Public International Law and Private Enterprise: Damages for a killing in East Timor

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Death in Dili

This is about a private effort to use the United States legal system to vindicate a breach of public international law in East Timor. On 12 November 1991, the Indonesian occupying forces[2] carried out a massacre in East Timor in which several hundred people died[3] or "disappeared".[4] Largely because of the presence of international media,[5] the event caught public attention in a way that the earlier deaths of a significant proportion of the pre-invasion population of about 600,000 to 700,000 had not.[6]

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2 I have discussed the illegality of the Indonesian presence in Clark, *The "Decolonization" of East Timor and the United Nations Norms on Self-Determination and Aggression*, in *International Law and the Question of East Timor* (CIIR/IPJET, 1995). See also Clark "Timor Gap: The Legality of the 'Treaty on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia' " [1992] *Pace Y B Int'l L* 69. Continuing reports of human rights violations are regularly addressed in various parts of the United Nations system. Nevertheless, the core problem is the utter illegality of the Indonesian presence.

3 In a scathing report he made following a visit to the territory, the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mr Bacre Ndiaye, states: "According to the testimonies gathered in East Timor by the Special Rapporteur, the total number of persons killed was estimated to be between 150 and 270, although some estimated it to be around 400." Report by the Special Rapporteur, Mr Bacre Waly Ndiaye, on his mission to Indonesia and East Timor from 3 to 13 July 1994, at 6-7, UN Doc E/CN 4/1995/61/Add 1 (1994) ("Report of the Special Rapporteur").

4 *Ibid* at 7 (government acknowledges 66 disappearances; up to 224 alleged).

5 Max Stahl captured the event on camera in his 1992 documentary, "In Cold Blood: Massacre in East Timor". Alan Nairn was present for *The New Yorker* (Notes and Comment, *The New Yorker*, December 9, 1991, at 41). John Pilger's 1994 documentary "Death of a Nation" discussed subsequent killings of injured survivors of the massacre. See also Pilger *Distant Voices* (Rev ed, London, Vintage 1994) Chapter VI.

6 Aditjondro G *In the Shadow of Mount Ramelau: The Impact of the Occupation of East Timor* (1994) pp 37-39 (up to 300,000 "missing" in population estimates); Report of the Special Rapporteur, *supra* n 3 at 6 (total of 200,000 killed, or died from starvation and disease). Estimates include both direct casualties of war and those perishing subsequently from starvation and dislocation.

Among the dead in November of 1991 was a 21 year old New Zealander, Kamal Bamadhaj.[7] A student in the Indonesian language, and on Asian history and politics at the University of New South Wales at the time, he was travelling in Indonesia and East Timor before his death. He had been generally supportive of pro-democracy efforts in Indonesia and East Timor and had offered his assistance to various groups and individuals as a translator.

With the aid of the United Nations, tortuous negotiations had resulted in a planned visit to Timor of a Portuguese parliamentary delegation which would be accompanied by diplomats and journalists from various nations. The approach of the time for this delegation led to considerable ferment among the populace and to preparations among many to make sure that the facts would be properly presented. Responding, the Indonesian military increased its efforts at repression. At the last moment, the delegation was cancelled when the Indonesian side refused to accept the presence with the delegation of a Lisbon-based Australian journalist, Jill Jolliffe, (an expert on East Timor) whom the Portuguese insisted on including.

On 28 October 1991, Indonesian forces stormed the Motael Catholic Church in the capital, Dili, and killed a young man, Sebastiao Gomes, who had taken refuge there. A mass was scheduled in his memory at the church two weeks after Gomes's death. The mass would become a highly political event. Kamal Bamadhaj went to the church to record the mass and to take photographs of the subsequent procession from the church to the cemetery where the young man was buried. He and other Westerners present in Dili had apparently met the night before and "decided that it was important that they attend . . . They hoped that the obvious presence of Westerners and media would deter the Indonesian military from further violent action."[8] When the peaceful crowd reached the cemetery, the Indonesian soldiers opened fire and shot for five to ten minutes.

Bamadhaj may have been shot for the first time at this point. He was seen shortly afterwards, walking alone about half a kilometre from the site. In his mother's words:

> Witnesses saw a military vehicle approach him; an argument ensued — apparently over his camera; shots rang out. Kamal fell and was left bleeding by the side of the road. The autopsy showed that he had been shot once in the arm and once at close range in the chest, by different calibre weapons.

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7 The factual material that follows is based on news reports, on the Report of the Special Rapporteur, *supra* n 3, on material filed with the United States District Court for the District of Massachusetts, Boston, in *Todd* v *Panjaitan*, Civil Action No 92-12255-PBS, and on material from the files of the New Zealand Ministry of Foreign Affairs and Trade released in July 1994 to Phil Goff MP, under the (New Zealand) *Official Information Act*. There is an excellent discussion of the *Panjaitan* case from an Australian viewpoint in Hilary Little, "Domestic Implementation of International Human Rights Law: The United States *Alien Tort Claims Act* and *Torture Victim Protection Act* as a Model for Australia and Other States?" International Law Essay, University of Melbourne, 1994.

8 The quotations are from p 5 of the Declaration by Plaintiff Helen Todd, filed in *Todd* v *Panjaitan*.

> Anton Marti, a representative of the International Red Cross, found Kamal bleeding by the side of the road, still conscious, waving his New Zealand passport. He no longer had the camera. Marti placed Kamal in his Red Cross vehicle and attempted to deliver him to the nearest general hospital. [He was delayed by the military for a considerable period of time and finally directed to a military hospital.] The delay was fatal. Kamal died of loss of blood.[9]

Initial reports reaching New Zealand[10] (and London, where Kamal's mother was on holiday) were to the effect that Kamal had been injured only. His mother immediately endeavoured to fly to Dili. By the time she reached Denpasar in Bali, it was clear that he was dead. She then sought to continue her flight to recover the body but was prevented by Indonesian military officials from boarding a plane from Denpasar to Dili.[11]

Some of the New Zealand diplomatic traffic relating to the incident has been released to a Member of Parliament, Phil Goff, under New Zealand's Official Information legislation. The tone of much of the correspondence — a mixture of distress and a desire to assist the Indonesians in damage control — is captured by the following report of a dressing-down received by the Indonesian Charge in Wellington on 15 November 1991:

> — We are seriously concerned at events in Bali when the parents of Kamal were not allowed on the plane by military personnel
>
> — It is particularly unfortunate
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> — Indonesian authorities gave assurances that all assistance would be given to the parents in going to Dili and making arrangements for the body
>
> — We had been assured that Indonesian authorities wished to contain the consequences of this tragedy and that Indonesian authorities accepted that the best way was to facilitate the visit of the parents
>
> — We now have very grave doubts about the sincerity of the Indonesian authorities
>
> — We need immediate and very persuasive confirmation that the assurances of all assistance given yesterday will be honoured. Otherwise the [Prime Minister] may be compelled to consider further action
>
> — When the media learn of this, there will be greater pressure on the [Prime Minister]

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9 *Ibid* at 6-7.

10 Message, Wellington to Jakarta, 13 November 1991, entitled "Kamal Ahmed Bamadhaj" released under the *Official Information Act*.

11 Declaration of Helen Todd at 3. Message, *ibid*.

— Indonesian Ministers must get involved

— We need to get the situation back on track[12]

Further released documents suggest continuing efforts for at least a few weeks on the part of the New Zealand authorities to obtain a full explanation of Kamal's death, but there is nothing to indicate that any such explanation was forthcoming.[13] In a letter dated 28 July 1992, the New Zealand Prime Minister forwarded to Ms Todd what seems to be the most detailed, but hardly informative, reponse from the Indonesians.[14] Ms Todd, not surprisingly, regarded the response as inaccurate and quite inadequate.[15]

One thing the New Zealand Government did not do was make a claim for reparation in respect of Kamal's death.[16] That was left to private enterprise.

The suit in Boston

Sintong Panjaitan was, at the time of the Dili massacre, the Indonesian military commander of the region which includes East Timor. He was punished for his part in the massacre by being sent to management school at Harvard University in

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12 Message from Wellington to Jakarta, 15 November 1991, released under the *Official Information Act*.

13 The Report of the Special Rapporteur, *supra* n 3, documents the total inadequacy of the Indonesian investigation of the massacre to date and concludes that "it is not too late to conduct proper investigations, to identify and bring to justice the perpetrators, to determine the fate and whereabouts of the missing persons, to grant compensation to the victims or their relatives, and to prevent the occurrence of further killings."

14 The relevant part read:

The circumstances surrounding [Kamal's] death were as follows:

a) Mr Bamadhaj arrived in Dili as a tourist in October 1991 and early in the day of 12 November 1991, he was already seen in the Motael Church before the mass negan.

b) The presence of Mr Kamal Bamadhaj in the midst of the demonstrators, along with seven other foreign nationals in Dili could only be perceived as being with the intention of participating in the demonstration of 12 November 1991.

c) He was seen to be actively engaged in fomenting and encouraging the demonstrators to be defiant to the security officers along the way from the Church to the Santa Cruz Cemetery. It was in such a chaotic and hostile atmosphere that unfortu ıately the spontaneous and unauthorized shootings took place resulting regrettably in a number of c ısulaties, including Mr Kamal Bamadhaj. We regret the fact, that by actively participating in such a demonstration he had actually endangered himself unnecessarily. He has also acted contarily to his formal request of entry into Indonesia as a tourist. The Department of Foreign Affairs further wishes to explain that members of the Security Forces who resorted to the excessive use of force during that incident have been court-martialed.

15 See letter dated 30 July 1992 from Helen Todd to Prime Minister. Ms Todd emphasized her understanding that her son and the other foreigners were acting as observers. She noted that "Ten low ranking soldiers have been given token sentences of between eight months and 18 months. No senior or even middle ranking officers have been charged. Meanwhile their unarmed victims have been sentenced to up to 15 years in prison."

16 For some thoughts on possibilities along these lines, see *infra* at notes 84-87.

Cambridge, Massachusetts. It was here that representatives of Kamal's mother caught up with him in August of 1992 and filed suit in the United States Federal District Court. The Complaint described the suit as being for "summary execution, wrongful death, assault and battery and intentional infliction of emotional distress." The summary execution claim relied on international human rights law; the other claims appealed to basic notions of the common law and statutory law on personal injury resulting in wrongful death which is part of the body of law in Massachusetts and other states. Upon receipt of the Complaint, Panjaitan returned to Indonesia where he now advises the Government on the environment.

On 26 October 1994, Judge Patti B. Saris, entered a default judgment in Boston as follows:

(1) An award of compensatory damages to Helen Todd as administratrix of the estate of her son Kamal Bamadhaj for the conscious mental and physical pain and suffering of Kamal Bamadhaj in the amount of two million dollars ($2,000,000), plus interest.

(2) An award of compensatory damages to plaintiff Helen Todd for her pain and suffering and loss of companionship of her son in the amount of two million dollars ($2,000,000), plus interest.

(3) An award of punitive damages to plaintiff Helen Todd in the amount of ten million dollars ($10,000,000).[17]

Jurisdiction

The federal courts of the United States are courts of limited jurisdiction. Accordingly, in addition to showing that there is personal jurisdiction over the defendant,[18] a plaintiff must point to some statutory basis on which the court has jurisdiction over the subject-matter. The Plaintiff's initial Complaint and later Memorandum of Law in Support of Motion for Default Judgment[19] relied on four distinct theories of subject-matter jurisdiction:

The *Alien Tort Claims Act*[20]

The *Torture Victim Protection Act*[21]

17 Default Judgment, dated 26 October 1994, *Todd* v *Panjaitan*.

18 Typically by showing that the defendant was present within the jurisdiction. Decisions of the Supreme Court of the United States indicate that even a fairly transitory presence will suffice for "personal" jurisdiction. See, for example, *Burnham* v *Superior Court*, 495 US 604 (1990).

19 Fed R Civ P, R 55 provides for the entry of a judgment by default. Where the amount is for a sum certain, the clerk may enter it. In other cases, application must be made to the judge to whom the file has been assigned. In *Todd* v *Panjaitan*, extensive documentary material was filed on behalf of the plaintiff and the judge also heard oral testimony.

20 28 USC s 1350.

21 Pub L No 102-256, 106 Stat 78 (1992).

"Arising under" jurisdiction[22]

Pendant jurisdiction[23]

Only the first of these is mentioned in the judge's cursory one and a half page default judgment. Apparently she regarded it as sufficient.[24] The first two grounds, however, are both of interest in the present context of private actions for an international law claim and will therefore be discussed in the paragraphs that follow.[25]

The Alien Tort Claims Act of 1789

The *Alien Tort Claims Act* was enacted in 1789 by the First Congress. It provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

The potential of the statute in a modern human rights context became apparent in *Filartiga* v *Pena-Irala*[26] where the Police Chief of Asuncion, Paraguay, was sued in the federal court in New York for torture committed in Paraguay. Plaintiffs were the father and sister of the victim, a 17-year old tortured to death. The trial judge initially dismissed the suit on the ground that violations of the law of nations do not occur when the aggrieved parties are nationals of the acting state.[27] He believed that he was bound to so interpret the *Alien Tort Claims Act* on the basis of existing authority. He was reversed on appeal to the Second Circuit Court of Appeals. In the catchy words of the Court, "for the purposes of civil liability, the torturer has become — like the pirate and the slave trader before him — *hostis humani generis*, an enemy of all mankind."[28] It followed that there was jurisdiction under the *Alien*

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22 28 USC s 1331 provides that there is federal subject matter jurisdiction in cases "arising under" the Constitution and laws of the United States. The argument here was that customary international law is part of the common law and thus of the "laws" of the United States. Cases with language supporting the application of s 1331 were cited by the Plaintiff.

23 Where a claim is brought under federal law, the same underlying conduct may give rise to a claim based on state law also. To avoid the inefficiencies involved in splitting the action, 28 USCA s 1367, affords the federal courts "supplemental jurisdiction over all other claims that are so related to claims in the [federal action] that they form part of the same case or controversy under Article III of the United States Constitution."

24 The judge laconically states that she is acting "pursuant to 28 USC s 1350" without further explanation.

25 See *supra* at notes 22 and 23 on the "arising under" and pendant jurisdiction claims.

26 630 F2d 876 (2d Cir 1980).

27 The major thrust of modern (post-1945) human rights law has been to find ways to protect the individual against his or her own state. In this respect, *Todd* v *Panjaitan* is a very traditional case, since it involved a claim by an alien against a state of which he was not a national, or - in the United states tort proceedings - against one acting under colour of authority of that state.

28 *Supra* n 26, at 890. In reaching this conclusion, the Court looked to a wide range of "sources" including multilateral treaties, the practice of global and regional international organizations, the

Tort Claims Act. The Filartigas were represented by the same public interest group that would later represent Ms Todd, the New York-based Center for Constitutional Rights.[29]

What exactly is included in the concept of a "tort" which is "in violation of the law of nations" is far from obvious — the term is hardly in general usage. *Filartiga* merely decided that torture at least was included. There are, however, some fairly well-established categories that can be used by analogy to suggest what must be a significant part of the field, including the following.

The Restatement of the Foreign Relations Law of the United States, s 702, has a category of "customary international law of human rights." It provides that:

> A state violates international law if, as a matter of state policy, it practices, encourages, or condones:
>
> (a) genocide
>
> (b) slavery or slave trade
>
> (c) the murder or causing the disappearance of individuals
>
> (d) torture or other cruel, inhuman, or degrading treatment or punishment
>
> (e) a consistent pattern of gross violations of internationally recognized human rights.[30]

Since s 702 is concerned specifically with state responsibility, in order to utilize it to flesh out the *Alien Tort Claims Act*, it is necessary to make the evidently sensible step to individual tort responsibility for these acts.[31]

28— *Continued*
writings of publicists and judicial decisions.

29 The Center, which has now litigated a substantial number of alien tort suits, has produced a very useful "working draft" entitled *Suing for Torture and Other Human Rights Abuses in Federal Court: A Litigation Manual* (1993). A summary for activists exploring the possibility of lawsuits is also available. A much expanded version of the Manual will appear late in 1996 as Stephens B and Ratner M, *International Human Rights Litigation in US Courts*. For good discussions of the Alien Tort area in general, see Randall K, *Federal Courts and the International Human Rights Paradigm* (Durham, Duke University Press, 1990); Steinhardt R "Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos" (1995) 20 *Yale J Int'l L* 65.

30 Restatement of the Law Third, The Foreign Relations Law of the United States, s 702 ("Restatement Third").

31 We are talking here of the tort equivalent of the Nuremberg Tribunal's proposition that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." Judgment of the International Military Tribunal, (1946) 41 *Am J Int'l L* 172 at 221. The customary law of human rights covers cases where there is some state involvement but individual responsibility is also appropriate. This does not mean that for the *Alien Tort Claims Act* to apply there must always be state involvement. See *Adra* v *Clift*, 195 F Supp 587 (DC Maryland, 1961) (unlawful taking of child with falsified passport); *Kadic* v *Karadzic*, 70 F 3d 232 (2d Cir 1995) (suit for genocide, war crimes and

Another provision of the Restatement, s 404, does, however, deal with individual responsibility, albeit criminal responsibility. It concerns "Universal Jurisdiction to Define and Punish Certain Offenses".[32] It posits the existence of a category of criminal offences "recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes and perhaps certain acts of terrorism . . ."[33] A Comment by the drafters of the Restatement suggests that tort liability is acceptable here, too: "In general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example by providing a remedy in tort or restitution for victims of piracy."[34]

In its work on State Responsibility, the International Law Commission has distinguished between international delicts and international crimes committed by a state, the latter being the more egregious. An international crime may result, under the Commission's analysis, where there is "a serious breach of an international obligation of essential importance" in such areas as aggression, the establishment or maintenance by force of colonial domination, slavery, genocide, apartheid or massive pollution of the atmosphere or of the seas.[35] Again, it is probably possible to make the jump from state responsibility to individual tort responsibility in such cases.

Then there is the International Law Commission's project for a Draft Code of Crimes Against the Peace and Security of Mankind.[36] The successor to the Nuremberg Charter's Crimes Against Peace, War Crimes and Crimes Against Humanity,[37] the list of horrors includes aggression, genocide, apartheid, systematic or mass violations of human rights, exceptionally serious war crimes, international terrorism, illicit traffic in narcotic drugs and wilful and severe damage to the environment.[38] If there is international criminal responsibility for individuals in

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31— *Continued*
crime against humanity allowed to proceed against "head" of unrecognized Bosnian Serb entity).

32 Restatement Third, *supra* n 30, s 404.

33 *Ibid*.

34 *Ibid*, s 404, Comment b.

35 Draft Articles on State Responsibility, article 19, in Report of the International Law Commission on the Work of its Twenty-Eighth Session, UN GAOR, 31st Sess, Supp No 10, at 174, UN Doc A/31/10 (1976).

36 Report of the International Law Commission on its 43rd Session, UN GAOR, 46th Sess, Supp No 10, UN Doc A/46/10 (1991).

37 See Clark "Crimes Against Humanity at Nuremberg" in Ginsburgs G and Kudriavtsev VN (eds), *The Nuremberg Trial and International Law* (Dordrecht, Nijhoff M, 1990) p 177.

38 Other possible "sources" of what might amount to a tort in violation of the law of nations include the categories of *jus cogens* (or peremptory norms) and obligations *erga omnes*. On *jus cogens*, the Restatement Third, *supra* n 30, s 103, Reporters' Note 6, suggests that: "There is general agreement that the principles of the United Nations Charter prohibiting the use of force are *jus cogens* . . . It has been suggested that norms that create 'international crimes' and obligate all states to proceed against violations are also peremptory. Such norms might include rules prohibiting genocide, slave trade and slavery, apartheid and other gross violations of human rights, and perhaps

such cases, which may be adjudicated either by an international tribunal or by states on a universal jurisdiction basis, it is surely plausible that tort liability is acceptable on a similar basis.[39]

None of these classifications — which keep echoing a similar list of egregious violations — were created with the *Alien Tort Claims Act* in mind. But then the founders of the American Republic did not explain what they had in mind either, so some analogies must be found from general international law.

The Center for Constitutional Rights and the Lowenstein International Human Rights Project have also developed a sort of generic law professors' brief on the issues, which was filed, inter alia, in the *Todd* case.[40] In this brief, over 25 leading United States professors of international law argue that "Summary execution, torture, disappearance, cruel, inhuman, or degrading treatment, and arbitrary detention violate universal, obligatory, and definable norms of international law." Most of this package has some support in the case law.[41]

It was the summary execution category[42]

38— *Continued*
attacks on diplomats." (Citations omitted.) The International Court of Justice has described obligations *erga omnes* as being "the concern of all states." "Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Barcelona Traction, Light, and Power Co Ltd (Second Phase) (*Belgium* v *Spain*), 1970 ICJ 3 at 32.

39 See *supra* n 34. While various treaty regimes may make the exercise of criminal jurisdiction obligatory (on an extradite or prosecute basis) tort jurisdiction simply remains as a private option.

40 The version filed in *Todd* v *Panjaitan* comprised extracts of the relevant portions of Affidavit of International Law Scholars, filed in *Xuncax* v *Gramajo*, US DC D Mass, Case No 91-11564 WD, 886 F Supp 162 (D Mass 1995). (The *Xuncax* judgment addresses many of the issues discussed herein).

41 Torture is proscribed in *Filartiga*, *supra* n 26. In *Forti* v *Suarez-Mason*, 672 F Supp 1531 (ND Cal 1987), the District Court allowed plaintiff's claims of torture and summary execution to proceed, but dismissed claims of disappearance and of cruel, inhuman or degrading treatment. On reconsideration the Court accepted the claim of disappearance but still rejected the claim of cruel, inhuman or degrading treatment (in the author's view misunderstanding the scholarly evidence), 694 F Supp 707 (ND Cal 1988).

42 Apparently this would also be the Restatement category of "murder", ("Under this section, it is a violation of international law for a state to kill an individual other than as lawful punishment pursuant to conviction in accordance with due process of law, or as necessary under exigent circumstances, for example by police officials in line of duty in defense of themselves or of other innocent persons, or to prevent serious crime." Restatement Third, *supra* n 30, s 702, Reporters' Note f.) The title of the "Special Rapporteur on extrajudicial, summary or arbitrary executions" (a post created by the Commission on Human Rights) suggests a more verbose name for what may be the same category (or three overlapping categories?) In his Report on the Dili massacre, *supra* n 3 at 11, the Special Rapporteur noted that, in respect of what he called "The Government's responsibility in the killings":

> The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Havana, Cuba, from 27 August to 7 September 1990, provide that law enforcement officials, in carrying out their duties, shall as far as possible apply non-violent

on which the plaintiff relied in *Todd* v *Panjaitan*. According to the law professors' brief:[43]

> An act constitutes summary execution if it (1) intentionally results in the proximate death of an individual; (2) is not the result of a fairly and publicly constituted tribunal based on the existing law of the state, and (3) is caused by or at the instigation of a public official.

One matter that is not yet resolved in an appellate court is whether the *Alien Tort Claims Act* defines the parameters of the cause of action as well as being jurisdictional, or whether it is merely jurisdictional. We shall return to that question once the *Torture Victim Protection Act* has been described.

The Torture Victim Protection Act of 1992

In spite of its more limited title, the *Torture Victim Protection Act* deals with civil actions[44] both for torture[45] and for extrajudicial killings. This statute was adopted at least partly in response to the decision of the District of Columbia Court of Appeals in *Tel-Oren* v *Libyan Arab Republic*.[46] In that case, a different set of federal judges (notably Judge Bork) raised some doubts about whether *Filartiga* was good law.

Section 2(a) of the 1992 Act provides:

42— *Continued*
means and shall only use force in exceptional cases including self-defence or defence of others against the imminent threat of death or serious injury. Such force must be proportional to these objectives and the seriousness of the crime, and must minimize damage and injury. Force may only be used when less extreme means are insufficient. Of particular relevance in the context of the Santa Cruz killings are principles 12 to 14, which prohibit the use of force against participants in lawful and peaceful assemblies. Force may only be used to the minimum extent necessary in the dispersal of unlawful assemblies.

43 *Supra* n 40 at 23-24.

44 There is language in the legislative history of the Act suggesting that the Act was necessary to fulfill United States obligations when it came to ratify the 1984 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res. 39/46. UN GAOR, 39th Sess, Supp No 51, at 197, UN Doc A/39/51 (1985). In fact that Convention requires the exercise of *criminal* jurisdiction over torture. Appropriate criminal legislation was adopted in 1994 enabling the United States to ratify that Convention. (It is perhaps exemplary of the haphazard way that treaty law develops that torture, clearly a breach of customary law, at least by the 1970s, became also subject to a treaty regime in 1984; extrajudicial killing, equally proscribed under customary law, is not the subject of a treaty regime by name, although it must be encompassed under treaty protections of the right to life).

45 "Torture" is defined consistently with the Torture Convention, *supra* n 44.

46 726 F2d 774 (DC Cir 1984), *cert. denied*, 470 US 1003 (1985). This was an action in respect of a terrorist attack in Israel. It was sufficient to dismiss the case that "terrorism" is not as developed a concept as torture, and that the main defendants were "private" not state actors (namely the PLO). Judge Bork went further and cast doubt on whether there could ever be a federal action without a much more express grant than the 1789 Act (or international law itself) provided. The 1992 Act is, in significant part, a response to this.

> An individual who, under actual or apparent authority, or under color of law, of any foreign nation[47]
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> (1) subjects an individual to torture shall, in a civil action, be liable in damages to that individual; or
>
> (2) subjects an individual[48] to extrajudicial killing shall, in a civil action, be liable for damages to that individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

"Extrajudicial killing" (apparently synonymous with summary execution) is defined in s 3(a) of the Act as:

> a deliberated [sic.] killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.[49]

This Act, even more clearly than the *Alien Tort Claims Act*,[50] is evidently both jurisdictional and defining of a federal (statutory) cause of action.[51] It also (unlike the *Alien Tort Claims Act*) contains a provision requiring the exhaustion of "adequate and available remedies in the place in which the conduct giving rise to the claim occurred."[52] Given the Indonesian legal system's approach to such cases[53] (to

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47 This language touches on a point that is also implicit in most cases under the *Alien Tort Claims Act*: generally the person sued will have been acting under color of the authority of the state or of those purporting to exercise the authority of the state. There must be some cases (such as piracy, some war crimes and genocide) where this is not necessarily so. And see *Adra* v *Clift*, *Kadic* v *Karadzic*, *supra* n 31. Note, however, that the defendant will seldom be able to rely on an act of state defence where he performs an act contrary to international customary law. See generally, Berman M & Clark R "State Terrorism: Disappearances" (1982) 13 *Rutgers L J* 531 at 572-75.

48 Unlike the *Alien Tort Claims Act* which limits claims to those brought by "aliens", a United States citizen could be an "individual" within the meaning of the *Torture Victim Protection Act* and thus eligible to sue. Citizens may also be able to base claims for international torts on other jurisdictional theories such as general federal question jurisdiction, 28 USC s 1331, or diversity jurisdiction, 28 USC s 1332(a)(2).

49 A case like *Todd* v *Panjaitan*, where the liability of the defendant is based on his acts or omissions as part of the command structure, forces attention on the potentially difficult question of what is to be made of the term "deliberated killing" (certainly not an established term of art) in this definition (and of the equally awkward phrase "intentionally results in the proximate death of an individual" in the law professors' analysis, *supra*). By "disciplining" Panjaitan, even the Indonesian authorities conceded he had some role in the massacre. No one suggests that he personally contemplated the death of any particular person, certainly not of Kamal. Yet he was alleged to have set in train events which he intended/knew/was reckless/ought to have known (in descending order of degree of culpability) would cause some deaths. The appropriate culpability element requires at least an expansive notion of intent if not the development of negligence principles. I have explored some of these culpability issues in a criminal as opposed to a tortious context in Clark "Medina: An Essay on the Principles of Criminal Liability for Homicide" (1973) 5 *Rutgers Camden L J* 59.

50 See discussion *infra* at notes 57-62.

51 See generally, Drinan R and Kuo T "Putting the World's Oppressors on Trial: The Torture Victim Protection Act" (1993) 15 *Hum Rts Q* 605.

52 *Torture Victim Protection Act*, s 2 (b).

53 *Supra* at notes 3 and 15, and *infra* at notes 81 and 84.

say nothing of its dubious applicability in East Timor)[54] the exhaustion clause presented no problem in *Todd*. The difficulty with applying the *Torture Victim Protection Act* was that it had not been enacted at the time the killing occurred in Dili. The plaintiff's theory to overcome this was that there was no problem with any presumption against retroactivity since "it is clear that the statute does not affect substantive rights, but merely clarifies pre-existing law."[55]

Evidently the judge did not think it necessary to pursue this line of reasoning in *Todd* v *Panjaitan*, since she was persuaded that the *Alien Tort Claims Act* provided an adequate basis for decision in the case of Kamal. Nevertheless, the Torture Victim Protection statute will be available in future appropriate cases.[56]

Choice of Law on Substance and Damages

The *Alien Tort Claims Act* is jurisdictional. One question, however, that was not fully explored by the Second Circuit Court of Appeals in *Filartiga*, nor resolved in subsequent cases, was whether it is *merely* jurisdictional. That is to say, as to the substance of the cause of action (including liability and the measure of damages), does the "law of nations" provide the basis? Or is it necessary to refer out to some state's[57] body of substantive rules in accordance with some of the principles of choice of law found in doctrines of private international law?

On remand in *Filartiga*, the trial judge took the view that since the "tort" to which the statute refers was a wrong "in violation of the law of nations" rather than "a wrong actionable under the law of the appropriate sovereign state," the court "should determine the substantive principles to be applied by looking to international law, which, as the Court of Appeals stated, 'became a part of the common law *of the United States* upon the adoption of the Constitution.' "[58] Nevertheless, the judge hedged a little by placing partial reliance on Paraguayan law in assessing

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54 *Infra* at notes 69-71.

55 Plaintiff's Memorandum of Law in Support of Motion for Default Judgment at 25. The Plaintiff's Memorandum cites authorities drawing a distinction between statutes which affect substantive rights (presumed to be prospective only) and those not affecting substantive rights (presumed to be retroactive); *Bradley* v *School Board of City of Richmond*, 416 US 696 (1974), *Bennett* v *New Jersey*, 470 US 632 (1985), *Demars* v *First Service Bank for Savings*, 907 F 2d 1237 (1st Cir 1990). The argument is similar to the reasoning of the Nuremberg Tribunal to the effect that the Nuremberg crimes already existed; the London Charter merely provided a forum for their prosecution. *Supra* n 31 at 218-19.

56 It was strongly relied upon in *Kadic* v *Karadzic*, *supra* n 31. Oddly, the Court of Appeals seems in that case to have regarded the *Torture Victim Protection Act* as not being in itself jurisdictional - it apparently merely decribed the cause of action. Jurisdiction could be found under the *Alien Tort Claims Act* or pursuant to an "arising under" theory, *supra* n 22. Most commentators view the *Torture Victim Protection Act* as both substantive and jurisdictional.

57 "State" is used here with conscious ambiguity to include both a constituent state of the United States and a "state" in the international sense.

58 *Filartiga* v *Pena-Irala*, 577 F Supp 860 at 863 (EDNY 1984), citing 630 F 2d at 886 (emphasis in original).

damages.[59] An initial assessment of damages had been made by a federal Magistrate who had concluded that the plaintiffs were entitled to receive only those damages payable under Paraguayan law. This did not include punitive damages. Paraguayan law did, however, forbid torture and provide for "moral damages" in such cases, which would include emotional pain and suffering, loss of companionship and disruption of family life.

In the court's view, it was "essential and proper to grant the remedy of punitive damages in order to give effect to the manifest objectives of the international prohibition against torture."[60] Since international law did not itself spell out the details, the court saw itself in this connection as a kind of delegate of the international community:

> The international law prohibiting torture established the standard and referred to the national states the task of enforcing it. By enacting s 1350, Congress entrusted that task to the federal courts and gave them power to choose and develop federal remedies to effectuate the purposes of the international law incorporated into the United States common law.[61]

Punitive damages, the "federal remedy" chosen to effectuate the purposes of international law, had, at least in the magnitude of the awards contemplated, a somewhat American cast to it.[62]

The upshot in *Filartiga* was an award to the two plaintiffs of $150,000 each for emotional pain and suffering, loss of companionship and disruption of family life. Dolly Filartiga (the sister) received a further $25,000 for future medical expenses in treatment of her psychiatric impairment from the affair, and Dr Filartiga (the father) received $50,000 for expenses related to medical and funeral costs and lost income. All this was in accordance with the Magistrate's recommendations. The judge added to the Magistrate's amounts $10,364 in litigation expense[63] and $5,000,000 in punitive damages to each plaintiff.

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59 At 864, the judge appears to place considerable weight on the many connections of the case with Paraguay. It was clear, however, that the Paraguayan legal system would not be responsive to the claim. (Dr Filartiga's Paraguayan attorney had been brought to police headquarters, shackled to a wall, threatened with death and later disbarred without cause.) The Paraguayan law relied upon was the "law in the books" rather than the "law in action".

60 *Ibid* at 865.

61 *Ibid* at 863. On the role of domestic courts in enforcing fundamental policies of the international order, see, for example, Falk R, *The Role of Domestic Courts in the International Legal Order* (Syracuse, NY, Syracuse University Press, 1964); Lillich R, "The Role of Domestic Courts in Promoting International Human Rights Norms" (1978) 24 *NYL Sch L Rev* 153 (1978).

62 As the Inter-American Court of Human Rights has noted, "Although some domestic courts, particularly the Anglo-American, award damages in amounts meant to deter or to serve as an example, this principle is not applicable in international law at this time." IA Court HR, *Velasquez Rodriguez Case*, Compensatory Damages, Judgment of July 21, 1989, (1989) 11 *Hum Rts L J* 127, 130. On the Inter-American Court's later efforts to erect standards for damages, see Padilla D "Reparations in *Aloeboetoe* v *Suriname*" (1995) 17 *H R Q* 541.

63 Plaintiff's expert had testified that these expenses were recoverable under Paraguayan law but the

Subsequent cases under s 1350 have followed a similar approach, including substantial punitive awards,[64] although the district court's decision in *Filartiga* remains the most cogent discussion of the issue, and in *Todd* v *Panjaitan* the Center for Constitutional Rights argued along similar lines.

In its argument concerning the international law standard, the Center referred to the much-cited decision of the Permanent Court of International Justice in the Case Concerning the Chorzow Factory[65] (*Germany* v *Poland*). There the Court asserted that:

> [R]eparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.

As applied to injuries to individuals, the argument was:

> That one injured is, under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or reputation, there can be no doubt, and such compensation should be commensurate to the injury.[66]

Such principles have recently been applied by the Inter-American Court of Human Rights in the *Velasquez Rodriguez Case*[67] in which the Court awarded damages against Honduras for loss of earnings and psychological injuries to the family of a disappeared person.

If the substance of the action depended in whole or in part on some domestic rule of decision, there were at least several possibilities in *Todd*: the reference might be to the law of the forum (probably Massachusetts law in accordance with the normal federal rule),[68] the law of East Timor (that is to say Portuguese law), or the law of Indonesia.

In a Declaration made at the request of the Plaintiff, I asserted my belief that it would be utterly inappropriate to apply the law of the Indonesian occupiers. I noted, in particular, that the United Nations General Assembly continues to regard Portugal as the colonial power and East Timor as a non-self-governing territory. In 1976, the Assembly rejected the Indonesian claim of annexation inasmuch as the people of the territory have been prevented from freely exercising their right to self

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63— *Continued*
magistrate disallowed them. The judge reversed the magistrate, apparently in reliance on Paraguayan law. See 577 F Supp, at 865.

64 See Plaintiff's Exhibit J in *Todd*, Damages Awards in Prior Cases; Lillich R "Damages for Gross Violations of Human Rights Awarded by US Courts" (1993) 15 *Hum Rts Q* 207 (which contains a very good discussion of the choice of law problem and of the way in which the courts have hovered between local law and principles designed to vindicate international law).

65 1928 PCIJ (Ser A), No 17, at 47.

66 Whiteman M, *Damages in International Law* (Washington, Government Printer, 1943) pp 718-19.

67 *Supra* n 62.

68 *Erie RR* v *Tompkins*, 304 US 64 (1938).

determination.[69] Moreover, whatever might once have been the rule, modern international law obligates states not to give legal recognition to the actions of states acquiring dominion over territory by means of force. That obligation is reflected, for example,[70] in two resolutions of the General Assembly unanimously adopted in 1970 and 1974, and widely regarded as codifying customary law.[71] A court refusing to apply Indonesian law could explain its action either in terms of applying the public policy of the international system (and thus of the forum) or, alternatively, as being bound by customary international law so to act. It would probably conclude that international law was the correct standard to apply on the substance of the case. It might, however, conclude that Portuguese law was the correct frame of reference.

Careful lawyering, indeed, (bearing in mind the way in which the trial judge had proceeded using Paraguayan law on remand in *Filartiga*)[72] suggested that Portuguese law of wrongful death ought to be explored in *Todd*. Three eminent members of the faculty of Coimbra University (one of the oldest European institutions of higher learning) were asked to do this.[73] Their analysis, like that of the Paraguayan expert in *Filartiga*, is particularly interesting to a common law lawyer who is more used to the way in which the Anglo-American law approaches the question of damages. They concluded that under the Portuguese civil law system (in particular the Constitution and the Civil Code) the wrongful acts alleged against Panjaitan would give rise to an enforceable obligation to compensate. Under Portuguese law, moreover, public employees and members of the armed forces are liable for torts committed in the course of their employment. An action for wrongful death in Portugal belongs to the heirs of the victim. The mother of the victim has standing to sue if there is no wife or children. The measure of damages in such a case was said to include "damage for death, non-patrimonial damages (pain and

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69 GA Res 31/53, UN GAOR, 31st Sess, Supp No 39, at 125, UN Doc A/31/39 (1977).

70 For a more extended discussion of the point, see Clark *supra* n 2, [1992] *Pace Y B Int'l L* at 86-87.

71 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, GA Res 2625 (XXV), UN GAOR, 25th Sess, Supp No 28, at 121, UN Doc A/8028 (1971); Definition of Aggression, GA Res 3314 (XXIX), UN GAOR, 29th Sess, Supp No 31, at 142, UN Doc A/9631 (1975).

72 *Supra* at n 59.

73 Affidavit of Boaventura De Sousa Santos, Joao Pedroso and Jose Manuel Pureza, in *Todd*. The Portuguese experts discussed at some length the question of the applicability of Portuguese law in Timor, concluding:

> Portuguese law has maintained without interruption the applicability of its juridical order in East Timor. First, as an ordinance imposed by the colonizing mother country to its overseas colonies. Since 1974, and according to the basic rules and principles of the general international law, as a disposition of the administering power (as Portugal has been repeatedly recognized by the international community), applicable to the non-autonomous territory until the fulfillment of the exercise of the right of its people to self-determination.

Affidavit, at 6. The Plaintiff's Memorandum of Law, at 42, also discussed Massachusetts law on compensatory and punitive damages against the "unlikely event that the Court decided to apply Massachusetts law."

suffering) as well as emergent patrimonial losses and lost earnings."[74] "Emergent patrimonial losses" would include such expenses as medical care before death and the funeral. The Affidavit indicates typical figures that are awarded in Portugal for death and for pain and suffering. An award for lost wages is normally based on an estimate of future earnings to age 65 less 25% of that sum that the deceased might reasonably be expected to spend on himself.[75] The experts noted that "Although Portuguese law does not provide for punitive damages per se, our concept of compensatory damages does include some of the factors classified as 'punitive' in the United States, such as the brutality of the defendant's conduct and the correspondant suffering of the victim and the defendant's ability to pay."[76]

In the event, Judge Saris did not find it necessary in her default judgment to explain the basis of her damage award.[77] The difficult choice of law issues were thus left unresolved.

One should perhaps avoid overstating the novelty of the United States approach in the *Alien Tort Claims* and *Torture Victim Protection Acts*. After all, as the court pointed out in *Filartiga*:[78] "Common law courts of general jurisdiction regularly adjudicate transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred."[79] Turning the latter into a federal case, however, entails a measure of uniformity and demonstrates the extent to which "the United States" as an entity takes the matter seriously.[80]

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74 Affidavit at 7.

75 The Plaintiff's Memorandum of Law, *supra* n 55, Exhibit C, contains projections of Kamal's probable future earnings as an Australian academic or public servant and the tax implications thereof developed by Professors Garth Nettheim and Philip Burgess of the Law Faculty and Binh Tran-Nam and Neil Warren of the Economics Department at the University of New South Wales. The present value of this stream of earnings was estimated at between $921,669 and $1,134,911. It is notable that Judge Saris did not try to enter the thicket of lost earning and made no award under this head. Instead, she made hefty awards for the pain and suffering of Kamal (presumably while he was bleeding to death) and his mother, plus the punitive awards.

76 *Ibid* at 12. The concepts here discussed are closely related to the British notion of "aggravated damages".

77 *Supra* n 17.

78 *Supra* n 26 at 885.

79 For example, New Zealand courts, which generally follow British practice, would appear to have jurisdiction in tort if Panjaitan were to come within New Zealand territory; his presence would be the key jurisdictional feature, not Kamal's New Zealand citizenship. The hard question in such cases has often been the choice of law one. British courts have tended to apply a kind of double actionability test; the act must be actionable both by the law of the place of commission and the law of the forum. American courts have tended to apply the law of the *lex loci delicti*. Both have become increasingly flexible. See *Red Sea Insurance Co* v *Bouygues SA* [1994] 3 WLR 926 (PC) (exception to double actionability where tort may be governed by the law of the country which has the most significant relationship with the occurrence and the parties - in that case, the place where the events took place).

80 This may be of particular significance in a federal system. See the argument made for doing something similar in Australia in Little, *supra* n 7.

Collecting on the Judgment

The odds of collecting the money from Panjaitan are fairly low. He left no obvious assets in Massachusetts, and the Indonesian legal system is unlikely to be helpful.[81] Nonetheless, the whole exercise must give him pause. It is probable that he will not wish to return to the United States; certainly he will not want to move assets there. In accordance with rules in various jurisdictions about the enforcement of foreign judgments, it may be possible to take the American judgment and seek to execute it elsewhere.[82] Some jurisdictions do this on a statutory or common law basis; in others there are treaties on the reciprocal enforcement of judgments. If nothing else, the prospects of attempts to execute might make Panjaitan feel like a pariah and inhibit his future freedom of movement to travel internationally.

There is also the question of whether it might be possible to collect from Indonesia itself at the international level, rather than in some domestic court. It must be emphasized that the United States judgment is against Panjaitan, not against Indonesia. There are serious foreign sovereign immunity problems in most domestic legal systems with suing (or trying to collect from) the state, even in cases where there are egregious human rights violations.[83] But on the international scene, there is no reason why an effort could not be made to collect sovereign to sovereign. That is to say, there is nothing to prevent the New Zealand Government, armed with the

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81 The Special Rapporteur, *supra* n 3 at 10, says: The Special Rapporteur was told that the practice in the event of a death caused by soldiers is to give a bag of rice and a piece of cloth to the family of the victim. According to the military commander of East Timor, it is rather 3 million rupiahs [some US $1400] and 50 kg of rice. However, the Indonesian officials met by the Special Rapporteur declared that no compensation had been granted to the families of the persons killed or disappeared.

82 The matter arose potentially for Panjaitan who made a controversial visit to Australia on government business in March 1995. See "Canberra sponsors massacre general," *The Australian*, 15 March 1995. It is possible in Australia to register some foreign judgments in the Supreme Court of any of the Australian States or Territories pursuant to the *Foreign Judgments Act* 1991 (Cth) and then seek to enforce them. Registration may only be done in respect of foreign jurisdictions for which the Governor-General has made appropriate regulations on a basis of reciprocity. No regulations are currently in force for the United States or any of its states. There was no problem of official immunity in Massachusetts because of Panjaitan's "private" status there. A visit on government business could raise (murky) immunity problems. See also North P & Fawcett J, *Cheshire and North's Private International Law* (11th ed, London, Butterworths, 1987) Chapter 15 (discussing various enforcement possibilities and problems in the United Kingdom).

83 In the United States, for example, the *Foreign Sovereign Immunities Act* of 1976 would probably preclude suit against the Indonesian Government in cases like Kamal's. There are moves afoot to change this as a matter of domestic law. See Zaid M "Terrorism and Foreign Sovereign Immunity: The Time has come to Remove the Terrorist's Legal Cloak" (1993) 9 *Int'l Enforcement L Reporter* 373 (discussing proposed amendments introduced into the House and Senate). There is not a great deal of international practice on whether such a move might arguably conflict with international law. Some would argue that it supports it! A provision such as article 2, para 3 b. of the *International Covenant on Civil and Political Rights*, GA Res 2200 (XXI), 21 UN GAOR, Supp No 16, at 52, UN Doc A/6316 (1967), which promises "an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity," suggests some possibilities for delegitimating sovereign immunity.

judgment, from finally espousing the claim of its citizen, Kamal, and suggesting to Indonesia that it might discharge the obligations of *its* citizen — or its own responsibilities in turning Panjaitan and his troops loose to behave in the way they did.[84] Panjaitan was, after all, acting on its behalf at the relevant time. There are some analogies. For example, it is not uncommon in domestic legal practice for governments whose employees have been sued personally for torts committed in the general scope of their employment to indemnify them and pay any judgment.

In any event, a report in mid-1995 suggested that the New Zealand Government had promised to seek a response from Indonesia about collecting on the award,[85] and the writer understands that in August of that year the New Zealand Minister of Foreign Affairs registered with his Indonesian counterpart, Ali Alitas, the concern expressed by a number of New Zealanders that the Court's decision should be followed up. The New Zealand Government had apparently given some previous thought to this kind of issue of state responsibility.

On 16 October 1975, another New Zealand citizen, Gary Cunningham, was killed near the Indonesian border with East Timor by Indonesian forces who were already encroaching on Timorese territory. He was one of five journalists for a Melbourne TV station covering Indonesian border incursions. The Australian Journalists Association pressed the Australian Government to seek compensation. The New Zealand Secretary of Foreign Affairs hoped that New Zealand would not need to get involved although there might be some "demands" in that direction. The hope was that Australia — whose television coverage was involved — would deal with it. As he put it, "[w]e can expect that to do so [seek compensation] would harm our own relations with Indonesia."[86] The matter was not pursued by New Zealand and the Australian response was muted, at least until recently.[87]

The New Zealand Government has, however, been more forceful on at least one other occasion and was then successful in encouraging the payment of compensation. When French agents sank the Greenpeace ship, "Rainbow Warrior", in Auckland Harbour, the Government, in spite of its lack of formal standing, encouraged the French to compensate the dependents of the photographer killed in the incident (a Dutch citizen) and Greenpeace itself (the vessel was registered in the United Kingdom). France did so. As the New Zealand Minister of Justice at the time

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84 There is not a great deal of modern discussion of state responsibility to aliens for physical injury. For a thoughtful presentation, see Yates G "State Responsibility for Nonwealth Injuries to Aliens in the Postwar Era" in Lillich R (ed) *International Law of State Responsibility for Injuries to Aliens* (Charlottesville, University Press of Virginia, 1983) p 213. Older practice supports the existence of a duty to exhaust domestic remedies before going the diplomatic route. The Yates discussion suggests that this barrier is not very significant in modern practice. Any Indonesian remedies existing in theory are probably futile. See Report of Special Rapporteur, *supra* n 3 at 10, 21-22.

85 "Dili Massacre Damages", *Timor Link*, June 1995 at 7.

86 Memo to Minister of Foreign Affairs, dated 29 June 1976, released under the *Official Information Act*.

87 See Sherman T, *Report on the Deaths of Australian-Based Journalists in East Timor in 1975* (June 1996).

put it, "What New Zealand was saying to France on this matter was, in effect, that it was a *political* imperative that decent arrangements be made for compensation for damage suffered in New Zealand but not by New Zealand."[88] One might have thought that there was even more than a "political imperative" where one's own citizen was involved, as in the *Todd* and *Cunningham* cases!

A final thought: perhaps collecting the money is not what is significant. An important feature of such a lawsuit is the catharsis it entails for those who remain. There is also some political pressure and some measure of accountability for the perpetrators. Kamal's mother put it eloquently:

> 22. I bring this case because those who killed him and those in power who set the policies that killed him have not even acknowledged that a crime has been committed. They lead privileged lives. The policy of repression continues. The military culture that systematically tramples on human rights still flourishes.
>
> 23. I bring this case not only as Kamal's mother but on behalf of the hundreds of East Timor mothers who are forced to grieve in silence for their dead children. Our grief and anger is the same, but, unlike them, I can bring a case against a military officer without putting the rest of my family in danger. Whatever compensation is awarded by the court in this case will belong to the mothers of all the victims of the Dili massacre, and I will find a way to get it into their hands.
>
> 24. There must be some accounting for the unarmed young people shot to death by the military in Dili that morning simply because they dared to raise their voices against sixteen years of organized military brutality against the people of East Timor.
>
> 25. In the last notes in his diary, Kamal predicted "another wave of genocide against the Timorese people." He wrote: "Whether total genocide occurs in East Timor or not depends not only on the remarkably powerful will of the East Timorese people, but also on the will of humanity, of us all." I believe that a successful outcome of this lawsuit can serve as an important piece of humanity's reaction to that genocide — as a piece of a monument to all those who fell that day in East Timor in search of democracy.[89]

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88 Palmer G "Settlement of international disputes: the 'Rainbow Warrior' Affair" (1989) *Commonwealth L Bull* 585 (emphasis in original).

89 Declaration of Helen Todd in *Todd* v *Panjaitan*.