before the Court for trial on damages, pursuant to Fed.R.Civ.P. 55(b)(2). On November 8, 2000, United States District Judge Gladys Kessler entered a default judgment against Defendant Major General Johny Lumintang, who failed to file an Answer or otherwise appear.¹ On March 21, 2001 the case was referred to the

undersigned for all purposes, including trial. On March 27-29, 2001, the Court conducted a non-jury trial to establish the amount of damages. At trial, plaintiffs presented the testimony of eight witnesses: Richard Tanter, Professor of International Relations and Comparative Politics at Japan's Kyoto Seika University; John Doe III; Jane Doe; Theodore Folke, documentary filmmaker for the United Nations; John Doe II; Arnold Kohen, author on East Timor and consultant for the human rights organization The Humanitarian Project; Ian Thomas, cartographer and remote sensing specialist; and Estella Abosch, social worker and member, Advocates for Survival of Torture and Trauma. In addition, plaintiffs presented approximately 40 exhibits in support of their claims, including videotaped depositions of Sertorio Junior, a friend of John Doe I who worked with him for East Timor's independence, and John Doe IV. Because the defendant Major General Lumintang has presented no defense, the Court will accept the plaintiffs' uncontroverted evidence as true. *See, e.g., Elahi v. Islamic Republic of Iran*, 124 F. Supp.2d 97, 99 (D.D.C. 2000).

¹ Defendant was served on March 30, 2000 at Dulles Airport. *See* Return of Service [3].

Upon careful consideration of the evidence presented at trial and the entire record in this case, the Court finds that a judgment for damages shall be rendered in favor of plaintiffs as more fully set forth below.

FINDINGS OF FACT

I. BACKGROUND: HISTORY OF EAST TIMOR

1. Timor is a Pacific Ocean island which lies approximately 400 kilometers northwest of Darwin, Australia. In the 19th Century, European colonization of Southeast Asia resulted in the division of the Island of Timor into two parts. The western part was under Dutch control; the eastern part under Portuguese control. When the Republic of Indonesia was formed as a result of the war against the Dutch between 1945 and 1949, Dutch West Timor became part of the Republic of Indonesia. East Timor remained as a Portuguese colony at that time. That was the situation which prevailed up until December 1975.

2. Beginning in August, 1975, there were increasing numbers of border incursions into East Timor by Indonesian Armed Forces. On December 7, 1975, Indonesia invaded East Timor proper. Between 133,000 to 200,000 East Timorese disappeared during the period 1975 to 1979 as a result of Indonesian Army actions. Numerous U.N. Security Council resolutions condemned this action.

II. LIEUTENANT GENERAL JOHNY LUMINTANG

A. Actions before 1999

3. Between 1975 and 1979, Defendant Lumintang was a lieutenant or captain in the infantry. He took part in the Indonesian invasion of East Timor. Although he was assigned principally to East Timor, he took part in operations in Irian Jaya, which is the western part of the island of New Guinea. Irian Jaya was another area where the Indonesian Armed Forces brutally suppressed local resistance, including bombings of villages.

4. Defendant later held senior command positions in field operation posts. From 1993 to 1994, Lumintang was the Commander of Military Resort Command in East Timor, identified as "Koren 164". Subsequently Lumintang was promoted to the position of Commander of the First Infantry

Division of "Kostrad," the army strategic reserve command. In 1996, Lumintang became the Chief of Staff of Military Area Command 8, which included the province of Irian Jaya, the western part of New Guinea and also the Island of Moluccas to the north.

B. From January 1999 to August 30, 1999.

5. In 1998, after widespread discontent in Indonesia proper, President Suharto resigned and his vice president, Dr. Habibie, became the President of Indonesia. On January 28, 1999, President Habibie made an unexpected announcement that he was prepared to consider the possibility of a ballot in East Timor to allow the East Timorese people to decide between "autonomy" as a special part of Indonesia or independence.

6. On January 18, 1999, Lumintang became the Army Deputy Chief of Staff. As a Lieutenant General, Lumintang held the second highest rank in the Tentara Nasional Indonesia ("TNI"), the Indonesian armed forces. He was directly responsible to the Army Chief of Staff, who in turn was directly responsible to the Commander of the Armed Forces. *See* March 27, 2001 Trial Transcript at 42-48.

7. At trial, Professor Richard Tanter, an expert in the Indonesian military, explained that Lumintang's duties as the Army Deputy Chief of Staff were as follows:

(a) The Deputy Chief of Staff of the Army is the principal aide and adviser to the Army Chief of Staff, and has the duty and obligation to lead, organize and guide staff and leadership bodies, and Central Service and Executive bodies, as well as other duties as instructed by the Chief of Staff, and other responsibilities as follows:

(1) To make proposals and suggestions to the Chief of Staff on matters concerning his area of responsibility;

(2) To lead the Inspector General, General Staff, Special Staff, and Budget and Planning Staff, in formulating plans and programs of the execution of the Army's duties;

(3) To ensure coordination is effected and maintained between Army Headquarter Staff and Army field bodies and commands; between Army Headquarter staff and the Headquarter Staff of other parts of the Armed Forces and Police, and Army Headquarter staff and the staff of Armed Forces Headquarters and the staff of the Military Defense and Security.

(4) To coordinate, control and supervise the execution of Army decisions, plans, and programs, as well as personnel, material, and financial arrangements;

(5) To coordinate, supervise, and give direction to the staff Central Service and Executive bodies.

(b) Whenever the Deputy Chief of Staff is prevented from carrying out his duties he shall be replaced by an officer appointed by the Army Chief of Staff.

(c) The Deputy Army Chief of Staff is responsible in the execution of his duties as outlined above to the Army Chief of Staff. *See* March 27, 2001 Trial Transcript at 73-75.

8. The Indonesian Army's operations are formally carried out through three commands: (1) Military Area Command ("Kodam"), and within that, the Military Resort Command ("Koren"); (2) Special Forces ("Kopassus"); (3) Army Strategic Reserve Command ("Kostrad"), which is basically the fighting part of the army. As Army Deputy Chief of Staff, the defendant had direct responsibility for all three. *See Id.* at 44.

9. In East Timor, paramilitary auxiliary forces, commonly known as militias, were also under the command of the Indonesian Army. Although these militias were present throughout Indonesia's occupation of East Timor, in late 1998, many additional militias were formed. In August 1998,

they became effectively part of the Indonesian Armed Forces. The militia expansion, formation, and arming continued rapidly. In December 1998 and January 1999, new and more militias were formed, and they spread throughout the territory. The militias were instructed, supported, and guided by Indonesian Army officers. They also received arms directly from the Indonesian Military Area Resort Command.

10. Militia assaults on unarmed villages throughout East Timor began after Indonesian President Habibie's January 1999 announcement.

11. On February 16, 1999, as part of the military's coordination with the militias, a meeting took place in East Timor involving Lieutenant Colonel Sudrejat, who was head of the Combined Intelligence Task Force, part of the Special Forces Command, Kopassus, and all of the principal militia leaders. At the meeting, Sudrejat demanded that independence leaders and their families be "wiped out." Sudrejat operated within Kopassus. This command position was directly subject to the command of the Army Chief of Staff for planning, operations and for the implementation of operations. Lumintang, as Deputy Chief of Staff, was specifically responsible to supervise the implementation of Lieutenant Colonel Sudrejat's activities with Kopassus. *See* March 27, 2001 Trial Transcript, 75-76.

12. On the 26th of March, 1999, a group of senior Indonesian civil and military officials at the Military Headquarters in East Timor's capital city, Dili, met with militia leaders. At that meeting, the Governor of East Timor, Abilio Soares, directed the militias to prepare to liquidate all senior pro-independence people and their parents, sons, daughters, and grandchildren. If they sought shelter in the churches, they were to be killed along with the nuns and priests. *Id.* at 98.

13. One place Soares' order was implemented was in Liquica, a large town west of Dili. Fifteen young men from a militia group called Besi Merah Putih Redwhatta ("BMP"), together with

Indonesia troops from the Military Resort Command, local military police, and the elite military force (the Police Mobile Brigade), surrounded a church in Liquica where a number of people, with their priest, had gathered following the previous day's killing. The military killed fifty-four people in the church grounds in Liquica that day. Id. at 84. The foregoing was not an isolated incident; such killings had been happening repeatedly on a lesser scale and continued thereafter.

14. In his official capacity, Lumintang was responsible, with the Inspector General, for the scrutiny of the manner in which operations and strategic planning were carried out. Further, Lumintang held a position of responsibility to address and assist in military discipline. As the second ranking person in the Army, defendant played a prominent role in reviewing the manner in which military operations were carried out. That this is particularly true is evident from the structure of the Indonesian military and the clear and detailed obligations that were assigned to Lumintang in his position as Deputy Chief of Staff. However, Lumintang failed to impose any disciplinary measures upon any individual subordinate to him for the events at Liquica, or elsewhere, despite his ability to do so. Id. at 86-89.

15. On May 5, 1999, a formal international agreement was signed between the United Nations and the governments of Indonesia and East Timor ("the May 5th Agreement") to conduct a referendum known as the Popular Consultation of East Timor. As part of the May 5th Agreement, security in the Province of East Timor for the duration of the ballot and its preparation was assigned to the Indonesian Armed Forces.

16. Also on May 5, 1999, Lieutenant General Lumintang issued a telegram, instructing the responsible local commander in East Timor to anticipate situations which may arise from the vote and to "prepare a security plan with the aim of preventing the outbreak of civil war . . ."

Although this suggested possible civil war, there was no two-sided fighting. Instead, there were assaults by pro-integration forces, supported by the military, on anyone who spoke or was believed to be speaking for independence. The telegram also directed the military to prepare for "evacuation." Id. at 90-93.

17. Another example of Defendant's direct role in the events that transpired both immediately before and after the August 30, 1999 Popular Consultation occurred on June 30, 1999. On that date, a manual bearing Lumintang's signature was issued. This manual provided instructions for army secret warfare including instructions about education, training and examination of army personnel. Page 35 of the manual directed training in, *inter alia*, abduction, killing, kidnapping, terror, and agitation. Id. at 93-95. This manual was distributed to and used by soldiers in East Timor, including those at Koren 164, Lumintang's previous command.

18. On June 18th, 1999, another meeting took place in East Timor at army headquarters, Koren 164, in Dili. The attendees included Major General Anwar, then the official head of security for the Indonesian liaison contingent with the United Nations Administration Assistance for East Timor ("UNAMET"), and his deputy, Koren 164 Commander, Colonel Tono Suratman, and the militia leaders. Acknowledging the possibility that the East Timorese would vote for independence, at that meeting the ground work was created for the Indonesian military to respond to such an outcome. The plans were structured in two parts. The first portion involved attempts to disrupt the Popular Consultation, either in the days leading up to the vote or by interference with voting on the day of the vote. If these efforts were not successful and the East Timorese voted for independence, militia were to reject the results and to demand that East Timor be partitioned into a pro-Indonesian part and an independent part. This plan included forced relocation of the local East Timor

population and the re-population and transmigration into what would then be empty regions of East Timor. *Id.* at 99-100.

C. From August 30, 1999 on.

19. On August 30, 1999, the Popular Consultation was held. Ninety eight percent of those East Timorese who were eligible voted. Nearly 79 percent of the East Timorese voted in favor of independence and against autonomy.

20. Although the results of the vote were not announced until September 4, 1999, after the vote on August 30th, pro-Indonesian militias and TNI forces began a sustained and coordinated program of massive destruction which continued until the arrival of an international military peacekeeping forces ("INTERFET") on September 21 or 22, 1999.

21. Violence was directed against independence leaders, their families, and ordinary civilians. Many people were killed immediately. The destruction also took other forms: major buildings, homes, cars, and shops were blown up or burnt. Most schools were destroyed. *See* March 28, 2001 Trial Transcript at 66-69; Exhibit 26.

22. On September 6, 1999, intense fires began in East Timor. Given the size, location and temperature, none of these fires could have been caused by natural forces. Experts from the Australian Weather Service monitoring a European satellite called ERS1 tracked and identified these fires between September 6 and September 28, which occurred in groups and clusters which directly corresponded to the locations of towns, villages and settlements in East Timor. On September 9, 1999 large areas of Dili were afire. *See* March 29, 2001 Trial Transcript at 22-27.

23. East Timorese were also forced to gather, first at the local district or subdistrict military headquarters by militia where they were held either by militia in concert with TNI personnel or by armed soldiers. Once gathered, they then were

forced over the border into West Timor. Some of these people traveled by ship, many were transported in military headquarters' trucks and jeeps. Others went in stolen vehicles. Information released by the United Nations indicates that between September 4th and September 21st 1999, the date INTERFET arrived in Dili, some 240,000 people, or a third of the population was relocated from East Timor in less than 20 days. The forced evacuation of approximately one-third of the East Timor population was the result of long-term strategizing and planning that required the coordinated work of the Indonesian military and militia. This depopulation was consistent with the strategies discussed at the June 18, 1999 meeting involving Major General Syahnakri and Suki Anwar and with the general character of the telegram sent by Lumintang on May 5, 1999.

24. In February 2001, Defendant Lumintang became the Secretary of the Department of Defense of Indonesia.

III. JANE DOE I

25. Jane Doe I was born on March 24, 1944 in the village of Same, East Timor. She is 56 years old. She and her husband were married on August 30, 1980. They had nine children, the youngest of whom is identified in this case as John Doe I. John Doe I was shot by pro-Indonesian militia acting in concert with the TNI on October 11, 1999.

26. Jane Doe I testified under a pseudonym because she was afraid of possible reprisals if her real identity were known.

27. Jane Doe I's children attended school. John Doe I went through his junior year of high school, and Jane Doe I anticipated sending him to college.

28. Jane Doe I's children, especially John Doe I, participated in political demonstrations supporting independence for East Timor. While she was proud of their activism, she was constantly apprehensive about their safety. Her children always responded that they would be all right.

29. After the January 1999 announcement by President Habibie, an Indonesian civil servant went door to door to distribute pamphlets urging a vote for autonomy within Indonesia. This person said to Jane Doe I, "Now you are under our domain, so you have to vote for the autonomy. Otherwise, your life will be in danger."

30. Jane Doe I's family voted together on August 30th, 1999. After the vote they discussed possible precautions for their safety. Jane Doe I urged that they should be quiet and remain at home, telling her family that if something should happen, they could be together and that if they had to die, then at least they would die together at home. She argued with her son, John Doe I, who wanted to flee the family home. She did not want to give him money to go to his friends because she would not know if anything happened to him. However, finally she gave him a little money and he left. That was the last time she saw her youngest child alive.

31. After John Doe I left the house, Jane Doe I and her family were told by a neighbor who was an Indonesian soldier that they should leave. She did not because she was expecting John Doe I to return.

32. On September 6, 1999, Jane Doe I and her family were forced to leave their home by an Indonesian policeman who demanded the key to the house and said a car was waiting to take the family to West Timor. The only things they left with were the house documents and family photographs.

33. Jane Doe I and her family left Dili in their own car, forced to join other civilians being exiled in a caravan of cars and trucks commandeered by the Indonesian army. They arrived at a large camp in the West Timor border town of Noelbaki the next day. The Indonesian military and the militias were running the camp. She and her husband and their eight children and two grandchildren slept in the car that night. As they tried to sleep, they could hear gunfire in the rice fields surrounding the

camp. Fearful for their safety, they left at five o'clock the next morning. During their trip they were stopped by the Indonesian soldiers and police who told them they could go west but could not return to East Timor.

34. Jane Doe I and her family went to Kupang, the capital of West Timor, then boarded a ferry to another Indonesian city called Maumere, where they stayed. There was no work and they lived off money from her daughter in Australia.

35. Subsequently, the family decided to return to East Timor. They sold their car and received travel documents from the mayor of Maumere and returned to Dili after a five-day delay in Kupang.

36. When Jane Doe I returned to Dili, she found her home destroyed. She and her family built a temporary residence near her son-in-law's where the family resided.

37. Because of the panic and chaos that ensued in East Timor, Jane Doe I did not know of the whereabouts of John Doe I until October 11, 1999, when she received a call from her daughter telling her that John Doe I had been killed.

IV. JOHN DOE I

38. John Doe I had finished his junior year in high school at the time of his death. Although he and other activists initially fled to the hills immediately following the vote on August 30, 1999, he had returned to his home village of Becora in early September.

39. After the results of the vote were announced, people in Becora began to celebrate. John Doe I was in the village. The sound of gunfire could be heard, and homes were set on fire. After setting fire to these homes, TNI soldiers and militia started to loot other homes.

40. The TNI and militia began firing at people. They first shot and killed a teacher. A crowd of people had gathered on a main street in Becora, and an armed group of TNI soldiers and militia approached the crowd and fired into it. A large

group of armed TNI soldiers and militia approached John Doe I and others who had congregated to celebrate East Timor's independence from Indonesia. As they started to run, the soldiers and the militia began firing at them. John Doe I was shot in the leg. Others present helped John Doe I to escape.

41. The TNI and militia blocked the major roads in East Timor as the situation worsened. The main streets were full of many TNI and militia. Other members of the TNI, including Kopassus members, were also present, prohibiting John Doe I from receiving medical care.

42. John Doe I and the others fled Becora, remaining there until INTERFET's arrival in East Timor. Subsequently, John Doe I was transported to the hospital in Dili, where he underwent surgery. Despite the efforts of the hospital's medical personnel, John Doe I died of his wounds.

V. JOHN DOE II

43. John Doe II was born on April 5, 1970 in the village of Liquica, East Timor. He was 30 years old at the time of trial, is unmarried, and has no children.

44. When Indonesia invaded East Timor in 1975, John Doe II, his parents and other family members fled to the hills of East Timor. While living in the hills his parents became ill, and, due to the unavailability of medical care, died. He remained in hiding for approximately 3 years, living with relatives. Eventually he and others were arrested by Indonesian military personnel and removed to a village named Atabae.

45. John Doe II eventually returned to Liquica, where he resided with relatives until approximately 1982, when he relocated to Caicoli, a village in Dili. There he resided with his half-brother. In Caicoli, John II attended school for approximately two years.

46. In 1990, John Doe II began employment, working for a master laborer, as a general construction laborer.

47. Sometime in the early 1990's, John Doe II became active in politics; initially with a student youth movement and then, subsequently in 1998, as an official member of the East Timor Resistance Movement. After voting in the Popular Consultation on August 30, 1999, John Doe II became fearful for his safety. To protect himself, he left his village during the evenings, staying in the hills and returning to his village each day.

48. On September 1, 1999, while John Doe II was present in Caicoli, he observed a group of militia members arrive in the village and witnessed them burning the home of one of the residents, Mr. Caetano, to the ground. This caused John Doe II and many other residents to flee to the mountains. John Doe II remained in the mountains until September 4, 1999, when he traveled to the UNAMET headquarters in Balide, Dili. However, when he arrived at UNAMET, there were many Indonesian military personnel present there. Fearing for his safety, he again fled, this time to the hills above Dili, arriving in a small village called Dare.

49. In Dare, John Doe II lived in the bush with many other people who were also in hiding. There he survived on food he had received from UNAMET and vegetables he was able to acquire from local farmers.

50. On September 10, 1999, he and the other people in hiding ran out of food, forcing John Doe II to leave Dare the next morning in search of food. John II found biscuits in a home that had been abandoned. As he was returning to hiding, John Doe II encountered seven Indonesian army personnel. These men were outfitted in Indonesian army uniforms.

51. Three of the soldiers called to him, directed him to come over to them and began to interrogate him, first inquiring what he was carrying. John

Doe II identified the bag of biscuits. The soldiers then asked him if he was taking these biscuits to members of FRETILIN or FALINTIL, two East Timorese pro-independence organizations. John Doe II responded that the biscuits were for his family.

52. The soldiers asked for John Doe II's identification card and his wallet, which he gave them. From the wallet the soldiers found a receipt for money that John Doe II had donated to FALINTIL. The soldiers then asked John Doe II if he was a member of FALINTIL, he replied that he was not and they then inquired about the receipt. He explained that he had given money to an individual, and not to FALINTIL directly. The soldiers asked John Doe II if he had any knowledge about the circumstances surrounding the death of an Indonesian soldier in Dili and he indicated that he did not.

53. The soldiers then began kicking him in the ribs, the leg, and the face. John Doe II pleaded with them, telling them that he knew nothing about the death of the Indonesian soldier, but they accused him of lying.

54. As the soldiers beat John Doe II, another soldier, who was also dressed in an Indonesian army uniform, approached. The soldier advised John II to gather his belongings and leave.

55. As John Doe II was about to leave, there was gunfire. In response, the three soldiers dropped to the ground and started firing their weapons in the air. When they stopped, they took John Doe II into their custody, and forced him to walk up a hill to an army barracks. There were three other soldiers present at these barracks when he arrived there.

56. One of the three soldiers that John Doe II had originally encountered then struck John Doe II in the mouth and chin with a rifle, swinging the rifle like a baseball bat. Because of the force of the blow and because the barracks was located on a hill, John II fell and began to tumble down the hill.

57. As he began to run, the soldiers shot at John Doe II and he was struck with a bullet in the left leg. John Doe II saw that the portion of his leg below the wound was almost totally severed and he bled profusely from the wound. Unable to walk, John Doe II "snaked" toward the Maloa River.

58. Eventually John Doe II encountered two men who were hiding in a home. The pain from his wound was so intense that he asked these men to kill him. They refused and brought John Doe II to a doctor who administered anesthesia to him, but could not effectively treat his injury.

59. The two men then took John Doe II back to Dare. In Dare, John Doe encountered members of his family who then took John Doe II into their care and custody.

60. Due to the presence of the Indonesian military, which made travel unsafe, John Doe II remained in Dare from September 11, 1999 through September 24, 1999, subsequent to the arrival of INTERFET.

61. During this period of time, John Doe II's condition worsened; his wound began to decay, emitting a foul odor; he could not talk; he developed a fever and he lapsed in and out of consciousness.

62. On September 24, 1999, John Doe II was transported to a hospital in Dili. His foot was amputated on September 25. He remained hospitalized until October 25, 1999.

VI. JOHN DOE III

1. John Doe III is 27 years old, and was born in Hato-Udo Ainaro, East Timor. He is married and has two children. John Doe III is John Doe IV's son and John Doe V's brother. He currently resides in Dili, East Timor.

64. In April of 1998, John Doe III graduated with a degree in political science from Timor University where he had been a student since 1992.

65. John Doe III also began to work for the independence of East Timor in 1992. He took part in campaigns of the CNRT, traveling from town to town in East Timor distributing campaign material and speaking publicly for independence.

66. John Doe III is currently employed as a human rights advocate by Yayasan Hak, a human rights organization in East Timor. In that position, he has responsibility for investigating human rights violations that took place in East Timor.

67. From 1995 to 1999, the Indonesian military frequently threatened to kill John Doe III for his advocacy of East Timorese independence and human rights. During this time, John Doe III was often watched at his home by the Indonesian military. The threats and surveillance lead him to fear for his safety and for the safety of his family.

68. On July 14, 1999, the Indonesian police apprehended John Doe III in Dili, East Timor for advocating for East Timorese independence and for demonstrating against the Indonesian military's assault on East Timorese people and Catholic nuns in Maliana, East Timor.

69. The Indonesian police detained John Doe III for three days. While detained, the Indonesian police interrogated John Doe III and frequently threatened to kill him. At night, the Indonesian police increased the frequency of their threats, making those threats almost every hour.

70. In March, 1999, one of John Doe III's brothers was captured by the TNI, interrogated and severely beaten. The TNI interrogated John Doe III's brother about his family's support of the East Timorese independence movement and their refusal to join the militia groups forming to discourage independence. After he was released and with the assistance of his family, his brother sought medical attention for broken ribs and head injuries and spent three weeks in the hospital recovering.

71. On August 12, 1999, just before the referendum on independence, the military threatened John Doe III and his father while they were rallying for independence in the market in Same, East Timor. Members of the military told them that if East Timor declared independence from Indonesia, they and their family would be killed for their role in the movement.

72. In the market that day, John Doe III witnessed members of the TNI shoot a young man in the legs, stab another and take three others into custody during a pro-independence rally.

73. In August of 1999, John III's father, John Doe IV, was captured by the Indonesian police, interrogated, and threatened with death. John Doe IV recounted to John Doe III the threats by Indonesian police to kill John Doe IV and his family if they were caught actively supporting independence or if the East Timorese ultimately voted in favor of independence.

74. After the results of the referendum were announced in September, 1999, John Doe III witnessed uniformed TNI soldiers assaulting East Timorese citizens and burning homes and other buildings.

75. On September 5, 1999, the Indonesian police detained John Doe III and several other activists, and took them to an Indonesian police station in Comoro, East Timor. After his release the next day, he fled to Denpasar, Indonesia, and the following day to Jakarta, where he stayed until October 16, 1999.

76. Upon returning to East Timor, John Doe III's brother and sister informed him that his parents' home had been burned by the Indonesian military, forcing his parents to go into hiding. He was also told that his brother, John Doe V, had disappeared.

77. In December, John Doe III was told by East Timorese citizens who had fled to West Timor after the results were announced that his brother, John Doe V, had been captured by the Indonesian military, tortured, mutilated, executed and burned.

He was told that the Indonesian military first shot his brother in the legs and then stabbed him repeatedly. At that point, John Doe V was still alive, so his torturers cut his throat and hacked off his legs and hands and, ultimately, burned his remains.

78. On February 27, 2000, John Doe IV received a letter from a militia member, Verrisimo da Costa, a.k.a. Vasco Beti, a man who had witnessed the torture and execution of John Doe V. John Doe III read the letter to his father.

79. The letter confirmed that John Doe V had been tortured and executed by the Indonesian military and described where his remains could be found.

80. With his father and nearly 200 other people from their village, John Doe III traveled to that location, found a charred area of ground, and after digging there, found the remains of his brother.

VI. JOHN DOE IV

81. John Doe IV was born in Bekala, East Timor. He has lived in Bekala all his life. He does not know the date of his birth, but is approximately 60 years old. He is married and has ten grown children.

82. John Doe IV is the father of John Doe III and John Doe V.

83. From 1961 until 1972, John Doe IV was employed by the Portuguese army. In 1972 he became a civil servant with the Indonesian government, working as a janitor and deliveryman in the Office of Military Command, Hatoudo subdistrict until late 1999, when the Indonesian occupation of East Timor ended. He is currently self-employed as a farmer.

84. John Doe IV was living in Bekala, and voted there in September, 1999 for the independence of East Timor.

85. After the results of the referendum were announced, John Doe IV observed the TNI burning nearly every home in Bekala, over many

days.

86. John Doe IV feared for the safety of his wife, and sent her into hiding. She left the home approximately five days after the results of the election were made known.

87. Approximately six days after the announcement, the TNI came to John Doe IV's home in the night, armed with weapons. John Doe IV recognized among them members of the TNI. He and four of his children, including John Doe V, fled the TNI's gunfire. That night the TNI burned their home.

88. As he and his children fled to escape the TNI, he became separated from his son, John Doe V.

89. John Doe V disappeared shortly after, and John Doe IV searched for his son every day. The search ended when he received the aforementioned letter from Verrisimo da Costa. Because John Doe IV cannot read, John Doe III read the letter to him.

90. John Doe IV traveled to the location disclosed in the letter, one and a half hours from his home. He found his son's wallet, with a picture of his son, John Doe V. John Doe IV also found John Doe V's burned remains.

VII. JOHN DOE V

91. John Doe V, born in East Timor, was the brother of John Doe III and the son of John Doe IV. He was not married and had no children.

92. He attended elementary school in East Timor from 1979 to 1985 and junior high school from 1985 to 1988. He graduated from high school in 1991. Until March, 1999, John Doe V studied at the College of Social Welfare in Bandung, Indonesia.

93. From 1992, he was a political activist, working for the independence of East Timor.

94. He was staying in his family's home in Bekala in September, 1999 with his mother and father and several of his siblings.

95. With his family, John Doe V witnessed the destruction of all of the homes in Bekala by the TNI in the days following the announcement of the Popular Consultation.

96. Shortly after his mother went into hiding, armed members of the TNI came to the family home at night. John Doe V fled the destruction of their home with his family.

97. That night, September 6, 1999, he became separated from his family while fleeing the TNI's gunfire. He was captured by the TNI and taken to a wooded area outside Bekala, about an hour and a half from his family home.

98. There, on or about September 7, 1999, he was tortured and summarily executed. He was shot twice, but those wounds were not immediately fatal. After he was shot, he was stabbed several times. His executioners cut off his hand and ear while he was still alive. At some point during that night, John Doe V throat was cut. His executioners burned his body and left it in the woods.

It is uncontradicted that the experiences of plaintiffs described herein — including murder, summary execution and torture — were undertaken and directed by the Indonesian government and military, in which defendant was Army Deputy Chief of Staff, in response to the East Timorese struggle for independence from Indonesia.

CONCLUSIONS OF LAW WITH RESPECT TO JURISDICTION AND LIABILITY

I. SUBJECT MATTER JURISDICTION

This Court has subject matter jurisdiction over this case under the Alien Tort Claims Act ("ATCA"), [28 U.S.C. § 1350](#), the Torture Victim Protection Act, Pub.L. No. 102-256, 106 Stat. 78 (1992) (codified as [28 U.S.C. § 1350](#) note) ("TVPA"), and supplemental jurisdiction.

A. ALIEN TORT CLAIMS ACT

The ATCA provides that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." [28 U.S.C. § 1350](#). The statute has been interpreted to provide alien plaintiffs both a forum and a right to compensatory and punitive damages under United States law. *See, e.g., Xuncax v. Gramajo*, [886 F. Supp. 162](#) (D. Mass. 1995). In order for there to be subject matter jurisdiction under the ATCA, three conditions must be met: (1) the Plaintiff must be an alien; (2) the cause of action must be in tort; and (3) the tort must be committed in violation of the law of nations or a treaty of the United States. *See Doe v. Islamic Salvation Front (FIS)*, [993 F. Supp. 3, 7](#) (D.D.C. 1998) (internal citations omitted). The three ATCA Criteria for jurisdiction have been met here. First, Plaintiffs are aliens — they are all citizens of East Timor. Second, their causes of action are based on torts committed under Defendant's direction, authority and auspices, although not directly by Defendant himself. *See, e.g., Hilao v. Estate of Marcos*, [103 F.3d 767](#) (9th Cir. 1996) (former president of Philippines could be held liable for abuses committed by military under his command upon proof that defendant knew of such conduct and failed to use his power to prevent it); *see also Xuncax*, [886 F. Supp. 162](#) (former Vice Chief of Staff and Director of Army General Staff in Guatemala could be held liable for acts of members of the military forces under his command when official was aware of brutality, and devised and directed implementation of indiscriminate campaign of terror against civilians including plaintiffs and their relatives). Finally, the actions at issue are in violation of the law of nations. In *Filartiga v. Pena-Irala*, [630 F.2d 876](#) (2nd Cir. 1980), the first case in the modern line interpreting the ATCA, the Second Circuit held that [28 U.S.C. § 1350](#) grants jurisdiction to federal courts to consider the claims of aliens for torts committed in violation of fundamental norms of international law. This Court has found that international law "is formed by the `general assent

of civilized nations", and that courts "must interpret international law under the ATCA as `it has evolved and exists among the nations of the world today,'" FIS at 3 (citing Doe v. Karadzic, 70 F.3d 232, 238 (2nd Cir. 1995)). Among the acts that courts have held violate international law and are actionable under the ATCA are torts alleged in this case — torture, summary execution, crimes against humanity and cruel, inhuman and degrading treatment. See FIS, 993 F. Supp. at 4, 8; Xuncax, 886 F. Supp. 162.² For the foregoing reasons, the Court has jurisdiction over plaintiffs' claims of torture, summary execution, crimes against humanity and cruel, inhuman and degrading treatment under the ATCA.

² The policies underlying such `universal jurisdiction' in cases like this are clear. Simply stated, certain offenses, no matter is where they occur, "are so universally condemned that the perpetrators are the enemies of all people." Demjanjuk v. Petrovsky, 776 E.2d 571, 552 (6th Cir. 1985). *cert. den.*, 475 U.S. 1016 (1986). As the Court in Filartiga noted, "for the purposes of civil liability, the torturer has become — like the pirate and the slave trader before him — *hostis humani generis*, an enemy of all mankind." 630 F.2d at 890.

B. TORTURE VICTIM PROTECTION ACT

The TVPA "provides for a federal cause of action for torture and execution committed anywhere in the world" FIS 993 F. Supp. at 9. In order to bring a claim under the TVPA, the claimant must first exhaust "adequate and available remedies in the place in which the conduct giving rise to the claim occurred." 28 U.S.C. § 1350, note 2. In this case, plaintiffs argue that they can not seek redress in East Timor "due to the legacy of the illegal military occupation of Indonesia. The Indonesian judiciary does not resolve cases of abuse filed by civilians against military officials, and any suit against the defendant in East Timor or Indonesia would be futile and result in serious reprisals

against those raising the allegations." Complaint at ¶ 32 [5]. In such situations, where exhaustion of remedies in the nation in which the conduct occurred would be futile or patently inadequate, courts have held that exhaustion under the TVPA is not required. See, e.g., Cabin v. Assasie-Gyimah, 921 F. Supp. 1189 (S.D.N.Y. 1996). Therefore, the Court finds that exhaustion in this case is not required.

Under § 2(a) of the TVPA:

An individual who, under actual or apparent authority, or under color of law, of any foreign nation (1) subjects an individual to torture shall, in a civil action, be liable to that person for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to that individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

Id. Extrajudicial killing or summary execution is defined by § 3 of the TVPA as "a deliberate killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by all peoples." The execution of John Doe V by Defendant, acting through the TNI and affiliated militia, was an "extrajudicial killing" as defined by the TVPA. Therefore, the TVPA provides this Court with jurisdiction to adjudicate Plaintiffs' claims of extrajudicial killing/summary execution.

C. FEDERAL QUESTION JURISDICTION

Plaintiffs also seek jurisdiction pursuant to 21 U.S.C. § 1331, which provides for federal subject matter jurisdiction in cases "arising under" the Constitution and the laws of the United States. Plaintiffs claim that the complaint in this case charges a violation of fundamental norms of

customary international law, which "arise under" U.S. law, and therefore that jurisdiction exists under § 1331.

It is not entirely clear whether § 1331 provides a basis for jurisdiction under international law. Some district courts have upheld section 1331 jurisdiction for international law violations in the human rights arena. *See, e.g., Bodnar v. Banque Paribas et al.*, 114 F. Supp. 117, 127 (E.D.N.Y. 2000); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1544 (N.D.Cal. 1987). However, this Circuit has expressed a much more cautious view. In *Tel-Oren v. Libyan Arab Republic* Judge Edwards stated that section 1331 did not supply jurisdiction for claimed violations of international law unless the plaintiffs could point to a remedy granted by the law of nations or argue successfully that such a remedy is implied. *See* 726 F.2d 774, 779-80 n. 4 (D.C. Cir. 1984). Judge Edwards went on to point out that the law of nations generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations. *Id.* at 778 (Edwards, J., concurring).

In this case, the Court need not reach the question whether jurisdiction may be grounded on § 1331. Plaintiffs in this case have asserted jurisdiction for all of their international law claims via the ATCA and the TVPA, and, as discussed above, the Court has found that it has jurisdiction over each and every one of plaintiffs' international law claims via these two statutes. Since those acts appear to provide a remedy for the plaintiffs' allegations related to torture, summary execution/extrajudicial killing, crimes against humanity and cruel, inhuman and degrading treatment, their causes of action are statutorily authorized. Therefore, the Court need not determine whether any causes of action not specifically authorized by statute may be implied by international law standards as incorporated into United States law and grounded on section 1331 jurisdiction. *See Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995).

D. SUPPLEMENTAL JURISDICTION

Finally, plaintiffs claim that the Court has jurisdiction over their municipal claims: assault, battery, and intentional infliction of emotional distress, pursuant to the principles of supplemental jurisdiction. *See* 28 U.S.C. § 1367. The statute provides, in pertinent part: "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims within such original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367 (a). As discussed above, the Court has original jurisdiction over plaintiffs' claims of cruel, inhuman and degrading treatment, crimes against humanity, torture and summary execution under the ATCA and TPVA. The same evidence supports plaintiffs' municipal law claims of assault, battery, and intentional infliction of emotional distress. Therefore, the Court finds that plaintiffs' claims against Defendant for torts committed in violation of the law of nations are so related to their municipal tort claims that they form "part of the same case or controversy under Article III of the United States Constitution," *Id.* Thus the Court will exercise supplemental jurisdiction over Plaintiffs' municipal tort claims. *See Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1993); *see also* 14A CHARLES ALAN WRIGHT, ARTHUR R. MILLER EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3661.1 (3rd ed. 1998).

"In a federal question action where the federal court is exercising supplemental jurisdiction over state claims, the federal court applies the choice-of-law rules of the forum state." *Paracor Finance, Inc. v. General Elec. Capital Corp.*, 96 F.3d 1151, 1164 (9th Cir. 1996). Thus, the Court must apply District of Columbia choice of law rules to determine which substantive tort law should be applied to plaintiffs' municipal tort claims.

In resolving choice of law questions, the District of Columbia employs a governmental interests approach, which balances the competing interests of the two jurisdictions. *See Estrada v. Potomac Elec. Power Co.*, 488 A.2d 1359, 1361 n. 2 (D.C. 1985); *Myers v. Gaither*, 232 A.2d 577, 583 (D.C. 1967). *See also Godbey v. Frank F. Basil Inc.*, 603 F. Supp. 775, 777 n. 8 (D.D.C. 1985). In determining which jurisdiction has the greater interest in having their own laws apply, this Court considers "the place of the injury, the place where the conduct occurred, the domicile of the parties, [and] the place where the relationship between the parties is centered." *Myers*, 232 A.2d at 583. *See also Estrada*, 488 A.2d at 1361 n. 2 (citing Restatement (Second) of Conflicts § 145).

Nix v. Hoke, 139 F. Supp.2d 125, 131 (D.D.C. 2001). Under this approach, it is clear that the law of East Timor should apply to the plaintiffs' municipal tort claims of assault, battery, and intentional infliction of emotional distress. The conduct and injuries occurred in East Timor, plaintiffs are and have been, at all times relevant to this litigation, East Timorese citizens and domiciliaries, and the relationship between plaintiffs and Lumintang is centered in East Timor.

"To determine the content and meaning of the laws of a foreign country, a federal court may look to any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." *Xuncax*, 886 F. Supp. at 196 (citing *Fed.R.Civ.P.* 44.1). In this case, plaintiffs have provided the court with a declaration by Professor Roger Stenson Clark as well as an affidavit containing the testimony of Professors Joao Pedroso, Bonventura de Sousa Santos and Jose Manuel Pureza regarding the provisions and principles of the law governing East Timor which are relevant to this case. *See* Plaintiffs Supplemental

Memorandum of Law at Attachment One, [Declaration of Roger Stenson Clark, hereinafter "Clark Dec."] and Exhibits A, [United Nations Regulation on the Authority of the Transitional Administration in East Timor, hereinafter "U.N. Regs."] and B [Affidavit of Joao Pedroso, Bonventura de Sousa Santos, and Jose Manuel Pureza, hereinafter "Pedroso et al. Aff"] thereto. The court relies on this information in its analysis of the law governing assault, battery and intentional infliction of emotional distress in East Timor.

The law that currently applies in East Timor is Portuguese law. East Timor was a colony of Portugal in 1975, when it was invaded by Indonesia. Because the Indonesian invasion was a violation of international law, the United Nations has never recognized its military occupation, instead classifying East Timor as a non-self-governing territory of Portugal. *See* Clark Dec. at ¶ 4; *see also* Pedroso et al. Aff. at 5-6. On August 30, 1999, the people of East Timor voted for independence; on October 25, 1999, the United Nations Transitional Administration in East Timor ("UNTAET") was established to act as the temporary governmental authority. "Section 3.1, Regulation No. 1999/1 of the UNTAET states that until replaced by UNTAET regulations or subsequent legislation or democratically established institutions of East Timor, the law applied in East Timor prior to 25 October 1999 shall apply in East Timor insofar as they do not conflict with certain international legal norms." *Id.* at ¶ 5(a); *see also* Attachment A, UNTAET Regulation No. 1999/1, Section 3.1. To date, UNTAET has not passed any regulations addressing the torts of assault, battery and intentional infliction of emotional distress. *See* Clark Dec. at ¶ 5(a). Therefore, the law of Portugal with respect to these torts continues to apply in East Timor. *See Id.* at ¶ 5(c).

Portuguese law provides a cause of action for assault, battery, and intentional infliction of emotional distress. *See* Pedroso et al. Aff. at 7.

The Portuguese Constitution provides, *inter alia*, that "the moral and physical integrity of persons is inviolable." *Id.* at 8. Article 483 of the Portuguese Civil Code provides, in pertinent part: "The person who, through fraud or mere fault, illicitly violates the rights of another or any legal provision for the protection of the interests of others, is compelled to compensate the injured party for the damages resulting from the violation." *Ibid.* A cause of action therefore arises when the following elements have been met: "a) violation of another's right or interest; b) unlawfulness of the fact; c) imputation of the fact to the agent; d) causing damage; e) nexus of causality between fact and damage." *Ibid.* Portuguese law does not provide immunity to public employees and members of the armed forces for torts committed during the course of their employment. *See Id.* at 8-10 (citing the Portuguese Constitution at Arts. 22; 266.2; 271).³

³ Because Defendant in this case is not a Portuguese public employee or affiliated with the Portuguese military, it seems likely that Portuguese law would treat him as a foreign civilian rather than a member of the military. The Portuguese Civil Code subjects foreign civilians to the same rules of tort liability as any civilian. *See Pedroso et al. Aff.* at 9.

Assuming the facts presented by plaintiffs to be true, the Court finds that defendant unlawfully violated plaintiffs' rights by subjecting them to assault, battery, and intentional infliction of emotional distress, that defendant's actions caused plaintiffs to suffer intense harm and accordingly that they are entitled to collect compensatory damages pursuant to Article 483 of the Portuguese Civil Code.

II. DEFENDANT'S LIABILITY FOR COMPENSATORY AND PUNITIVE DAMAGES

It has been established by the default judgment and by testimony at trial that Lumintang had responsibility for the actions against plaintiffs and

a larger pattern of gross human rights violations. Defendant's May 5, 1999 telegram was part of a plan that ultimately led to a campaign of killing, torture and terror and the forced exodus of one-third of the East Timorese population. He was the signatory of a training manual that provided instruction on tactics including terror, kidnapping and intimidation for use by Indonesian soldiers in East Timor. For the following reasons, the Court finds that Lumintang is liable for the actions committed by his subordinates.

A. PRINCIPLES OF COMMAND RESPONSIBILITY

The doctrine of command responsibility — holding a commander criminally or civilly responsible for crimes committed by subordinates — is well established under both international and U.S. domestic law. Under the command responsibility doctrine, a commander may be criminally or civilly liable as a principal even though the commander did not directly participate in the commission of the actual offenses. The theory underlying the doctrine of command responsibility is that the commander is in the best position to prevent violations of humanitarian law; because commanders are in positions of great public trust and responsibility and are empowered to prevent or punish abuses, a heightened legal duty is imposed upon them. As emphasized by the court in *Kadic v. Karadzic*, 70 F.3d 232, 242 (2nd Cir. 1995), "international law imposes an affirmative duty on military commanders to take appropriate measures within their power to control troops under their command for the prevention of atrocities." The elements of the doctrine of command responsibility are three-fold. First, a relationship of subordination must exist between the commander and the perpetrator. (This relationship need not be a direct one; the commander defendant need not be an immediate superior of the perpetrator.) Second, it is necessary to demonstrate that the commander knew, or should have known, that troops under his command were committing, were about to

commit, or had committed international law violations (*mens rea*). Third, the commander must have failed to prevent or punish abuses (*actus reus*).

Several cases arising under the ATCA and TVPA have applied the principles of command responsibility in U.S. courts. In Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996), the court affirmed an ATCA and TVPA class action judgment against the former ruler of the Philippines. Citing, *inter alia*, the legislative history of the TVPA, the Ninth Circuit upheld the finding that Marcos could be found liable if he "directed, ordered, conspired with, or aided the military in torture, summary execution, and disappearance" or, alternatively, "knew of such conduct by the military and failed to use his power to prevent it." Hilao, 103 F.3d at 776-778. Similarly, in Xuncax v. Gramajo, the court issued a default judgment based upon evidence of the defendant's direct responsibility for having ordered, planned and initiated a pattern and practice of human rights violations, and his indirect responsibility for knowledge and support of the abuses of his subordinates in finding him liable under the ATCA and TVPA. Xuncax, 886 F. Supp. at 172. In Paul v. Avril, 901 F. Supp. 330 (S.D. Fla. 1994), the court entered a default judgment against a former military ruler of Haiti for torture committed by soldiers under the defendant's command. The court emphasized:

All of the soldiers and officers in the Haitian military responsible for the arbitrary detention and torture of plaintiffs were employees, representatives, or agents of defendant Avril, acting under his instructions, authority, and control and acting within the scope of the authority granted by him.

Paul, 901 F. Supp. at 255. In Forti v. Suarez-Mason, 672 F. Supp. 1531 (ND. Cal. 1987), the Northern District of California held that an Argentine general could be held liable under the

ATCA for command responsibility over "torture by military and police personnel under the supervision and control of defendant while he served as Commander of the First Army Corps." In that case, Plaintiffs alleged that their torturers:

were all agents, employees, or representatives of defendant acting pursuant to a 'policy, pattern and practice' of the First Army Corps under defendant's command. Plaintiffs assert that the defendant 'held the highest position of authority' in Buenos Aires Province; that defendant was responsible for maintaining the prisons and detention centers there, as well as the conduct of Army officers and agents; and that he 'authorized, approved, directed, and ratified' the acts complained of

Forti 672 F. Supp. at 1537-8. As the Forti case indicates, a policy, pattern or practice of human rights violations committed by subordinates under a defendant's command is relevant to both a defendant's knowledge of such acts and his failure to exercise an affirmative duty to control his subordinates. By failing to intervene to prevent or punish a policy, pattern or practice of abuses, a commander may be found to have essentially ratified the abuses.

The legislative history of the Torture Victim Protection Act (TVPA) is unequivocal; Congress stated its intention to apply international standards of command responsibility in determining liability in U.S. courts. The Senate TVPA Report indicates:

The legislation [creating the TVPA] is limited to lawsuits against persons who ordered, abetted, or assisted in the torture. It will not permit a lawsuit against a former leader of a country merely because an isolated act of torture occurred somewhere in that country. However, a higher official need not have personally performed or ordered the abuses in order to be held liable. Under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts — anyone with higher authority who authorized, tolerated, or knowingly ignored those acts is liable for them.

S. Rep. No. 249, 102d Cong., 1st Sess. (1991) at 9.

In the present case, Defendant Lumintang is both directly and indirectly responsible for the human rights violations committed against the Plaintiffs. Lumintang had "direct" responsibility for these acts: as the third-ranking member of the Indonesian military, he — along with other high-ranking members of the Indonesian military — planned, ordered, and instigated acts carried out by subordinates to terrorize and displace the East Timor population, to repress East Timorese who supported independence from Indonesia, and to destroy East Timor's infrastructure following the vote for independence. Lumintang's signature on the May 5, 1999 telegram was sent to subordinates in the Indonesian army that furthered the events in East Timor in 1999. The June 30, 1999 manual that was issued over his signature advocated training tactics for use by Indonesian soldiers that violate international law and were the same tactics that were actually used by these soldiers both before and after the Popular Consultation. These official acts support a finding that Lumintang was directly involved in ordering, instigating or planning acts which led to the plaintiffs' injuries in this case. The defendant also had indirect

command responsibility for the plaintiffs' injuries. In his position as Vice Chief of Staff of the TNI, and as a member of the TNI High Command, Lumintang (1) served as commander of subordinate members of the TNI in East Timor who perpetrated the acts of violence which injured the plaintiffs; (2) knew or should have known that subordinates in East Timor were committing, were about to commit or had committed widespread and systematic human rights violations, and (3) failed to act to prevent or punish the violations. Based on the principles of command responsibility, the Court finds that defendant may be held liable for the actions of his subordinates, including the abuses suffered by plaintiffs in this action.

III. DAMAGES

After careful consideration of the pleadings, the unrebutted testimony presented by plaintiffs at trial, and the entire record in this case, the Court concludes that plaintiffs have established legitimate causes of action, and they have further established that defendant is liable to them for relief. As a final matter, the Court turns to the issue of what relief plaintiffs may be awarded: damages.

A. GENERAL PRINCIPLES OF COMPENSATORY AND PUNITIVE DAMAGES

Defendant has violated international law through summary execution, torture, crimes against humanity, and cruel, inhuman, or degrading treatment of plaintiffs and their relatives. In addition, Lumintang has violated Portuguese law through assault, battery and intentional infliction of emotional distress. The measure of damages under international law is restoration of the *status quo ante*. Plaintiffs should be awarded monetary damages to compensate them for all the pecuniary and non-pecuniary injuries, both direct and indirect, sustained as a result of Lumintang's violations of their internationally secured human rights. Plaintiffs are also entitled to compensatory

damages for their tort claims under Portuguese law. Finally, plaintiffs are entitled to an award of punitive damages in order to punish and deter such egregious violations of international law. It is now well established that victims of human rights violations and their relatives may obtain compensatory and punitive damages under the ATCA and TVPA. *See, e.g., Hilao*, 103 F.3d 789; *Xuncax*, 886 F. Supp. 162; *Paul*, 901 F. Supp. 330; *Abebe-Jiri v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Filartiga*, 577 F. Supp. 860.

B. COMPENSATORY DAMAGES

The basic international rule of damages entitles a victim to compensation for all injuries proximately caused by the defendant's wrongful acts. "It is a principle of international law . . . that every violation of an international obligation which results in harm creates a duty to make adequate reparation." *Velasquez Rodriguez Case*, Inter-American Court of Human Rights, Judgment of July 21, 1989, 25, 11 H.R.L.J. 127 (1989) (awarding the family of a disappeared person damages for loss of earnings and psychological injuries). The Inter-American Court relied on the leading case on the international law of damages, *Case Concerning the Chorzow Factory (Germany v. Poland)*, 1928 P.C.I.J. (Ser. A), No. 17, at 47, in which the Permanent Court of International Justice held that compensatory damages include not only immediate and actual losses, but consequential damages as well: "[R]eparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." *Id.* When injuries to individuals are at issue, as in this case, international law allows damages to be awarded for a broad range of physical, emotional, and social harms:

That one injured is, under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt, and such compensation should be commensurate to the injury.

M. Whiteman, DAMAGES IN INTERNATIONAL LAW, 718-719 (1943). In addition, under Portuguese law, compensatory damages including lost earnings and pain and suffering may be awarded for plaintiffs' municipal tort claims.⁴

⁴ Under Portuguese law, it appears that actions for survival damages may be had — with the death of the victim, the right to compensation for pain and suffering falls to the estate of the decedent or to the decedent's heirs at law. *See Pedroso Aff.* at 10-11. Thus, under Portuguese law, damages for pain and suffering may be awarded to the estates of John Does I and V, as well as to Jane Doe and John Does II, III and IV.

Plaintiffs have presented no evidence as to loss of income, property, benefits or services. However, they have presented extensive and detailed evidence on the issues of pain and suffering, both through their own testimony and through that of Estella Abosch, a social worker who conducted evaluations of the plaintiffs and testified as an expert in the field of psychotherapy and trauma, including torture. *See, e.g.,* March 29, 2001 Trial Transcript at 33.

Ms. Abosch testified that Jane Doe suffers from post traumatic stress syndrome and major depression due to the destruction of her home and property and the loss of her youngest child. She experiences intense guilt over the death of her son because she had argued with him on the last day she saw him alive, and subsequently "blames

herself for not having done enough to save him." Id. at 40. She cannot fall asleep or stay asleep, and experiences recurring nightmares.

John Doe II suffers from constant physical discomfort due to the loss of part of his leg. Ms. Abosch testified that during her meetings with John Doe II, "he was uncomfortable, many times changing his position because he can not hold a position for a long time due to the pain in his amputated leg." Id. at 45. He has no access to medical facilities that could fit him with a prosthetic limb. John Doe II does not have much formal education; accordingly, "he depended on his body to work" and the loss of his leg has, of course, been devastating in that regard. Id. at 50. He has no source of income, and relies on his cousin, with whom he lives, for economic survival. See Id. at 54. He suffers from profound depression; in addition, since the loss of his leg he has developed an alcohol addiction. He has lost a lot of weight, sleeps poorly, has difficulty performing many of the activities of daily life, and has no hope for the future. When asked to describe himself, John Doe II says he is "a bird without a wing." Id. at 54.

Like the other plaintiffs in this action, John Doe III suffers from post-traumatic stress disorder and depression. He is also burdened by survivor's guilt because he feels that without his encouragement, his deceased brother, John Doe V, might not have become involved in human rights work. In addition, he and John Doe V looked very much alike, so John Doe III feels that he, not his brother, may have been marked for execution, and John Doe V could have been killed in a case of mistaken identity. See Id. at 59. John Doe III has difficulty sleeping, and often wakes up at night crying and in terror. Id.

John Doe IV testified through a videotaped deposition from East Timor. See Trial Exhibit 46, Transcript of Videotape Deposition Excerpts taken by Anthony DeCaprio of John Doe IV on February 27, 2001 in East Timor (through

translator). Since the death of his son, John Doe V, John Doe IV suffers from repeated nightmares that people are going to kill him. He is so frightened that he, like his son, may be tortured and killed that he will not venture far from his home. See Id. at 14. He often dreams that John Doe V is talking to him; when he wakes up, he cries. See Id. at 16-17.

Finally, plaintiffs presented evidence that John Does I and V had suffered grievously before their deaths. According to the deposition of Sertorio Junior, a fellow independence fighter in East Timor and a friend of John Doe I, John Doe I was shot by the TNI on September 4, 1999. See Trial Exhibit 44, Transcript of Videotape Deposition Excerpts taken by Anthony DeCaprio of Sertorio Junior on February 26, 2001 in East Timor (through translator) at 6. He did not receive medical treatment, however, until about two weeks after the shooting, because the presence of the TNI and militia made it impossible to reach the hospital. See Id. at 12. John Doe lived with excruciating pain from an untreated gunshot wound to the leg for two weeks; he then died from it. Likewise, John Doe V suffered unimaginably before his death. John Doe III testified that witnesses to his brother's death told him that members of the TNI shot John Doe V repeatedly in the legs. He was then stabbed repeatedly, but, according to the information John Doe III received, did not die. He was finally killed when one of the soldiers slit his throat. See March 27, 2001 Trial Transcript at 181.

The Court finds this evidence more than sufficient to justify awards of compensatory damages to Jane Doe and John Does II, III and IV and to the estates of John Does I and V.

C. PUNITIVE DAMAGES

Summary execution, torture, crimes against humanity, genocide, and cruel, inhuman, or degrading treatment are universally condemned as violations of fundamental human rights. Domestic courts may reflect the strength of these

international prohibitions in their judgments and damage awards. *See, e.g.*, Declaration on the Protection of all Persons from Being Subjected to Torture, General Assembly Res. 3452, 30 U.N. G.A.O.R. Supp. (No. 34), 91 U.N.Doc. A/1034 (1975), Arts. 7, 11. Federal common law has followed Filartiga's reasoning that punitive damages are an appropriate mechanism available to uphold international norms against human rights abuses: "[T]he objective of the international law making torture punishable as a crime can only be vindicated by imposing punitive damages." Filartiga, 577 F. Supp. at 863-864 (awarding \$10 million in punitive damages). The amount of punitive damages should correspond to both the seriousness of the wrong and the injury to the plaintiff:

In ascertaining [damages] the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go farther, unless it was done willfully, or was the result of reckless indifference to the rights of others. . . . In that case, the jury are authorized, for the sake of public example, to give such additional damages as the circumstances require. The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages.

Smith v. Wade, 461 U.S. 30, 42 (1983) (*quoting Milwaukee St. Paul R. Co. v. Arms*, 91 U.S. 489, 491) (1875)).

Defendant unquestionably had an "evil motive" in authorizing and implementing the crimes against humanity and terror that encompassed the torture, summary execution, and injuries suffered by plaintiffs and their families. The nature and scope of Defendant's acts, his evil motive, and the need for deterring such acts are the elements for determining the measure of punitive damages to be awarded to these Plaintiffs.

1. Evidence of similar acts, or a pattern of similar activity not directed specifically against plaintiffs is relevant in assessing punitive damages

To justify an award of punitive damages, plaintiffs must provide evidence of the intentional and atrocious abuse inflicted upon them or upon those plaintiffs in whose capacity they have sued. In addition, previous ATCA cases as well as cases on punitive damages in general clearly establish that, in order to assess the overall impact of a defendant's egregious misconduct, evidence that establishes a pattern and practice of abuses committed by defendant is relevant in assessing punitive damages. This evidence includes testimony by experts familiar with the defendant's participation in similar activities as well as his role in a broader pattern of human rights abuses.

The Supreme Court has made clear that evidence of repeated conduct is relevant to the determination of the proper amount of punitive damages to be assessed against a defendant. Recently, the Court held:

Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law. . . . Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance (citation omitted).

BMW of North America Inc. v. Gore, 116 S.Ct. 1589 (1996). Evidence of similar acts, or a pattern of similar activity not directed specifically against plaintiffs is also admissible to show that the defendant had knowledge that these acts were about to occur, were occurring, or had occurred. *See Monger v. Cessna Aircraft* 812 F.2d 402, 406 (8th Cir 1987). In order for the acts to be

admissible they must be (as here) substantially similar circumstances. *See* New York Life Ins. Co. v. Seighman, 140 F.2d 930, 932-933 (6th Cir. 1944). Thus evidence of similar incidents are relevant and admissible evidence. Johnson v. Colt Industries, 609 F. Supp. 776 (D. Kan. 1985), *aff'd*, 797 F.2d 1530 (10th Cir. 1986).

Numerous cases brought under the Alien Tort Claims Act and Torture Victim Protection Act have considered evidence other than that which is directly related to the acts committed against plaintiffs in assessing punitive damages. For example, in Xuncax, the court imposed an award which included punitive damages against the former Minister of Defense of Guatemala. The court included evidence of a "campaign of terror" which resulted in "thousands of civilian deaths":

In this case, plaintiffs have convincingly demonstrated that, at a minimum, Gramajo was aware of and supported widespread acts of brutality committed by personnel under his command resulting in thousands of civilian deaths. . . . In the face of public outcry, the massacres continued and indeed got worse. . . . Indeed, the evidence suggests that Gramajo devised and directed the implementation of an indiscriminate campaign of terror against civilians **such as** plaintiffs and their relatives.

886 F. Supp. at 172-173 (emphasis added; citations to expert affidavits omitted). Other courts have allowed evidence of a defendant's pattern of abuses in assessing the proper level of punitive damages, including Mushikiwabo v. Baraywagwiza, 1996 U.S. Dist. LEXIS 4409 (S.D.N.Y. Apr. 9, 1996) ("the Court will not detail here all of the acts of torture and murder that were carried out according to the plan of the defendant and his coconspirators, which have been extensively documented in the affidavits submitted in support of this motion. . . . One cannot place a dollar value of the lives lost as the result of

defendant's actions and the suffering inflicted on the innocent victims of his cruel campaign. Ultimately, however, a monetary judgment is all the Court can award these plaintiffs."); Doe v. Karadzic, 93 Civ. 878 (S.D.N.Y. Oct. 4, 2000) (judgment of \$4.5 billion awarded to 39 plaintiffs — testimony included expert testimony by Cherif Bassiouni and Diane Paul about the pattern of genocide, war crimes and crimes against humanity inflicted by defendant); Filartiga v. Pena-Irala, 577 F. Supp. 860 (E.D.N.Y. 1984); Todd v. Panjaitan, No. 92-12255, 1994 WL 827111 (D. Mass. Oct. 26, 1994) (expert testimony by Allan Nairn on Panjaitan's history in the Indonesian military); Prosper v. Avril, 812 F. Supp. 207 (S.D. Fla. 1993); Forti v. Suarez-Mason, No. 87-2058-DLJ (N.D. Cal. Apr. 25, 1990); Quiros de Rapaport v. Suarez-Mason, No. C87-2266 (N.D. Cal. Apr. 11, 1989); Martinez-Baca v. Suarez-Mason, No. 87-2057 (N.D. Cal. Apr. 22, 1988).

Admitting evidence of a pattern of abuses to assess the proper amount of a punitive damage award follows the well-established principle of punishing those who have committed abuses which have relegated their status to that of "enemies of all mankind." Filartiga, 630 F.2d 876, 890 (2d Cir. 1980). In this seminal case, the court explained the key role of punitive damages in international human rights cases: "the objective of the international law making torture punishable as a crime can only be vindicated by imposing punitive damages. . . . It is essential and proper to grant the remedy of punitive damages in order to give effect to the manifest objectives of the international prohibition against torture." 577 F. Supp. at 864-865. *See also* RESTATEMENT (SECOND) ON TORTS § 908 ("Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.") By definition, punitive damages are not intended to compensate the plaintiff but to punish the defendant for his wrongful acts. *See* City of

Newport v. Fact Concerts, Inc., 453 U.S. 247, 266 (1981). In order to assess the harm by a defendant in need of punishment, the extent of his acts must be addressed.

The record clearly establishes that Lumintang has participated in a pattern of egregious conduct. *See supra* pages 4-10 (citing extensively to Trial Transcript). By January 1999, he was Army Deputy Chief of Staff, and his duties were to ensure coordination between Army headquarters staff, field staff, and the headquarters staff of other parts of the armed forces and police; and to coordinate and supervise the execution of army decisions, plans, and programs, as well as personnel, material, and financial arrangements. The Army, in which Lumintang was a senior officer, supported the militia in East Timor, aiding, abetting, arming, encouraging and directing them, and participating directly in the militia's chain of command. Lumintang coordinated the campaign to turn East Timorese against each other through the militia by bringing in Special Forces from Indonesia. As the second ranking officer in the Army, Lumintang had responsibility for discipline of troops when 54 people were shot and attacked with hatchets, bows and arrows as they fled the Liquica Church. The June 30, 1999 manual that went out over Lumintang's signature included "tactics and techniques" including abduction, killing, or kidnapping and terror — these same tactics were used in East Timor. Plaintiffs have presented testimony of the widespread terror, atrocities and destruction which resulted from Defendant's actions. *See supra* at 4-10 (citing extensively to record); *see also* March 28, 2001 Trial Transcript at 58-69 and Exhibit 26 — Testimony of Theodore Folke and videotape of extensive destruction in Dili, East Timor; March 29, 2001 Trial Transcript at 20-27 and Exhibits 35-43 — Testimony of Ian Thomas and satellite images depicting devastation of the landscape of East Timor. Punitive damages are clearly warranted, and the evidence other than the actions committed directly against plaintiffs demonstrates

the nature of defendant's actions and the need for punitive damages commensurate with these atrocities.

As noted above, punitive damages are imposed for two purposes — to punish truly heinous conduct and to deter others from committing similar acts. *See* 996 F. Supp. at 1250, 1251. For the foregoing reasons, the Court finds that the award of punitive damages in this case is manifestly necessary to achieve both of these goals.

CONCLUSION

The plaintiffs have established, through the evidence submitted at trial, that defendant Johny Lumintang, in his capacity as Army Deputy Chief of Staff of the TN!, caused plaintiffs to suffer, *inter alia*, torture, wrongful death, summary execution, assault, battery and intentional infliction of emotional distress. Accordingly, for the reasons more fully set forth above, defendant is adjudged liable to plaintiffs for relief pursuant to the ATCA, the TVPA, and Portuguese municipal law. Judgment is hereby awarded on behalf of plaintiffs and against defendant in the following amounts:

Jane Doe: Compensatory Damages: \$1,000,000
Punitive Damages: \$10,000,000

John Doe I: Compensatory Damages: \$ 750,000
Punitive Damages: \$10,000,000

John Doe II: Compensatory Damages: \$1,750,000
Punitive Damages: \$10,000,000

John Doe III: Compensatory Damages: \$ 750,000
Punitive Damages: \$10,000,000

John Doe IV: Compensatory Damages: \$1,000,000
Punitive Damages: \$10,000,000

John Doe V: Compensatory Damages: \$ 750,000
Punitive Damages: \$10,000,000

The Clerk of the Court shall enter judgment accordingly. An appropriate Order accompanies these Findings of Fact and Conclusions of Law.

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