Indonesian Human Rights Abuses in West Papua: Application of the Law of Genocide to the History of Indonesian Control

A paper prepared for the Indonesia Human Rights Network

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I. SUMMARY

This paper considers whether the Indonesian government's conduct toward the people of West Papua constitutes genocide, as defined by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention). The paper begins with a detailed account of the human rights situation in West Papua from the beginning of Indonesian rule in 1963 until today. It then analyzes the law of genocide as applied to the West Papuan case. Although the paper does not offer a definitive conclusion about whether genocide has occurred, it finds in the available evidence a strong indication that the Indonesian government has committed genocide against the West Papuans. Moreover, even if the acts described in the paper were not carried out with intent to destroy the West Papuans as a group, a necessary element of the crime of genocide, many of these acts clearly constitute crimes against humanity under international law. A summary of the paper's principle findings follows.

Introduction to the Law of Genocide

The Genocide Convention, which was adopted by the General Assembly in 1948 and entered into force in 1951, declared that genocide is a crime against international law. It established that persons found guilty of genocide or genocidal acts "shall be punished," and it imposed affirmative obligations on States Parties to undertake to prevent and punish the crime. The International Court of Justice has recognized the Convention's proscription of genocide as a part of customary international law and a *jus cogens* norm, a principle recognized by the international community as one from which no derogation is permitted.

Article II of the Genocide Convention defines genocide as:

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

1. Killing members of the group;
2. Causing serious bodily or mental harm to members of the group;
3. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
4. Imposing measures intended to prevent births within the group;
5. Forcibly transferring children of the group to another group.

Under this definition, the crime of genocide consists of two important elements: the prohibited act and the requisite intent. Thus, in analyzing whether the Indonesian government has committed genocide against the West Papuans, this paper considers: 1) whether the West Papuans constitute a group under the Convention's definition of genocide; 2) whether the acts perpetrated against the West Papuans are among those described by this definition; and 3) whether these acts were carried out with intent to destroy the West Papuans as a group.

The Group Element of the Crime of Genocide

Genocide is a collective crime that targets a national, racial, ethnical, or religious group. Although West Papuans are linguistically and culturally diverse, they belong to the Melanesian race and have been viewed by the Indonesian government as a group that is both racially and ethnically distinct from Indonesia's majority Javanese population. The West Papuans also have a common national identity that has been strengthened in the course of their common struggle for independence from Indonesian rule. Therefore, this paper concludes that West Papuans clearly fit within the ambit of protection delimited by the four kinds of groups listed in Article II of the Genocide Convention.

The Act Element of the Crime of Genocide

Indonesian military and police forces have engaged in widespread violence and killings in West Papua. This paper documents a history of massacres of the West Papuan people, from the killing by aerial bombardment of several thousand Papuans in Jayawijaya in 1977 to the use of napalm and chemical weapons against villagers in 1981 to the massacre of 32 West Papuans

in Wamena in October 2000. Indonesian authorities have also been responsible for numerous extrajudicial killings, including torture killings of detained prisoners, assassinations of West Papuan political, cultural, and village leaders, and brutal killings of civilian men, women, and children. This pattern of massacres and killings falls squarely within the first category of act identified by the Genocide Convention, "killing members of the group."

Indonesian military and police force have subjected West Papuans to arbitrary and mass detention, torture, and other cruel and inhuman treatment or punishment. Detained Papuans have suffered electric shocks, beatings, pistol whipping, water torture, cigarette burns, and confinement in steel containers for months on end. Many West Papuans have been "disappeared" and likely tortured or killed, their family members subjected to psychological trauma and often severe economic deprivation as a result. Indonesian soldiers have also committed numerous acts of rape and sexual violence against West Papuan women, frequently in public and sometimes accompanied by mutilation or murder or both. Such acts of rape and sexual violence, mutilation, torture, cruel and unusual treatment or punishment, and disappearance constitute unequivocal acts of "serious bodily or mental harm to members of the group," the second category of act under the Genocide Convention. Many of these acts have resulted in the deaths of West Papuans, thus falling within the "killing" category as well.

At the same time, the Indonesian government's systematic program of resource exploitation, destruction of Papuan resources and crops, compulsory and often uncompensated labor, transmigration, and forced relocation has caused pervasive environmental harm to the West Papuan region, undermined traditional subsistence practices and the social fabric and governance systems of indigenous communities, and led to widespread disease, malnutrition, and death among West Papuans. Mining and logging operations, undertaken in support of PT

Freeport and other multinational corporations, have caused devastating environmental damage and the sickness or death of thousands of West Papuans. To facilitate mining operations and resettle transmigrants from elsewhere in Indonesia, the government has intentionally forced West Papuans from their traditional lands to unfamiliar locations, often leaving them without means of subsistence. The government has consistently refused to provide adequate medical care to the West Papuans and has discriminated against them in the provision of basic health care and reproductive services. Indonesian military forces have directly attacked West Papuans' property and crops and have occasionally forced Papuans to work without compensation or below subsistence wages, under threat of arrest.

Many of these acts, individually and collectively, clearly constitute crimes against humanity under international law. Moreover, by engaging in such acts with the knowledge that they would result in the destruction of the indigenous people of West Papua, the Indonesian government likely has "deliberately inflict[ed] conditions of life calculated to bring about [the West Papuan group's] destruction in whole or in part," implicating the third category of act under Article II of the Genocide Convention.

The Intent Element of the Crime of Genocide

To be found guilty of the crime of genocide, a perpetrator must have engaged in proscribed acts "with the intent to destroy, in whole or in part" the victim group. Intent consists of specific intent to destroy the group, not simply a general intent to commit the proscribed acts. However, because few perpetrators of genocide leave behind a clear record of intent, this element usually must be inferred from their acts, considered as a whole, along with any other available evidence that the victim group was targeted "as such."

In the West Papuan case, the required intent cannot be inferred as easily as it was for the Holocaust or the Rwandan genocide. However, this paper finds that the Indonesian government has engaged in a systematic pattern of acts that resulted in harm to, and the destruction of, a substantial part of the West Papuan group. The Indonesian government has disavowed genocidal intent by citing economic goals and repression of West Papuan "separatist" activity as the motivation for many of its acts. However, there is little doubt that animus toward the West Papuans has been a critical part of the motivation for the government's policies. Moreover, although the obvious, inevitable effect of these policies and acts would be the destruction of the West Papuan group, the Indonesian authorities did nothing to counter this effect. This paper does not resolve conclusively the question of whether the acts perpetrated by the Indonesian government against West Papuans were committed with intent to destroy the West Papuan group, as such. However, according to current understandings of the Genocide Convention, the pattern of acts and omissions documented by this paper supports the conclusion that the Indonesian government has acted with the necessary intent to find that it has perpetrated genocide against the people of West Papua.

II. INTRODUCTION

This paper considers whether the historical and contemporary situation in West Papua constitutes genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Since Indonesia secured control over West Papua in 1963, and established formal sovereignty over the territory in 1969 through the so-called Act of Free Choice, West Papuans have lived as second-class citizens in their own land, deprived of their right to self-determination and subjected to serious human rights abuses at the hands of Indonesian authorities. Violent military campaigns and extrajudicial killings have claimed the lives of thousands of West Papuans. Thousands more have been subjected to torture, disappearance, arbitrary detention, rape, or other forms of serious mental and bodily harm. The government of Indonesia has forced West Papuans off of their land, exploited their resources, destroyed their property and crops, denigrated and attacked their culture, and excluded them from the upper levels of government, business, and education.

The term "genocide" was coined by jurist Raphael Lemkin during the Second World War as a means of describing the atrocities perpetrated by the Third Reich. It became a crime under international law when the U.N. General Assembly voted, on December 9, 1948, to approve the Convention on the Prevention and Punishment of the Crime of Genocide. The Genocide Convention defines genocide as any of a proscribed set of acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such."[1] The Convention entered into force on January 12, 1951, and the proscription of the crime of genocide, as defined

[1] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, reprinted in 45 AM. J. INT'L. L. 7 (1951).

by the Convention, has long since became a norm of *jus cogens*[2] and an unequivocal part of customary international law.[3]

Genocide is not a term to be used lightly, and we do not do so here. Genocide is the ultimate denial of the right to existence of entire groups of human beings. It is the quintessential human rights crime, a crime that attacks the very concept of humanity. It is also a crime that cannot easily hide behind a protective wall of domestic jurisdiction and state sovereignty, as it imposes affirmative, binding obligations upon all states parties to prevent and punish it. The Convention's unusual enforcement component, and the reluctance of some states to employ the term because of the weighty responsibilities it invokes, caution against enlarging the definition of genocide in a way that weakens the stigma associated with the crime or dilutes the strength of states' commitment to preventing it.

Many atrocities that do not meet the strict definition of genocide fit within the definition of "crimes against humanity," a broader concept that includes persecution against any identifiable group on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law. Since 1948, the gap between crimes against humanity and genocide has narrowed considerably. Today,

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[2] The Vienna Convention on the Law of Treaties defines a *jus cogens* norm as one that is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted . . . ." Vienna Convention on the Law of Treaties, art. 53.

[3] Prosecutor v. Goran Jelisic, Case No. IT-95-10-T, ICTY T. Ch. I, 14 Dec. 1999, para. 60 ("[T]he Convention has become one of the most widely accepted international instruments relating to human rights. There can be absolutely no doubt that its provisions fall under customary international law as, moreover, noted by the International Court of Justice as early as 1951. The Court went even further and placed the crime on the level of *jus cogens* because of its extreme gravity."). Customary international law is commonly defined as the law of the international community that "results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) of Foreign Relations Law of the United States § 102(2). The governing statute for the International Court of Justice (ICJ) includes customary international law, or "international custom, as evidence of a general practice of law," as one of the types of law that the Court is to apply. Statute for the International Court of Justice, Oct. 23, 1945, art. 38(1)(b), 59 Stat. 1055, 1060. The ICJ has further explained that for a rule of customary international law to arise, "[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence that this practice is rendered obligatory by the existence of a rule of law requiring it." North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth., 1969 I.C.J. 3, 44 (Feb. 20).

crimes against humanity may be committed in times of peace as well as in times of war. States arguably have an obligation to prevent and to punish crimes against humanity as a matter of customary international law. Thus, even if the human rights violations committed by the Indonesian government against West Papuans do not meet the criteria for genocide as defined by the Genocide Convention, they likely constitute crimes against humanity and warrant international action.

This paper assesses whether the conduct of the Indonesian government toward the West Papuans constitutes genocide. Part I presents a detailed chronological account of the human rights situation in West Papua, from the beginning of Indonesian rule until today, based on available historical and contemporary English-language sources. Part II applies the law of genocide to the case of West Papua. It begins with a brief introduction to the law of genocide and then considers three questions that correspond to the three elements of the crime of genocide. First, do the West Papuans constitute a group under the definition of genocide? Second, do the acts perpetrated by the Indonesians against the West Papuans qualify as genocidal? Third, should we infer from these acts an "intent to destroy" the West Papuans as such? This paper does not claim to definitively answer these questions, but instead aims to provide a strong foundation for further serious discussion of whether the human rights abuses perpetrated against the West Papuans constitute genocide. Equally important, it seeks to highlight the urgent need for additional archival and on-the-ground investigation and for heightened international attention to the grave human rights situation in West Papua. Whenever the specter of genocide is raised, such investigation and concern may become literally a matter of life and death.

III. HISTORY OF HUMAN RIGHTS ABUSES IN WEST PAPUA

A. Pre-Colonial West Papua

West Papua is the western half of New Guinea, the second largest island in the world. The island is divided into two parts, West Papua, which Indonesia has incorporated as a province, and Papua New Guinea, an ex-Australian-administered territory that gained its independence in 1975. The inhabitants of West Papua emigrated from Asia nearly 50,000 years ago, during the last ice age. They consisted primarily of three groups—Negritos, Papuans, and Melanesians—who are today categorized as a single race, Melanesians. Historically, the people living in West Papua have been divided along clan and linguistic lines. In 1963, when the Netherlands handed West New Guinea over to Indonesia, it included 200 languages among 500,000 Papuans in an estimated population of 700,000.[4] Separate communities often came together in loose political confederations and according to their common ecological conditions, but relationships were often colored by competition for power over traditional lands.

West Papuans' first contact with neighboring Malay cultures occurred as traders from the Malay archipelago (now Indonesia) took herbs, spices, and slaves from the island, beginning at least as early as the seventh century. Indonesia claims that the Java-based Hindu emperor Majapahit included West New Guinea[5] within his kingdom circa 1293. He did not make any effort to inhabit the island or befriend the natives, and many historians dispute the view that Majapahit's empire extended this far to the east.[6] European explorers discovered the island along the Spice Route, and a Spanish trader claimed it for his king in 1545. The Spanish never returned, and the island became home to a British settlement in 1793, during a period when the

[4] ROBIN OSBORNE, INDONESIA'S SECRET WAR: THE GUERILLA STRUGGLE IN IRIAN JAYA 2 (1985).
[5] *Id*. at 6. This was the name given to Papua under Dutch rule. The local residents, however, call themselves Papuans, and the region West Papua. For the remainder of this paper, West New Guinea will be used to refer to the region when under Dutch rule.
[6] *See id*.

European powers were vying for colonial territories in southeast Asia. When the British were driven out by disease and the inhospitable landscape two years later, the Dutch quickly took their place. The Netherlands declared its sovereignty over the western half of New Guinea in 1828.

B. West Papua Under Dutch Colonial Rule

The difficulty of inhabiting the land with European settlers contributed to the new colonial government's decision to appoint the Sultan of Tidore to administer the territory for the Dutch.[7] Although this arrangement was made in 1848, the Dutch were slow in setting up administrative institutions and used the territory mostly for its natural resources. The oil company Royal Dutch Shell began to tap into the region's oil reserves in 1907. Over the next few decades, the wealth of resources available became increasingly apparent and was being actively exploited by both British and American companies. As a response to the widespread Indonesian rebellion against colonial rule in 1926, the Dutch instituted a policy of internal exile. They created a new settlement in West New Guinea, known as Tanah Merah ("red earth") to house exiled Indonesians. The settlement served to establish an Indonesian presence in New Guinea. Because of its frequent malaria outbreaks and its isolated location in the midst of a jungle peopled by headhunting tribes, Indonesian nationalists dreaded Tanah Merah and grew increasingly hostile toward the West Papuan people. When the Netherlands surrendered its colonies to Japan in 1942, the Dutch forced Indonesians from Tanah Merah onto steamers headed to Australia, where they were imprisoned by the Australian government.[8]

When the Dutch fled West New Guinea, they did not leave behind much of an administrative infrastructure. The majority of the island's inland areas were in contact only with

[7] The Sultan was also responsible for the administration of numerous islands later included within independent Indonesia. This is another historical fact on which the Indonesians base their claim to West Papua. The Sultan's administrative powers were taken away in 1901, when he began causing problems for the Dutch government.
[8] *See* OSBORNE, INDONESIA'S SECRET WAR, *supra* note 4, at 9-10.

churches and missionary projects, which were scattered throughout the region. Japan saw itself as the liberator of the region from the control of white imperialists, yet sought to impose its own sovereignty over the West Papuans. The Japanese were faced with voices of West Papuan dissent left over from Dutch rule, including the Koreri movement that had developed in Biak.[9] The movement was based on a belief that a powerful spiritual figure would come and liberate the Papuans from oppression.[10] In response to the Koreri movement and the small, armed resistance to Japanese domination, Japanese officials arrested, tortured, and killed suspected members of the movement and ordered entire villages to be relocated. West Papuan resistance and Japanese retaliation continued until the liberation of the region by American-led forces in August 1944. After Japan's surrender in August 1945, the Dutch administration gradually returned to West New Guinea.

In the meantime, a separate independence movement had been brewing in neighboring Indonesia. The Body for Researching Indonesian Independence (BPKI), an organization created under the Japanese that later included many of independent Indonesia's most prominent leaders, held two meetings in July 1945 to discuss the possibility and the implications of Indonesian independence, including the question of which territories would be part of the new state. The majority of the delegates supported an independent Indonesia that would include all of the Dutch Indies and West New Guinea. When Indonesian nationalists proclaimed independence on August 17, 1945, their version of Indonesia included the territory of West New Guinea. During the four-year independence struggle that followed, the Papuan question was largely ignored by

[9] Biak is a small island off the north coast of West Papua. It is considered a region of West Papua.
[10] The movement gained support at the end of the 1930s under the leadership of a woman named Angganita, who followers believed had magical powers and began to preach resistance, first against the foreign missionaries, then against the Dutch. OSBORNE, INDONESIA'S SECRET WAR, *supra* note 4, at 11. Angganita was arrested by the Dutch, who, according to one of its colonial administrators, saw the movement as "far less a religion than a self-conscious Papuan nationalism." CARMEL BUDIARDJO & LIEM SOEI LIONG, WEST PAPUA: THE OBLITERATION OF A PEOPLE 5 (3d ed. 1988) (1973).

the international community. At the 1949 Hague Round Table Conference, which established independent Indonesia, the Dutch refused to cede control of West New Guinea to the Indonesians, preferring to maintain it as the final foothold of Dutch imperialism in southeast Asia. The Dutch promised Papuan independence at some point in the near future. Thus, when Indonesia finally gained independence in 1949, it did not include West New Guinea.

The exclusion of West New Guinea from newly independent Indonesia was largely the result of strong Papuan opposition that made it clear that the inhabitants of West New Guinea had no interest in being grouped with Indonesia. In July 1946, the head of the Netherlands administration in New Guinea organized a conference of representatives from the eastern archipelago. Franz Kaisiepo, the Papuan delegate to the conference, expressed the view that if Papua were to become part of Indonesia, it would be swallowed up without any attention paid to the economic situation of the inhabitants.[11] Supported by the Australian government, he cited differences in language and ethnic background as the major factors separating the people of Papua from the rest of the archipelago.[12] He was joined by Johan Ariks, a nationalist Papuan who advocated armed resistance to any foreign control of the area.[13]

As fear of the Indonesian communist threat grew among the Western countries, the Dutch promised to bring West New Guinea into the modern world by educating and training the indigenous Papuans to govern the country and then pulling out of the area. In the 1950s, the Dutch began the process of Papuan nation building in earnest. By 1957, the Netherlands had created numerous positions for Papuans in government services, and the goal of handing over a majority of government posts to Papuans seemed within reach.[14]

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[11] OSBORNE, INDONESIA'S SECRET WAR, *supra* note 4, at 14-15.
[12] *Id*.
[13] *Id*. at 17.
[14] *Id*. at 17-19.

By the end of the 1950s, the Dutch development plan was well on its way to success, but it was cut short prematurely by the Sukarno government's escalating diplomatic and military pressure on the Dutch to cede control over Papua. President Sukarno used the Dutch plan as an opportunity to play on Indonesian nationalism and distract his constituency from their declining economic situation. The Indonesian government began a campaign with pamphlets, slogans, rallies, and a war cry emphasizing the need to gain control of West Papua. Indonesia amassed weapons from the Soviet Union in a military buildup intended to intimidate the Dutch. The United States, the United Kingdom, and Australia, seeking to avoid a Cold War confrontation, chose not to support the Papuans and instead sought to placate the Indonesians. Nevertheless, the U.N. General Assembly, in three separate debates on the question of "West Irian,"[15] failed to pass a resolution either backing Sukarno's claim to the territory or affording the Papuans the right to self-determination. Nonetheless, in February 1961, the Dutch held elections for the West New Guinea Council, a representative body intended to encourage the establishment of a Papuan political elite that would eventually govern the region after Dutch withdrawal.[16] In April 1961, the Council met for the first time. With this governing body in place, the Dutch government formally proposed the "Luns Plan" to the U.N. General Assembly. The plan called for a termination of Dutch sovereignty followed by a U.N. administration and the establishment of an international study commission that would supervise the administration and organize a plebiscite to determine the territory's status.[17] On December 1, 1966, the Council agreed on the name of West Papua for their new nation, created a national anthem, and adopted the Morning

[15] This was the Indonesian title for Dutch New Guinea, or Papua.
[16] The Council included three Dutch representatives, two Eurasians, and twenty-three Papuans; sixteen were elected and twelve appointed by the Dutch. JOHN SALTFORD, THE UNITED NATIONS AND THE INDONESIAN TAKEOVER OF WEST PAPUA, 1962-1969: THE ANATOMY OF BETRAYAL (2003). [*hereinafter* SALTFORD, UNITED NATIONS AND INDONESIAN TAKEOVER].
[17] *Id.* At 11.

Star Flag. The flag was raised for the first time later that day, the anniversary of which is now celebrated by West Papuans as their independence day.

In response, the Indonesian government began to use military tactics against the Papuans. Indonesians launched a paratroop assault on West Papua and forces of its former colonial ruler, and the Indonesian and Dutch navies engaged each other off the Papuan shores.

With outright war an imminent threat, U.S. President John F. Kennedy took on the role of negotiating a peace accord between the Dutch and the Indonesians. On August 15, 1962, the two parties signed the New York Agreement under the auspices of the United Nations. No West Papuan representative participated in the agreement. By its terms, the Netherlands was to transfer its authority to an interim U.N. administration, the United Nations Temporary Executive Authority (UNTEA), on October 1, and the U.N. administration would hand the territory over to Indonesia on or after May 1, 1963. The agreement further provided for a U.N.-supervised election, sometime after Indonesia's take-over, to allow the Papuans to decide their own fate: whether or not to remain a part of Indonesia. The plan was implemented immediately, and UNTEA took control of West Papua in October 1962.

C. Indonesia's Seizure of Power and the Act of Free Choice

Prior to the arrival of the UNTEA forces, various Indonesian commanders who claimed that they had liberated West Papua (or West Irian, as they now called it) asserted their rule over the locals through military force. Even after the arrival of UNTEA's security force, about 1500 Indonesian commandos remained in West Irian, ostensibly to assist the local police. Instead, they engaged in harsh tactics to curb Papuan nationalist sentiment, including mass arrests and sometimes torture. At the same time, the Indonesians exploited the local economy, mandated the

use of the Indonesian language as the mode of instruction in schools, and formulated plans for the emigration and settlement of 400,000 Javanese in West Irian.[18]

UNTEA pulled out in May 1963, despite repeated requests by West Papuans for them to stay and protect Papuan rights. After UNTEA's departure, an armed struggle began between the Indonesian military and a pro-independence Papuan resistance movement known as the *Organisasi Papua Merdeka* (OPM).[19] Papuans from all over the region joined to support the OPM, and the Indonesian government responded by targeting civilians as well as OPM fighters. Killings, disappearances, torture, and rape of Papuans by government forces became common. In addition, the Indonesian government organized mass migrations from Java to West Papua, resettling hundreds of Indonesian families in the midst of the Papuan population.

In April 1967, a U.S.-based multinational mining corporation, Freeport Indonesia, signed its first concession agreement with Indonesia's recently established "New Order" government. This "Contract of Work" was reportedly the first contract entered into by the military-led Indonesian administration, and it gave Freeport "broad powers over the local population and resources, including the right to take land and other property and to resettle indigenous inhabitants while providing 'reasonable compensation' only for dwellings and other permanent improvements."[20] Today, P.T. Freeport Indonesia, which is 91-percent owned by its U.S.-based parent company, Freeport-McMoRan (in which the Anglo-Australian mining giant Rio Tinto holds a 16.5-perecent direct interest), continues to mine in West Papua.[21] Its mining, as well as security, activities have greatly exacerbated the tensions and violence between the Indonesian

[18] OSBORNE, INDONESIA'S SECRET WAR, *supra* note 4, at 33-35.
[19] This is translated as the Free Papua Movement.
[20] Abigail Abrash, *Development Aggression: Observations on Human Rights Conditions in the PT Freeport Indonesia Contract of Work Areas, With Recommendations* 9-10 (Robert F. Kennedy Memorial Center for Human Rights, July 2002).
[21] Grasberg Indonesia, Rio Tinto Website, available at http://www.riotinto.com/aboutus/worldwide Operations/default.aspx (last visited Dec. 9, 2003).

government and the native Papuans. For example, a major purpose of the Indonesian transmigration plan has been to provide a non-native workforce for Freeport's operations.

Freeport arrived in West Papua two years before the Indonesian government conducted the now infamous referendum, the "Act of Free Choice." Under Article 18 of the New York Agreement of 1962, all adults from the West Papuan territory were to be eligible to participate in the act of self-determination, which was "to be carried out in accordance with international practice." Fernando Ortiz-Sanz, the Bolivian ambassador to the United Nations, arrived in Indonesia in August 1968 to "advise, assist and participate" in a referendum to determine the future status of the territory, which was named the "Act of Free Choice" by the Indonesian government.[22] From the outset, Ortiz-Sanz found his mission under-funded, under-staffed, and constantly struggling with the Indonesian government in Jakarta to ensure adherence to the guarantees of the New York Agreement, for example, its requirement that the act of self-determination be carried out "in accordance with international practice." The government, for its part, had made its intent clear. In an April 1969 speech, President Suharto assured the Indonesian military of the impending "return of West Irian into the fold of the motherland."[23] Under significant pressure from Jakarta, the West Papuan provincial assembly sanctioned the creation of eight assemblies to determine the individual representatives who would participate in the Act of Free Choice and who were to be selected either by election, by choice of social, cultural or religious organizations, or by the assemblies themselves. All told, each member of the eight assemblies represented approximately 750 West Papuans, and the assemblies in turn selected 1,026 delegates, 1,024 of whom eventually voted on the Act later in the year.[24]

[22] Report of the Secretary General Regarding the Act of Self-Determination in West Irian, U.N. Doc. A/7723, 6 November 1969, Annex 1 [*hereinafter* Report of the Secretary General].
[23] OSBORNE, INDONESIA'S SECRET WAR, *supra* note 4, at 41.
[24] Report of the Secretary General, *supra* note 22, Annex 1.

Ortiz-Sanz, understanding the extent to which the Indonesian government was controlling the Act from behind the scenes, campaigned for more direct representation, but was rebuffed by Jakarta. The resistance movement, the activities of which had largely ceased toward the end of 1968, suddenly came back to life in April 1969.[25] Various insurgencies sprouted up in Waghete and in Enarotali, where locals dug holes in runways at a nearby airstrip to prevent Indonesian planes from landing. The April uprisings were characterized by an undertone of nationalism, with the Morning Star flag becoming a rallying symbol for protesters at Enarotali. In response to one of the uprisings in Paniai,[26] the Indonesian military conducted machine-gun strafing runs from the air on protestors, killing dozens and forcing thousands into the wilderness, where heavily armed Indonesian paratroopers followed.[27] Neither of the April uprisings lasted long, but they sparked a flurry of OPM activity throughout West Papua, a flurry that was met with a fierce response by the Indonesian military, which overpowered and captured a number of resistance fighters and imprisoned them in military camps in what have been described as "barbaric" conditions.[28]

A number of OPM members attempted to flee to Australian-controlled Papua New Guinea (PNG), only to be turned back just over the border. In camps back on the West Papua side of the border, members of the Indonesian military retaliated against the refugees, killing 28 in two separate incidents. As West Papuans staged a number of minor uprisings throughout the countryside, the Indonesian government sought to convince the foreign press and the U.N. team that commerce in West Papua's commercial centers was booming. These efforts were less than

[25] OSBORNE, INDONESIA'S SECRET WAR, *supra* note 4, at 42.
[26] The larger region that included Enarotali.
[27] OSBORNE, INDONESIA'S SECRET WAR, *supra* note 4, at 42-43.
[28] *Id*. at 43-44.

convincing, with inflation perilously high, few employment opportunities—especially for Papuans—and the local economy in a state of near chaos.[29]

In response to a surge in anti-government sentiment, Indonesian military leaders began making public threats against Papuan leaders who voted (or advocated voting) for West Papuan independence, vowing to shoot them on the spot if they did not vote for Indonesian control. Consequently, when the voting finally got underway at the beginning of May, there was little doubt as to the outcome. Ortiz-Sanz and his staff attempted to oversee all of the local proceedings, but, in the end, the U.N. team actually observed the selection of only 195 of the 1,026 selected to participate in the Act. Of those 195, it was obvious to the U.N. observers that many—if not all—had been coerced by the Indonesian government.[30]

With the representatives selected, the eight regional assemblies began meeting in July. The first vote came in Merauke, where the 175 delegates were kept under close guard by the government before eventually voting unanimously for Indonesian control. The scene was repeated throughout West Papua at the next six assembly meetings and the final assembly vote at Jayapura on August 2. With no dissenting votes, 1,024 Papuan council members chose Indonesian control. The Indonesian government had its territory.

In November 1969, Ortiz-Sanz filed his official report with the United Nations, expressing disappointment with the process and dissatisfaction with the Indonesian government and the overall mission. The report, while generally affirming the legitimacy of the result, concluded that "'with the limitations imposed by the geographical character of the territory and the general political situation in the area, an act of free choice has taken place in accordance with *Indonesian* practice,'" pointedly omitting any reference to the referendum's accordance with

[29] *Id.* At 44-45.
[30] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 24-26. *See also* OSBORNE, INDONESIA'S SECRET WAR, *supra* note 4, at 46-48.

"international practice," which had been one of the requirements of the New York Agreement.[31] Despite strong statements from the delegations from Ghana, Sierra Leone, Togo, and Zambia, among others,[32] the General Assembly passed a resolution taking note of the results of the Act. At least for the time being, the General Assembly acknowledged Indonesia's legal control of West Papua.

D. West Papuan Resistance and Indonesian Repression

In the aftermath of the Act of Free Choice, the Indonesian government, which had initiated a transmigration program to West Papua during the mid-1960s, stepped up its efforts to populate the island with migrants from other parts of the country. The military evicted many native Papuans from their land by trickery or at gunpoint in order to allow settlers from other parts of Indonesia, often ex-military men and their families, to move onto the land.[33]

After a short grace period between the conclusion of the referendum and its acknowledgement by the United Nations, the Indonesian military increased its operations in West Papua. These operations were increasingly brutal. In May 1970, a unit of the Indonesian Armed Forces ("ABRI") Udayana Division shot dead Maria Bonsapia, a pregnant villager, before a crowd of 80 women and children. The soldiers cut the fetus out of her body and dissected the baby. A group of soldiers also raped and killed her sister.[34] The soldiers then informed the gathered crowd that their military colleagues had recently massacred 500 West Papuans in the Lereh district.[35]

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[31] SALTFORD, UNITED NATIONS AND INDONESIAN TAKEOVER, *supra* note 16, at 166, *quoting* Report of the Secretary General, Annex 1, para.253.
[32] Ghana proposed an alternate resolution noting the severe problems of the 1969 Act of Free Choice and calling for another self-determination referendum by 1972. However, this was never voted on.
[33] OSBORNE, INDONESIA'S SECRET WAR, *supra* note 4, at 58.
[34] *Id*. at 50.
[35] Seth Rumkorem, a former Free Papua Movement (the "OPM") leader, described this massacre to *Tahanan Politik* ("TAPOL") in 1984. TAPOL is the name of a London (UK)-based organization campaigning for human rights in

In June 1970, an Indonesian patrol of fifty red-berets[36] and green-berets[37] assembled on the west coast of the island of Biak after an alleged OPM attack on Indonesian soldiers. The Indonesian soldiers encircled two villages on the shore, Wusdori and Kridori. They forced all villagers out into an open space between the two villages and killed all the men, fifty-five in total, in front of the women and children.[38] The next day, the soldiers captured thirty Papuan men from neighboring villages. They forced the captives into the boats of those killed the day before, tied stones around their necks, and threw them overboard. These men all drowned.[39]

The continued brutality stirred up further protest to Indonesian rule, especially in the jungles along the West Papua-PNG border, where a new movement known as the *Tentara Pembebasan Nasional*[40] (TPN) was slowly gaining strength. On July 1, 1971, the TPN, in a move more symbolic than practical, formally declared the independence of West Papua, signifying for posterity that the people of West Papua refused to accept the Act of Free Choice and that they would continue to fight to see that the principle behind it—their right to self-determination—would one day be vindicated.[41]

In the mid-1970s, the Indonesian government became worried that the ferocity of the military's response to OPM and TPN attacks was motivating more and more West Papuans to join the resistance. The government began moving away from large-scale troop deployments toward a more active role for the security agencies, most notably the Command for the Restoration of Security and Order ("KOPKAMTIB"), Indonesia's top military intelligence

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Indonesia. The acronym is the name for "political prisoner" in Indonesia. *See* TAPOL, *The Indonesian Human Rights Campaign*, *at* http://tapol.gn.apc.org/ (last visited July 5, 2002).

[36] Indonesian elite forces.

[37] Indonesian infantry.

[38] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 79-80 (quoting Henk de Mari, in DE TELEGRAF, Oct. 11, 12, & 19, 1974). Extracts from these articles were published in TAPOL BULLETIN, No. 8, January 1975).

[39] *Id*.

[40] "People's Liberation Army."

[41] OSBORNE, INDONESIA'S SECRET WAR, *supra* note 4, at 56; BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 64-65.

body.[42] As Osborne notes, "KOPKAMTIB intimidated elements of the Papuan population: academics, bureaucrats with suspect loyalties, village heads, the unemployed."[43]

According to OPM leaders, many key figures were killed during this time. Poisoning was a popular method.[44] The fate of Marthin Luther Waren was a typical case.[45] In August 1972, he disappeared after the Indonesians allegedly released him from prison. After he signed a release document, his friends, Daan and Kapaopas, saw an Indonesian intelligence officer offering him a ride in a non-military vehicle. Marthin Luther Waren left with the officer and never appeared again.[46]

Also in 1972, a new and deadly disease began taking its toll on the native West Papuans: cysticercosis. Physicians from the Enarotali hospital first detected the epidemic when they found tapeworm eggs in nine percent of 122 hospitalized Ekari people.[47] These physicians traced the transmission to the batch of pigs from Bali that the Indonesian government gave as a "peace offering" to the Ekari people[48] after a prolonged military counter-insurgent operation.[49] In 1977, the epidemic ranked as one of the major causes of mortality in the adult Ekari population.[50] By 1978, serological tests confirmed that at least twenty-five percent of adults and children among the Ekari were infected with cysticercosis. By 1973, the disease had spread to West Papuans living in the Baliem Valley.[51] Later, it spread further east to the village of Ok Sibil, near the

[42] KOPKAMTIB was Indonesia's foremost military intelligence agency well into the 1980s.
[43] OSBORNE, INDONESIA'S SECRET WAR, *supra* note 4, at 59.
[44] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 59, 83.
[45] *Id*. at 59.
[46] *Id*.
[47] *Id*.
[48] Ekari tribespeople were the first victims of the pigworm epidemic. They inhabit one of the two densely populated highland basins—Paniai Lake, which was also the most popular destiny for Javanese transmigrants. Thousands of these Papuans had fought in the armed resistance against the incorporation of West Papua into Indonesia. *Id*. at 58-60.
[49] *Id*.
[50] *Id*.
[51] The Baliem Valley is located in the central part of West Papua.

border with Papua New Guinea.[52] The health authorities in Jakarta were slow to provide vital drugs. When a Catholic priest attempted to obtain a drug believed to be the only cure, he discovered that it was not included on the list of medicines allowed for import into Indonesia. The territorial Director-General for Public Health told him that the Department of Health could do nothing to fight the disease "except advise people to change their habits and way of life . . . . In terms of national priorities, tapeworm comes much lower than other diseases like malaria, tuberculosis and so on."[53]

During the same period, anti-Indonesian government political activity was growing among indigenous Papuans. By 1973, the sentiment of many West Papuans had swayed in favor of the OPM, especially as the "Indonesianisation" of the education system and of Papuan society as a whole began to take root.[54] The Indonesian government, which had publicly attempted to step back its opposition to the West Papuan independence movement, did not help its cause when, in the summer of that year, it changed the name of West Papua from "West Irian" to "Irian Jaya" ("victorious Irian") to go along with the Indonesian name for the capital, Jayapura ("victory city").[55]

In 1977 and 1978, the Indonesian military executed major operations in the Jayawijaya highlands. On July 22, 1977, the Indonesian army used two aircraft to strafe a group of villages, including Akimuga, about 40 kilometers from Timika. Each of these villages had an estimated population of more than a thousand.[56]

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[52] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 59-60.
[53] *Id*. at 60 (quoting TEMPO, Aug. 6, 1983).
[54] *Id.*
[55] There is debate about what "Irian" means. The Indonesian government officially maintains that it is an acronym, *Ikut Republik Indonesia Anti Nederland*, loosely translating as "follow the Republic of Indonesia against the Netherlands." Many West Papuans claim that Irian is actually an old Biak term, though there is disagreement as to the meaning. *See* Irian Jaya, *available at* http://www.irja.org/eypij.htm (last visited April 28, 2002).
[56] OSBORNE, INDONESIA'S SECRET WAR, *supra* note 4, at 69. This account was given by Terry Doyle, a civilian Australian pilot who for eight years flew from Darwin to a small airport that served the Freeport copper mine, south

Soon after this military operation, a group of West Papuans cut Freeport's copper slurry pipeline. The Indonesian army responded with massive and indiscriminate retaliatory actions, including a sweeping ground operation code-named *Operasi Tumpas* ("Annihilation")[57] around the region of Akimuga. The military arrested and detained local Papuans, many for months. According to Amnesty International, the army used steel containers to incarcerate thirty men in total darkness for three months in the Freeport mining site, where night temperatures approached the freezing point.[58]

Strafing and bombing missions killed numerous West Papuan villagers and caused thousands to flee their homes into the jungles. In May 1977, OV-10 Broncos dropped anti-personnel "Daisy Cluster" bombs near the village of Ilaga, located on the other side of the Puncak Jaya mountain chain from Freeport's mine.[59] At the end of August, two OV-10 Bronco Bombers shelled the region of Akimuga. Soldiers also destroyed most of the food gardens belonging to Papuans in the region. As a result, many Papuan children suffered severe malnutrition.[60]

According to the "Full Report on the Irian Jaya Situation" prepared by the OPM, in all of the villages through which the Indonesian army passed, the army burned houses and churches, shot the villagers' pigs and chickens, and killed men, women and children.[61] In the village of Kuyuwagi, Indonesian soldiers disemboweled local Papuans whom they had killed, twisting their

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of the Baliem Valley. Upon taking a routine flight into Timika airport that day, he learned from an American employee of Freeport that the attack was to take place. He got airborne right after the attack and saw smoke and dust rising and huts burning. He also heard the Indonesian pilots discussing the attack over the radio. Similar events were described by two RAAF air force officers who were on a team engaged in the mapping operation that formed part of Australia's military aid program to Indonesia. *Id.* at 68.

[57] *Id*. at 71.

[58] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 34.

[59] *Id*. at 34-35 (quoting Denis Reinhardt, NATION REVIEW, 15-21 Sept. 1977). "Daisy Cluster" or "Cluster bombing" is a high-altitude delivery of a 15,000-pound conventional bomb designed to kill everyone present within a huge area. Originally it was designed to create an instant clearing in the jungle.

[60] OSBORNE, INDONESIA'S SECRET WAR, *supra* note 4, at 70.

[61] *Id*. at 71.

entrails around sticks and inserting stones, cabbages and leaves into their bodies. The soldiers also used bayonets to pierce pregnant women through the vagina and tear them open to the chest. They cut unborn babies into halves.[62] In one incident, an Indonesian soldier killed Nalogolan Kibak, the tribal leader of Kampong Dila, and filled a bucket with his blood. Then the soldiers forced the tribal leaders, teachers, and pastors of the area, at gunpoint, to drink the blood.[63]

The military report of incidents in the District of Jayawijaya in 1977 noted that repeated strafing from helicopters resulted in "many casualties."[64] Eliezer Bonay, a former governor of West Papua, placed the death toll around 3,000 when he testified before the Tribunal on Human Rights in West Papua.[65] The Jakarta daily, *Kompas*, reported that during the time of military attacks, there were "a very large number of victims . . . . [T]he Baliem River was so full of corpses that for a month and a half, . . . people could not bring themselves to eat fish."[66] The high death toll was due to the indiscriminate aerial bombardment and shelling "where there were villages or [wherever] there were people."[67]

In May 1978, the OPM kidnapped seven high-ranking Indonesian army officers and civilian officials to draw international attention to its demand for negotiations with the Indonesians.[68] The Indonesian military responded with bombing sorties by OV-10 Bronco aircrafts and the burning of villages on both sides of the West Papua/Papua New Guinea border.

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[62] *Id.*
[63] *Id.*
[64] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, App. I: Military Report of Incidents in the District of Jayawijaya in 1977, at 119-24.
[65] West Papuan émigrés in Papua New Guinea set up the South Pacific Human Rights Tribunal to investigate the human rights violations in West Papua. *Id*. at 169. The OPM estimated that several thousand people had lost their lives in the highlands uprisings. OSBORNE, INDONESIA'S SECRET WAR, *supra* note 4, at 72. Indonesia claimed that the death toll was much lower; one officer told visiting Australian journalist Denis Reinhardt that around 900 people lost their lives in the uprisings. *Id*.
[66] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 68 (quoting KOMPAS, 28 November 1977).
[67] OSBORNE, INDONESIA'S SECRET WAR, *supra* note 4, at 72.
[68] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 69.

The operation led to the death of several hundred people and drove at least a thousand to flee to Papua New Guinea.[69]

Indonesian military forces also committed extrajudicial killings. In 1976, Indonesian soldiers, on the order of the chief of intelligence of Korem 172, the military command in Abepura, beat two prisoners, Pilomen Wenda and Oscar, to death with iron bars.[70]

Mimi Fatahan was another victim of extrajudicial killing. He had fled to Papua New Guinea in April 1977. After Papua New Guinea authorities forcibly deported him to West Papua, the military command detained him in Jayapura. In May 1977, a hunting party of officers from the regional military command took Fatahan to the jungle. He never returned.[71] One informant reported that villagers discovered Mimi Fatahan's body, chopped into pieces, in a drum floating on Lake Sentani, the largest lake in West Papua.[72]

In 1979, the death of Baldus Mofu, an elected member of the New Guinea Council set up by the Dutch in 1961, drew wide publicity. Mofu had been under close surveillance by the Indonesians. Whenever the OPM went into action or unrest broke out in the towns, Indonesian military officials arrested, beat, and tortured him.[73] Mofu was imprisoned again between July and October 1979. Several weeks after the Indonesians released him, two unknown men took him away from his house. Early the next morning, he returned home, bruised and swollen all over. He died within hours.[74] Mofu and Mimi Fatahan were particularly prominent victims of Indonesian repression, but many shared their fate as Indonesia sought to consolidate its control over the territory.

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[69] *Id*, at 69 (quoting PACIFIC ISLANDS MONTHLY, Sept. 1978).
[70] *Id*. at 85 (quoting TAPOL BULLETIN, No 46, July 1981). This report is based on an army document that recorded the narrative of Soeyoto, a retired low-ranking soldier, who drove the victims to the place where they were beaten to death. Soeyoto heard them crying out as they were beaten up, but he was not present to witness their deaths directly.
[71] *Id.* at 85.
[72] *Id.*
[73] *Id*. at 85-86.
[74] *Id*.

E. Exploitation of West Papuans' Land, Resources, and Labor

Since the beginning of Indonesian rule, government and military officials have been heavily involved in resource extraction in West Papua. By 1980, the oil industry in West Papua had gone into decline, prompting the dismissal of local West Papuan employees in favor of Javanese labor, which was viewed as more skilled and reliable.[75] A U.S. professor who visited West Papua in 1980 noted the planned influx of Indonesian workers, including more than 2,000 families that were scheduled to be "dropped" near two major oilfields in order to implement a "policy of non-employment of Melanesians in the oil industry."[76]

For the Indonesian government and its foreign investors, the success of copper mining in West Papua more than made up for the decline in oil production. In the 1980s, U.S.-owned Freeport continued to exploit the rich copper resources of West Papua.[77] By the beginning of the 1990s, the mining town of Tembagapura had become an enclave of expatriates and Indonesians, segregated from the local people in a way described by Budiardjo as "reminiscent of South Africa's apartheid system."[78] In 1982, Freeport employed 452 expatriates, 1,859 Indonesians, and only 200 Papuans. The Papuans were hired as unskilled laborers and forced to live on the outskirts of the site in illegal squatter settlements.[79]

Freeport's mining operations also led to the relocation of the Amungme tribe from the region around Tembagapura to a hot, malarial area near the coast. In June 1980, the Amungme were devastated by an epidemic that swept through the settlement, killing 216 children. Freeport did nothing to provide food or medicine to the Papuans to fight the epidemic, although the

[75] *Id.* at 32.
[76] *Id.* (citing THE TIMES OF PAPUA NEW GUINEA, May 22, 1981).
[77] Australia West Papua Association, *West Papua Information Kit, with Focus on Freeport* 9 (1998).
[78] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 34.
[79] *Id.*

company itself attributed the high death toll to undernourishment.[80] The Amungme leaders sent numerous unsuccessful petitions to the Indonesian government, asking for government services; access to schools and jobs; land rights, recognized by law, that had been denied to the Papuans; and the negotiation of a new contract between Freeport, the Indonesian government, and the Papuans.[81] These petitions were uniformly unsuccessful, suggesting an Indonesian policy of deliberate indifference toward the West Papuan people.

Indonesia's desire to promote the growth of the plantation economy in West Papua led to the further alienation of West Papuan land and culture. An investigation in the early 1980s of two plantations managed by a state-owned company named PTP-2 revealed that land had been seized with minimal if any compensation. Villagers were relocated and left with insufficient land to practice their traditional shifting cultivation, as large areas of land were transformed from self-supporting food production to single-crop production for sale on the global market.[82] In 1988, the U.S. company Scott Paper and the Indonesian company Astra entered into a joint venture and established a eucalyptus plantation and pulp mill in the Merauke region, threatening to further displace indigenous Papuan sustenance production and to cause desertification in the region.[83]

Indonesian authorities also continued to exploit West Papua's rich timber resources. In 1982, three articles published in a Jakarta daily described the exploitation of the Asmat tribe, which lived near the south coast of West Papua, by Jakarta-based timber companies. The companies relocated the Asmat people and subjected them to a regime of compulsory labor, by which local officials forced villagers to cut down their own forests at below-subsistence wages.

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[80] *Id*. at 36.
[81] *Id*. at 37.
[82] *Id*. at 55.
[83] WEST PAPUA: PLUNDER IN PARADISE 77 (Anti-Slavery Society Indigenous Peoples and Development Series ed., 1990).

Officials warned that those who refused to accept the logging jobs and conditions could be arrested.[84] "The compulsory log-felling scheme exploited forests that were the property of the tribespeople. It threatened their sago supplies, the staple food of the Asmat people. . . . It disrupted village life, forcing villagers to stay in the forest for as long as six weeks."[85] An Indonesian environmental group warned that the Asmat people were "on the brink of cultural starvation after a decade of enforced ironwood logging."[86] In 1988, a Jakarta weekly newspaper warned that the Asmat area, rapidly succumbing to soil erosion, might soon be submerged by nearby rivers.[87]

A similar instance of forced labor occurred in the Paniai region of West Papua from 1982 onward. There, the Indonesian military, having established a post around Tiga Danau, imposed a system of forced labor on the indigenous population.[88] All men, with the exception of teachers, were required to work around the guard post every Wednesday, performing night patrol, and the youth were forced to deliver rations to the guard post without compensation.[89] If one man from the village was absent for any of these duties, the whole village was punished.[90] These punishments included monetary fines as well as physical punishment or torture.[91]

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[84] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 38-40 (citing KOMPAS, Oct. 4, 6, & 7, 1982).The authorities also extracted other forms of labor from the Papuans, arresting people on petty charges and keeping them in detention to work on road and building construction. *Id.* at 40.
[85] *Id*. at 39.
[86] *Id*. (citing a statement by Kampanye Pelestarian Hutan Indonesia [the Movement of Indonesian NGOs against Foreign Destruction], dated Oct. 1982 and made public during a National Parks Conference in Bali).
[87] *Id*. at 41 (citing EDITOR, July 2, 1988, *as reported in* INDONESIA NEWS SERVICE No 120, July 25, 1988). Oil, copper, and timber were not the only West Papuan resources exploited by outsiders. In 1987, Transpeche, a French company, began to operate West Papua's first canning business with an on-stream canning facility. Local West Papuan fishermen, who still relied on poles and lines, had no hope of surviving against the deep nets and modern equipment of Transpeche. *Id.* at 41-42.
[88] Office for Justice and Peace, *Memoria Passionis: The Historical Sketch of the Paniai's Resistance and Suffering at Tiga Danau Besar in Paniai Regency, Papua* 17-18 (Nov. 2000).
[89] *Id.* at 17.
[90] *Id.* at 17-18.
[91] *Id.* at 18.

F. Renewed Military Campaigns, Rape, Torture, and Extrajudicial Killings

During the same period, the Indonesian military waged a series of brutal campaigns against the West Papuans, targeting civilians as well as members of the OPM. In 1981, the military launched Operation Clean Sweep, which sought to undermine support for the Papuan resistance by persecuting relatives of OPM members. Soldiers raped, assaulted, and killed the wives of known rebels and sacked villages suspected of lending support to the OPM. Survivors reported brutal murders in the Jayapura district, claiming that whole families had been bayoneted to death and their bodies left to rot.[92]

Operation Clean Sweep apparently aimed both to intimidate those suspected of supporting the OPM and to cleanse the border regions of Papuans to make room for Javanese migrants. This objective was suggested by the army's slogan: "Let the rats run into the jungle so that the chickens can breed in the coop."[93] Lands emptied by Operation Clean Sweep were converted into transmigration areas and soon populated by settlers from Java or elsewhere in Indonesia.[94]

By the summer of 1981, the campaign had extended into the Central Highlands. In August, the military responded to apparent OPM activity by bombing the village of Madi, in the Paniai basin in the Central Highlands, where a Dutch television team had filmed hundreds of OPM supporters training for the resistance. Troops used napalm and chemical weapons against the villagers and killed at least 2,500; some estimates put the death toll as high as 13,000.[95]

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[92] OSBORNE, INDONESIA'S SECRET WAR, *supra* note 4, at 87; BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 80.
[93] OSBORNE, INDONESIA'S SECRET WAR, *supra* note 4, at 87.
[94] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 81.
[95] The Papua New Guinea government estimated that at least 2,500 West Papuans were killed in Madi, while Dutch TV reporters suggested the much higher figure. OSBORNE, INDONESIA'S SECRET WAR, *supra* note 4, at 87-88.

A 1984 report by Amnesty International noted that the Indonesian army and police often arrested and detained anyone suspected of OPM involvement, especially after nationalist incidents such as the raising of the West Papuan flag.[96] Military personnel arrested and detained people without warrant and for indefinite periods of time.[97]

While most detained West Papuans were never formally charged or tried, those who were brought to court were unlikely to receive a fair trial. TAPOL reported that police, the army, prosecutors, and judges in West Papua regularly disregarded the procedural safeguards codified in the Criminal Procedure Code. In 1983, Mulya Lubis, then chairman of the Foundation of Legal Aid Institutes ("YLBHI"), declared, "The new Criminal Procedural Code might just as well not exist, for it has no reverberations in Irian Jaya."[98]

Indonesian officials commonly subjected political prisoners to torture, including electric shocks, beating, pistol-whipping, deprivation of toilet facilities, and water torture, in which the prisoner was placed in a bunker nearly filled with water. Many former prisoners also claimed that detainees died after being poisoned by prison guards. Amnesty International documented the experiences of eight West Papuans who were detained in the late 1980s after returning to West Papua from Papua New Guinea, where they had been living as refugees. The eight men were subjected to repeated beatings during their detention; during one session, an Indonesian soldier ordered one of the men, weak from the beating, to climb a tree and recite the five articles of the State ideology.[99]

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[96] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 84 (citing Amnesty International, *Irian Jaya: Patterns of Arrest and Detention,* Document No. ASA 21/06/86, March 1986).
[97] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 81, 83. The few trials that received attention outside of West Papua involved individuals accused of raising the West Papuan flag or other peaceful political protests. WEST PAPUA: PLUNDER IN PARADISE, *supra* note 83, at 46.
[98] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 83.
[99] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 83 (citing Amnesty International, *Indonesia/East Timor: Allegations of Torture,* Doc No. ASDA 21/01/88, Mar. 1988).

According to John Etheridge, a Catholic Bishop who worked with West Papuan refugees in a refugee camp in Papua New Guinea:

> I've heard stories about people being put in 44-gallon drums of water and just left there for eight hours, and after that, taken out and put in the sun for eight hours. I've heard lots of stories about people being cut to pieces. I've seen photographs, a photograph of a hole in the ground, full of water, and you can just see two heads—two or three heads—just above the water. . . . I saw a photograph of a Melanesian in a room of some sort. It looked like a morgue slab and he was naked. It was obvious that he was dead and it looked to me that strips of skin had been taken off his legs and his feet.[100]

In the 1980s, several West Papuans were killed while in detention or were disappeared and presumed killed after being released from custody. In early 1984, Indonesian forces responded to a pro-independence uprising in Jayapura by launching a major retaliatory campaign called Operation Clean-up.[101] Elite para-commandos flown in to direct the operation arrested and shot to death several West Papuans suspected of OPM involvement.[102]

In 1983, the Indonesian authorities arrested and detained anthropologist Arnold Ap and his colleague Eduard Mofu, who was the son of Baldus Mofu.[103] Ap had promoted Papuan cultural expression, championed the revival of traditional Papuan music, and, closer to the time of his arrest, criticized Indonesian policies on the radio program that he hosted.[104] Ap's arrest resulted in immediate protests and calls for his release. Neither Ap nor Mofu were released, however. In April 1984, para-commandos killed the two men after tricking them into leaving

[100] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 84.
[101] OSBORNE, *supra* note 4, at 89.
[102] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 86.
[103] Baldus Mofu was disappeared and killed in 1971. *See* notes 73-74 and accompanying text.
[104] OSBORNE, INDONESIA'S SECRET WAR, *supra* note 4, at 149.

their place of detention on the premise that they would be taken to Papua New Guinea. The Indonesian government claimed that the pair had been killed while trying to escape.[105]

Despite popular outrage at Ap's death, extrajudicial killings continued. In May 1985, Indonesian troops burned down 200 village houses in the Enarotali region of the Central Highlands in retaliation for the killing of two migrants from Indonesia killed in an OPM operation. In June and July of that year, the military killed 517 villagers in several highland villages in reprisal for a confrontation between OPM and Indonesian troops that resulted in the death of more than thirty Indonesian soldiers.[106]

In a 1987 report, Amnesty International identified five West Papuans who were believed to have been killed by security forces in 1986. Amnesty noted, however, that information about extrajudicial killings "is often scanty and difficult to verify, given the limited access to Irian Jaya by independent observers and the restrictions on press freedom in Indonesia more generally."[107] Such restrictions by the Indonesian government served to block international scrutiny

G. Transmigration, Displacement, Disease, and Death

At the commencement of its fourth Five Year Plan in 1984, the Indonesian government announced that West Papua would become a primary target area for transmigration.[108] By the end of 1984, the government had set up 24 major transmigration sites or compounds, appropriating 700,000 hectares of land from its traditional owners. By the middle of 1986,

[105] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 86-87.
[106] *Id*. at 81.
[107] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 87 (citing Amnesty International, *Indonesia: Update on Amnesty International's Concerns in Irian Jaya*, ASA 21/01/87, Jan. 1987).
[108] *Id. See also Indonesian Transmigration: Hit the Road, Java*, THE ECONOMIST, Aug. 4, 1984, at 61 (noting that "in the next five years the [Indonesian] government wants to import 1m people to add to the province's population of 1.2 m., a prospect which has alarmed neighboring Papua New Guinea and stirred a small Irianese separatist movement back to life").

27,726 families had been moved into West Papua, a total of nearly 140,000 people since the end of the 1970s.[109]

Until 1988, the World Bank funded about ten percent of Indonesia's transmigration program with a total of $650 million in loans. In 1988, it offered another $150 million to help Indonesia improve its existing sites. Yet a French study in 1989 found that 80 percent of the transmigration sites failed to improve the living standards of the settlers, let alone those of the West Papuans.[110]

Transmigration schemes dispossessed West Papuans of their land and required them to move into the transmigration sites, along with the "transmigrants," people from elsewhere in Indonesia who had been settled on the compounds. According to a team of senior Indonesian officials, writing in 1986, the taking of land for transmigration did not require compensation, but only a certificate of recognition, perhaps accompanied by the construction of a church or school or even a traditional ceremony.[111] Within the transmigration compounds, the government required that Papuans be dispersed, with one Papuan family to every nine Javanese families, thus ensuring that the Papuans would become a minority in each area. The West Papuans neither shared in the economic benefits of the new settlements nor held significant posts in the administrative staff of the transmigration program.[112]

In the towns, West Papuans had also become marginalized, living as second-class citizens in a foreign culture. According to the *Far Eastern Economic Review*, non-Melanesians accounted for about a quarter of the population of West Papua in the mid-1980s; they included

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[109] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 51. *The Jakarta Post* offered a lower figure of 23,000 families (115,000 people) for 1979-89. WEST PAPUA: PLUNDER IN PARADISE, *supra* note 83, at 63 (citing article in the *Jakarta Post*).
[110] WEST PAPUA: PLUNDER IN PARADISE, *supra* note 83, at 71.
[111] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 51.
[112] *West Papua in Revolt: Many Flee from Indonesian Reprisals*, TAPOL BULLETIN 5 (March 1984) [*hereinafter West Papua in Revolt*].

spontaneous migrants as well as settlers brought over as part of the transmigration program.[113] The newcomers dominated the government bureaucracy, the business sector, and upper levels of education.[114] Television programs and magazines addressed a Javanese audience, while propaganda posters sponsored by the "Project for the Guidance of Alien Societies" urged the Papuans to relinquish their inefficient and primitive ways for the superior lifestyle of the Indonesians.[115]

The loss of their land and disruption of their lifestyles placed the West Papuans at severe risk of malnutrition and disease by the mid-1980s. In 1984, an Indonesian doctor suggested that Indonesian intrusions into West Papuan lifestyles led to a high incidence of disease among the West Papuan population. A Dutch doctor interviewed by a Dutch TV company called the health situation of the West Papuans "alarming." He described high rates of yaws, measles, whooping cough, small- and large-scale epidemics, and sexually transmitted diseases that impaired the fertility of the Dani people who resided in the fertile Baliem Valley, a major transmigration site.[116] A Dutch missionary working in the mountain regions told the Dutch TV journalists that infant mortality among the West Papuans in that region was above 60 percent, and the average life expectancy only 30 or 31 years.[117]

Mortality and morbidity rates among Papuans escalated in the later 1990s as rates of HIV infection rose dramatically. In 2002, 20.4 people per 100,000 were infected by HIV in Papua, compared to only 0.42 cases per 100,000 in the rest of Indonesia.[118] Approximately 40 percent of Indonesia's HIV and AIDS cases were located in Papua, a province that is home to less than

[113] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 44 (quoting Chris Manning, FAR EASTERN ECONOMIC REVIEW, Apr. 30, 1987).
[114] WEST PAPUA: PLUNDER IN PARADISE, *supra* note 83, at 42-43.
[115] *Id*. at 42; BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 48, 56-57.
[116] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 58.
[117] *Id*. at 46, 58.
[118] Leslie Butt et al., *The Smokescreen of Culture: AIDS and the Indigenous in Papua, Indonesia*, at 1, *forthcoming in* PACIFIC HEALTH DIALOG, Sept. 2002 (publication of Sept. 2002 issue pending as of Sept. 27, 2003).

one percent of Indonesia's population.[119] Papuans also appear to contract HIV at rates significantly higher than those of the Indonesian migrant community residing in Papua.[120]

Several recent studies suggest that this stark discrepancy in infection rates is due to government-sponsored AIDS educational interventions that systematically discriminate against ethnic Papuans. AIDS prevention efforts by the Papuan Department of Health, which is staffed almost exclusively by ethnic Indonesians, have targeted the professional brothel and bar worker industries that employ Indonesian migrants. Papuan sex workers, who generally work for low pay in unregulated and high-risk environments outside of formal brothels and bars, are rarely provided with any information about HIV/AIDS prevention or condom use.[121] General AIDS awareness and safe sex campaigns in Papua are sporadic and have focused on urban areas, where they do not reach the majority of Papuans, who live in rural and semi-urban regions.[122] Meanwhile, local health care systems are inadequate and frequently discriminate against Papuans. For example, in the Baliem Valley, administrators at family planning and maternal and child health clinics hold separate sessions for Papuan members of the Dani tribe and Indonesian migrants because "the Dani are dirty and women won't want to use the same examining table as a Dani."[123] The same clinics have refused to provide oral contraceptives to Dani women, on the grounds that they will misuse them or feed the pills to their pigs.[124] Indonesian officials often point to Papuan culture and sexually deviant behavior as reasons for the spread of HIV and other

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[119] *Id*.
[120] *Id.* (citing Leslie Butt et al., *The Papuan Sexuality Project Research Report* (Jakarta: Family Health International, 2002) (unpublished report)).
[121] *Id*. at 5-6; Leslie Butt et al., *Preventing AIDS in Papua: Revised Research Report* 35-45 (December 2002).
[122] Butt et al., *Smokescreen of Culture*, *supra* note 118, at 7. In a recent survey of 196 Papuans, only 29 percent of respondents were able to recognize a condom when shown one and asked to identify it. Butt et al., *Preventing AIDS in Papua*, *supra* note 121, at 47.
[123] Leslie Butt, *KB Kills: Political Violence, Birth Control, and the Baliem Valley Dani*, 2 ASIA PACIFIC JOURNAL OF ANTHROPOLOGY 63, 70 (2001). The clinics turn away Dani women who come to the clinic on the wrong day. *Id*.
[124] *Id*. at 70-71. Dani women are instead given a choice between Norplant implantations or injections of Depo-Provera (which causes temporary sterilization), which are presented to the women without full disclosure of their risks and side effects. *Id*.

STDs, a view that has exacerbated inequalities in AIDS prevention and education programs in the region.[125] Without a more equitable and comprehensive response by the Indonesian government to the public health crisis in Papua, HIV/AIDS is likely to become an epidemic that threatens the very survival of the Papuan people.

H. Flight of West Papuan Refugees to Papua New Guinea

While the Indonesian government was moving Javanese settlers into the region, the violence in West Papua was forcing many native residents to flee the country. In February 1984, the army launched a violent campaign in response to a failed OPM uprising in Jayapura. The military operation led to the flight of 300 West Papuans across the border to Papua New Guinea (PNG).[126] The refugees were primarily from Jayapura and included West Papuan intellectuals and government officials. By April, more than 6,000 Papuan refugees had escaped to Papua New Guinea, fleeing from military reprisals and dislocation caused by transmigration and resource exploitation. By June, approximately 10,000 refugees—one percent of West Papua's indigenous population—occupied makeshift camps hastily erected by PNG.[127]

Under pressure from its large and powerful neighbor, the PNG government maintained that the thousands of West Papuans fleeing over the border were not "refugees" but illegal "border crossers."[128] For several months, the PNG government allowed conditions in the refugee camps to deteriorate, in the hope that the refugees would return home.[129] However, after the deaths in August 1984 of several dozen refugees in two PNG camps, the PNG government

[125] Butt et al., *Smokescreen of Culture*, *supra* note 118, at 2.
[126] *West Papua in Revolt*, *supra* note 112, at 1.
[127] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 93; WEST PAPUA: PLUNDER IN PARADISE, *supra* note 83, at 56.
[128] WEST PAPUA: PLUNDER IN PARADISE, *supra* note 83, at 56; *West Papua in Revolt*, *supra* note 112, at 1.
[129] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 98.

allowed the United Nations High Commissioner for Refugees (UNHCR) full access to the camps.[130]

In November, when a team of Indonesian and PNG officials visited the camps to convince the refugees to return, they were met with angry demonstrations. At the Blackwater camp, refugees threw stones at the visitors, prompting local police to use tear gas to curb the demonstration.[131] In December 1984, the Australian section of the International Commission of Jurists published a report that described the conditions that had forced the West Papuans to flee and urged the PNG government not to engage in the *refoulement*, or forced repatriation, of the refugees.[132] Nonetheless, in December, eight refugees, members of the OPM, were deported to Jayapura, where they were immediately detained.[133] Deportations continued through 1985, but when twelve refugees were beaten and later secretly tried for subversion upon their return in November 1985,[134] the international outcry led the PNG government to shift toward a policy of relocation, resettlement, and voluntary repatriation.[135]

By late 1987, UNHCR reported that only 1,500 refugees had returned to West Papua.[136] Those returning under the auspices of UNHCR's repatriation scheme were formally handed over to Indonesian officials. They were not allowed to return to their villages, but were instead

[130] WEST PAPUA: PLUNDER IN PARADISE, *supra* note 83, at 57.
[131] Robin Osborne, *Refugee Protection Ends in Violence: Indonesians in Papua New Guinea Protest and Repatriation Plans*, THE GUARDIAN, Nov. 6, 1984.
[132] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 99.
[133] *Id*.; WEST PAPUA: PLUNDER IN PARADISE, *supra* note 83, at 57.
[134] *The 3 November Incident in Vanimo*, TAPOL Bulletin No. 69, 16 (May 1985).
[135] In May 1987, Papua New Guinea acceded to the 1951 UN Convention Relating to the Status of Refugees and to the 1967 Protocol Relating to the Status of Refugees, thus strengthening the role of UNHCR. However, in October of that year, the PNG government signed a Treaty of Mutual Respect, Friendship, and Cooperation with Indonesia, affirming a mutual policy of border control and noninterference in each other's internal affairs. WEST PAPUA: PLUNDER IN PARADISE, *supra* note 83, at 58. *See also Indonesia: Cover-up Job*, THE ECONOMIST, Nov. 15, 1986; *Papua New Guinea, Indonesia Confer*, FACTS ON FILE WORLD NEWS DIGEST, June 13, 1986.
[136] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 109. Indonesian officials claimed that 6,904 had been returned.

relocated to sites designated by the authorities, often areas under military control.[137] Returnees complained that they were subjected to security checks and harassment.[138] The government also implemented a campaign of pacification amongst returnees in the border regions, which aimed to undermine support for the OPM. Local officials sought to organize young West Papuan returnees to prevent recalcitrant members of their community from joining the resistance or leaving for PNG.[139]

I. West Papuan Protests Against Foreign Resource Exploitation and Indonesia's Response

In 1991, PT Freeport renegotiated the terms of its concession with the Indonesian government. This new Contract of Work granted the company an additional 2.5 million hectares of land for mining operations—land that was occupied at the time by five indigenous peoples.[140] This new contract included increased benefits for the employees of the mine as well as their families, and also for the military to serve as security forces for the mine, but did not extend the benefits of schools, hospitals, and job training to the local indigenous people.[141] This expanded control and exploitation led to opposition and clashes between PT Freeport (protected by the Indonesian military, which Freeport pays millions a year for their services) and the local people. In 2001, Freeport paid $4.7 million for security services provided by more than 2,300 Indonesian

[137] WEST PAPUA: PLUNDER IN PARADISE, *supra* note 83, at 44; *Repatriated Refugees are Being Sent to Government Relocation Sites*, TAPOL BULLETIN no. 74, 10-11 (Mar. 1986).
[138] WEST PAPUA: PLUNDER IN PARADISE, *supra* note 83, at 58; Australia West Papua Association, *West Papua Information Kit*, *supra* note 77, at 30.
[139] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 110.
[140] Amnesty International, *Indonesia: Irian Jaya: National Commission on Human Rights Confirms Violations* 2 (September 1995).
[141] Abrash, *Development Aggression*, *supra* note 20, at 10.

military personnel.[142] Some of the killings, detentions, and torture of Papuan people by the Indonesian military have taken place on Freeport property or in shipping containers provided by the corporation.[143] In 1994, Kelly Kwalik, a leader of the OPM, and others began to protest Freeport's, and hence the military's, expansion near the town of Timika. Protests involved peaceful as well as armed demonstrations.[144] The military's response was swift and brutal. On October 6, 1994, Indonesian soldiers arrested four brothers, all civilians—Sebastianus Kwalik, Romulus Kwalik, Marios Kwalik, and Hosea Kwalik—and detained them in a shipping container at a military post in Koperapoka, near Timika, accusing them of being involved with Kelly Kwalik and the OPM.[145] Testimony from the first and second wives of Sebastianus Kwalik indicates that all four were kept in the container and tortured from October 6 until approximately

[142] Freeport McMoRan Copper & Gold, Inc., *Security Matters*, Internal Draft, Exhibit A of Douglas N. Currault II to Securities and Exchange Commission, Mar. 3, 2003 (Re. Freeport McMoRan Copper & Gold, Inc., Response to Request Pursuant to Rule 14a-8i(10)). Projected 2002 costs for these services totaled $5.6 million. *Id.*

[143] National Human Rights Commission of Indonesia, *Results of Monitoring and Investigating of Five Incidents at Timika and One Incident at Hoea, Irian Jaya During October 1994-June 1995* (Jakarta: September 1995); *Australian Council for Overseas Aid, Trouble at Freeport*, (Melbourne: Australian Council for Overseas Aid, April 1995);.Catholic Church of Jayapura, *Violations of Human Rights in the Timika Area of Irian Jaya, Indonesia* (August 1995); LEMASA, *Amungme People's Response to National Commission on Human Rights Findings Announced on 22 September 1995*, September 1995; Jacob Pattipi, *Conclusion on Investigation on Land Title Issues in Timika Believed to have Ignited Human Rights Violations* (Jayapura: 6 October 1995); *The Opinion of LEMASA Concerning the Human Rights Situation and Prolonged Conflict in the Area of Operation of PT Freeport Indonesia, Mimika, Irian Jaya* (Timika: September 1997); Indonesian Evangelical Church (Mimika, Irian Jaya), the Catholic Church Three Kings Parish (Timika, Irian Jaya) & the Christian Evangelical Church of Mimika, *Human Rights Violations and Disaster in Bela, Alama, Jila and Mapnduma* (1998); Survival International, *Rio Tinto Critic Gagged* (London: Survival International, May 1998); RFK Memorial Center for Human Rights and the Institute for Human Rights Studies and Advocacy, *Incidents of Military Violence Against Indigenous Women in Irian Jaya* (West Papua), *Indonesia* (Washington/Jayapura: May 1999); Amungme community members, The Victims Residing in the Area of the PT Freeport Mining Concession in the Villages of Banti, Arwanop, Tsinga, Hoeya, Waa, and Timika, Statement sent to Komnas HAM, Freeport management, and the RFK Center, 7 February 2000; Chris Ballard, *The Signature of Terror: Violence, Memory and Landscape at Freeport*, *in* INSCRIBED LANDSCAPES: MARKING AND MAKING PLACE (Bruno David & Meredith Wilson eds. 2001).

[144] Msgr. H.F.M. Munninghoff (Catholic Diocese of Jayapura), *A Report on the Human Rights Violations Against the Local People in the Area Around Timika, Region of Fak-Fak, Irian Jaya: Year 1994-1995*, 4 (Aug. 1, 1995) [hereinafter *A Report on Human Rights Violations Around Timika*]. *Compare* Report of the Investigation Committee of Human Rights Violation in Papua or Irian Jaya (May 8, 2001, Jakarta), authorized by the Indonesian Human Rights Commission (Komnas HAM) (Decree of Commission Chairman, dated 5th February 2001, Ref. No.: 020/KOMNAS HAM/II/2001) [*hereinafter* Report of Investigation Committee] (stating that the OPM and Kelly Kwalik had only conducted peaceful demonstrations).

[145] *See* Report of the Investigation Committee, *supra* note 144, at 23; Munninghoff, *A Report on Human Rights Violations around Timika*, *supra* note 144, at 6-9. The "container" where the brothers were held was a shipping container provided by PT Freeport. Abrash, *Development Aggression*, *supra* note 20, App. 3.

November 15, 1994.[146] On that day, both wives went to visit the men, but were told that their husband and his brothers had gone on a military operation and were not in the container anymore.[147] The women never saw the men again.[148]

Three days after the Kwalik brothers were arrested, five other individuals were arrested and detained by the military. The two women in the group, Yuliana Magal (age 50), the adoptive mother of Kelly Kwalik, and Yosepha Alomang (age 37), were kept in a flooded water closet, separate from the men. The closet was filled up to their knees with water and human feces. Yuliana Magal was interrogated and tortured for many hours, despite the fact that she did not understand Indonesian and the interrogators did not speak her language.[149] The two women were held in the water closet for one month.[150]

Christmas day, 1994, brought more demonstrations and more military violence in Waa village, near PT Freeport's mining center in Tembagapura.[151] That morning, Indonesian troops fired on members of the Amungme community and other highland Papuans, who had gathered peacefully to raise the Morning Star flag. When community member Naranebalan Anggaibak was injured in the attack, Indonesian military placed a noose around his neck and dragged him from the back of a car to the army checkpoint near Tembagapura. Soldiers then suspended Mr. Angaibak's dead body from the ankles on a post across from the checkpoint and harassed Papuan

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[146] Report of the Investigation Committee, *supra* note 144, at 23.
[147] Munninghoff, *A Report on Human Rights Violations around Timika*, *supra* note 144, at 9.
[148] *Id*.
[149] Amnesty International, *Indonesia: Irian Jaya: National Commission on Human Rights Confirms Violations*, *supra* note 140, at 7 ("So to make Yuliana talk they prodded her with the muzzles of their weapons which they pointed at her forehead and put a heavy iron weight on her head for an hour until she was exhausted. Then they took the weight and put it on her shoulder for another hour. Then she had to kneel and cradle the weight for another hour.").
[150] Munninghoff, *A Report on Human Rights Violations around Timika*, *supra* note 144, at 17. *See also* Robert F. Kennedy Center (RFK) & Institute for Human Rights Study and Advocacy in Irian Jaya (IHRSTAD), *Incidents of Military Violence Against Indigenous Women in Irian Jaya (West Papua), Indonesia* (May 1999), at 3 [hereinafter RFK & IHRSTAD, *Incidents of Military Violence Against Indigenous Women*].
[151] Report of the Investigation Committee, *supra* note 144, at 23. *See also* Munninghoff, *A Report on Human Rights Violations around Timika*, *supra* note 144, at 18.

villagers by asking them whose pig or dog Mr. Angaibak was. The military reportedly disposed of Mr. Angaibak's body by throwing it into a ravine along the road between Tembagapura and Timika, as they previously had disposed of other indigenous Papuans killed by the Indonesian military.[152]

Another incident occurred after Easter mass in April 1995. After a scuffle between a civilian, Piet Tebay, and a soldier who had ordered him to report to the security station in Timika, the soldier stabbed Tebay with Tebay's own arrow. Although Tebay eventually recovered, the stabbing incited the crowd to protest the military presence in the community. During the protest, another scuffle between a soldier and a civilian occurred. This time, the soldier shot the civilian two times, killing him.[153]

Indonesian soldiers conducted another attack upon civilians in May 1995. Fighting had broken out between the military and the OPM in early 1994, forcing many native residents to flee their homes and run into the forest for protection.[154] On May 31, 1995, an army patrol near Hoea was out looking for the OPM leader and came across a group of such refugees, who were gathered together for a prayer meeting. When they saw the soldiers, the people began to run. The military opened fire, killing eleven people, including the pastor and four children (ages five, six, fourteen, and fifteen).[155]

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[152] Chris Ballard, *The Signature of Terror: Violence, Memory, and Landscape at Freeport, in* INSCRIBED LANDSCAPES: MAKING AND MAKING PLACE (Bruno David & Meredith Wilson eds., 2001).
[153] Munninghoff, *A Report on Human Rights Violations around Timika, supra* note 144, at 11.
[154] Amnesty International, *Indonesia: Irian Jaya: National Commission on Human Rights Confirms Violations, supra* note 140, at 5.
[155] *See id*. ("We came from behind them. They saw us and were obviously afraid and began to run away. Three soldiers immediately began to shoot towards them."); Munninghoff, *A Report on Human Rights Violations around Timika, supra* note 144, at 4-5 ("While they were praying, suddenly one patrol from the 572[nd] under command of master sergeant Marjaka who was patrolling the area of Kampung Hoea, surrounded the people and without warning started shooting at the congregation involved in prayer. The Rev. Martinus Kibak raised his hands to surrender, but commandant Marjaka didn't care. He ordered the soldier closest to him . . . to shoot the minister. The bullet fatally wounded the minister in the left part of his abdomen."). Note that in September 1995, Indonesia's National Commission on Human Rights (Komnas HAM) found that the violations committed against Papuans in and around

Between late 1995 and early 1996, various groups of researchers—including one known as the "Lorentz Team" and a group from the World Wildlife Fund—visited the Mapnduma area of West Papua, within Freeport's concession area. After a community meeting in which local residents clashed with the researchers over the way in which their research would be carried out and the effects such research would have on the residents' lives, a group of 200 Papuans took the researchers hostage.[156] The OPM later took credit for the action, and the military responded.

During the four months the hostages were held, Indonesian forces set up camp in nearby communities, taking over many of the residents' homes for their own use and forcing residents to flee in fear. Reports of abuses in one village included "killings, torture, rape, intimidation, destruction of goods and property, and restricted access to foodstuffs and other vital supplies."[157] The military also deemed the Central Highlands Region, previously untouched by the government, a "Red Zone," which meant that outsiders could not enter it and residents needed to obtain permission from government or army officials to travel within it.[158] One *Kopassus* lieutenant commander told a human rights investigator that the role of the military in the

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Freeport mining centers was "directly connected to [the Indonesian army] . . . acting as protection for the mining business of PT Freeport Indonesia." Abrash, *Development Aggression*, *supra* note 20, at 13.

[156] RFK & IHRSTAD, *Incidents of Military Violence Against Indigenous Women*, *supra* note 150, at 8. Of the twenty-four original hostages, eleven were released within the first two weeks and two more in the following two months, leaving four English citizens, two Dutch, and five Indonesians. *See* Institute for Human Rights Study and Advocacy in Irian Jaya (IHRSTAD) et al., *Military Operation for the Release of Hostages and Human Rights Violations in the Central Highlands of Irian Jaya: Unveiling the Mystery of the Bloody ICRC Mission, the Involvement of Foreign Soldiers, and the Indonesian Army* (press release, Aug. 25, 1999) [*hereinafter* IHRSTAD et al., *Military Operation for the Release of Hostages*].

[157] RFK & IHRSTAD, *Incidents of Military Violence Against Indigenous Women*, *supra* note 150, at 9 (referring to the village of Kenyam I). For an extensive account of rape in the region between 1996 and 1999, see *id*. at 4. *See also* Report of the Special Rapporteur on Violence Against Women, Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, Jan. 21, 1998, U.N. Doc E/CN.4/1999/68/Add.3, at 14 [*hereinafter* Report of the Special Rapporteur on Violence Against Women] ("According to reports in February 1996 troops from all over Indonesia came to the Mapnduma area. It was alleged that the soldiers raped women there indiscriminately: girls as young as 12 were victims, as were mute, mentally retarded and pregnant women.").

[158] RFK & IHRSTAD, *Incidents of Military Violence Against Indigenous Women*, *supra* note 150.

Highlands was to clear the area of indigenous communities "to make sure that investors can come in."[159]

Throughout these months, the International Committee of the Red Cross (ICRC) attempted to negotiate with the OPM for the release of the hostages, and by the beginning of May appeared to have reached an agreement. On May 8, 1996, the ICRC organized a feast in the village of Nggeselema to celebrate International Cross Day and the planned release of the hostages. However, at the last minute, OPM leaders cancelled the release of the hostages, believing that the ICRC had broken its agreement to bring official representatives of the British, Dutch, German, and Indonesian government to Nggeselema. The Indonesian military responded by launching a military operation under *Kopassus* Commander Brigadier General Probawo Subianto. On May 9, four or five soldiers, reportedly British SAS members and foreign mercenaries from the South African mercenary company Executive Outcomes, commandeered an ICRC helicopter and attacked Nggeselema, shooting at the villagers who had come to greet the aircraft believing that it carried ICRC staff members. As the villagers scattered, helicopters from the Indonesian air force arrived and began shooting at and dropping bombs on the villagers, destroying many homes and a local medical clinic. At least eight Papuan civilians died in the attacks, and many more were injured.[160] On May 15, after two Indonesian hostages had been killed, the remaining hostages ran for safety.[161]

The end of the hostage crisis did not mark the end of the military activity in that area. Between December 1996 and October 1997, the Indonesian military shot and killed eleven civilians as they attempted to return from the forest to their villages to gather food; two others

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[159] *Id*.
[160] *Blood on the Cross*, television program transcript, broadcast Dec. 7, 1999, Four Corners, Australia Broadcasting Company, *available at* http://www.abc.net.au/4corners/stories/s39706.htm; IHRSTAD et al., *Military Operation for the Release of Hostages*, *supra* note 156.
[161] RFK & IHRSTAD, *Incidents of Military Violence Against Indigenous Women*, *supra* note 150.

were "disappeared"; and three were injured. Military forces also burned 13 church buildings, 166 homes, and 29 traditional "men's houses."[162]

J. West Papua Under President Habibie: Continued Military Violence

Suharto was forced to resign in May 1998 and was replaced by his Vice President, B.J. Habibie, creating what many saw as a potential opening for discussion about the situation in West Papua.[163] The area around Timika was officially no longer a "Red Zone," and demonstrations where Papuans raised the Morning Star flag started to take place all over the country. Between July 1 and 7, 1998, such flag-raisings occurred in Jayapura, Biak, Wamena, Manokwari and Sorong.[164] Despite the hope that the military violence in West Papua would end with Suharto's rule, the Indonesian forces cracked down on these demonstrations.

On July 6, 1998, at 5:00 a.m., local police and Indonesian military opened fire on a group of Papuans at a flag-raising in Biak. The soldiers then forced dozens of men and women to lie on their backs and marched on their stomachs.[165] Eight people were killed immediately, three were disappeared, and thirty-seven injured.[166] Later, women's mutilated bodies washed up on

[162] Indonesian Evangelical Church et al., *Human Rights Violations & Disaster in Bela, Alama, Jila and Mapnduma, Irian Jaya*, 1, 4-33 (May 1998) (including an in-depth description and witness testimony about the violations).
[163] President Habibie expressed this openness in a number of ways. First, he proposed to the Parliament that the name of Irian Jaya be changed to Papua. Second, on February 26, 1999, the "Team of 100" – a group of 100 representatives of indigenous Papuans – was invited to Jakarta for a meeting with President Habibie, marking the beginning of a "National Dialog on Irian Jaya." The Team of 100 presented the President with the results of a survey of 16,486 Papuans, of whom more than 90 percent expressed their desire for independence. After this presentation, the President told the Papuans, "The aspirations you have expressed are important, but founding a country isn't easy; let's contemplate those aspirations again." Human Rights Watch, *Human Rights and Pro-Independence Actions in Papua, 1999-2000*, at 14.
[164] Report of the Visit of the Working Group to Indonesia (31 January to 12 February 1999), UN Working Group on Arbitrary Detention, UN Economic and Social Council, U.N. Doc. E/CN.4/2000/4/Add.2. 5 July 1999.
[165] Report of the Investigation Committee, *supra* note 144, at 13.
[166] Report of the Special Rapporteur on Violence Against Women, *supra* note 157, at 14. Another report stated that five civilians had died. *See* Human Rights Watch, *Human Rights and Pro-Independence Actions in Papua*, *supra* note 163, at 10.

the coast of Biak. Allegedly, "women were taken out to sea on Indonesian navy ships, where they were raped, sexually mutilated and thrown overboard."[167]

Over the next two years, the military responded to flag-raising demonstrations (whether peaceful or not) with armed violence.[168] One of the bloodiest of these responses occurred in Wamena on October 6, 2000.[169] Early in the morning, a joint security force composed of special crowd-control police and Brimob (an acronym for Mobile Brigade) and Strategic Reserve troops raided at least seven community centers in Wamena.[170] These forces fired warning shots, chainsawed flagpoles, and tore up or confiscated the Morning Star flag. By 8:00 a.m., more than fifty people had been rounded up, beaten, and taken to police headquarters. At least one man had been killed by gunfire, and ten had been wounded. [171]

Within hours, a large crowd had gathered across the river in Wouma. The crowd began to protest, burning and looting shops as they went. Troops arrived and began to open fire from a nearby migrant residential community. The crowd then attacked the migrants' homes, killing twenty-four non-Papuans. At least seven Papuans were also killed by gunfire.[172]

In the aftermath, twenty-two Papuans were arrested for the killings, although almost all were political leaders who were not connected with the violence in Wouma.[173]

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[167] Report of the Special Rapporteur on Violence Against Women, *supra* note 157, at 14.
[168] Report of the Investigation Committee, *supra* note 144, at 13-16 (describing the arrest of twenty-two and torture of two at Sorong on July 5, 1999; the shooting and injury of thirty-eight at Timika on December 2, 1999; the shooting death of one and injury of two in Merauke on February 16, 2000; the shooting death of three and the arrest and torture of one in Nabire between February 28 and March 4, 2000; the shooting and injury of thirteen and arrest and beating of one in Sorong on July 27, 2000); and the shooting deaths of three, the disappearance of fifteen, the shooting and injury of twelve, the arrest of thirty-six, and the detention of twenty-eight in Sorong on August 22, 2000).
[169] On October 3, Papuan community leaders reported that they had secured a delay in a ban of the Morning Star flag, which had been threatened by the police and provincial authorities. This delay was to last until October 19, when these leaders were to meet with President Wahid. Human Rights Watch, *Violence and Political Impasse in Papua* 12 (July 2001).
[170] *Id*.
[171] *Id*.
[172] *Id*.
[173] *Id*.

Some were threatened with torture if they did not confess. In the end, arrested youth group (Satgas Papua) members were sentenced to between six and ten months of imprisonment; the remaining political leaders were sentenced to between four and four and a half years of imprisonment.[174]

Two months after the violence in Wamena, the police station in Abepura was attacked and two police officers were killed.[175] The police immediately sent out teams to round up suspects. What followed, however, was "a methodical revenge attack in which all highlanders were targets."[176] The police and the Brimob first swept through the Ninmin Dormitory in Abepura, near the capital of Jayapura, which housed students from the highlands of West Papua, forcing the occupants outside and beating them. Twenty-three people from that dormitory—fourteen boys and nine girls, including one girl who was only seven years old—were taken into police custody and severely beaten. Next, a group of police swept through four residential neighborhoods where Papuans, mostly from the Wamena area of the highlands, lived.[177] Within 24 hours, three highland students were killed and one hundred individuals had been detained in police headquarters.[178]

The violence did not end there, however. En route to the police headquarters and once there, all of those detained were beaten with rifle butts, wooden blocks, or iron bars.[179] Some were burned with cigarettes, forced to lick the blood off the floor, and whipped with electric cables; one man was ordered to cut and eat his own hair.[180] The detainees were constantly

[174] *Id*. at 14.
[175] The number and identity of the attackers has not been verified.
[176] Human Rights Watch, *Violence and Political Impasse in Papua*, *supra* note 169, at 15.
[177] *Id*.
[178] *Id*.
[179] A Swiss journalist detained in the same prison described the beatings meted out there that night, including one that resulted in the death of a detainee. *Id*. at 19.
[180] Report of the Investigation Committee, *supra* note 144, at 32-37.

insulted with racist, derogatory language.[181] Approximately 24 hours later, the prisoners were released.

After the events at Abepura, Indonesia's National Human Rights Commission recommended prosecution of the perpetrators in the newly created National Human Rights Courts.[182] The local police and administration, however, encouraged all members of the police forces involved not to talk to the human rights investigators.[183]

All in all, one report estimated that between 1998 and 2000, there were 80 cases of summary execution and 500 cases of arbitrary detention and torture of West Papuans by the Indonesian government or military in West Papua.[184] In its 2001 report on Indonesia, the U.S. Department of State noted:

> Security forces were responsible for numerous instances of, at times indiscriminate, shooting of civilians, torture, rape, beatings and other abuse, and arbitrary detention in . . . Papua . . . . Security forces in Papua assaulted, tortured, and killed persons during search operations for members of militant groups. The security forces inconsistently enforced a no-tolerance policy against flying the Papuan flag, tearing down and destroying flags and flag poles, and killing eight persons, and beating others who tried to raise or protect the flag . . . .[185]

The State Department's 2002 report affirmed that Indonesian security forces have continued this pattern of repression and violence. Indonesian soldiers and police "committed assaults, rapes, and supported militias," "frequently and arbitrarily detained persons without

[181] For a list of phrases spoken to the detainees, see Report of the Investigation Committee, *supra* note 144, at 42-43 (quoting statements such as: "Women with curly hair and ugly dare to attack the Police?"; "The curly hair is just animal and must be extinguished!"; and "Your God is shit. Call your God Lord Jesus to help you!").
[182] Human Rights Watch, *Violence and Political Impasse in Papua*, *supra* note 169, at 20.
[183] *Id.* at 21.
[184] John Rumbiak, *The On-Going Human Rights Violations in West Papua: Impunity or Accountability?,* 3 (Apr. 2001).
[185] UNITED STATES DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: INDONESIA (2001).

warrants, charges or court proceedings," and regularly "tortured detainees."[186] In November 2001, Theys Eluay, a prominent pro-independence leader in West Papua, was assassinated. He was kidnapped and then apparently tortured to death. This death came two weeks after Indonesia promulgated Law No. 21/2001 on Special Autonomy for the Province of Papua, which both the pro-independence advocates and the police force in Papua rejected.[187]

Finally, on August 31, 2002, gunmen ambushed a group of foreign schoolteachers employed by Freeport-McMoRan who were returning from an afternoon picnic near the Freeport mine in Tembagapura. The attackers fired more than 130 bullets, killing two Americans and an Indonesian and injuring twelve others. According to U.S. officials, evidence indicates that members of the Indonesian army were responsible for the murders and may have sought to frame members of the Free Papua Movement in order to convince the State Department to add the group to the department's terrorist list or, alternatively, to induce Freeport to increase its payments to the military.[188] This tragic incident reaffirms the close and complex relationship between Indonesian security forces and Freeport McMoRan. It also suggests the lengths to which the military may be willing to go to bolster its own power at the expense of the West Papuan people.

Violence, civil unrest, and grievous abuses of human rights continue to affect the lives of West Papuan civilians. Recent developments suggest that without significant international pressure, the pattern of violent repression in West Papua is likely to continue. Whether this

[186] UNITED STATES DEPARTMENT OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: INDONESIA (2002).
[187] *See* Siegfried Zollner, *Conference: "Autonomy for Papua. Opportunity or Illusion?"* 11 EUROPE PACIFIC SOLIDARITY BULLETIN 3 (June-July 2003); Abigail Abrash, *Indonesia Assassinates Indigenous Leader in Quest to Keep Papua*, 26 CULTURAL SURVIVAL QUARTERLY (March 2002). Apparently, the pro-independence group rejected the legislation because Indonesia did not consult the people of Papua beforehand. The police rejected it because it made some concessions to the Papuan people, including allowing them to fly the Morning Star flag. *Id*.
[188] *See* Dana Priest, *A Nightmare, and a Mystery, in the Jungle: Ambush of School Outing Left 3 Dead, 8 Wounded, And Suspicion of Involvement by Indonesian Army*, WASHINGTON POST, June 22, 2003, at A1.

history of repression and violence constitutes genocide, as defined in the Genocide Convention, is the question that Part II of this paper addresses.

IV. APPLICATION OF THE LAW OF GENOCIDE TO THE CASE OF WEST PAPUA

A. Introduction to the Law of Genocide

On December 9, 1948, the United Nations adopted the International Convention on the Prevention and Punishment of the Crime of Genocide.[189] The Convention proscribes the intentional physical destruction of national, ethnical, racial and religious groups. It declares that genocide, whether committed in times of peace or in times of war, is a crime under international law. It further provides that persons committing genocide or genocidal acts "shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals," and obligates States Parties to undertake to prevent and punish the crime. As the International Court of Justice noted in its 1951 advisory opinion, "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation."[190] The ICJ has since recognized the Convention's proscription against the crime of genocide as a part of customary international law and a *jus cogens* norm.[191]

The Genocide Convention affirms that States may not fail to act in the face of mass atrocities directed at the destruction of a particular group. Polish scholar and jurist Raphael Lemkin coined the word "genocide" during the Second World War as a means of describing the mass extermination by the Third Reich of millions of Jews and other national, ethnic, and

[189] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, reprinted in 45 AM. J. INT'L. L. 7 (1951) [*hereinafter* Genocide Convention].
[190] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion), [1951] I.C.J. REPORTS 16, at 21, *quoted in* Legality of the Treat or Use of Nuclear Weapons (Advisory Opinion, [1996] I.C.J. REPORTS 226, 31. *See also* Report of the Secretary-General pursuant to 2 of the Security Council Resolution 808 (1993), U.N. Doc. S/25704, 45.
[191] Prosecutor v. Goran Jelsic, Case No. IT-95-10-T, ICTY T. Ch. I, 14 Dec. 1999, para. 60.

religious groups. The term, which merged the Greek word "*genos*" (race or tribe) with the Latin "*cide*" (killing), took hold almost immediately and was prosecuted, within the scope of "crimes against humanity," by the Nuremberg war crimes tribunal in 1945-46. On December 11, 1946, the United Nations General Assembly adopted by unanimous vote a resolution that explicitly condemned the crime of genocide. The Convention was adopted by General Assembly resolution in 1948 and entered into force on January 12, 1951.

Article II of the 1948 Convention defines genocide as:

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> 1. Killing members of the group;
> 2. Causing serious bodily or mental harm to members of the group;
> 3. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> 4. Imposing measures intended to prevent births within the group;
> 5. Forcibly transferring children of the group to another group.[192]

This definition of genocide has been repeated without significant change in subsequent instruments, including Article 4(2) of the statute creating the International Criminal Tribunal for the Former Yugoslavia (ICTY), Article 2(2) of the statute creating the International Criminal Tribunal for Rwanda (ICTR), and Article 6 of the Rome Statute for the Creation of the International Criminal Court.[193]

Genocide is a collective crime that targets a national, racial, ethnical, or religious group.[194] A national group is "a collection of people who are perceived to share a legal bond

[192] Genocide Convention, art. 2.
[193] Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. S/RES/827 (1993), annex, art. 4(2); Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994), annex, art. 2(2); Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, art. 7(1).
[194] In Prosecutor v. Akayesu, the first case in which an individual defendant was charged with genocide before an international court, Trial Chamber I of the ICTR suggested a broader understanding of the group requirement, holding that the drafters of the Convention did not mean to exclude from its protection "any stable and permanent group." Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, ICTR T. Ch. I, 2 Sept. 1998, paras. 516, 701.

based on common citizenship, coupled with reciprocity of rights and duties."[195] An ethnical group is a group defined by its common language and culture.[196] A racial group is distinguishable by physical traits consistent with specific geographical areas.[197] A religious group is one whose members share common beliefs or denominations.[198] A common attribute of the four groups protected by the Genocide Convention is that "membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner."[199] The definition of genocide does not apply to more mobile groups, which one may join through individual voluntary commitment, such as political, social, or economic groups. As a leading scholar of the law of genocide has suggested, the four categories of groups "operat[e] much as four corner posts that delimit an area within which a myriad of groups covered by the Convention find protection."[200] Thus, it is not necessary to show that a group specifically meets one of the four criteria set forth in the Convention in order to make a claim of genocide, but only to demonstrate that it fits within the four corners defined by these criteria. In recent years, adjudicators have showed a willingness to use this approach to hold that a number of kinds of groups fall under the Convention's protection, including, most prominently, tribal groups.[201]

The crime of genocide itself consists of two important elements: the prohibited act (the material element, or *actus reus*) and the requisite intent (the moral/mental element, or *mens rea*).

However, subsequent decisions retreated from this broad and inherently subjective standard. Prosecutor v. Kayishema and Ruzinda, Case No. ICTR-95-1-T, Judgment, 21 May 1999; Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment, 6 December 1999.

[195] *Akayesu*, para. 512 (Sept. 2, 1998).

[196] An ethnical group may identify itself as such or be identified as such by others, including the perpetrators of genocide. *Id*., para. 513; *see Kayishema and Ruzindana*, para. 98.

[197] *Akayesu*, para. 514.

[198] *Id*., para. 515; *Kayishema and Ruzindana*, para. 98.

[199] *Akayesu*, para. 511.

[200] WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 111 (2000).

[201] *See* Report of the International Law Commission on the World of Its Forty-Eighth Session, 6 May-26 July 1996, U.N. Doc. A/51/10, at 89.

The act element of genocide is explicitly set forth in the five subparagraphs of Article II of the Convention, where the drafters list the five types of "acts" that, if committed with the requisite intent and directed against a group protected by the Convention, constitute genocide. Of the five genocidal acts, three require proof of a result—killing members of the group, causing serious bodily or mental harm to members of the group, or forcibly transferring children of the group to another group. The other two acts—deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part and imposing measures intended to prevent births within the group—do not require proof of the result, but instead require a further specific intent to destroy the group. For the three acts that require proof of a result, a finding of genocide does not require establishment of a cause and effect relationship between the acts and the destruction of the group, but may instead be based on a showing that one or more victims suffered physical or mental harm and that the act was committed with the requisite intent.[202] Genocide can be committed by acts or by omissions. For example, military officers' failure to intervene when their subordinates are violating the Convention has been held to constitute genocide.[203]

The act element of genocide is inextricably connected to the element of intent. Genocide is distinguishable from crimes against humanity in international law largely on the basis of the intent behind the crime.[204] This intent must be specific—it cannot be a general intent to murder, in the case of Article II(a); it must be a specific intent to kill someone because of his or her membership in a group. Genocidal intent may involve the desire to exterminate a large number of members of a protected group or, alternatively, the desire to destroy a more limited number of

[202] SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 200, at 164-65.
[203] *See* Prosecutor v. Kambanda, Case No. ICTR-97-23-S, ICTR T. ch. 4, Sept. 1998 (holding that failure by governmental leaders to take action to stop ongoing, known massacres, constituted genocide). The jurisdiction of the Convention also extends, in Article III, to include attempt to commit genocide, conspiracy to commit genocide, and complicity in genocide as crimes under international law.
[204] *See Jelisic*, para. 66.

members of the group who are selected because of the potential impact of their destruction on the survival of the group as such.[205] Although specific intent is required, it may be inferred in most cases from the acts themselves, as well as from the context in which those acts took place. As the ICTR held in *Prosecutor v. Akayesu*, "it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others."[206] It is also possible to infer intent when genocidal acts are committed in connection with a separate objective with a non-genocidal motive; for example, when otherwise genocidal acts are carried out with the ultimate motive of giving the government greater access to natural resources.[207]

Absent a showing of genocidal intent, severe offenses committed on a mass scale and directed against a civilian population are likely to constitute "crimes against humanity" under customary international law. There are several definitions of crimes against humanity, but all involve the persecution of individuals or groups in a widespread and systematic fashion.[208] The concept of crimes against humanity was first discussed in Article 6(c) of the Charter of the International Military Tribunal (the "Nuremberg Tribunal"), which provides:

> [Crimes against humanity include] murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, 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

[205] *Id*., paras. 81-82.
[206] *Akayesu*, paras. 523.
[207] The ICTY and the ICTR have been largely silent on the question of dual motives. However, the Australian Human Rights and Equal Opportunities Commission has ruled that "even if motives were mixed, a fundamental element in the programme [of transferring indigenous children to families of European descent] was the elimination of indigenous cultures, and that as a result the co-existence of other motives was no defense." Australian Human Rights and Equal Opportunities Commission, *Bringing Them Home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 270-75, *available at* http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen (last visited Apr. 26, 2002).
[208] SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 200.

> Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Crimes against humanity do not necessarily require a connection to war or armed conflict. While the jurisdiction of the ICTY extends only to crimes against humanity committed in the context of armed conflict,[209] the Rome Statute for the International Criminal Court, like the Statute of the ICTR, affirms that such crimes may occur in times of peace as well as in times of war, so long as they are committed as "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[210] Building upon the statutes and case law of the ICTY and ICTR, the Rome Statute expands the definition of crimes against humanity to expressly include such acts as torture; the forcible transfer of population; imprisonment or severe deprivation of physical liberty; acts of sexual violence, including rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization; persecution on national, ethnic, cultural, gender, or other impermissible grounds; disappearance; and apartheid.[211] With the entry into force of the International Criminal Court on July 1, 2002, perpetrators of crimes against humanity, like perpetrators of genocide, may be held criminally responsible for their crimes under international law.[212]

B. The "Group" Element of the Crime of Genocide

As a distinct racial and/or ethnic group with a common national identity strengthened in the course of the common struggle for independence from Indonesian neo-colonial rule, West Papuans fit within the ambit of protection delimited by the four enumerated groups in Article II of the Genocide Convention.

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[209] Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. S/RES/827 (1993), annex, art. 5; Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994), annex, art. 4.
[210] Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, art. 7(1).
[211] *Id.* art. 7(1).
[212] However, the ICC may exercise jurisdiction only if the person accused of crimes against humanity is a national of a State Party to the Statute, or if the crime was committed on the territory of a State Party. *Id.*, art. 12(2).

1. *National Group*

Within the context of the 1948 Genocide Convention and the writings of Raphael Lemkin, the term "national group" refers not only to groups identified with an established nation state,[213] but also to national minorities with shared, distinct historical and cultural links, which may encompass racial, ethnical, and religious groups.[214] The International Criminal Tribunal for Rwanda has defined a national group as "a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties."[215] Alternatively, scholars have argued that "national" may refer to one's origin when viewed through a sociological or ethnological lens.[216]

Any of these definitions support the conclusion that West Papuans are a national group protected by the 1948 Convention. They constitute a tiny minority in Indonesia. Their population was estimated to be about 2.11 million of the whole population of Indonesia, which stood at 193.92 million as of July 1, 2000.[217] West Papuans' struggle for independence dates back to the days of Dutch colonial rule, and West Papuans chose their own national anthem and national flag. The common struggle against Indonesian rule has forged a strong sense of national unity, expressed through such actions as raising and defending the West Papuan flag despite violent Indonesian military crackdowns.

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[213] *See* Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 ARIZ. J. INT'L & COMP. L. 415, 456, *quoting* 3 U.N. GAOR C.6, 74th mtg. at 98, U.N. Doc. A/C.6/SR. 74 (1948) (Mr. Petren, Swed.).
[214] SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 200, at 118.
[215] *Akayesu*, para. 512.
[216] SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 200, at 116-17 & n.95.
[217] *See* Indonesian Census 2000 Discussion Paper, *available at* http://groups.yahoo.com/group/demonetasia/message/34.

2. *Ethnical Group*

The pure objective test of an ethnical group requires a common language and a common culture.[218] West Papuans speak a myriad of languages[219] and manifest diverse cultures. Historical accounts suggest that West Papuans have grouped largely along tribal lines governed by ecological conditions and separated by cultural-linguistic barriers even between close clan neighbors.

However, an interpretation that includes a subjective element suggests that West Papuans may constitute an ethnical group. A trial chamber of the ICTR opined that an ethnic group could be a group "which distinguishe[d] itself, as such; or, a group identified as such by others, including perpetrators of the crimes."[220] The Indonesian government, by its actions, appears to identify the West Papuans as a common ethnic group. In the 1970s and 1980s, the government sought to "Indonesianize" West Papuan education and culture, compelling West Papuans to abandon their "primitive" customs and to speak and dress like Indonesians. The Indonesian police shot and killed Papuans who resisted these "civilization" efforts. While West Papuans may distinguish between people of different cultural-linguistic units, the Indonesian government appears to have treated West Papuans as an inherently unified ethnic group; thus, West Papuans may meet the criteria of "ethnical group" for the purpose of determining whether genocide has occurred.

3. *Racial Group*

West Papuans constitute a racial group from both an objective and a subjective perspective. The objective test for "racial group" requires a determination that the relevant

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[218] *Akayesu*, para. 513.
[219] *See* OSBORNE, INDONESIA'S SECRET WAR, *supra* note 4, at 2 ("[W]hen Holland handed over West Papua to Indonesia, it had listed more than 200 languages among 500,000 people in an estimated population of 700,000.").
[220] *Kayishema and Ruzindana*, para. 98.

group is distinguished from others by hereditary physical traits frequently identified with geographic areas, irrespective of linguistic, cultural, national or religious factors.[221] Indigenous West Papuans belong to the Melanesian race, the descendants of three broad races of migrant people who settled in parts of the South Pacific. Melanesians are of different origin than the Javanese, who constitute the majority of the Indonesian population. Despite regional differences among the West Papuans, as among other Melanesian groups, anthropologists believe that classifying Melanesians as a race is valid because of the many shared characteristics of the people.[222]

The subjective test for "racial group" considers the perceptions of the perpetrators toward the victimized group.[223] Indonesians historically have regarded West Papuans as a "primitive, barbaric and unproductive" race.[224] The government's transmigration program and its exclusion of West Papuans from the government bureaucracy, the business sector, and upper levels of education was grounded, at least in part, on the assumption that West Papuans were an inferior race to the Javanese people. The racist "Project for the Guidance of Alien Societies" sought to "civilize" the West Papuans without suggesting that they might ever attain the sophistication of the racially superior Indonesians. The army's slogan, "Let the rats run into the jungle so that the chickens can breed in the coop," suggests that Indonesian military campaigns targeted West Papuans—civilians as well as members of the OPM—as an inferior race. Clearly, the Indonesian government has consistently viewed the people of West Papua as a group that is racially distinct from the majority Javanese population.

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[221] *Akayesu*, para. 514.
[222] OSBORNE, INDONESIA'S SECRET WAR, *supra* note 4, at 2. *See* Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994), UN Doc. S/1995/1405, annex, para. 159. According to the Commission of Experts on Rwanda, "to recognize that there exists discrimination on racial or ethnic grounds, it is not necessary to presume or posit the existence of race or ethnicity itself as a scientifically objective fact."
[223] *See Kayishema and Ruzindana*, para. 98.
[224] BUDIARDJO & LIONG, WEST PAPUA, *supra* note 10, at 48, 56.

4. *Religious Group*

Christianity is the dominant faith among West Papuans. Although West Papuans detained by Indonesian authorities routinely suffer humiliation on the basis of their religious faith, it is not clear that Indonesian policy toward West Papuans has been based on their religious faith. Moreover, not all West Papuans are Christians, and many follow traditional religions. This suggests that West Papuans have not been targeted for destruction as a religious group.

5. *Ambit of Protection Established by the Four Enumerated Groups*

The language and the legislative history of the Genocide Convention strongly suggest a holistic interpretation of the four enumerated groups. The four categories overlap and help define each other, including within their scope a wide range of different groups, all of which are covered by the Convention.[225] A claim of genocide does not require that a group specifically meet one of the four criteria set forth in the Convention. Rather, it is sufficient to prove that the group fits within the corners delineated by these criteria.[226] This approach has extended the application of genocide to cover groups, including tribal groups, without determining whether they are subsumed within one particular category—national, racial, ethnical or religious.[227] From this holistic perspective, consistent with the intent of the Genocide Convention's drafters, the case of West Papuans fits squarely into the ambit of protection established by the "corner posts" of the four enumerated groups.

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[225] SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 200, at 111.
[226] *Id*. at 112.
[227] *E.g.*, the International Law Commission on the Draft Code of Crimes against the Peace and Security of Mankind determined that tribal groups should be protected by the Convention; *see* Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May- 26 June 1996, UN Doc. A/51/10, p.89. The Canadian Criminal Code, in its provisions relating to genocide, protects groups that are distinguished by color as well as those identified by race, religion, or ethnic origin. *See* Criminal Code (Canada), RSC 1985, c. C-46, s. 318(4).

C. The Act Element of the Crime of Genocide

Since Indonesia gained control of West Papua, the Indonesian government has engaged in conduct toward West Papuans that falls within several of the categories of act that constitute genocide under the Genocide Convention. The Indonesian authorities have killed thousands of members of the West Papuan group, and they have "caus[ed] serious bodily and mental harm to members of the group."[228] Evidence strongly indicates that the Indonesians have also deliberately inflicted on the group "conditions of life calculated to bring about its physical destruction."[229]

1. *Massacres and Extrajudicial Killings*

The Indonesian military and its related security forces have engaged in widespread violence and killings in West Papua. Such a pattern of massacres and killings falls squarely within the first category of act identified by the Genocide Convention. The act of killing has been interpreted by the International Criminal Tribunal for Rwanda as having two elements: (1) that the victim is dead, and (2) that the death resulted from an unlawful act or omission by the accused.[230]

The incidents described above clearly fulfill both of these elements. Indonesian police and military officials have killed numerous West Papuans as a result of unlawful acts and omissions, including the 1970 massacre of more than 85 West Papuans in western Biak, the killing by aerial bombardment of several thousand villagers in Jayawijaya in 1977, and the use of napalm and chemical weapons against villagers during Operation Clean Sweep in 1981. More recent examples, including the Indonesian military operations in the Central Highlands (Mapnduma, Bela, Alama and Jila) and the October 2000 Wamena massacre that resulted in 32

[228] Genocide Convention, art. 2(2).
[229] Genocide Convention, art. 2(3).
[230] SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 200, at 157.

deaths, demonstrate the continuity and widespread nature of such acts even in the current stage of Indonesian control of West Papua.

Individual extrajudicial killings by the military and security forces also come under the heading of "killing members of the group." They have occurred most often when detained prisoners have been tortured to death. Examples include the 1976 deaths of two men beaten with iron bars; the killing of Mimi Fatahan, whose body was chopped into pieces by members of the regional military command in Jayapura; the torture and killing of Naranebalan Anggaibak in 1994; and the three students detained and killed in the 2000 raid on the Abepura student dormitory. In all of these circumstances, both legal elements of killing have been met, and the murders of these victims are prohibited by international law.

The Indonesian military and KOPKAMTIB have been responsible for the assassinations of numerous political and village leaders in an effort to wear down the West Papua resistance movement. These extrajudicial killings fall within the "killing" category of acts that can constitute genocide. The beating to death of Baldus Mofu, the shooting of Arnold Ap and Eduard Mofu, and the 2001 kidnapping and killing of Theys Eluay, demonstrate that these political killings are deliberate and planned. The Indonesian military's attacks on West Papua's political, intellectual, and community leaders clearly fall within the category of "killing members of the group" and, because they specifically target an influential segment of the population, reflect the requisite intent to destroy the group in part.

2. *Torture, Disappearance, and Detention*

The Indonesian security forces' torture, disappearance, and arbitrary arrest of West Papuans constitute unequivocal acts of serious bodily and/or mental harm. The ICTR defined "serious bodily or mental harm" as "acts of torture, be they bodily or mental, inhumane or

degrading treatment, persecution."[231] Another Trial Chamber of the ICTR defined this category of act as "harm that seriously injures the health, causes disfigurement, or causes any serious injury to the external, internal organs [sic] or senses."[232] The Trial Chamber of the ICTY has similarly held that torture and inhuman or degrading treatment constitute "serious bodily or mental harm" under the Genocide Convention.[233] Indonesian authorities have repeatedly caused West Papuans serious bodily or mental harm by subjecting them to torture, disappearance, and cruel and inhuman treatment and punishment.

Throughout the inland areas of West Papua, security forces have engaged in arbitrary and mass detention of indigenous Papuans, frequently supplemented by cruel and inhuman punishments, including electric shocks, beating, pistol whipping, water torture, and skinning alive. Documented cases include men being detained in steel containers in total darkness for three months and women being kept for long periods of time in closets filled with filthy water. During the Abepura violence, one hundred individuals from four residential neighborhoods were rounded up and severely tortured with wooden blocks, iron bars, cigarettes, and electric cables.

Similarly, numerous West Papuans have been reported missing over the last three decades, especially in the Highland areas. The kidnapping of these individuals, although they cannot be confirmed as killings, are, nevertheless, a form of "serious bodily or mental harm to members of the group." Although the effects of kidnapping may not be permanent (some people have managed to return to their homes), they still have serious long-term effects. The disappearance of Martin Luther Waren after his release from jail, and the detention and then disappearance of the Kwalik brothers in 1994, are examples of such violations. People who have

[231] *Akayesu*, para. 504.
[232] *Kayishema and Ruzindana*, para. 109.
[233] Prosecutor v. Karadzic and Mladic (Case Nos. IT-95-5-R61, IT-95-18-R61), Consideration of the Indictment within the Framework of Rule 61 of the Rules of Procedure and Evidence, July 11, 1996, para. 93.

"disappeared" have been deprived of their right to bodily integrity and likely have been killed or subjected to torture or cruel and unusual punishment. Moreover, the spouses and children of individuals who have been "disappeared" suffer serious physical or mental harm. They are subjected to the psychological trauma of not knowing the fate of their family members. Often, they suffer serious financial deprivation as a result of the disappearance.

Indonesian government and military authorities have subjected West Papuans to torture, cruel and inhuman treatment and punishment, kidnapping, and disappearance. Such acts deprive victims of their basic human rights and clearly constitute the kind of bodily and mental harm that is proscribed by the Genocide Convention.

3. *Violence Against Women and Rape*

During Indonesia's rule, soldiers have raped, killed and mutilated indigenous West Papuan women, causing serious bodily and mental harm. In *Akayesu*, the ICTR held that:

> Rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm.[234]

The ICTR found that the genocidal intent required under the Convention was clear in the sexual violence carried out in Rwanda:

> [T]he acts of rape and sexual violence . . . were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public . . . and often by more than one assailant. . . . Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.[235]

[234] *Akayesu*, para. 731 (Sept. 2, 1998).
[235] *Id.*

In West Papua, similarly, the military's use of rape was targeted specifically and exclusively against indigenous Papuan women, was committed in public (sometimes by more than one soldier), against girls as well as women, and was sometimes accompanied by murder or mutilation or both.

While the reports of rape and violence against indigenous Papuan women by the Indonesian military are legion, two examples demonstrate especially clearly the use of rape to inflict serious bodily and mental harm upon West Papuans. First, in 1970, soldiers patrolling the jungle border area shot and killed a pregnant woman, cut the baby from the mother's womb, and dissected it in front of 80 women and children of the village. At the same time, a group of soldiers raped and killed the pregnant woman's sister. In 1998, in order to disrupt a pro-independence demonstration, the Indonesian navy used force on the participants.

> It is alleged that women were taken out to sea on Indonesian navy ships, where they were raped, sexually mutilated and thrown overboard. Women's corpses reportedly washed up on the Biak coast. Some of them showed signs of sexual mutilation; breasts had been removed.[236]

These reports of rape, mutilation, and murder committed by the Indonesian military solely against indigenous Papuan women fulfill the requirements of the Genocide Convention's second type of act, "causing serious bodily or mental harm."[237] Many of these acts have also resulted in the death of Papuan women, thus meeting the requirements of the "killing" category of act that is set out in Article 2 of the Convention.

4. *Resource Exploitation, Relocation of Groups, and Environmental Harm*

Systematic resource exploitation, one of the explicit goals of the Indonesian government's involvement with West Papua, has led to the forced relocation of indigenous

[236] Report of the Special Rapporteur on Violence Against Women, *supra* note 157, at 14.
[237] Rape has sometimes been interpreted as a "condition of life calculated to destroy the group." *See* SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 200, at 170.

peoples within West Papua and has caused serious and pervasive environmental harm to the area. While the following acts may not constitute "deliberately inflicting conditions of life calculated to destroy the group in whole or in part" under a narrow conventional analysis of the Genocide Convention, a more expansive reading of this category of act is appropriate in this case.

In recent years, considerable case law has developed around what kinds of acts or omissions constitute the requisite "conditions of life" inflicted upon a specific group, calculated to destroy that group in whole or in part. In *Akayesu*, the ICTR Trial Chamber held that deliberately inflicting conditions of life "should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction."[238] Examples of acts that would fit this definition, when committed with the requisite specific intent, were "systematic expulsion from homes and the reduction of essential medical services below minimum requirements."[239]

The Indonesian government, in conjunction with various mining and timber corporations, has done both of these things to Papuans. To enable PT Freeport mining operations, the Amungme people were compelled to move from their homes in the Tembagapura area (in the cool, highlands region) to the hot, coastal Timika region. This move, in fact, caused the death of a large number of the group, due to their introduction to new diseases for which they had no immunity. In another case, a government-owned plantation seized the property of indigenous people, forcing them to relocate on land that was insufficient to support their needs, and refused to compensate them fairly.

The government has consistently refused to provide adequate medical services to the people of West Papua—even for diseases that were introduced as a result of the Indonesian

[238] *Akayesu*, para. 505.
[239] *Id*., para. 506. For additional examples, see SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 200, at 166-171.

government's transmigration policies. When the government renegotiated PT Freeport's Contract of Work in 1991, it required the company to provide increased benefits—including medical care and hospitals—for the company's workers and the Indonesian military, but did not require the company to extend these benefits and services to the local, indigenous population. While indigenous West Papuans have suffered from cysticercosis over the last thirty years due to infected pigs, government officials in Jakarta have prohibited exportation of the drugs necessary to fight the disease. Finally, Indonesian health authorities in Papua have excluded or discriminated against Papuans in the provision of basic reproductive health care and in essential HIV/AIDS prevention and education programs. Under recent international case law, these acts by the Indonesian government on behalf of or in collaboration with corporations operating in West Papua may, if committed with the requisite intent, be considered genocidal acts.

The environmental damage caused by the mining and logging of West Papua may constitute a third way in which the Indonesian government has imposed conditions of life calculated to destroy indigenous West Papuans as a group. While the intent element may be harder to prove for these acts, the results of the mining and logging have been devastating to the health and existence of the indigenous people. According to one report, scores of Papuans have suffered illnesses related to Freeport's discharge of mining waste into the rivers, and in 1999, five Papuans died from copper poisoning when they ate mollusks and other organisms from a polluted river.

Unlike the acts of "killing" or "causing serious bodily or mental harm," the act of inflicting conditions of life calculated to destroy the group contains within it an additional, specific intent element. The scope of what constitutes such intent has been examined in a

number of cases and scholarly articles, with mixed results.[240] According to one interpretation, the intent of the actor must be the eventual destruction of the group alone, unalloyed with economic intentions.[241] Another interpretation, however, adopted by the Rome Statute creating the International Criminal Court, holds that intent exists if the actor "meant to cause that consequence or is aware that it will occur in the ordinary course of events."[242] While no tribunal or other judicial body has yet followed the latter interpretation of intent with respect to the Genocide Convention, the West Papuan case demonstrates that such an interpretation is appropriate and necessary.

Acts motivated by economic goals, coupled with indifference toward the existence of a group, that result in the destruction of that group in whole or in part, should not escape a finding that they are genocidal acts, simply because the actors did not explicitly express their intentions in terms of the group's extermination. In the case of the Aché Indians of Paraguay (the facts of which were never brought before any court), most scholars have recognized that genocide occurred, despite the State's claim that its motives (development of the land on which the Aché lived) were entirely economic and that the resultant death of half of the Aché population over ten years was entirely incidental.[243] The Indonesian government's use of economic development language suggests a similar excuse-making for the deaths of thousands of indigenous Papuans. The obvious connection between development goals and genocidal intent reveals itself in the

[240] For a description of the various interpretations, see SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 200, at 169-70, 201, & 243-44.
[241] *See id.*
[242] Rome Statute, Art. 30 § 2(b). Professor Alexander Greenawalt has argued that the Genocide Convention should be interpreted to define intent in this same manner. Alexander K. A. Greenawalt, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2259 (1999). Many domestic jurisdictions use a similar definition of intent for criminal causes of action. *See* Model Penal Code § 2.02 (1985) ("A person acts purposely with respect to a material element of an offense when . . . it is his conscious object to engage in conduct of that nature or to cause such a result; and . . . if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.).
[243] *See* GENOCIDE IN PARAGUAY (Richard Arens ed., 1976); Greenawalt, *Rethinking Genocidal Intent*, *supra* note 242, at 2285-87; Joy Gordon, *When Intent Makes All the Difference in the World: Economic Sanctions on Iraq and the Accusation of Genocide*, YALE HUM. RTS. AND DEVEL. L. J. 57, 63 (2002)

attitude of the Kopassus lieutenant commander described above who flatly admitted that the military's job was to clear the highlands of West Papuans in order to make room for investors. Deaths that result, even indirectly, from Indonesia's policies and conduct during the 40 years of its rule reflect, at least, an indifference toward the lives of Papuans that is consistent with this broader and more appropriate notion of intent.

The result of Indonesia's actions—the deaths of thousands of indigenous Papuans over the course of Indonesia's forty-year rule—is the same whether those actions were based on development goals or the government's intent was to exterminate Papuans outright. If, as one scholar has argued, the "core concern" of the Genocide Convention is the "permanent losses to humanity that result from the annihilation of enumerated groups," then "the requirement of genocidal intent should be satisfied if the perpetrator acted in furtherance of a campaign targeting members of a protected group and knew that the goal or manifest effect of the campaign was the destruction of the group in whole or in part."[244] Thus, while this is a more expansive interpretation of the specific intent requirement than has been endorsed judicially, its application to the acts surrounding resource exploitation, relocation, and environmental harm in West Papua is consistent with the requirement's purpose. Application of such an analysis to the history of Indonesian control of West Papua leads to the conclusion that the required specific intent was present: the State knew that the effect of its acts — in support of and in collaboration with the relevant corporations — would be the destruction of the indigenous people of West Papua.[245] By engaging in such acts, the Indonesian government "deliberately inflict[ed] conditions of life calculated to destroy the [West Papuan] group in whole or in part," thus violating Article 2 of the Genocide Convention.

[244] Greenawalt, *Rethinking Genocidal Intent*, *supra* note 242, at 2288.
[245] *See* note 240-41 & 244 and accompanying text.

5. *Destruction of Property and Crops*

The Indonesian military has regularly engaged in the destruction of property and crops belonging to and cultivated by the indigenous people of West Papua. This type of destruction, when engaged in with the requisite intent, constitutes "deliberately inflicting conditions of life calculated to destroy a group in whole or in part." The Guatemalan Commission for Historical Clarification found that acts of genocide had been committed against the Mayan people of Guatemala when the army razed villages, destroyed property and collectively-worked fields, and burned crops.[246] Indonesian military forces burned church buildings, homes, and crops in West Papua. The result of these attacks on the property of the West Papuans was to force them to flee their homes and into the forests. Many subsequently starved to death or suffered from diseases due to exposure to the elements. These consequences were the foreseeable result of the "ordinary course of events," and thus were committed by the military with the intent required for such conduct to fit within the definition of genocidal acts.

6. *Forced Labor*

Throughout Indonesia's rule of West Papua, Indonesian authorities have occasionally forced indigenous Papuans to work without fair, or sometimes any, compensation. While these forced labor programs have been relatively infrequent, they may constitute "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."[247]

Forced labor, used in Nazi Germany as part of the Final Solution, was among the examples given during the drafting of the Geneva Convention as one of those "conditions of life

[246] SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 200, at 168.
[247] Genocide Convention, art. 2(c) (1948).

calculated to destroy a group in whole or in part."[248] Two incidents of forced labor in West Papua have been documented: the obligatory labor in the Paniai Timur region, beginning in the early 1980s and lasting throughout the 1990s, and the forced logging of the south coast of West Papua. The Indonesian government forced the West Papuans of the Paniai region to supply free labor to a nearby military post; any failure to do so was punished with fines, corporal punishment, and torture. In another incident described above, Indonesian authorities relocated the Asmat tribe and forced them to engage in logging at below-subsistence wages. The Indonesian authorities enforced the system of forced labor with threats of arrest. The specific intent of the Indonesian authorities to destroy the Asmat tribe in whole or in part is evidenced by the length of time they had to remain away from their homes and by the below-subsistence wages the Asmat workers received. Being away from their villages and families for long periods of time disrupted not only village life, but also the creation of families and the procreation of the Asmat people.

7. *Transmigration Program*

Indonesia's transmigration program seems clearly to constitute the deliberate infliction of "conditions of life calculated to destroy" West Papuans. The evidence strongly suggests that the Indonesian government must have been aware that such a policy would eventually bring about the physical (as well as cultural) destruction of the indigenous West Papuan population. Such knowledge fulfills the "intent" requirement, as described above.

In furthering its transmigration policy, the Indonesian government moved transmigrants from elsewhere in Indonesia to West Papua. Indonesian authorities intentionally forced West

[248] SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 200, at 165 ("Under its heading physical genocide, the Secretariat draft presented two provisions addressing this issue [including] the subjection to conditions of life which, by lack of proper housing, clothing, food, hygiene and medical care, or excessive work or physical exertion, are likely to result in the debilitation or death of the individuals . . . .").

Papuans from their traditional land to land with conditions to which they were not accustomed. This forcible removal left West Papuans with no means of subsistence. In many cases, they were also denied opportunities for employment. They were exposed to diseases for which they had no immunity. The Indonesian government intended its actions and was aware of the consequences likely to follow. These consequences, which were devastating for the West Papuans, occurred in the ordinary course of events as a result of the transmigration policy. The transmigration policy and its attendant acts "deliberately inflict[ed]" on the West Papuan group conditions aimed to "bring about the its physical destruction in whole or in part." Implementation of the transmigration policy itself may therefore be considered a genocidal act.

D. Inferring Intent: West Papua and the Contemporary Standard

As the ICTY concluded in the *Jelisic* case, "It is in fact the *mens rea* [the mental-state element of the crime] which gives genocide its speciality and distinguishes it from an ordinary crime and other crimes against international humanitarian law."[249] In other words, whereas the act element is what makes the genocide a crime in the first place, the intent element is what makes the crime genocide. Under the 1948 Convention, the intent must be specific—it cannot be just a general intent to murder.[250] Although specific intent is required, however, the *ad hoc* tribunals have interpreted the standard to allow specific intent to be inferred, in most cases, from the acts themselves. According to the ICTR, "[I]t is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others."[251]

[249] *Jelisic*, para. 66.
[250] For example, under Article II(a) of the Convention, the *mens rea* must be a specific intent to kill someone *because of* their membership in a group.
[251] *Akayesu*, para. 523.

As one scholar summarizes, "[I]ntent may be inferred from a number of facts such as words or deeds or a pattern of purposeful action that deliberately, consistently, and systematically targets victims on account of their membership in a particular group while excluding the members of other groups."[252] In the case of West Papua, inferring intent from the acts seems to be a difficult proposition, because the relevant acts, on their own, do not clearly suggest the kind of systematic campaign that the text of the Genocide Convention explicitly requires. Yet, the pattern of activity undertaken by the Indonesian government, when considered in aggregation, begins to emerge as the sort of conduct that the Convention was designed to proscribe.

The Indonesian government, particularly the military, Brimob, and the KOPKAMTIB, has regularly brutalized the people of West Papua since the end of the colonial period, killing uncounted thousands in a series of incidents. Through its transmigration programs, the Indonesian government has undermined the social and cultural heritage of the people of West Papua by altering, at a fundamental level, the demographics and the underlying social structures of the region. Through the economic development efforts that it has sponsored, the Indonesian government has caused widespread and devastating pollution and other environmental damage, which, in turn, have led to the further obliteration or forced relocation of numerous West Papuan groups. Through its refusal to introduce necessary measures of medical and economic relief for a plague that, evidence suggests, the government itself introduced, the Indonesian government has turned a willfully blind eye to the decimation of the people of West Papua. Indeed, throughout the past forty years, the Indonesian government has shown a callous disregard for—and, at times, an intentional and specific malevolence toward—the basic human rights and dignity of the people of West Papua.

[252] KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 74 (2002).

Although no single act or set of acts can be said to have constituted genocide, *per se*, and although the required intent cannot be as readily inferred as it was in the cases of the Holocaust or the Rwandan genocide, there can be little doubt that the Indonesian government has engaged in a systematic pattern of acts that has resulted in harm to—and indeed the destruction of—a substantial part of the indigenous population of West Papua. The inevitability of this result was readily obvious, and the government has taken no active measures to contravene. According to current understanding of the Genocide Convention, including its interpretation in the jurisprudence of the *ad hoc* international criminal tribunals, such a pattern of actions and inactions—of acts and omissions—supports the conclusion that the Indonesian government has acted with the necessary intent to find that it has perpetrated genocide against the people of West Papua.

In the case of West Papua, however, it is necessary to consider whether the requisite intent can be inferred when genocidal acts have been committed in furtherance of an objective with a *non-genocidal* motive. The Genocide Convention's intent requirement speaks to the intended consequences of certain categories of acts—the objective to destroy a group in whole or in part. Motive, on the other hand, addresses the question of *why* the perpetrator desires these consequences to occur. In this case, the Indonesian government might maintain that its actions have all been designed to achieve economic gain and that the destruction of—or attempt to destroy—the people of West Papua was not intended "as such." Can the required intent be established when the government makes a credible claim that the motive behind the acts was not directly related to the extermination of the group against whom the acts were directed?

Commentators generally agree that the inclusion of the words "as such" in Article II of the Genocide Convention is the Convention's lone attempt to address motive as an element

additional to and distinct from intent, but there is no commonly accepted interpretation of what the term actually means.[253] One argument is that the "as such" requirement mandates that the crime of genocide can only cover acts committed against groups where the destruction of that group is not only intended but is the *motive* behind the acts. Such a reading, however, is too narrow to be reconciled with the history of the Convention's drafting, which shows that an explicit reference to motive was left out of the text largely because of a fear that such a reference would limit the Convention's application.[254] Nevertheless, despite the drafters' intent not to limit the Convention's application to cases where there was also an explicitly genocidal motive, the Convention has never been extended to cover cases where such motive was not present. Neither the ICTY nor the ICTR have helped to resolve this question of interpretation.[255]

The problem is particularly troubling in cases where the commission of genocide is arguably a *means*, rather than an end. Is the intent requirement satisfied when otherwise genocidal acts are carried out with the ultimate motive of increasing government or government-sanctioned access to natural resources? In one pertinent case, the Australian Human Rights and Equal Opportunities Commission ruled that "even if motives were mixed, a fundamental element in the programme [*sic*] [of transferring indigenous children to families of European descent] was the elimination of indigenous cultures, and that as a result the co-existence of other motives was no defence [*sic*]."[256] While it has no analogue in the case law of the ICTY or ICTR, the conclusion of the Australian commission is implicit in the purpose and logic of the Genocide

[253] Indeed, the record indicates that there was significant debate in the drafting of the Convention about whether or not to include a requirement for there to be an explicitly genocidal motive as part of the *mens rea*. *See* SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 200, at 245-56.
[254] *Id.*
[255] *Id.* at 252 ("The case law of the *ad hoc* tribunals is hardly enlightening as to this vexing problem of interpretation.").
[256] Australian Human Rights and Equal Opportunities Commission, *Bringing Them Home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families,* at 270-75, *available at* http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen (last visited on March 11, 2002).

Convention and consistent with its legislative history. This conclusion suggests that motivation need not be exclusive in order for the crime to constitute genocide. Instead, animus or racism toward the victim group may be coupled with the desire to achieve political, territorial, or other goals.[257]

Without further research, it may not be possible to determine conclusively whether the acts perpetrated by the Indonesian government against the West Papuans were committed with the intent to destroy the West Papuan group, as such. However, the presence of other motives should not negate a claim of genocide so long as the motive for the acts of the Indonesian government, taken as a whole, includes or reflects opposition to or animus toward the West Papuans *qua* West Papuans. Relying on contemporary and appropriate interpretations of the Convention's intent requirement, a strong argument can be made that the conduct of the Indonesian government toward the people of West Papua over the last forty years has involved the requisite intent or *mens rea* to constitute genocide.

V. CONCLUSION

Since Indonesia gained control of West Papua, the West Papuan people have suffered persistent and horrible abuses at the hands of the government. The Indonesian military and security forces have engaged in widespread violence and extrajudicial killings in West Papua. They have subjected Papuan men and women to acts of torture, disappearance, rape, and sexual violence, thus causing serious bodily and mental harm. Systematic resource exploitation, the destruction of Papuan resources and crops, compulsory (and often uncompensated) labor, transmigration schemes, and forced relocation have caused pervasive environmental harm to the region, undermined traditional subsistence practices, and led to widespread disease, malnutrition,

[257] *See* Lippman, *The 1948 Convention Forty-Five Years Later*, *supra* note 213, at 23-24 (1994) (discussing the legislative history of the Genocide Convention).

and death among West Papuans. Such acts, taken as a whole, appear to constitute the imposition of conditions of life calculated to bring about the destruction of the West Papuans. Many of these acts, individually and collectively, clearly constitute crimes against humanity under international law. Further, the West Papuans, objectively, and in the eyes of their Indonesian persecutors, appear to constitute a group as defined by Article II of the Genocide Convention.

In the final analysis, whether the sum of acts committed by the Indonesians against the West Papuans rises to the level of genocide turns largely on the question of whether these acts were committed with the requisite *mens rea* or intent to destroy the West Papuan group. Obviously, few perpetrators of genocide leave behind a clear record of intent akin to Hitler's explicit statements of intent to destroy the Jews or the Rwandan Hutu government's carefully laid plan to rid Rwanda of all ethnic Tutsis. Usually, intent must be inferred from the perpetrators' acts, considered as a whole, along with any other available evidence that the victim group was targeted as such. In the West Papuan case, any such inference necessarily remains tentative given the difficulties in procuring comprehensive qualitative or quantitative data about Indonesian human rights abuses in West Papua, past and present. However, the historical and contemporary evidence set out above strongly suggests that the Indonesian government has committed proscribed acts with the intent to destroy the West Papuans as such, in violation of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the customary international law prohibition this Convention embodies.