



NOTE

DEFINING “NATIONAL GROUP” IN THE GENOCIDE  
CONVENTION: A CASE STUDY OF TIMOR-LESTE

David Lisson

# NOTES

## DEFINING “NATIONAL GROUP” IN THE GENOCIDE CONVENTION: A CASE STUDY OF TIMOR-LESTE

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### INTRODUCTION

Drafted in the shadow of the Holocaust, the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)<sup>1</sup> defined the international crime of genocide for the first time. Central to the Genocide Convention, and to the crime that it defined, is a unique focus on groups. Raphaël Lemkin, the inventor of the term “genocide,” understood the crime as an effort aimed at “the destruction of essential foundations of the life of

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1. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

national groups, with the aim of annihilating the groups themselves.”<sup>2</sup> Article 2 of the Genocide Convention reflects Lemkin’s desire to protect groups as social units by providing that only actions committed with the intent to destroy certain groups as such constitute genocide. Distinct from mass killing, which targets individuals, genocide targets the group to which those individuals belong.

Significantly, however, not all social units are protected by the Genocide Convention. Article 2 limits the crime to acts committed with the intent to destroy “national, ethnical, racial or religious” groups.<sup>3</sup> Other entities, such as those defined by political parties, economic class, or sexual preference, are unprotected. Born out of the political realities at the time of drafting, this closed list of protected groups presents one of the most serious and heavily debated limitations of the Genocide Convention.<sup>4</sup> Moreover, the limitation makes the way in which the four enumerated groups are defined a matter of fundamental importance. If genocide is the destruction of only certain groups, then the threshold question in any potential prosecution is whether the targeted group falls within any of the protected categories.

This Note focuses particularly on the category of “national group.” The meaning of “national group” in the Genocide Convention has been left relatively unexplored, and it is often left out of discussions about whether a targeted group falls within Article 2. International tribunals have provided a brief definition of the term based on a similar term in public international law: “a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.”<sup>5</sup> However, there is reason to doubt whether this definition makes sense in light of the social phenomenon the Genocide Convention is meant to address. This Note will suggest that an alternative definition based on the concept of self-determination is more appropriate.

In addition, this Note uses a case study of the Indonesian invasion and occupation of Timor-Leste between 1975 and 1999 to demonstrate the importance of re-conceptualizing the term “national group.” Indonesian forces invaded Timor-Leste on December 7, 1975, one week after the territory had declared independence. The invasion and subsequent occupation produced a staggering death toll as Indonesia attempted to integrate and “de-Timorize” the territory. Only after an internationally monitored referendum in 1999, which occurred in the midst of another spasm of mass violence, did Indonesia accept East Timorese independence and transfer authority to the U.N. Transitional Authority for Timor-Leste (UNTAET).<sup>6</sup> On January 30, 2006, the Commission

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2. RAPHAËL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* 79 (1944).

3. Genocide Convention, *supra* note 1, art. 2.

4. Beth Van Schaak, Note, *The Crime of Political Genocide: Repairing the Genocide Convention’s Blind Spot*, 106 *YALE L.J.* 2259, 2264 (1997).

5. Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 512 (Sept. 2, 1998).

6. All three periods—the invasion, the occupation, and the final outbreak of violence

for Reception, Truth and Reconciliation in Timor-Leste (CAVR) released its final report, providing a unique opportunity to analyze the mass violence and its implications for the law of genocide.

Under the current definition of “national group,” Indonesian forces were able unilaterally to remove their victims from the protection of the Genocide Convention by preventing the East Timorese from forming a state. It was at least in part for this reason that no genocide indictments were issued by the Special Panels for Serious Crimes established to convict the most serious human rights abusers.<sup>7</sup> This Note will argue that the definition of “national group” should focus not on whether the group comprises a state, but instead on whether the group in question possesses the right of self-determination. Self-determination guarantees certain groups the right under international law to freely determine their political status and pursue their own development as groups. The Genocide Convention should protect those same groups from destruction. The East Timorese victims possessed and attempted to exercise the right of self-determination through state formation. The intent to destroy such a group constitutes the intent to destroy a national group required by the Genocide Convention.

Understanding the true nature of the victim group is essential to any attempt at criminal prosecution. It is impossible to imagine a conviction for the crime of genocide arising from acts that occurred outside of a broader genocidal context and an international tribunal’s first step in establishing individual criminal liability is to establish that the perpetrator acted as part of a broader genocide.<sup>8</sup> Because the East Timorese victims have not been considered a national group, the majority of the international community has concluded that no genocide occurred in Timor-Leste. A better definition of national group would call this conclusion into question and open the door for future prosecution.<sup>9</sup>

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surrounding the referendum—are of interest. This Note will treat the periods as constituting various aspects of a single systemic intent on behalf of the Indonesian authorities.

7. The Special Panel for Serious Crimes completed four years of trials in May 2005. While its work was cut short by the end of the U.N. mission of which it formed a part, it convicted ninety-four individuals and acquitted three. Prosecutors did not issue a single indictment for genocide. JUDICIAL SYS. MONITORING PROGRAMME, DIGEST OF THE JURISPRUDENCE OF THE SPECIAL PANELS FOR SERIOUS CRIMES 63 (2007), available at [http://www.jsmp.minihub.org/Language\\_English/spsc2004\\_english.htm](http://www.jsmp.minihub.org/Language_English/spsc2004_english.htm).

8. In fact, the International Criminal Tribunal for Rwanda has stated that “it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systemically directed against that same group.” Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶¶ 523 (Sept. 2, 1998); see also *id.* ¶ 728 (“[I]t is possible to infer the genocidal intention . . . from the general context in which other culpable acts were perpetrated systematically against the same group, regardless of whether such other acts were committed by the same perpetrator . . .”).

9. As a practical matter, the prospect of prosecuting individuals for genocide in Timor-Leste may become less likely as time passes. However, a rethinking of the meaning of national groups could, at the very least, allow for the possibility of prosecutions in similar future cases.

## I. THE GENOCIDE CONVENTION AND PROTECTED GROUPS

A. *The Genocide Convention*

Signatories approved the Genocide Convention on December 9, 1948, and the treaty entered into force on January 12, 1951. While Article 1 confirms that genocide is a crime under international law, the all-important task of defining what exactly genocide entails is left to Article 2. In its entirety, that section reads:

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

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>10</sup>

A difficult provision as a whole, no aspect of Article 2 has proven more vexing and controversial than its selective protection of certain groups.

The essence of the crime of genocide is the intent to destroy a group. Social relationships based on common bonds are central aspects of human existence, and genocide directly targets these relationships. As Ben Saul succinctly explains: “Whereas murder is a crime affecting the integrity of a community, genocide attacks the very existence of the community.”<sup>11</sup>

Given the importance of group membership in human experience, it is reasonable to wonder why only certain groups are protected by the Genocide Convention. Some, such as economic, social, and linguistic groups, were consciously excluded, while others, such as those based on sexual preference, were not even considered.<sup>12</sup> The *travaux préparatoires* of the Genocide Convention show that the exclusion of political groups provoked more debate than any other aspect of the treaty.<sup>13</sup> Those opposed to the inclusion of political groups put forward a number of arguments. Some argued that political groups lack the “necessary homogeneity and stability,”<sup>14</sup> as they are involved in the political process, in which groupings are ephemeral.<sup>15</sup> Others pointed to the etymology of the word genocide and the need not to intervene in the

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10. Genocide Convention, *supra* note 1, art. 2.

11. Ben Saul, *Was the Conflict in East Timor ‘Genocide’ and Why Does It Matter?*, 2 MELB. J. INT’L L. 477, 483 (2001); *see also* Larry May, *How Is Humanity Harmed by Genocide?*, 10 INT’L LEGAL THEORY 1 (2004).

12. *See* WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 145-50 (2000).

13. *See, e.g.*, U.N. GAOR, 3d Sess., 74th-75th mtgs. at 98-121, U.N. Doc. E/794 (Oct. 14-15, 1948).

14. U.N. GAOR, 3d Sess., 63d mtg. at 6, U.N. Doc. E/794 (Sept. 30, 1948).

15. *See, e.g.*, U.N. GAOR, 3d Sess., 74th mtg. at 99, U.N. Doc. E/794 (Oct. 14, 1948).

internal affairs of states.<sup>16</sup> While some states strongly opposed these arguments, considerations of *realpolitik* eventually caused political groups to be excluded.<sup>17</sup> In the end, delegates "traded" the protection of political groups for mention of an international tribunal in the Genocide Convention.<sup>18</sup>

A number of scholars have proposed new definitions of genocide in order to expand the scope of the term. Jonassohn and Chalk suggest that genocide is mass killing with the intent to destroy any group, as that group and its membership are defined by the perpetrator.<sup>19</sup> Fein focuses on the destruction of a collectivity,<sup>20</sup> while Charny goes even further in creating a definition that focuses on the mass killings of defenseless and helpless individuals.<sup>21</sup> While these broader definitions may have value on a moral or academic level, they have no legal force. Accordingly, other scholars and activists have attempted to stretch the Genocide Convention definition itself or have argued that its gaps are filled by customary international law.<sup>22</sup> Van Schaak, for example, argues that the *jus cogens* prohibition against genocide—the fundamental international norm, as distinct from the Convention's prohibition—includes protection of political groups.<sup>23</sup> It seems difficult to argue, however, that the Convention now covers groups that were purposefully left out by its drafters. It is just as difficult to establish that binding *jus cogens* custom has developed to the point where it covers those groups when the Genocide Convention definition has been copied almost verbatim in a number of recently drafted international instruments.<sup>24</sup> As a result, a legal analysis must work within the Genocide Convention's definition of the crime of genocide, in which only national, ethnical, racial, and religious groups are protected.

Problematically, the Genocide Convention does not provide definitions of the groups that it protects, and there is no universal understanding of what constitutes a national, ethnical, racial, or religious group. Concepts such as

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16. *Id.* at 105-07; SCHABAS, *supra* note 12, at 137.

17. *See* SCHABAS, *supra* note 12, at 139-40.

18. Van Schaak, *supra* note 4, at 2268; *see also* Genocide Convention, *supra* note 1, art. 6.

19. *See* Kurt Jonassohn & Frank Chalk, *A Typology of Genocide and Some Implications for the Human Rights Agenda*, in *GENOCIDE AND THE MODERN AGE: ETIOLOGY AND CASE STUDIES OF MASS DEATH* 3, 4 (Isidor Wallimann & Michael Dobkowski eds., 1987); *see also* Frank Chalk, *Redefining Genocide*, in *GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS* 47, 52 (George J. Andreopoulos ed., 1994).

20. *See* Helen Fein, *Genocide, Terror, Life Integrity, and War Crimes*, in *GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS*, *supra* note 19, at 95, 97.

21. *See* Israel W. Charney, *Toward a Generic Definition of Genocide*, in *GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS*, *supra* note 19, at 64, 75.

22. *See* Lori Lyman Bruun, *Beyond the 1948 Convention—Emerging Principles of Genocide in Customary International Law*, 17 *MD. J. INT'L L. & TRADE* 193 (1993).

23. *See* Van Schaak, *supra* note 4.

24. *See, e.g.*, Rome Statute of the International Criminal Court art. 6, U.N. Doc. A/CONF.183/9 (July 1, 2002); S.C. Res. 955 art. 2(2), U.N. Doc. S/RES/955 (Nov. 8, 1994); S.C. Res. 827 art. 4(2), U.N. Doc. S/RES/827 (May 25, 1993).

“race,” for example, have no objective meaning and exist only from the point of view of those who intend to define them.<sup>25</sup> It has been left to ad hoc international criminal tribunals to establish definitions for these seemingly artificial terms so that they may be applied to real-world groups, and it is here that an examination of genocide jurisprudence begins.

The International Criminal Tribunal for Rwanda (ICTR) was the first tribunal to grapple with the problem of the Genocide Convention’s protected groups. In its first genocide conviction, *Prosecutor v. Akayesu*, the tribunal had to squarely address whether and how the Tutsi victim group met the Genocide Convention’s requirements. The court began by establishing generic definitions of both ethnic and racial groups. It defined an ethnic group as “a group whose members share a common language or culture.” A racial group, it explained, is “based on the hereditary physical traits often identified with a geographical region.”<sup>26</sup> The problem was in distinguishing the victim Tutsi group from Akayesu’s Hutu group on the basis of these objective definitions. Both of Rwanda’s main groups share customary practices, the Kinyarwanda language, the geographical region, and general physical characteristics. After examining the evidence, the court concluded that “the Tutsi population does not have its own language or a distinct culture from the rest of the Rwandan population.”<sup>27</sup>

In an attempt to get around this problem, the court took a new approach to the Genocide Convention’s protected groups. It held that the Tutsi group did not fall within any of the enumerated groups in the Genocide Convention, but nonetheless was entitled to protection. In a departure from a purely textual understanding of the treaty, the ICTR trial chamber ruled that the groups protected by the Genocide Convention are not limited to the four expressly listed, stating, “[I]t is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux préparatoires*, was patently to ensure the protection of any stable and permanent group.”<sup>28</sup> Under this delineation, any permanent and stable group would fall under the Genocide Convention. The court looked to such objective features as customary rules dictating patrilineal lines of heredity and the use of mandatory identity cards that identified the Tutsi as a separate ethnic group, and determined that they were a sufficiently stable and permanent group to warrant protection.<sup>29</sup>

Were this approach to have become definitive, it would have represented an extremely significant development in the interpretation of the Genocide Convention. It would have meant that the only requirement for a group to be

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25. See, e.g., CAROLINE FOURNET, INTERNATIONAL CRIMES: THEORIES, PRACTICE AND EVOLUTION 72-73 (2006).

26. *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶¶ 513-14 (Sept. 2, 1998).

27. *Id.* ¶ 170.

28. *Id.* ¶ 516.

29. *Id.* ¶¶ 170-71.

protected under the Genocide Convention is that it be stable and permanent, and that the groups enumerated in Article 2 are merely examples of groups that fulfill this requirement. This interpretation would have expanded the Genocide Convention significantly by enabling it to cover previously unprotected populations.<sup>30</sup>

The effect of *Akayesu* has been significantly more limited, however. While accepting that the drafters wanted to protect stable groups, subsequent chambers of both the ICTR and the International Criminal Tribunal for the Former Yugoslavia (ICTY) have been reluctant to expand the Genocide Convention to cover a residual category of non-enumerated groups. This is partly a result of the fact that the concept of permanent and stable groups is problematic. Religion, for example, is an enumerated group that involves an element of choice and is therefore mutable, while some excluded groups, such as those based on gender, sexual preference, or disability, are often not based on choice and are on some level immutable.<sup>31</sup> In fact, there was some evidence of social mobility between the Hutu and the Tutsi.<sup>32</sup> Moreover, it is questionable whether a residual category is consistent with the intent of the drafters, who decided upon a closed list. Accordingly, no case since *Akayesu* has been willing to acknowledge a distinct protected category of stable and permanent groups.

Later cases have nevertheless continued to accept that the drafters intended to protect stable, permanent groups, even if the groups were limited to those that were enumerated. In *Prosecutor v. Rutaganda*, the ICTR stated:

[C]ertain groups, such as political and economic groups, have been excluded from the protected groups, because they are considered to be "mobile groups" which one joins through individual, political commitment. That would seem to suggest a contrario that the Genocide Convention was presumably intended to cover relatively stable and permanent groups.<sup>33</sup>

In its first examination of genocide, the ICTY also accepted that Article 2 intended to "limit the field of application of the Convention to protecting 'stable' groups objectively defined and to which individuals belong regardless of their own desires."<sup>34</sup>

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30. See, e.g., Paul J. Magnarella, *Some Milestones and Achievements at the International Criminal Tribunal for Rwanda: The 1998 Kambanda and Akayesu Cases*, 11 FLA. J. INT'L L. 517 (1997). Significantly, such an approach would most certainly have resulted in the East Timorese being covered by the Genocide Convention.

31. Saul, *supra* note 11, at 205.

32. Transitions from one group to another were common in pre-colonial times, especially from the Hutu group to the Tutsi group as part of the *ubuhake*, the traditional Rwandan economic and social system. See G. PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE 1959-1994*, at 13-14 (1995), as cited in Verdirame Guglielmo, *The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals*, 49 INT'L & COMP. L.Q. 578, 589 n.51 (2000); see also *Prosecutor v. Kayishema*, Case No. ICTR 95-1-T, Judgment, ¶ 34 (May 21, 1999).

33. *Prosecutor v. Rutaganda*, Case No. ICTR 96-3, Judgment, ¶ 57 (Dec. 6, 1999).

34. *Prosecutor v. Jelacic*, Case No. ICTY 95-10-T, Judgment, ¶ 69 (Dec. 14, 1999).



In order to conform to the intent of the drafters without creating a residual category of non-enumerated groups, both the ICTR and ICTY have added an element of subjectivity to the definition of racial and ethnic groups. Acknowledging that collective identities are not derived solely from objective facts but rather are socially constructed, both tribunals have used subjective identification in order to fit victim groups into the Genocide Convention's protected classes.<sup>35</sup>

In *Prosecutor v. Kayishema*, for example, the ICTR once again considered whether the Tutsi constituted a protected group, and this time expanded the meaning of ethnic group to allow it to reflect subjective identity.<sup>36</sup> It repeated that an ethnic group is one whose members share a common language or culture, but it added to this definition any group "which distinguishes itself as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others)."<sup>37</sup> Again, the court noted that shared language, tradition, and legends made the Hutu and Tutsi groups almost indistinguishable objectively.<sup>38</sup> However, both the Hutu and the Tutsi identified one another as distinct ethnic groups. The issuance of ethnic identity cards, the recognition of both groups in the Constitution, the testimony of survivors, and the Rwandan custom that "ethnicity" is inherited through the father, all indicated that the Hutu and Tutsi were considered separate ethnic groups by their members.<sup>39</sup> The court used this evidence of perceived ethnic difference to determine that the Tutsi qualified for protection under the Genocide Convention.

Subsequent cases have combined the approach of looking for a stable and permanent group with that of subjective identification. In *Prosecutor v. Rutatanga*, the ICTR stated that "for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept," but "subjective definition alone is not enough to determine victim groups . . . . [T]he Convention was presumably intended to cover relatively stable and permanent groups."<sup>40</sup> In light of such objective indicators as national identity cards the court concluded:

The identification of persons as belonging to the group of Hutu or Tutsi . . . had thus become embedded in Rwandan culture, and can, in the light of the travaux préparatoires of the Genocide Convention, qualify as a stable and permanent group, in the eyes of both the Rwandan society and the international community.<sup>41</sup>

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35. For a summary of the development of these trends, see PRUNIER, *supra* note 32; *Developments in the Law—International Criminal Law*, 114 HARV. L. REV. 1943 (2001).

36. *Kayishema*, Case No. ICTR 95-1-T, ¶ 98.

37. *Id.*

38. *Id.* ¶ 34.

39. *Id.* ¶¶ 522-25; *see also id.* ¶¶ 34-54.

40. *Prosecutor v. Rutaganda*, Case No. ICTR 96-3, Judgment, ¶¶ 56-57 (Dec. 6, 1999).

41. *Id.* ¶ 374.

In *Prosecutor v. Jelusic*, the ICTY adopted this hybrid approach. While it limited the application of the Genocide Convention to "stable" groups objectively defined, it also stated in the next paragraph that:

The Trial Chamber consequently elects to evaluate membership in a national, ethnic or racial group using a subjective criterion. It is the stigmatisation of a group as a distinct national, ethnic or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnic or racial group in the eyes of the alleged perpetrators.<sup>42</sup>

Thus, the ad hoc international tribunals have struggled to create a meaningful and workable understanding of ethnic and racial groups. While laying out succinct, objective definitions for both, the tribunals have acknowledged the difficulty in applying such definitions in the real world, where race and ethnicity are socially constructed. While they originally attempted to solve this problem by adding a residual category of protected groups beyond the four groups enumerated in the Genocide Convention, they now use subjective identification as a means of establishing the existence of either a racial or ethnic group, so long as the group is permanent and stable.

This analytical development regarding racial and ethnic groups stands in stark contrast to the lack of thought international tribunals have put into the meaning of national groups. Neither the ICTR nor the ICTY has examined the issue in any depth. The original restrictive objective definition from *Akayesu* remains "a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties."<sup>43</sup> While the ICTR has wrestled with the application of *Akayesu's* definition of ethnic group to ensure that the Genocide Convention covered the Rwandan genocide, no such effort has been undertaken with regards to the definition of national group.

#### B. Problems with the Current National Group Definition

The need to develop a new approach to defining "national group" is apparent from the deficiencies in the *Akayesu* definition. The purpose here is not to criticize the definition of genocide that is provided in Article 2 of the Genocide Convention, but rather to examine the way in which that definition has been interpreted and to determine whether this interpretation makes sense.

To understand why the current definition of national group cannot be correct, it is helpful to first outline where the *Akayesu* chamber found authority for it. The tribunal stated that its definition was "based on the *Nottebohm* decision rendered by the International Court of Justice."<sup>44</sup> In that case, the government of Liechtenstein instituted a claim for restitution against Guatemala based on actions directed against Friedrich Nottebohm, a citizen of

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42. *Prosecutor v. Jelusic*, Case No. ICTY 95-10-T, Judgment, ¶ 70 (Dec. 14, 1999).

43. *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 512 (Sept. 2, 1998).

44. *Id.*

Liechtenstein.<sup>45</sup> The International Court of Justice (ICJ) held the claim to be inadmissible on the grounds that Nottebohm was not a national of Liechtenstein despite the naturalization conferred on him. It stated that, under international law:

[N]ationality is a legal bond having as its basis a social fact of attachment . . . . It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred . . . is in fact more closely connected with the population of the State conferring the nationality than with that of any other State.<sup>46</sup>

Nottebohm had no real connection to Liechtenstein, and therefore Liechtenstein was unable to claim him as a citizen and bring a case on his behalf.<sup>47</sup>

The problem is that in *Nottebohm*, the ICJ was interested in defining the meaning of “nationality” in the context of espousal. It had no interest in the meaning of “national group.” If states are to be able to espouse the rights of their citizens in the ICJ, which has jurisdiction over states only, then a tight relationship between the individual and the state representing his or her interests is necessary. Accordingly, the ICJ looked at the correspondence between a formal grant of nationality (citizenship) and the actual bonds of the individual to the granting state. However, such an approach is inappropriate in the context of genocide. The ICJ did not address the issue of group definition or destruction. Further, it could not have taken into consideration the situation in which a substate group that shares cultural and other bonds may hold the nationality of another state or may be stateless because such considerations are irrelevant to the question of espousal.<sup>48</sup> *Oppenheim’s International Law*, a leading international law treatise, cautions that “nationality” in the sense of citizenship in a state must not be confused with membership in a certain nation in the sense of “race.”<sup>49</sup> Unfortunately, this seems to be exactly what the ICTR did by using the jurisdictional sense of the term in *Akayesu* rather than its ethnographical or sociological meaning.<sup>50</sup>

It is a serious error to import the *Nottebohm* conception of “nationality,” which presupposed the granting of citizenship by a state, into the Genocide Convention because doing so fails to differentiate between a national group and a state. The problem is evident in a simple example: if state *A* invades state *B*, so that state *B* ceases to exist, and persons from what was state *B* (or their descendents) are later targeted and killed, it seems illogical that the victims would not constitute a national group because they no longer belong to a

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45. *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4, 12 (Apr. 6). *Nottebohm* is a leading case on espousal and nationality in international law.

46. *Id.* at 23.

47. *Id.* at 25-26.

48. See SCHABAS, *supra* note 12, at 115.

49. 1 OPPENHEIM’S INTERNATIONAL LAW 857 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

50. See SCHABAS, *supra* note 12, at 116.

distinct state (that is, they no longer shared legal bonds of common citizenship distinct from their killers). The existence of a state, which is necessary to grant the common citizenship at the time of the killing, cannot be determinative of whether a national group exists.

Accepting that the *Akeyesu* definition is incomplete, some scholars have massaged it to mean "national minorities," as that term was understood in Europe in the first half of the twentieth century. This concept refers to ethnic, linguistic, and religious minorities in existing states who are united by this identity and who share these characteristics with the majority population of another state.<sup>51</sup> Schabas, for example, conceptualizes national group in this way based on his interpretation of the drafters' original intent. He asserts that the term national "[d]oubtless . . . stemmed from the minorities system created under the aegis of the League of Nations."<sup>52</sup>

However, this approach is just as problematic as the more restrictive interpretation of the *Akeyesu* definition. To read "national group" as meaning "national minority" is inconsistent with the drafting. Firstly, it would make the inclusion of national groups redundant. If "national group" in the Genocide Convention meant only an ethnic, linguistic, or religious minority in a state, then it would make the term superfluous. The protection of national groups would serve no purpose if "national groups" meant only the already protected ethnic or religious minorities in a state.<sup>53</sup> In addition, the drafters knew of the term "national minority,"<sup>54</sup> but deliberately did not include the word "minority" in the Genocide Convention.

More formally, to read "minority" into the Genocide Convention would lead to absurd results if a national minority in numerical terms actually ruled the country. A mass killing of the majority in a state by the minority in a state certainly constitutes genocide, provided that the other elements of the offense are present.<sup>55</sup> Whether a national group is a minority or majority in the state is irrelevant.

Most fundamentally, it is their operation in practice that most clearly demonstrates the shortcoming of either the *Akeyesu* or the "national minority"

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51. This hybrid definition captures the essence of the definitions used by the Permanent Court of International Justice under the minorities system and the European Commission for Democracy Through Law (Venice Commission). See Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration, Advisory Opinion, 1930 P.C.I.J. (ser. B) No. 17, at 15 (July 31); EUR. COMM'N FOR DEMOCRACY THROUGH LAW, THE PROTECTION OF MINORITIES 12 (1994).

52. SCHABAS, *supra* note 12, at 116.

53. The Egyptian representative pointed out this redundancy while arguing against the inclusion of ethnical groups in Article 2. The fact that ethnical groups were nonetheless added suggests that national groups must mean something different than the national minorities covered by that term. U.N. GAOR, 3d Sess., 74th mtg. at 99-100, U.N. Doc. E/794 (Oct. 14, 1948).

54. U.N. GAOR, 3d Sess., 75th mtg. at 116, U.N. Doc. E/794 (Oct. 15, 1948).

55. Hurst Hannum, *International Law and Cambodian Genocide: The Sounds of Silence*, 11 HUM. RTS. Q. 82, 104 (1989).

approach, both of which depend on the existence of a formally recognized state. Requiring the formal recognition of a state allows a perpetrator to block access to national group protection by preventing the formation of a state. As discussed in the case study below, the human rights abuses perpetrated by Indonesia constitute the exact phenomenon that the Genocide Convention was meant to address, but the fact that the perpetrator was successful in preventing the formation of a state removed the East Timorese from the Genocide Convention's protection. The "national minority" understanding similarly errs by making the relation of the group to a state the defining feature of a national group. A national minority would cease to receive protection under the Genocide Convention if the state affiliated with that minority group ceased to be recognized as a state. The state is a political construct that does not affect the nature of a group that is destroyed.

It appears, then, that a new definition of national group is needed, and a logical place to start would be the Genocide Convention's *travaux préparatoires*.<sup>56</sup> Unfortunately, the preparatory work is not particularly illuminating and provides little evidence of a consensus supporting any single definition. There was no vote or consensual decision on the national group issue at the Ad Hoc Committee on Genocide, the Economic and Social Council, or the General Assembly. There was no significant debate on the meaning of "national group," and national groups were not included in General Assembly Resolution 96(1), which declared genocide a crime under international law for the first time.<sup>57</sup> The term was included in the final draft of the Genocide Convention, but very little debate occurred because no delegation argued against its inclusion. Some states, such as Belgium, seem to have understood the term to mean national minorities. Others explicitly rejected the linking of national groups to the formal existence of a state. Sweden, for example, highlighted the problem of such a link by noting that if "'national group' . . . meant a group enjoying civic rights in a given State, then the convention would not extend protection to such groups if the State ceased to exist or if it were in the process of formation."<sup>58</sup> The Egyptian representative seems to have described the situation accurately when he stated that "there had been no opposition to the national . . . group . . . although the idea of national

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56. Article 32 of the Vienna Convention on the Law of Treaties reads:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331, available at <http://www.un.org/law/ilc/texts/treaties.htm>.

57. See The Crime of Genocide, G.A. Res. 96 (I), U.N. Doc. A/ 96(I) (Dec. 11, 1946).

58. U.N. GAOR, 3d Sess., 73d mtg. at 97, U.N. Doc. E/794 (Oct. 13, 1948).

group was somewhat ambiguous.”<sup>59</sup> It is thus necessary to develop a new understanding of national group that is consistent with the Convention’s drafting but that avoids the pitfalls inherent in *Akayesu*’s reliance on the formal existence of a state.

### C. Self-Determination and Genocide

Put simply, groups that possess the right to self-determination should constitute national groups protected under the Genocide Convention. This Part will briefly explore the concept of self-determination and why it can give content to the term “national group” in the Genocide Convention. The following Parts will demonstrate the advantages of this new approach in practice.

Self-determination is one of the most complex topics in international law, and questions regarding which peoples possess the right to self-determination and how that right co-exists with the principle of territorial integrity have been the subject of extensive scholarly debate. It is unnecessary to engage these debates, however, because the purpose here is to examine the way in which the core concept can give meaning to the Genocide Convention’s protection of national groups. To do so requires only a brief review of the right in general.

The right of a people to self-determination is now considered a foundational principle of international law. It is mentioned in Article 1 of the U.N. Charter,<sup>60</sup> and Common Article 1 of the 1966 Covenants on Human Rights states that “[a]ll peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>61</sup>

The right has both an “external” and an “internal” aspect. Relevant primarily in the context of decolonization, self-determination’s external manifestation is realized through the formation of an independent state. Its internal manifestation relates to the relationship between a people and the state in which it resides. It is important to emphasize that the notions of “external” and “internal” self-determination do not refer to different rights. Rather, they are different modes of implementing the same right.<sup>62</sup> As noted by the

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59. U.N. GAOR, 3d Sess., 74th mtg. at 99, U.N. Doc. E/794 (Oct. 14, 1948).

60. U.N. Charter art. 1, para. 2.

61. International Covenant on Civil and Political Rights art. 1(1), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Social, Economic, and Cultural Rights art. 1(1), Dec. 16, 1966, 993 U.N.T.S. 3; *see also* Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (Oct. 24, 1970); Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., at 66, U.N. Doc. A/4684 (Dec. 14, 1960).

62. *See* DAVID RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION 226-28 (2002).

Supreme Court of Canada, “the right to self-determination of a people is normally fulfilled through *internal* self-determination—a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state.”<sup>63</sup>

The debates regarding self-determination often revolve around when the right can and should manifest itself in the formation of an independent state. What is important here, however, is the core concept that a people possessing the right to self-determination has the right to pursue its political, economic, social, and cultural development. There are three aspects worth highlighting about this core right. First, self-determination is a group right. Second, it directly relates to the group’s existence and expression as a group. Third, external political factors do not define the group or limit its development. These three principal aspects of the right to self-determination are the key to establishing the relationship between self-determination and genocide targeted at a national group.

The central importance of groups to both concepts is clear, regardless of any controversy about the precise definition of those groups. Even more fundamental, however, is the second core aspect. The protection of group expression and development is the very reason for both the right to self-determination and the identification of a distinct crime of genocide. In this respect, genocide may be seen as the direct inverse of self-determination. While self-determination refers to a group’s right to political, social, cultural, and economic development, genocide refers to the destruction of these rights.

This point deserves some emphasis. While the international community’s understanding of the concept of self-determination has changed slightly over time, it has always been linked with the aspirations of national groups. Prior to World War I, national self-determination was the paradigm for political organization. When explaining the concept of self-determination, Woodrow Wilson stated that “*national* aspirations must be respected.”<sup>64</sup> Under the League of Nations, the focus of self-determination shifted to national minorities. This emphasis changed again after World War II, when decolonization created a new context for self-determination and the focus shifted to colonial nations.<sup>65</sup> The right fostered the development and cultural expression of these once-colonial nations. It would be consistent for the

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63. Reference re Secession of Québec, [1998] 2 S.C.R. 217, ¶ 126 (Can.).

64. Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT’L L. 1, 3-4 (1993) (quoting Woodrow Wilson, War Aims of Germany and Austria, in 3 THE PUBLIC PAPERS OF WOODROW WILSON: WAR AND PEACE 177, 182-83 (Ray Stannard Baker & William E. Dodd eds., 1927)) (emphasis added).

65. More recently, in the post-colonial context, there has been a partial shift back to looking at self-determination for minorities. For a discussion of this changing understanding, see Rupert Emerson, *Self-Determination*, 65 AM. J. INT’L L. 459, 463 (1971), and Hannum, *supra* note 64, at 32. For a review of the way in which self-determination has been interpreted over time and the effect this has had on group identities in international law, see KAREN KNOP, *DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW* (2002).

definition of genocide to protect those same groups from destruction.

The third core aspect of self-determination, which separates the recognition of the group from the official status of the territory in which it is located, highlights the major problem with the current understanding of national group. The ICJ's *Western Sahara* decision addressed claims by Morocco and Mauritania to the territory of Western Sahara made on the basis of the territory's status at the time of its colonization by Spain. Significantly, the Court held that historical ties and the formal status of the territory did not affect the principle of self-determination and the free expression of the people's will.<sup>66</sup> As was explained clearly by Judge Dillard in his separate opinion, "[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the people."<sup>67</sup> The formal recognition of a state, and the nature of that state, may affect the manner in which the right to self-determination becomes manifest. However, *Western Sahara* makes clear that the people possess the right to self-determination regardless of the formal status of the territory in which they belong. This same maxim must apply to groups under the Genocide Convention so that such groups are protected regardless of the formal status of the territory in which they live.

In light of these connections, a sensible alternative definition of national group in the Genocide Convention would encompass any group possessing the right to self-determination. At the outset, however, two preliminary objections must be addressed. The first is that "peoples" possess the right to self-determination, while the Genocide Convention refers to "national" groups. While true, this objection seems too formal to present a serious obstacle. Were the Genocide Convention to use both "peoples" and "national group," then the two terms would probably have to relate to different groups so as to give both terms meaning. However, neither the Genocide Convention nor relevant instruments establishing the right to self-determination refers to both "peoples" and "national groups,"<sup>68</sup> and there is no reason why those terms cannot refer to the same type of group. This is especially so since the exact definition of both "peoples" and "national group" has been left unclear in international instruments.

This fact gives rise to a second objection: that the approach simply substitutes one vague and controversial term for another. That is, the precise meaning of "peoples" is just as unclear as the problematic "national group." The first response to this objection is that, in many cases, a group's right to self-determination may be well established. As will be discussed below, the fact that the East Timorese possessed the right to self-determination was never in question. The second response is that, even if ambiguity remains, the term "peoples" is no less clear than the terms "racial" or "ethnic" that international

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66. *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12, 68 (Oct. 16).

67. *Id.* at 122 (separate opinion of Judge Dillard).

68. Note that "national group" is different than "nation," which might refer to a state.



tribunals have worked to define. When they do the same for “peoples” they will, at the very least, be focusing their analysis on the correct indicators of group identity as opposed to their current incorrect inquiry into the formal existence of an independent state.

It is important to note that focusing on groups with a right to self-determination is consistent with interpretive trends in the jurisprudence regarding the other protected groups in the Genocide Convention. As discussed above, international tribunals have focused on the fact that the enumerated groups were meant to be relatively stable and permanent and that subjective identification is important when determining whether a group falls within an enumerated category. The generally accepted definitions of “peoples” all accord with these two interpretive features. Raič, for example, presents the following as a reasonable amalgamation of the leading definitions of “peoples”:

- (1) a group of individual human beings who enjoy some or all of the following features:
  - (a) a (historical) territorial connection, on which territory the group forms a majority;
  - (b) a common history;
  - (c) a common ethnic identity or origin;
  - (d) a common language;
  - (e) a common culture;
  - (f) a common religion or ideology;
- (2) the belief of being a distinct people distinguishable from any other people inhabiting the globe, and the wish to be recognized as such,<sup>69</sup> as well as the wish to maintain, strengthen and develop the group’s identity.

The list under point (1) ensures that the group is stable and relatively permanent since the characteristics are objective and relatively immutable. Point (2) incorporates the important aspect of subjective identity, which is central to both self-determination and genocide.

What is most fundamental is the fact that using self-determination to inform the meaning of national group in the Genocide Convention ensures logical consistency in international law while bringing the definition of national group in line with the social phenomenon that the Genocide Convention was

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69. RAIČ, *supra* note 62, at 261-63 (footnotes omitted). While using slightly different wording in specific points, the definition is generally the same as those provided by Cristescu, UNESCO, Brownlie, Klabbbers and Lefeber, and Margalit and Raz. See U.N. Educ., Scientific & Cultural Org. [UNESCO], Div. of Human Rights & Peace, *International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, Final Report and Recommendations*, U.N. Doc. SHS-89/CONF.602/7 (Feb. 22, 1990); U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, ¶¶ 270-79, U.N. Doc. E/CN.4/Sub.2/404/Rev.1 (1981) (prepared by Aureliu Cristescu); IAN BROWNLIE, *THE RULE OF LAW IN INTERNATIONAL AFFAIRS: INTERNATIONAL LAW AT THE FIFTIETH ANNIVERSARY OF THE UNITED NATIONS* 39-47 (1998); J. Klabbbers & R. Lefeber, *Africa: Lost Between Self-Determination and Uti Possidetis*, in *PEOPLES AND MINORITIES IN INTERNATIONAL LAW* 37 (C. Brölmann et al. eds., 1993); Ayishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. PHIL. 439 (1990).

meant to address. Focusing on groups with a right to self-determination solves the problem of having national groups dependent on the existence of a state and does so by reference to entities that are already recognized as having special rights. International law holds that certain groups have the right to freely pursue their political development regardless of whether or not they create an independent state. The group's right to self-determination exists independently and prior to any formal state status and it would be consistent for international law to also protect these groups to which it gives special rights. That this approach brings the Genocide Convention into line with social reality is best seen through an analysis of the definition's application to the case of Timor-Leste.

## II. TIMOR-LESTE CASE STUDY

This Part presents the case study of Timor-Leste. It begins with a historical account of the Indonesian occupation of Timor-Leste followed by a profile of the human rights abuses that occurred during that period as recounted in the final report of the Commission for Reception, Truth and Reconciliation in East Timor. It is to these findings that the current and proposed definitions of "national group" will be applied, making the advantages of the later approach apparent.

Perhaps surprisingly, there has been relatively little academic legal commentary on genocide in Timor-Leste despite the fact that there has been a significant amount of rhetoric surrounding the issue.<sup>70</sup> Those that have concluded that genocide did occur have generally skipped over the question of protected groups or have failed to take either the facts or law on the issue seriously. Roger Clark, for example, first looked at the Indonesian invasion of Timor-Leste from the perspective of the Genocide Convention in 1981, but he ignored the difficulty in defining the group whose destruction supposedly constituted the crime.<sup>71</sup> Similarly, Ben Kiernan has claimed that the East Timorese constitute a national group but has failed to provide a legal explanation for this conclusion.<sup>72</sup> Finally, Phillip Curtin has asserted without much analysis that the East Timorese are a national and ethnic group distinct

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70. References to "genocide" occurring in Timor-Leste were common in press reports, as well as in statements by East Timorese leaders and human rights experts. *See, e.g.*, Lindsay Murdoch et al., *Race Against Genocide*, SYDNEY MORNING HERALD, Sept. 7, 1999, at 1; Press Release, Human Rights Comm'n, Special Session of Commission on Human Rights Hears from NGOs on Situation in Timor; Adjourns Until Monday, U.N. Doc. HR/CN/99/69 (Sept. 24, 1999).

71. *See* Roger S. Clark, *Does the Genocide Convention Go Far Enough? Some Thoughts on the Nature of Criminal Genocide in the Context of Indonesia's Invasion of East Timor*, 8 OHIO N.U. L. REV. 321 (1981).

72. *See* Ben Kiernan, *War, Genocide and Resistance in East Timor, 1975-99: Comparative Reflections on Cambodia*, in *WAR AND STATE TERRORISM: THE UNITED STATES, JAPAN, AND THE ASIA-PACIFIC IN THE LONG TWENTIETH CENTURY* 199, 202 (Mark Selden & Alvin Y. So eds., 2003).

from the Indonesians but has provided no factual or legal support for either conclusion.<sup>73</sup> All have failed to engage the problems raised by the restrictive *Akayesu* definition of national group. The few legal scholars, such as Ben Saul, who have seriously engaged the issue of protected groups have generally concluded that the atrocities fail to qualify as genocide given national groups' current definitions.<sup>74</sup> Saul does not question the jurisprudence, however, and it is this gap that this study attempts to fill.

#### A. *A History of the Conflict in Timor-Leste*

The territory of Timor-Leste consists of the eastern half of the island of Timor at the eastern end of the Indonesian archipelago.<sup>75</sup> The island is approximately 480 kilometers north of Australia and is approximately 32,300 square kilometers in size. The eastern territory measures approximately 15,000 square kilometers—just slightly larger than Connecticut. The Portuguese began to trade with the island of Timor in the early 15th century, and skirmishes with the Dutch led Portuguese authorities to focus their colonizing efforts on the east. Portugal remained the colonial power there until 1975, making the conflict in Timor-Leste one of the last chapters in the history of European colonization.

While the United Nations General Assembly declared Timor-Leste a non-self-governing territory within the meaning of Chapter XI of the U.N. Charter in 1960,<sup>76</sup> Portugal continued to rule the territory as its “overseas province” until 1974. In April of that year, forces within the Portuguese military staged the bloodless coup known as the Carnation Revolution, which opened the door for decolonization. By the mid-1970s, a clandestine national liberation organization within Timor-Leste had attracted broad support and in September 1974, Fretilin (the Revolutionary Front for an Independent Timor-Leste), was legalized as a political party promoting independence.<sup>77</sup> Around the same time two other parties emerged: the Timorese Democratic Union (UDT), favoring federation with Portugal, and the much smaller Apodeti (the Timorese Popular

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73. See Philip J. Curtin, Comment, *Genocide in East Timor? Calling for an International Criminal Tribunal for East Timor in Light of Akayesu*, 19 DICK. J. INT'L L. 181, 209 (2000).

74. See Saul, *supra* note 11.

75. The country of Timor-Leste also includes the islands of Pulau Atauro, Pulau Jaco, and the Oecussi (Ambeno) region on the northwest portion of the island of Timor.

76. See G.A. Res. 1542 (XV), 15th Sess., Supp. No. 16, at 30, U.N. Doc A/4684 (Dec. 15, 1960).

77. Stephen McCloskey, *East Timor: From European to Third World Colonialism*, in THE EAST TIMOR QUESTION 1, 2 (Paul Hainsworth & Stephen McCloskey eds., 2000). For an account of East Timorese resistance movements throughout the period of colonial rule, see Geoffrey C. Gunn, *The Five-Hundred-Year Timorese Funu*, in BITTER FLOWERS, SWEET FLOWERS: EAST TIMOR, INDONESIA, AND THE WORLD COMMUNITY 3, 3-15 (Richard Tanter et al. eds., 2001).

Democratic Association), favoring integration with neighboring Indonesia.<sup>78</sup> It became clear, however, that the UDT and Fretilin were the only two parties to have significant support across the country.<sup>79</sup>

While Fretilin and the UDT formed a coalition for independence in January 1975, the coalition fell apart by that May.<sup>80</sup> Between March and July 1975, the Portuguese Decolonization Commission organized local elections in which most of the victors were Fretilin members or supporters.<sup>81</sup> The UDT launched an attempted coup on August 11, 1975 and Fretilin responded on August 20, at which point full-scale civil war broke out and the Portuguese administration withdrew. The fighting was fierce but relatively short-lived, and Fretilin had a clear upper hand by September.<sup>82</sup>

Indonesia was not passive during this period of internal conflict, as Indonesian officials were strongly opposed to East Timorese independence for historical and strategic reasons. Following the Carnation Revolution, there was increasing concern that an independent Timor-Leste would become a base for communist infiltration.<sup>83</sup> President Soeharto made Indonesia's position explicit in a conversation with U.S. President Gerald Ford when he stated that "the only way is to integrate into Indonesia."<sup>84</sup> Beginning in October 1974, the Indonesian government and military began directing a destabilization campaign called Operation Dragon. Originally covert, the operation quickly became an overt attempt to undermine the pro-independence parties and subvert the independence movement. In September 1975, Indonesian forces were "invited" by the UDT leader to intervene militarily, and Indonesian special forces took a number of western towns in October. Following the November 28th capture of the town of Atabe, Indonesian forces stood poised for a full-scale invasion.<sup>85</sup>

With Indonesian military operations intensifying, Fretilin declared Timor-

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78. Note that the pro-independence political party was originally named the Timorese Social Democratic Association (ASDT). It was renamed Fretilin in September 1974 to reflect its claimed representation of the Timorese people. See Sarah Niner, *A Long Journey of Resistance: The Origins and Struggle of CNRT*, in BITTER FLOWERS, SWEET FLOWERS: EAST TIMOR, INDONESIA, AND THE WORLD COMMUNITY, *supra* note 77, at 15, 16. In addition a number of smaller parties were formed; however, none had a significant impact on the decolonization process. See COMM'N FOR RECEPTION, TRUTH AND RECONCILIATION IN EAST TIMOR, REPORT TO THE PRESIDENT OF THE REPUBLIC pt. 3, at 16 (Oct. 31, 2005) [hereinafter COMMISSION REPORT], available at <http://www.ictj.org/en/news/features/846.html>.

79. COMMISSION REPORT, *supra* note 78, pt. 3, at 16.

80. The fallout was primarily a result of UDT concerns over Fretilin's possible communist leanings. See *id.* at 23.

81. Niner, *supra* note 78, at 17. The best estimate is that Fretilin received fifty to fifty-five percent of the vote, with UDT coming second and Apodeti finishing a distant third.

82. See COMMISSION REPORT, *supra* note 78, pt. 3, at 23-44; JAMES DUNN, TIMOR: A PEOPLE BETRAYED 156-206 (1983); IAN MARTIN, SELF DETERMINATION IN EAST TIMOR: THE UNITED NATIONS, THE BALLOT, AND INTERNATIONAL INTERVENTION 15-17 (2001).

83. See COMMISSION REPORT, *supra* note 78, pt. 3, at 20-22.

84. *Id.* at 38.

85. COMMISSION REPORT, *supra* note 78, pt. 3, at 50-52; Niner, *supra* note 78, at 18.

Leste independent in a formal ceremony in Dili, the territory's capital, on November 28, 1975. The hope was to secure international support for its resistance against Indonesia. Instead, the declaration of independence triggered full-scale invasion. On December 1, the Indonesian Foreign Minister stated: "Diplomacy is over. Now Timor-Leste issues shall be resolved on the battlefield."<sup>86</sup> After getting approval from President Ford and U.S. Secretary of State Henry Kissinger,<sup>87</sup> the Indonesian military invaded Dili on December 7, 1975.

The invasion of Dili has been called "one of the most brutal operations of its kind in modern warfare."<sup>88</sup> As will be discussed more fully, Indonesian forces committed grave human rights abuses in the city and the massacres quickly spread throughout the rest of the country.<sup>89</sup> In response, the United Nations Security Council unanimously passed a resolution on December 22 deploring the invasion, calling for an immediate withdrawal of Indonesian troops and reaffirming the right of the people of Timor-Leste to self-determination.<sup>90</sup> However, U.N. action was substantially frustrated and the debate shifted to the General Assembly in the early months of 1976. By April 1976, Indonesia had 32,000 troops in Timor-Leste and 10,000 in reserve, against which Fretilin deployed 2500 regular troops, 7000 part-time soldiers, and a 10,000-member militia.<sup>91</sup>

It is worth taking a break from the narrative to briefly note the nature and composition of the Fretilin party. Fretilin used a broad nationalist message that resonated across the territory's thirty ethnic and fourteen linguistic groups. While the majority of the party was Catholic, it also had a strong multi-cultural dimension, as exemplified by its high level of support in Dili's Muslim community.<sup>92</sup> Regional and ideological divisions would plague Fretilin in its first decade as its membership disagreed on the appropriate level of compromise with Indonesia, the level of military and political coordination (whether or not it was a Maoist "people's war"), and the implementation of its egalitarian social policies.<sup>93</sup> Much of the debate surrounded what should be done with the civilian population caught up in the fighting.<sup>94</sup> Significantly, however, internal division within Fretilin was the result of tactical disagreements, and the movement always retained its broad base and ethnic

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86. COMMISSION REPORT, *supra* note 78, pt. 3, at 57.

87. See Ford-Kissinger-Suharto discussion, Embassy Jakarta Telegram 1579 (Dec. 6, 1975), in EAST TIMOR REVISITED: FORD, KISSINGER AND THE INDONESIAN INVASION 62 (W. Burr et al. eds., National Security Archive, Electronic Briefing Book No. 62, 2001), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB62/doc4.pdf>.

88. DUNN, *supra* note 82, at 283.

89. COMMISSION REPORT, *supra* note 78, pt. 3, at 64-66.

90. S.C. Res. 384, U.N. Doc. S/RES/384 (Dec. 22, 1975).

91. DUNN, *supra* note 82, at 291-92.

92. Kiernan, *supra* note 72, at 204.

93. Kiernan, *supra* note 72, at 212-24; Niner, *supra* note 78 at 19.

94. COMMISSION REPORT, *supra* note 78, pt. 3, at 77.

diversity.

By February 1979, the Fretilin command was virtually destroyed as a result of internal division and heavy attacks by Indonesian forces. Between 1975 and 1980, Timor-Leste experienced the greatest humanitarian disaster in its history. In addition to the killing and starvation of civilians, the Indonesian military implemented a resettlement program as a means of separating the civilian population from the resistance fighters. Following a major Indonesian military push and the targeting of Fretilin leadership, only three of the original members of its central committee remained by 1981. The leadership reported that Fretilin had lost 79% of the members of its Supreme Command, 80% of its troops, 90% of its weapons, all its support bases, and all the channels of communication between its scattered groups and with the outside world.<sup>95</sup> With Timor-Leste pacified by 1980, the Indonesian military focused on mop-up operations and on controlling the civilian population in all areas.

Major military operations decreased in the 1980s as Indonesian authorities attempted to normalize their occupation. As part of this normalization, Indonesian authorities implemented a number of policies, such as transmigration and education reform, aimed at "Indonesianizing" Timor-Leste.<sup>96</sup> East Timorese were released from armed camps into "resettlement villages," and approximately 150,000 ethnically distinct Javanese from other Indonesian islands were relocated to the territory.<sup>97</sup> Indonesian authorities began to pursue a program to lower the birth rate among native Timorese.<sup>98</sup>

The independence movement was transformed in the 1990s as Timor-Leste became the focus of increasing international attention. Fretilin's shift from a guerrilla to a diplomatic campaign was accompanied by the end of the Cold War and the eventual resignation of President Soeharto following the Asian financial crisis in 1997. In January 1999, President B.J. Habibie, Soeharto's replacement, announced that Indonesia would allow Timor-Leste to choose independence if it wished.

In a U.N.-sponsored referendum on August 30, 1999, 78.5% of the East Timorese population voted for independence. Unfortunately, the referendum process was marred by enormous violence prior to and following the vote. As many as 500,000 East Timorese were displaced from their homes, and about half were forced to leave the territory.<sup>99</sup> When Indonesian forces withdrew,

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95. CARMEL BUDIARDJO & LIEM SOEI LIONG, *THE WAR AGAINST EAST TIMOR* 67-70 (1984).

96. COMMISSION REPORT, *supra* note 78, pt. 3, at 107.

97. CONSTANCIO PINTO & MATTHEW JARDINE, *EAST TIMOR'S UNFINISHED STRUGGLE: INSIDE THE TIMORESE RESISTANCE* 245 (1997).

98. Some groups have accused officials of sterilizing East Timorese women without their knowledge. See MATTHEW JARDINE, *EAST TIMOR: GENOCIDE IN PARADISE* 62 (1995).

99. U.N. Transitional Admin. in East Timor [UNTAET], *East Timor—UNTAET Background* (May 2002), <http://www.un.org/peace/etimor/UntaetB.htm>. As late as July 2000, 85,000 to 120,000 East Timorese remained confined within Indonesian West Timor. The Secretary-General, *Report of the Secretary-General on the United Nations Transitional*

they destroyed 70% of the territory's infrastructure and buildings in a wide-scale "scorched earth" policy.<sup>100</sup> With Indonesian authorities refusing to bring the violence under control, the International Force for East Timor entered the territory on September 17, and on October 25, the U.N. Security Council established the UNTAET to guide reconstruction and the eventual establishment of an independent state.<sup>101</sup> The state of Timor-Leste officially joined the international community on May 20, 2002.<sup>102</sup>

### B. Profile of Human Rights Violations

Grave human rights abuses occurred throughout each stage of Timor-Leste's struggle for independence, and they were perpetrated by individuals on all sides. It is important to acknowledge that Indonesia was not responsible for all of the human rights abuses and that grave violations occurred during the internal civil war among East Timorese factions.<sup>103</sup> However, the purpose of this Note is not to compare crimes or to provide a complete account of all crimes committed during the period. Rather, it is to use the facts relating to Indonesian crimes as a lens through which the definition of genocide may be examined. Accordingly, this Part provides a profile of the abuses committed by Indonesian forces or Indonesian-backed militias between 1975 and the arrival of multinational forces in the last weeks of September 1999.

The most comprehensive and reliable source of information regarding the events in Timor-Leste is the recently released final report of the CAVR.<sup>104</sup> It is on this report that the analysis here primarily relies. Over 2000 pages, the report provides detailed descriptions of specific events and provides high-level aggregate data regarding the human rights violations committed throughout the period between 1974 and 1999. The CAVR is considered successful, thorough, and independent, and its conclusions are as reliable as possible, given the subject matter.<sup>105</sup>

The CAVR concluded that the total number of conflict-related civilian deaths between 1974 and 1999 was 102,800. Of those, 18,600 represented unlawful killings or disappearances of civilians, while 84,200 were the result of conflict-induced hunger or illness.<sup>106</sup> Figures 1 and 2 depict the pattern of

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*Administration in East Timor*, ¶ 16, delivered to the Security Council, U.N. Doc. S/2000/738 (July 26, 2000).

100. COMMISSION REPORT, *supra* note 78, pt. 3, at 145.

101. S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999).

102. Cent. Intelligence Agency, The World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/tt.html>.

103. COMMISSION REPORT, *supra* note 78, pt. 6, at 17-18.

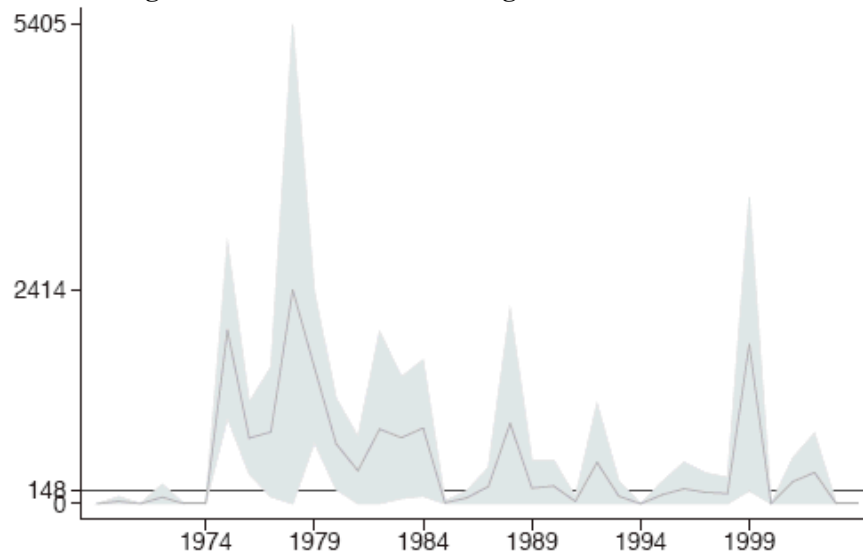
104. See COMMISSION REPORT, *supra* note 78.

105. See, e.g., Gerry van Klinken, *The East Timor Truth Commission Report Shines*, POL'Y FORUM ONLINE 06-11A (Feb. 9, 2006), <http://www.nautilus.org/fora/security/0611Klinken.html>.

106. COMMISSION REPORT, *supra* note 78, pt. 6, at 3. Disappearances were counted as

conflict-related death over time and show that the period between 1975 and 1980 was the most violent in terms of civilian deaths. The spike in killings during that period is matched only by the spike in killings that occurred around the time of the referendum in 1999. However, the number of deaths due to conflict-induced hunger and illness actually rose between 1984 and 1999, and one of the two periods of large-scale disappearances occurred during the lull in direct killings (especially between 1983 and 1984).<sup>107</sup> This is one indicator that Indonesian authorities carried out a consistent policy leading to death throughout the occupation.

**Figure 1. Estimated Total Killings in Timor-Leste<sup>108</sup>**



Total estimated deaths by deprivation: 16090 (+/- 4426)  
Source: Retrospective Mortality Survey conducted by CAVR

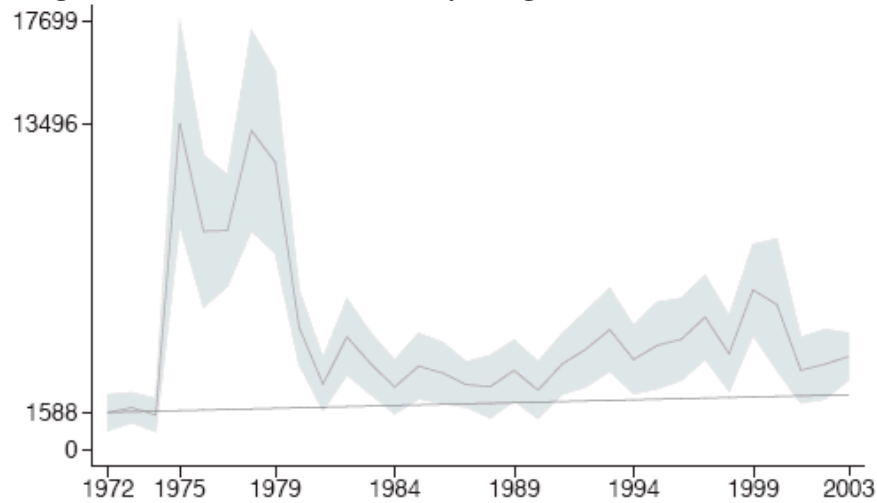
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unlawful killings. *Id.*

107. *Id.* pt. 6, at 15, 44.

108. Figures 1-4 are reproduced from COMMISSION REPORT, *supra* note 78, pt. 6. Any interpretations are mine alone and should not be interpreted to be those of the CAVR, the Post-CAVR Secretariat, or Human Rights Data Analysis Group.



**Figure 2. Estimated Total Deaths by Hunger/Illness in Timor-Leste**

Total estimated deaths by hunger/illness, 1972–2003: 161098 (+/- 10962)  
 Total estimated deaths by hunger/illness, 1975–1999: 135017 (+/- 10251)  
 Deaths in excess of estimated baseline, 1975–1999: 86539 (+/- 10251)  
 Source: Retrospective Mortality Survey conducted by CAVR

A vast majority of the fatal violations were attributable to Indonesian forces or their East Timorese auxiliaries (such as the militias, the civil defense force, and civilians working in the Indonesian administration). Figure 3, which provides a breakdown of institutions responsible for civilian killings and disappearances, shows that 57.6% of perpetrator involvement can be attributed to the Indonesian military and police, while 32.3% can be attributed to their East Timorese auxiliaries. In addition, only the Indonesian authorities consistently resorted to unlawful killings and disappearances. This consistency, combined with the fact that the killings were often committed in public, is a further indication of their systemic nature.<sup>109</sup>

109. *Id.* pt. 7.2, at 6.

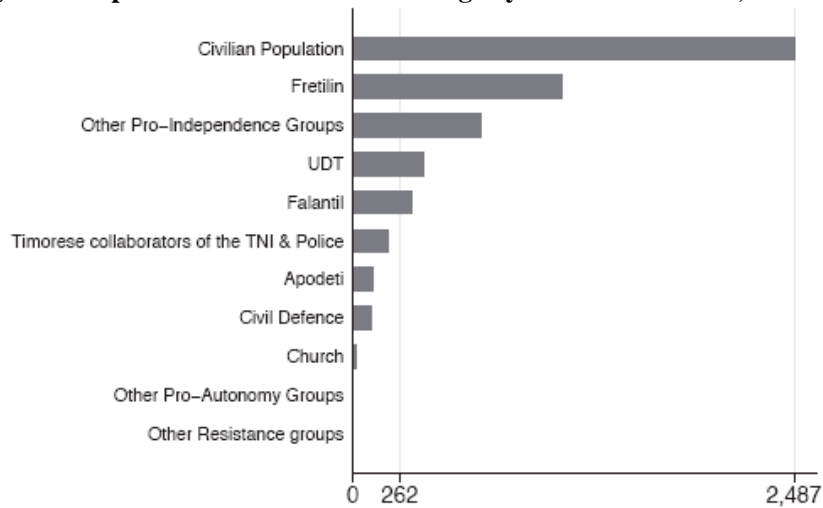
**Figure 3. Institutions Responsible for Civilian Killings and Disappearances**

Violation Type	Timorese			Other	Pro-Autonomy			Total
	Indonesian Military	Collaborators of TNI	Resistance Groups		Civilian Population	Groups	Unknown	
Civilian Killings	2947	1654	1514	1341	214	81	708	5109
Disappearance	642	245	80	72	21	2	111	833
	3589	1899	1594	1413	235	83	819	5942

Source: Database of Narrative Statements Given to the CAVR.

Figure 4 shows the affiliation of the civilian victims of unlawful killings. As will be discussed in the following Parts, the findings of the CAVR in this area are significant. While the narrative statements made clear that the overwhelming majority of killings and disappearances were committed against members and suspected sympathizers of the resistance movement, the killings were not limited to members of the Fretilin group.<sup>110</sup> Civilian victims outnumbered the Fretilin victims, suggesting a broader campaign focused on more than just that political group.

**Figure 4. Reported Acts of Civilian Killings by Victim Affiliation, 1974-99**



Source: Database of Narrative Statements Given to the CAVR  
 Note: some violations may be counted more than once because responsibility may be shared among perpetrators

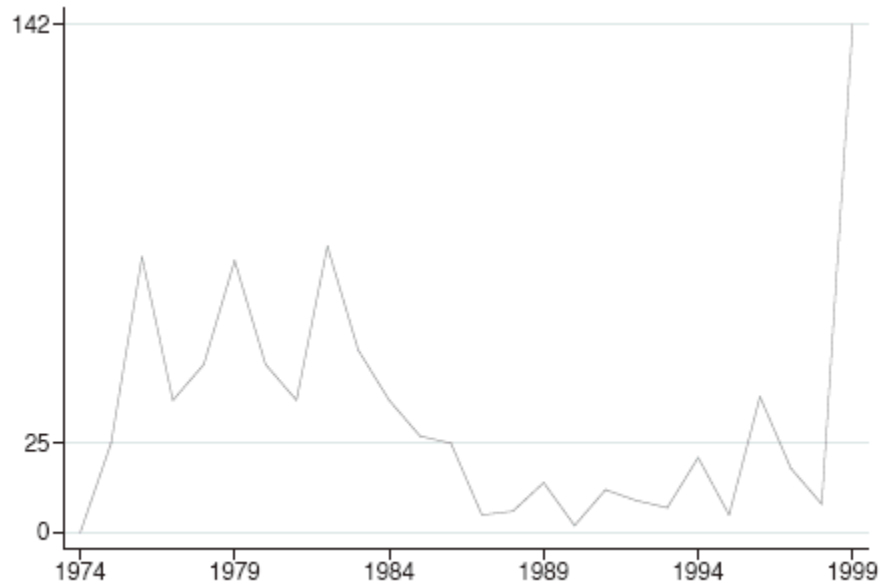
A similar pattern is evident with regards to nonfatal human rights violations. There were spikes in nonfatal violations during the initial invasion and occupation of Timor-Leste and in the years leading up to the 1999 referendum. The overwhelming majority of nonfatal violations were attributed

110. *Id.* pt. 6, at 21.

to the Indonesian authorities: 62.2% of documented nonfatal violations were attributed to the Indonesian military and police, and 38.7% to the East Timorese auxiliaries of the Indonesian occupation force. Of nonfatal violations reported to the CAVR, 88.7% were violations against the civilian population.<sup>111</sup> As the pro-independence movement grew more organized and open in the lead-up to the referendum in 1999, these civilian victims increasingly had pro-independence affiliations.<sup>112</sup>

Not all forms of nonfatal violations are relevant to a discussion on genocide. One extremely relevant crime, however, is rape, which international tribunals have found to satisfy the *actus reus* of genocide.<sup>113</sup> Figure 5 shows reported sexually based crimes over the period, and Figure 6 breaks down accountability by institution.

**Figure 5. Number of Reported Acts of Sexually-Based Violations, 1974-99**<sup>114</sup>



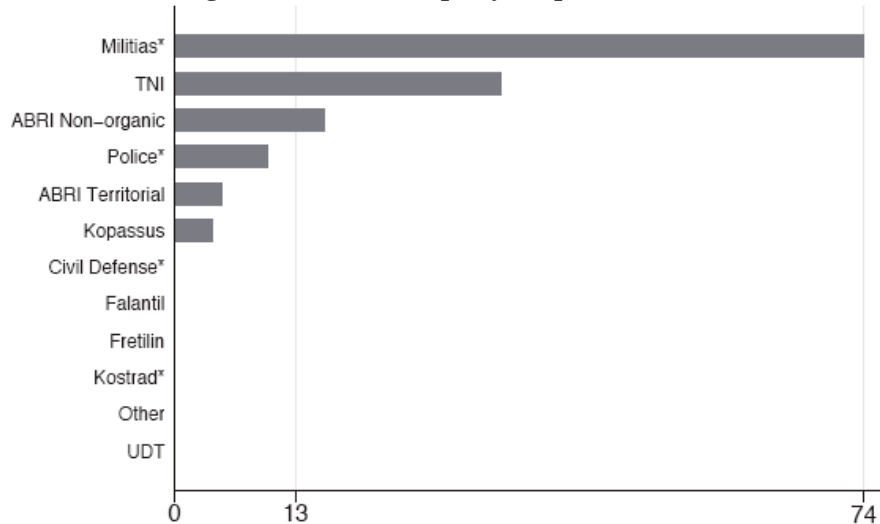
Source: Database of Narrative Statements Given to the CAVR

111. *Id.* pt. 6, at 24.

112. *Id.*

113. See Prosecutor v. Rutaganda, Case No. ICTR 96-3, Judgment, ¶ 51 (Dec. 6, 1999).

114. Figures 5-6 are reproduced from COMMISSION REPORT, *supra* note 78, pt. 7. Any interpretations are mine alone and should not be interpreted to be those of the CAVR, the Post-CAVR Secretariat or Human Rights Data Analysis Group.

**Figure 6. Count of Rape by Perpetrator, 1999**

Source: Database of Narrative Statements Given to the CAVR

Note: some violations may be counted more than once because responsibility may be shared among perpetrators

The consistency of rape perpetrated by Indonesian forces is indicative of a systemic program of sexual violence.<sup>115</sup> It is important to note that the qualitative findings of the CAVR reflect the quantitative data. First, the systemic nature of the violence and the command responsibility of Indonesian authorities come through in both. With regard to killings, the CAVR found that:

[T]he Indonesian military consistently resorted to killings and disappearances during the whole period of its occupation of Timor-Leste. This consistency is one indication that killings and disappearances had an overall strategic purpose, namely that of eliminating opposition to the occupation by terrorising the general population. The general character of the killings and disappearances committed by the Indonesian security forces, the specific methods they employed and the impunity enjoyed by those who carried them out are others.<sup>116</sup>

The fact that executions and massacres were frequent and public, for example, is strong evidence that they were accepted practices either ordered or condoned by senior Indonesian officers. Further, the CAVR was able to identify specific operations that resulted in significant levels of unlawful killing.<sup>117</sup> It is significant that the human rights violations were not isolated

115. COMMISSION REPORT, *supra* note 78, ch. 7.7, at 104.

116. *Id.* ch. 7.2, at 6.

117. For example, Operation Unity (*Operasi Persatuan*) in 1983 was aimed at the total eradication of resistance, according to the then commander-in-chief of the Indonesian armed forces. COMMISSION REPORT, *supra* note 78, ch. 7.2, at 306. The CAVR found that the

events, but rather were part of a systemic strategic plan carried out by Indonesian authorities.

A second qualitative aspect that is worth noting is the language and rhetoric that accompanied the violence. The language is important because it provides an insight into the minds of the perpetrators who committed the various acts. In Timor-Leste, the language was explicitly dehumanizing and the mix of biological and agricultural metaphors used was typical of genocidal atrocities.<sup>118</sup> Explaining massacres in Remexio and Aileu, Indonesian forces stated that the local people had been “infected with the seeds of Fretilin.”<sup>119</sup> After a similar massacre in 1981, a soldier allegedly asked: “When you clean your field, don’t you kill all the snakes, the small and large alike?”<sup>120</sup> In 1999, Indonesian authorities again used biological and cleansing metaphors when ordering their followers to “conduct a cleansing of the traitors of integration. Capture them and kill them.”<sup>121</sup> Indonesian forces also spoke of destroying a multi-generational kinship group. Prior to the referendum in 1999, for example, Indonesian military commanders threatened to “liquidate . . . all the pro-independence people, parents, sons, daughters and grandchildren.”<sup>122</sup> The perpetrators proclaimed that the East Timorese independence movement “should be eliminated from its leadership down to its roots,” and it was reported that Major General Adam Damiri ordered that not a single member of a pro-independence leader’s family was to be left alive.<sup>123</sup>

A final note should be made of the forced displacement that occurred between 1974 and 1999 and the effect it had on the civilian population. Fifty-five percent of households surveyed by the CAVR reported experiencing displacement during the period, and respondents reported that the Indonesian military was the institution most frequently telling the civilians to move.<sup>124</sup> During the end of 1978, tens of thousands of East Timorese were forced into resettlement camps under the control of the Indonesian military, and the International Committee of the Red Cross reported that eighty percent of the population in one such camp suffered from malnutrition.<sup>125</sup> The CAVR

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operation accounted for the systemic killing or disappearance of more than 250 civilians. *Id.*

118. For the use of similar language in other genocides, see Ben Kiernan, *Genocide and ‘Ethnic Cleansing,’* in 1 *ENCYCLOPEDIA OF POLITICS AND RELIGION* 294, 294-99 (Robert Wuthnow ed. 1998). □

119. Kiernan, *supra* note 72, at 224.

120. JOHN G. TAYLOR, *EAST TIMOR: THE PRICE OF FREEDOM* 70, 102 (1999).

121. Kiernan, *supra* note 72, at 225.

122. COMMISSION REPORT, *supra* note 78, pt. 4, at 32.

123. GEOFFREY ROBINSON, U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, *EAST TIMOR 1999: CRIMES AGAINST HUMANITY* 88 (2003), available at [www.etan.org/etanpdf/2006/CAVR/12-Annexe1-East-Timor-1999-GeoffreyRobinson.pdf](http://www.etan.org/etanpdf/2006/CAVR/12-Annexe1-East-Timor-1999-GeoffreyRobinson.pdf) (finding that human rights abuses were politically motivated and systematic); see also Annemarie Evans, *Revealed: The Plot to Crush East Timor*, S. CHINA MORNING POST (Hong Kong), Sept. 16, 1999, at A1; Kiernan, *supra* note 72, at 225.

124. COMMISSION REPORT, *supra* note 78, pt. 6, at 3.

125. COMMISSION REPORT, *supra* note 78, ch. 7.3, at 143; JARDINE, *supra* note 98, at

concluded that the displacements were directly connected to large-scale death:

Death was caused by famine, famine-related diseases, vulnerability to sickness from hunger, fear or exhaustion and a lack of access to medical care. It is likely that more people died from the effects of displacement than from any other violation. While the actual number of deaths is incalculable [sic].<sup>126</sup>

In its final general conclusion regarding displacements and famine, the CAVR reported:

The Commission believes that . . . Indonesia displaced people from their homes repeatedly in order to control them, used food as a weapon of war, refused for reasons of military strategy to allow international humanitarian agencies access to Timor-Leste until famine had reached catastrophic proportions, and forcibly displaced East Timorese civilians to West Timor for purely political ends.<sup>127</sup>

Large-scale displacement and enforced famine was yet another facet of a systematic pattern of destruction of the East Timorese people.

### III. GENOCIDE AND TIMOR-LESTE

#### A. *Demonstration of the Problem*

It is clear that Indonesian forces committed war crimes and other massive human rights violations. However, a conclusion that genocide occurred is more contentious. While the actions outlined in the previous Part constitute a number of the prohibited acts listed in Article 2 of the Genocide Convention, the data are less clear in demonstrating that the victims were targeted because they constituted a national, ethnic, racial or religious group, as those terms are currently understood.

As a preliminary matter, it is important to highlight that the data clearly demonstrate that the actions of the Indonesian forces and their auxiliaries constitute the material element, or *actus reus*, of the crime of genocide. Article 2 of the Genocide Convention lists five acts that are prohibited when done with the intent to destroy a protected group as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>128</sup>

If one leaves aside the definition of "the group" for the moment and describes it as the "East Timorese people," it is evident that many of the

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126. COMMISSION REPORT, *supra* note 78, ch. 7.3, at 144.

127. *Id.*

128. Genocide Convention, *supra* note 1, art. 2.

prohibited acts were committed. The killing of the members of the group is the most obvious, with 18,600 direct killings<sup>129</sup> representing a significant proportion of the estimated total population of 800,000 to 1,000,000 people.<sup>130</sup> Beyond killing, the forced displacement, starvation, and sexual violence each qualify as actions prohibited by Article 2. The ICTR has interpreted subsection (c) to include, “‘methods of destruction by which the perpetrator does not necessarily intend to immediately kill the members of the group’, but which are, ultimately, aimed at their physical destruction.”<sup>131</sup> The ICTR explicitly included the systemic expulsion from homes and the subjection to a subsistence diet in this definition. The 84,200 East Timorese who died<sup>132</sup> as a result of conflict-related hunger or illness, often after forced relocation into settlement camps, are clear evidence of conditions intended to bring about their physical destruction.<sup>133</sup> Finally, the ICTR has also defined “serious bodily or mental harm” as including acts of “rape, sexual violence, and persecution,”<sup>134</sup> and “measures intended to prevent births within the group” as including forced birth control and enforced sterilization.<sup>135</sup>

Defining the group is the central issue, however, and the listed acts must be carried out with the intent to destroy one of the Convention’s enumerated groups. It is here that the claim that genocide occurred becomes more difficult to sustain. It is hard to show that the victims constituted any of the listed groups as they are currently understood.

Firstly, while members of the Catholic Church were clearly involved in the conflict and were sometimes the victims of the violence, they were not targeted on the basis of their membership in that religious group. Figure 4 above demonstrates that while some victims were affiliated with the Church, they represented an extremely small proportion of those killed. While Fretilin members may have been predominantly Catholic, religion was clearly not the defining feature of the party or the independence movement.<sup>136</sup>

Secondly, the facts simply do not support claims that the East Timorese victims constitute a racial or ethnic group, or that they were targeted on that basis. It is a demographic fact that Timor-Leste is an extremely diverse region, comprised of indigenous Antoni peoples, Malays, Makassarese, Melanesians, Papuans, Chinese, Arabs, and Gujeratis.<sup>137</sup> While Tetum and Portuguese are the official languages, there are about sixteen major indigenous languages, with

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129. COMMISSION REPORT, *supra* note 78, pt. 6, at 3.

130. Cent. Intelligence Agency, *supra* note 102.

131. Prosecutor v. Rutaganda, Case No. ICTR 96-3, Judgment, ¶ 52 (Dec. 6, 1999).

132. COMMISSION REPORT, *supra* note 78, pt. 6, at 3.

133. *Rutaganda*, Case No. ICTR 96-3, ¶ 52.

134. *Id.* ¶ 51.

135. *Id.* ¶ 53.

136. This is evidenced by Fretilin’s strong support from Dili’s Muslim population mentioned above.

137. Saul, *supra* note 11, at 502.

Galole, Mambae, and Kemak also spoken by a significant number of people.<sup>138</sup> The East Timorese simply cannot be said to share "a common language or culture" or distinct hereditary physical traits, as is required by the most restrictive definition of ethnic and racial groups articulated in *Akayesu*. Accordingly, with the exception of the ethnic Chinese minority in Dili who were singled out by ethnicity,<sup>139</sup> it cannot be maintained that a specific ethnic or racial group was singled out and targeted for destruction.

Significantly, the independence movement reflected the ethnic and racial diversity of the territory. The conflict was never couched in racial or ethnic terms, and victims and perpetrators identified each other by their support for independence or proximity to Fretilin. This made the conflict significantly different from the Rwandan experience, where there were many indicators that victims and perpetrators clearly identified themselves with one or the other ethnic group.

Finally, as Ben Saul correctly highlights, it is impossible to place the East Timorese victims under "national group" as that term is currently defined.<sup>140</sup> As noted above, an existing nationality and a formally recognized sovereign state are prerequisites for a "legal bond based on common citizenship," and their absence undermines any claim of national group status. The state of Timor-Leste was recognized by the international community years after the atrocities occurred. Since there was never a formally recognized state of Timor-Leste, the East Timorese could not have shared a bond of common citizenship that would identify them as a national group during the period of human rights abuses.

While this result is mandated by the *Akayesu* definition, it also demonstrates that definition's fatal flaw. The large-scale killing, displacement, and sexual violence all fall under Article 2's prohibited acts. The atrocities were of a systemic nature, indicating a purpose beyond the destruction of individual victims.<sup>141</sup> The rhetoric used by Indonesian officials confirms the existence a systemic intent to destroy a group. As noted, biological metaphors were used to depict independence supporters as "snakes," "infected with the seeds of Fretilin," and there was a multi-generational focus to the violence as, "sons, daughters and grandchildren" were ordered killed.<sup>142</sup> It is beyond the scope of this Note to fully examine the patterns of rhetoric typical in genocidal societies and the reasons for their recurrence. However, this type of discourse

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138. Centr. Intelligence Agency, *supra* note 102; Turismo de Timor-Leste, <http://www.turismotimorleste.com/en/about/people>.

139. COMMISSION REPORT, *supra* note 78, ch. 7.2, at 34-48.

140. Saul, *supra* note 11, at 498-501.

141. After examining a number of massacres around the territory in 1979, for example, the CAVR stated that "[t]he scale and timing of the executions suggest to the Commission that . . . they were implemented as part of [sic] larger, centrally coordinated strategy aimed at eliminating the Resistance once and for all." COMMISSION REPORT, *supra* note 78, ch. 7.2, at 119.

142. See *supra* notes 118-23 and accompanying text.



was common in genocides that occurred in Rwanda, Srebrenica, and during the Holocaust. In Rwanda, for example, Leon Mugesera, a Hutu leader, gave an infamous and extremely influential speech in which he spoke of “exterminating” “cockroaches,” a commonly used reference to Tutsis.<sup>143</sup> The identification of a multigenerational group and the use of dehumanizing labels to facilitate that group’s destruction—two important elements of genocide—were prevalent in Timor-Leste.

Most significantly, the data demonstrate that the group targeted for destruction in Timor-Leste was not a mere political group but a group of the type the Genocide Convention was meant to protect. Figure 4, which depicts victim affiliation, shows this fact most clearly. Fretilin, a political group, was clearly a target of the violence. However, the civilian population more broadly accounted for the highest number of deaths. Fretilin clearly composed part of the targeted group, but it was only a part. It did not define it. Thus, the CAVR found that the Indonesian strategy was focused on eliminating the broader “resistance movement” and Indonesian authorities spoke not only of destroying Fretilin, but also the families of Fretilin members and other civilians “infected” by the party.<sup>144</sup> Party members were simply killed; those placed in resettlement camps without adequate food or medicine were not Fretilin party members, but rather ordinary civilians that may or may not have been favorably disposed to independence.<sup>145</sup>

Thus the case study shows a systemic intent to destroy the East Timorese. If the East Timorese had founded a state in 1975 when Portugal withdrew, its citizens would have been a national group sharing “a legal bond based on common citizenship, coupled with reciprocity of rights and duties,” as required by *Akayesu*.<sup>146</sup> Accordingly, the attempt to destroy them would have constituted genocide under the Genocide Convention. They were unable to form a state only because of Indonesia’s invasion and the subsequent atrocities Indonesian authorities committed. It is inconsistent and absurd for the Convention not to protect entities that are national groups in all practical respects but are prevented from formally forming a state by an invasion and the invader’s subsequent war crimes. Such a result allows perpetrators to profit from their wrongdoing; they avoid the jurisdiction of the Genocide Convention by unilaterally removing their victims from its protections.

The problem is even more apparent upon consideration of the subjective theory of group membership, which the ICTR has recognized.<sup>147</sup> Indonesian authorities explicitly rejected the notion that the East Timorese were a national group. Instead, they claimed that the East Timorese were nothing more than a

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143. For an examination of the speech and the rhetoric of genocide in Rwanda, see *Mugesera v. Minister of Citizenship and Immigration* [2005] 2 S.C.R. 100 (Can.).

144. Kiernan, *supra* note 72, at 224-25.

145. See COMMISSION REPORT, *supra* note 78, ch. 7.3, at 144.

146. *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 512 (Sept. 2, 1998).

147. See *supra* notes 35-39 and accompanying text.

group with a disfavored political opinion. In contrast, Fretilin and other independence supporters subjectively identified the East Timorese as a distinct national group and believed that the movement was not political. The East Timorese were a nation attempting to exercise its right to self-determination, and Fretilin leader Xana Gusmao declared Fretilin's role as "defending our homeland, without links to any political party whatsoever."<sup>148</sup> "FALINTIL," he emphasized, "are not involved in politics, but they are committed to building a free and democratic nation."<sup>149</sup> Fretilin was a nationalist organization that promoted the notion that their nation was distinct from that of Indonesia.

In this case, an overreliance on the subjective theory could work against the group by preferring the perpetrator's definition of that group. The facts show that civilians were victimized not just because of their membership in Fretilin but also because of their relation to a Fretilin member or because of their geographic location. All East Timorese were potential targets, regardless of their political activities, since self-determination was an essential part of the identity of most East Timorese.<sup>150</sup> To preclude protection because they did not constitute a formally recognized state would allow the perpetrator to escape punishment by imposing its subjective notion of group identity onto the victim group.

Thus, what is most problematic with the operation of the current definition is the fact that, but for Indonesia's actions, the atrocities committed in Timor-Leste would almost certainly have constituted genocide. It cannot be that the perpetrator's success in halting the formation of a state can result in the removal of the would-be citizens of that state from the Genocide Convention's protection. Yet the case of Timor-Leste demonstrates the way in which this can occur under the current definition of national group.

#### B. A New Approach

The benefits of a definition of "national group" that encompasses groups possessing the right to self-determination become clear when it is applied to Timor-Leste. Under the conception of national group presented in this Note, the East Timorese would be protected under the Genocide Convention by virtue of the territory's special designation as a non-self-governing territory.<sup>151</sup> This status gave the inhabitants of the territory the right, clearly recognized in international law, to decide whether or not to form an independent state.<sup>152</sup> Moreover, the granting of this right constituted the recognition of a people possessing the right to self-determination. The attempted destruction of this group thus constituted genocide, regardless of whether the East Timorese were

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148. A. BARBEDO DO MAGALHAES, *EAST TIMOR: LAND OF HOPE* 70 (1992).

149. *Id.*

150. See COMMISSION REPORT, *supra* note 78, ch. 7.1, at 3.

151. G.A. Res. 1542 (XV), *supra* note 76, ¶ 1.

152. See *infra* notes 153-64 and accompanying text.

able to create a formally recognized state.

Timor-Leste's designation by the General Assembly in 1960 as a "non-self-governing territory" under Chapter XI of the U.N. Charter made its right to self-determination relatively clear.<sup>153</sup> Immediately following World War II, self-determination was closely linked to the decolonization movement.<sup>154</sup> Chapter XI of the U.N. Charter laid out the principles regarding European colonies deemed "non-self-governing territories," and Article 73(b) obliged states administering non-self-governing territories to develop self-government in those territories.<sup>155</sup> While Chapter XI contains no explicit reference to self-determination, it is a guiding principle in the U.N. Charter as a whole and future General Assembly resolutions made the right explicit. Resolution 637 (VII) from 1952 called upon states to "recognize and promote the realization of the right of self-determination of the peoples of Non-Self-Governing and Trust Territories."<sup>156</sup> In Resolution 1514 (XV), the General Assembly's most definitive statement on the subject, the Assembly affirmed the right of non-self-governing territories to self-determination.<sup>157</sup> Noting that "all peoples have a right to self-determination," the resolution stated that, "[i]mmediate steps shall be taken, in Trust and Non-Self-Governing Territories . . . to transfer all powers to the peoples of those territories . . . in order to enable them to enjoy complete independence and freedom."<sup>158</sup>

That Timor-Leste was a non-self-governing territory with the right to self-determination is beyond dispute. The U.N. Security Council, in two binding resolutions, ordered respect for "the territorial integrity of East Timor, as well as the inalienable right of its people to self-determination in accordance with General Assembly Resolution 1514 (XV)."<sup>159</sup> The International Court of Justice also examined the territory's status in the case of *East Timor (Portugal v. Australia)*, and it emphasized the importance of self-determination and its *erga omnes* character, meaning that it is binding on all states.<sup>160</sup> More specifically, the court held that, "[f]or the two Parties, the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination."<sup>161</sup> As the CAVR reported:

The right of the people of Timor-Leste to self-determination was clear-cut and formally acknowledged by the international community. . . . The

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153. G.A. Res. 1542 (XV), *supra* note 76, ¶ 1. For a good discussion of the development of self-determination and non-self-governing territories, see THOMAS D. MUSGRAVE, SELF-DETERMINATION AND NATIONAL MINORITIES 62-90 (1997).

154. See Emerson, *supra* note 65, at 463.

155. U.N. Charter art. 73.

156. G.A. Res. 637 (VII), ¶ 2, U.N. Doc. A/2361 (Dec. 16, 1952).

157. G.A. Res. 1514, *supra* note 61.

158. *Id.* ¶¶ 2, 5.

159. S.C. Res. 389, ¶ 1, U.N. Doc. S/RES/389 (Apr. 22, 1976); see also S.C. Res. 384, *supra* note 90, ¶ 1.

160. *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90, 102 (June 30).

161. *Id.* at 103.

acknowledgment of this right established the legitimacy of the East Timorese cause in international law and sharply distinguished it from disputed claims to self-determination by some other peoples.<sup>162</sup>

Furthermore, Timor-Leste, as a distinct colonial territory with territorial integrity, could become an independent state if its population so chose under General Assembly Resolution 1541(XV).<sup>163</sup> Principle IX indicated that integration into another state could occur only when the integrating territory had attained "an advanced stage of self-government with free political institutions," and the people of the territory had freely chosen integration democratically based on universal adult suffrage.<sup>164</sup> Since neither of these criteria was met, Timor-Leste remained entitled to choose to become a state throughout the period of Indonesian occupation.

Thus, international law explicitly recognized the right of the East Timorese to form their own state. When it did so, it also recognized that those who would create the new state would constitute a national group. For the reasons outlined previously, the founding of the state cannot have been necessary for the creation of a national group. Instead, international law must have recognized that a national group existed when it recognized the legal potential to create a state.<sup>165</sup> Moreover, the territory's status as a non-self-governing territory suggests that it possessed at least a residual element of statehood prior to the Indonesian invasion. That designation constituted recognition that the territory and its people were formally and officially en route to statehood. This recognition by the international community, and thus the recognition of a national group, could not be extinguished by the Indonesian invasion.<sup>166</sup>

It is not strictly necessary to rely on Timor-Leste's right to state formation, however, because possession of the right to self-determination is enough to qualify it as a national group. The CAVR noted: "Self-determination is fundamental because it is a collective right of a people to be itself. The struggle to enjoy this right above all others was the central defining issue of the Commission mandate period. . . . [The right] was essential to the survival, identity and destiny of Timor-Leste."<sup>167</sup>

This highlights that the right to self-determination was the defining feature

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162. COMMISSION REPORT, *supra* note 78, ch. 7.1, at 3.

163. G.A. Res. 1541 (XV), princ. VI, U.N. Doc. A/4684(Dec. 15, 1960).

164. *Id.* princ. IX.

165. It might be argued that in recognizing a right to create a state, international law recognized only a *potential* national group, and that the state was necessary to confer this status. Firstly, this argument relies on a faulty understanding that a state is a prerequisite for a national group and would allow Indonesian forces to profit from their suppression of the separatist movement. Secondly, even if citizenship in a state is a prerequisite for a national group, it seems that Indonesian forces intended to destroy the national group by preventing its creation.

166. Many thanks to Professor Van Schaack for highlighting the residual element of statehood bestowed on the territory by virtue of its designation.

167. COMMISSION REPORT, *supra* note 78, ch. 7.1, at 3.

of the East Timorese group. It was this feature that targeted the group for destruction as Indonesian authorities attacked not only Fretilin, but also those on behalf of whom it was fighting. The orders were to obliterate everybody in areas in which Fretilin was present, to remove Fretilin supporters, their children and grandchildren, and to create conditions of life in which the East Timorese could not survive. Through these acts, Indonesian forces attempted to destroy the distinct identity and destiny of the East Timorese people. That is, they attempted to stifle the exercise of the right to self-determination by destroying the group that possessed it: a national group.

It may be argued that, even accepting that it was also a national group, the targeted group was a political group. While the facts demonstrate that the Indonesian authorities targeted a group that was broader than the Fretilin political party, the group was clearly defined in a significant way by its opposition to Indonesian annexation. Thus, the question arises as to whether a group that can plausibly be defined as both a protected and an unprotected group should receive protection under the Genocide Convention. The answer to this question must be yes. There is nothing in the Convention to suggest that a group that satisfies Article 2 is not protected if it can also be identified as another type of group. Indeed, the language seems to suggest that as long as the requirements of Article 2 are satisfied, then the crime has been committed. While there is a legitimate concern that the national group designation should not be used to circumvent the intent to exclude protection from groups defined by their political ideas, excluding groups capable of multiple definitions would allow perpetrators to use the political nature of a group to avoid sanction. This problem becomes clear when one imagines a racial, religious, or ethnic group that is closely aligned with a political party. It cannot be that a perpetrator attempting to destroy that racial, religious, or ethnic group can claim that it was merely targeting the supporters of the political party and thereby avoid sanction. Similarly, in the case of Timor-Leste, the Convention's protection of the underlying national group cannot be bypassed by claims that Indonesian authorities targeted those who opposed annexation.

#### CONCLUSION

The codification of genocide as a crime under international law represents the recognition by the international community that the destruction of social groups constitutes a particularly heinous act that deserves special condemnation. Yet, if genocide is to remain a meaningful term in international law, then it is vital that it be defined such that it is consistent with general legal principles and real-life experience. Indeed, it is precisely for this reason that international tribunals have worked to develop coherent and applicable definitions for some of the groups enumerated in the Genocide Convention. Faced with the problem of having to give meaning to terms such as "racial group" and "ethnic group," the tribunals have developed a framework that

looks at subjective identification and the experience of the groups to which the Convention is applied. In so doing, they have ensured that the Genocide Convention remains applicable to events that it was clearly intended to cover, such as those that occurred in Rwanda.

Unfortunately, the current understanding of genocide still contains a serious flaw that threatens to undermine the entire project of codifying the crime. If the Genocide Convention requires that national groups possess legal bonds based on common citizenship, then it allows the successful perpetrator to avoid punishment. In the case study of Timor-Leste, the victims constituted a broad group that was engaged in an attempt to establish a state, and had almost done so at the time of the Indonesian invasion. It was only the actions of the Indonesian perpetrators that prevented the founding of the state, thereby preventing the formation of legal bonds of common citizenship and removing the East Timorese from the Convention's protections. It is a common principle of all legal systems that a wrongdoer should not profit from his actions. The fact that a loophole in the current definition of national group prevents the sanctioning of massive human rights abuses gravely undermines the credibility of the Genocide Convention as a legal instrument. Moreover, the absence of a principled definition provides an incentive for courts to ignore the boundaries in Article 2 and to stretch the Convention beyond any meaningful limit, further trivializing the Convention and genocide itself.<sup>168</sup>

The solution to this problem is to shift the focus from the formal recognition of a state to the group that would form such a state. Thus, when international law recognizes that the East Timorese people have the right to form a state, it must also recognize that they constitute a national group. The creation of the state does not create the national group. Rather, the national group creates the state.

It is the concept of self-determination that provides the theoretical foundation for such an approach. Self-determination gives certain groups the right to freely determine their political status and pursue their development as groups. Genocide represents the very opposite of these rights. Rather than the group's development, genocide aims at its destruction. Given this relation, it seems logical for international law to protect from destruction those same groups on which it bestows one of its most fundamental rights.

The case of Timor-Leste shows that more than just the internal inconsistency of international law is at issue. In the case of Timor-Leste, the right to self-determination was central to the group's identity and destiny.

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168. The Spanish National Audience, for example, adopted the view that a dynamic interpretation of the Convention should extend the scope of Article 2 to cover all groups. *Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura chilena* [Order of the Criminal Chamber of the Spanish *Audiencia Nacional* affirming Spain's Jurisdiction to Try Crimes of Genocide and Terrorism Committed During the Chilean Dictatorship], SAN, Nov. 5 1998 (appeal No. 173/98, Criminal Investigation No. 1/98), available at <http://www.derechos.org/nizkor/chile/juicio/audi.html>.

Moreover, it was precisely because the East Timorese were attempting to exercise that right that they were targeted for destruction. Policies of mass murder, forced relocation, and starvation were intended to eliminate the East Timorese as a distinct group with a recognizable identity worthy of expression and recognition through a state.

There remains significant research to be done regarding the social entities that qualify as “peoples” carrying the right to self-determination. In some cases, such as Timor-Leste, the conclusion that a group possesses the right to self-determination will be relatively straightforward. Indeed, the conclusion that the Genocide Convention extends to protect the populations of former colonies should probably be clear. In some cases, the question of whether a targeted group possesses the right to self-determination, and therefore whether it qualifies as a national group, will be more difficult. The meaning of “peoples” will require the same level of thoughtful inquiry by tribunals as the meanings of “race” and “ethnicity” have required. However, it might be appropriate if this understanding of national group applied so as to protect groups such as the Québécois in Canada or the Basques in Spain, both of which fail to qualify as an enumerated group but are arguably peoples possessing the right to (internal) self-determination.

Before debating the limits of the concept, however, it is important for the issue of national group identification to be brought into proper focus by moving beyond the formalistic assessment of common citizenship. Going forward, international tribunals such as the International Criminal Court must reject the *Akayesu* definition, and should instead focus on self-determination as a guiding principle.<sup>169</sup> Only once the connections between self-determination and the destruction of national groups are acknowledged can the international community begin to develop a more coherent understanding of the Genocide Convention and the crime that it prohibits.

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169. In addition to jurisprudential change, it may be helpful to update the ICC’s *Elements of Crimes*, which currently provides no definition for any of the protected groups. See Preparatory Comm’n for the Int’l Criminal Court, *Addendum: Part II, Finalized Draft Text of the Elements of Crime*, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000).