

ACCOUNTING FOR ATROCITIES IN INDONESIA

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The purpose of this study is to examine some of the ongoing epic struggles for accountability in Indonesia. This is done by reference to the law and the legal process and reaching from the present back into the Indonesia of the past. This exercise has the effect of highlighting some of the immense challenges faced in developing and implementing coherent strategies for dealing with violent historical legacies in order to create better lives for Indonesians of the future. The author reaches the inevitable conclusion that the flurry of “transitional justice” activity has had little impact on changing society and taking Indonesia towards rule of law and democracy. Without genuine public support and major strategic reform of institutions such as the military, the police, the judiciary and the Attorney General’s Office, any effort at justice and accountability will not be more than window-dressing nor will it make Indonesia a better and safer place.

I. INTRODUCTION

From Aceh to Papua, there have been, and continue to be, gross violations of human rights and humanitarian law in Indonesia. The work of Indonesia’s own *Komisi Nasional Hak Asasi Manusia* (Human Rights Commission, hereafter “Komnas HAM”) thus far reveals that crimes against humanity were committed in Jakarta in 1984 (Tanjung Priok), 1997 and 1998 (Trisakti, Semanggi and the riots accompanying the fall of Soeharto); East Timor¹ in 1999; and at least three times in Papua — 2000 (Abepura), 2001 (Wasior), 2003 (Wamena). These findings suggest that there have been, and continue to be, widespread or systematic attacks on the civilian population in various locations in Indonesia. Scrutiny of the regular reports issued in the media and by international and domestic non-governmental organisations (N.G.Os) is instructive and sobering.² In 2002, the US State Department reported that:

Soldiers and police murdered, tortured, raped, beat, and arbitrarily detained both civilians and members of separatist movements.... In Aceh, where separatist GAM rebels remained active, military and police personnel committed many extrajudicial killings and used excessive force against non-combatants as well as combatants; at least 898 persons were killed during the year.³

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¹ Although the official name of the independent State informally known as East Timor is the República Democrática de Timor-Leste, this article uses the name “East Timor” as it can be used consistently throughout and is thus less confusing for the reader.

² See for example, the regular reports of Human Rights Watch, Amnesty International, TAPOL (Indonesia Human Rights Campaign), Lembaga Studi dan Advokasi Masyarakat (The Institute of Policy Research and Advocacy or ELSAM), KontraS (The Commission for Disappearances and Victims of Violence) and YLBHI (Indonesian Legal Aid Foundation).

³ U.S. State Department, “Country Reports on Human Rights Practices: Indonesia (2002)” 31 March 2003, online: <<http://www.state.gov/g/drl/rls/hrrpt/2002/18245.htm>>.

Unfortunately, its report for 2004 suggests that nothing has changed:

Government agents continued to commit abuses, the most serious of which took place in areas of separatist conflict. Security force members murdered, tortured, raped, beat, and arbitrarily detained civilians and members of separatist movements, especially in Aceh and to a lesser extent in Papua. Some police officers occasionally used excessive and sometimes deadly force in arresting suspects and in attempting to obtain information or a confession. Retired and active duty military officers known to have committed serious human rights violations occupied or were promoted to senior positions in the Government and the TNI.⁴

And, while the latest State Department Report covering the period from 2005-2006 observed that there had been improvements in the human rights situation during the year particularly with the truce in Aceh, it also pointed out that significant problems remained.⁵ The description of the activities of the Indonesian security forces is distressingly similar to the litany of previous years:

Security forces continued to commit unlawful killings of rebels, suspected rebels, and civilians in areas of separatist activity, where most politically motivated extrajudicial killings also occurred. There was evidence that the Indonesian Armed Forces (TNI) considered anyone killed by its forces in conflict areas to be an armed rebel. The government largely failed to hold soldiers and police accountable for such killings and other serious human rights abuses in Aceh and Papua.

This is confirmed by Amnesty International's 2005 Report on Indonesia:

In NAD [Nanggroe Aceh Darussalam], the gravity and pervasiveness of human rights abuses committed by the security forces and GAM meant that virtually all aspects of life in the province were affected, even before the devastation caused by the earthquake and tsunami. Reliable figures relating to the conflict remained difficult to obtain. By September, according to official sources, 2,879 members of GAM and 662 civilians had been killed since May 2003. More than 2,000 suspected members of GAM had been arrested. The security forces conceded the difficulty in distinguishing between GAM members and the civilian population. Trials of hundreds of suspected GAM members or supporters contravened international standards for fair trial, with many suspects denied full access to lawyers and convicted on the basis of confessions reportedly extracted under torture. There were concerns that some may have been imprisoned solely on the basis of the peaceful expression of their political beliefs.⁶

⁴ U.S. State Department, "Country Reports on Human Rights Practices: Indonesia (2004)" 24 April 2005. "TNI" is an abbreviation of Tentara Nasional Indonesia, meaning the military. Also see U.S. Bill H.R. 2601, *Foreign Relations Authorization Act, Fiscal Years 2006 and 2007*, 109th Cong., 2005, Section 1015, Developments in and policy towards Indonesia: "(A) reform of the Indonesian security forces has not kept pace with democratic political reform, and that the Indonesian military is subject to inadequate civilian control and oversight, lacks budgetary transparency, and continues to emphasize an internal security role within Indonesia; (B) members of the Indonesian security forces continue to commit many serious human rights violations, including killings, torture, rape, and arbitrary detention, particularly in areas of communal and separatist conflict; and (C) the Government of Indonesia largely fails to hold soldiers and police accountable for extrajudicial killings and other serious human rights abuses, both past and present, including atrocities committed in East Timor prior to its independence from Indonesia."

⁵ US Department of State, "Country Reports on Human Rights Practices, Indonesia (2005)" 8 March 2006, online: <<http://www.state.gov/g/drl/rls/hrrpt/2005/61609.htm>>.

⁶ Amnesty International, Annual Report 2005, Indonesia.

One of the most revealing insights into the fragility of the situation in Indonesia was the murder by cyanide poisoning of Indonesia's foremost human rights advocate and thorn in the side of the military, Munir Said Thalib, *en route* a flight to the Netherlands in 2004.⁷

Sadly, this is nothing new in Indonesia. The country provides a textbook example of the direct link between impunity for atrocities going back over decades and perpetual cycles of violence. The Republic of Indonesia was born through the spilling of much blood, and some of the events of the early years of the nation are still the cause of enmity, resentment and bewilderment, most of the time because people simply do not know what really happened and why. There is also much fear, for many perpetrators are still alive and have never been held to account. Aceh is currently subdued and savouring what seems to be peace, Papua remains volatile and resentful. As with occupied East Timor, resistance to the presence of the Indonesian military and State apparatus has led to exceptionally violent and repressive measures. There are many other situations of violence and repression regularly identified as being the cause of immense public resentment and having the potential to cause social conflict in the future; these include the violent suppression of an alleged Communist uprising in Madiun in 1948 to set up an "Indonesian People's Republic", the alleged Communist coup in 1965 and the ensuing campaign of violence against suspected Communist party members including massive summary executions and arbitrary arrest and detention of thousands of persons, the massacre of Moslem demonstrators in Tanjung Priok in 1984, the massacre of villagers in Lampung in 1989, the disappearance of student activists then the killing of student demonstrators at Trisakti and Semanggi universities in 1997 and 1998 and the riots in Jakarta in May 1998. 1965 is actually a convenient cut-off date, marking one of Indonesia's earlier transitions which led to thirty-three years of repressive authoritarianism. The rule of Soeharto and his New Order can in fact be distinguished from preceding and successor regimes; it saw the entire archipelago, from Merauke to Sabang, experience organised State sponsored or tolerated violence, and massive victimisation of civilians. The complex web of serious human rights violations was made possible through the use of significant State resources including many institutions and individuals part of or linked to the civilian or military authorities. As already noted, Komnas HAM has confirmed that crimes against humanity were committed in several locations over this period. In fact, all of this suggests that during the New Order, there may have been a single widespread or systematic attack against the civilian population, varying in shape and form, changing in intensity over time, but always there and always directed against the civilian population, particularly those regarded as a threat to the regime. Unravelling such a situation is not within the capacity of ordinary courts of law, let alone in Indonesia.

Since President Soeharto fell from power in May 1998, one of the most controversial issues in Indonesia has been what to do about the nation's enormous legacy of human rights violations, and how to build a better future for Indonesia. Upholding the rule of law and ensuring that there is responsibility for gross violations of human rights are recognised as key factors in the democratisation of Indonesia. But it is not as simple as putting on a few trials and then moving on—in the years since independence, millions have lost lives or had their lives devastated by State-sponsored violence. Large numbers of persons have caused that destruction, too often believing that the interests of the State were a greater good to

⁷ The investigations were extremely difficult, with major obstruction by the military and the state intelligence agency (BIN) who are widely suspected to have been behind the murder. At the time of his death, Munir was believed to have been working on a report on military corruption. On 20 December 2005, Garuda pilot Pollycarpus Budihari Priyanto was convicted and sentenced to 14 years of imprisonment—see "Pilot jailed for activists murder" *Associated Press* (20 December 2005), online: CNN < <http://www.cnn.com/2005/WORLD/asiapcf/12/20/indonesia.pilot.ap/index.html>>. Also see "Pilot Finally Named Suspect in Munir's Murder" *Laksamana.Net* (18 March 2005); "Indonesian pilot on trial for arsenic-poisoning of Indonesian activist" *AFP* (9 August 2005); Mark Forbes, "Murder trials shapes a test for Yudhoyono" *The Age* (10 August 2005).

which the rights of the individual could be subordinated. It was only in January 2003 that Komnas HAM opened a wide-ranging investigation into the atrocities of the Soeharto era, and even that process seems to have stalled.

Indonesia's conundrum is a typical one faced by nations trying to move from repression and authoritarianism towards some sort of democracy. The question of what to do is also interlocked with the question of how to prioritise multiple pressing demands, how to address accountability when persons and institutions linked with Soeharto's New Order retain immense influence, and whether more harm than good is done by re-introducing horrors of the past into the public sphere. Even if a *bona fide* will to address these issues exists, is there the institutional capacity to deal with the huge legacy of violence and repression through law and order mechanisms? What kind of impact can holding a few unlucky scapegoats accountable have in a situation where generations of soldiers, policemen and State officials have followed institutionalised norms of conduct and been richly rewarded for it? In Indonesia's case, the situation is rendered still more complex because many of these atrocities are closely tied to territorial integrity and the question of what it means to be a national of the Republic of Indonesia. In other words, they are linked to the fundamental issue of national identity.

The debate on what to do about gross violations of human rights has been held hostage to the powerful forces that dominate Indonesia.⁸ The debate is dominated by three groupings: progressives seeking to reform Indonesia through rule of law and to promote human rights protection through accountability (usually linked to civil society and N.G.Os), the "old New Order" which is linked to Soeharto and his regime (usually the various organs of State such as the TNI and police), and victims of human rights violations (who may be torn between wanting to forget the horrors, wanting justice, revenge or reparation and wanting these things never to happen again). One of the big issues is where to draw the line temporally.⁹ As a result, there is often deadlock. But this is not to deny that there has been a lot of activity in this area, particularly law-making.¹⁰ However, steps forward are too often accompanied by as many steps backward. Institutions and the individuals within them remain, at the core, unreformed.

The purpose of this study is to examine some of the ongoing epic struggle for accountability in Indonesia. This is done by reference to the law and the legal process and reaching from the present back into the Indonesia of the past. This exercise has the effect of highlighting some of the immense challenges faced in developing and implementing coherent strategies for dealing with violent historical legacies in order to create better lives for Indonesians of the future.

The structure of this paper is as follows. An introduction to the basic legal regime in Indonesia sets the framework for my first area of focus—a detailed examination of the special schemes that have been created to deal with gross violations of human rights of the present and future. These are Komnas HAM and four permanent human rights courts. Special "koneksitas" courts have also come to be used for what are actually human rights violations,

⁸ See Kasim *et al.*, "Tutup Buku Dengan 'Transitional Justice'?" (Indonesia: ELSAM), 2004), for a close study of the "transitional justice" paradigm in Indonesia between 1999 and 2004. Note, however, that Indonesia has been through several "transitions", for example, from being a Dutch colony to an independent nation and from the Old Order under Soekarno to the New Order under Soeharto, and that democracy is not necessarily the direction in which this transition is heading.

⁹ Historians such as Asvi Marwan Adam and Henk Schulte Nordholt have pointed out that one can trace the record of extreme violence back to the thirteenth century and there were numerous major atrocities at the hands of European adventurers or colonisers in the islands of the East Indies. Others stress that the Japanese occupation has never been properly examined. Some want the cut-off date to be at the founding of the Republic of Indonesia and others want the cut-off date to be at the start of Soekarno's Guided Democracy and yet others want it to be 1 October 1965 with Soeharto's coming into power on the back of the so-called G30S movement.

¹⁰ On the role of justice in the transition in Indonesia, see Matthew Draper, "Justice as a Building Block of Democracy in Transitional Societies: The Case of Indonesia" (2002) 40 Colum. J. of Transnat'l L. 391.

but which involve both military personnel and civilians—these will also be examined. I will then consider some crucial substantive legal issues, such as the compatibility of the crimes as defined in the legislation with internationally recognised definitions. My second area of focus is the framework for dealing with human rights violations of the past, *i.e.* those committed prior to the adoption of the current legislation. The *ad hoc* human rights courts as well as the truth and reconciliation commissions, in Indonesia itself and between Indonesia and East Timor, will be examined here. I will also consider some of the most pressing substantive legal issues arising from the investigation and prosecution of historic atrocities. One such issue is the problem of retroactivity of laws; another is the use of “cookie-cutter” definitions of crimes going backwards in time.

This leads to the inevitable conclusion that the flurry of “transitional justice” activity has had little impact on changing society and taking Indonesia towards rule of law and democracy. Without genuine public support and major strategic reform of institutions such as the military, the police, the judiciary and the Attorney General’s Office, the efforts at securing accountability are unlikely to make Indonesia a better and safer place.

II. PRELIMINARY ISSUES

The current Constitution of Indonesia was first drafted in 1945 as a transitional measure, but it was only amended after the fall of Soeharto. The *Majlis Permusyawaratan Rakyat* (People’s Consultative Assembly or MPR) has amended the Constitution four times: in October 1999, August 2000, November 2001 and August 2002.¹¹ In August 2000, the Constitution was amended to strengthen the protection of human rights. New Articles 28 A-J guarantee, *inter alia*, the right to legal protection and to fair and equal treatment before the law; the right to protection of private life, family, dignity and property; the right to life; freedom from torture; freedom of thought and conscience; and freedom of religion. A more controversial prohibition on retroactive application of legislation was also included. New Article 28I(1) confirms that the right not to be prosecuted on the basis of retroactive laws is one that cannot be diminished under any circumstances. The problems caused by this article are discussed later in this paper.

Under the amended Article 20, the *Dewan Perwakilan Rakyat* (People’s Representative Assembly or DPR) has law-making power, with the right to present bills for approval to the DPR being granted to the President and all members of the DPR. Ratification by the President of legislation approved by the DPR is still required, but Presidential refusal to do so can be overridden by a provision that such bills will pass into law after 30 days. Importantly, given the lengths of tenure enjoyed by Soekarno and then Soeharto, the amended Article 7 limits the terms of office of Presidents to two five-year terms. The MPR no longer has the power to appoint the President and his/her deputy. The new Article 6(A), adopted in the third amendment to the Constitution, provides that the President and his/her deputy are to be appointed from pairs of candidates chosen by political parties; winners must score more than 50% of the overall vote, with at least 20% coming from at least half of the provinces of Indonesia. The MPR no longer has a role to play in setting the broad guidelines of State policy—setting the “*Garis-garis Besar Haluan Negara*” is now the sole prerogative of the Executive. An anomalous situation has been created through the changes to Article 1 (“*sovereignty of the people is to be exercised in accordance with the Constitution*”) and Article 4 (the President still “*holds the power of government*”); Lindsey has pointed out that as a result, sovereignty of the people “seems to float with no locus”.¹²

¹¹ For a concise overview, see Staff, Department of Politics and Social Change, Center for Strategic and International Studies, “Indonesia’s New Constitution: A Peaceful Reform” (2002) 20:3, *The Indonesian Quarterly* 252. Also see Tim Lindsey, “Indonesian Constitutional Reform: Muddling Towards Democracy” (2002) *Singapore Journal of International and Comparative Law* 244.

¹² Lindsey, *ibid.* at 262.

Formal justice in Indonesia is administered through “General Courts” comprising District Courts, High Courts and the Supreme Court. In addition, there are the Military Courts, Administrative Courts, Religious Courts and a Commercial Court. The Supreme Court is the highest judicial tribunal and the final court of appeal in Indonesia. The Constitutional Court, established by the third Constitutional amendment in November 2001, is empowered by the amended Constitution itself to review the constitutionality of laws (*i.e.*, legislation passed by the DPR), determine jurisdictional disputes between key state institutions, decide on motions for the dissolution of political parties and resolve disputed election results. It may also be called upon to examine motions for the dismissal of the President or Vice-President. The Attorney General has overall responsibility for criminal prosecutions in Indonesia, and heads the Prosecution Service comprising the Attorney General’s Office (*Kejaksaan Agung*), the High Public Prosecution Office and over 300 District Prosecutors offices.¹³ He is a member of the Cabinet and reports directly to the President.

In a normal situation, law and order in Indonesia are regulated by the *Kitab Undang-Undang Hukum Pidana* (the Penal Code, hereafter “KUHP”), which is based on the Dutch *Wetboek van Strafrecht voor Indonesia 1915* although it has been subjected to numerous revisions and amendments. The KUHP governs criminal acts committed by civilians, as well as the Police (since their separation from the TNI in 1999), within the territory of the Republic of Indonesia.¹⁴ It allows for the exercise of extraterritorial jurisdiction, limited to crimes such as those against the security of the state, forgery of money and debt certificates, piracy and air hijacking. The KUHP also applies to any person guilty of a punishable act outside Indonesia on board an Indonesian vessel or aircraft. The exceptions are set out in Articles 4 and 5, none of which includes provision for exercise of jurisdiction over genocide, war crimes, torture or crimes against humanity. In 1981, a new code of penal procedure, *Kitab Undang-Undang Acara Pidana*, (hereafter “KUHAP”) was adopted.

Specialised laws and mechanisms have been developed for out-of-the-ordinary situations involving gross violations of human rights.¹⁵ These are fully controlled by Indonesians. One reason for this is jealously guarded State sovereignty, another is that Indonesia has an adequate infrastructure and a significant number of educated and skilled personnel, particularly those from the legal and human rights community, that can be called upon.¹⁶

Serving members of the armed forces are ordinarily subject to the *Kitab Undang-undang Hukum Disiplin Tentara* (Military Disciplinary Law Book or “KUHDT”)

¹³ See David Cohen, *Intended to Fail: The Trial Before the Ad Hoc Human Rights Court in Indonesia* ed. by International Center for Transitional Justice, 49-50, online: <http://ist-socrates.berkeley.edu/~warcrime/East_Timor_and_Indonesia/Reports/IntendedtoFail.pdf> for an insight into how this office actually works.

¹⁴ The KUHP contains many provisions on the unlawful taking of life (murder, premeditated murder, manslaughter *etc.*), for harm against the person (assault, kidnapping, rape) and damage to property. Arbitrary arrest and detention is criminalised, as is abuse of authority and other crimes committed by State officials. It also contains limited and outdated provisions on sexual assault. There are no provisions on international crimes.

¹⁵ These laws and mechanisms are the subject of the following sections of this paper.

¹⁶ This is not to idealise the abilities of the N.G.O. community nor to say there are no capacity problems in the judiciary, prosecution, police and other organs involved in the justice process. There are many very serious problems, as the reports of local N.G.Os such as ELSAM, and international organisations such as TAPOL, Human Rights Watch, Amnesty International and Human Rights First make clear. The point being made here is that Indonesia is in a different situation from, *e.g.* East Timor, where the devastation of the infrastructure and non-existence of ready trained and qualified locals necessitated international involvement during and after the United Nations’ administration of the territory. Such foreign involvement continues to this day.

and *Kitab Undang-undang Hukum Pidana Militer* (Military Criminal Law Book or “KUHPM”).¹⁷ Each branch of the armed forces has its own military courts that are structured along identical lines of first instance district military courts (*Pengadilan Tentara*), appellate high military courts (*Pengadilan Tentara Tinggi*) and a supreme military court (*Pengadilan Tentara Agung*), as well as military sessions of the Supreme Court.¹⁸ The primary legislation is Law Number 5 of 1950. There is also an extraordinary military court (*Makhamah Militer Luar Biasa*), the legal basis for which lies in a 1963 Presidential decree, with original and exclusive jurisdiction to try any person—civilian or military—designated by the President. Even in the case of a civilian, all the judges and prosecutors are military personnel.¹⁹ Military courts now fall, ultimately, under civilian jurisdiction, for the highest appeal court in this system is the Supreme Court. Finally, there is a special procedure for dealing with crimes that are committed by a combination of military and civilian actors; they are tried by a mixed panel of civilian and military judges (known as *Koneksitas* courts) with power for the Chief Justice of the Supreme Court to refer the case to a military court.²⁰

The state of the Indonesian judiciary is one of the major obstacles towards establishing Rule of Law²¹ and democracy in Indonesia. According to United Nations Special Rapporteur, Param Cumaraswamy in 2002, corruption in the system is endemic, and that Indonesia’s legal system was among the worst he had seen.²² A diagnostic study of corruption in Indonesia carried out by the Partnership for Governance Reform in Indonesia found

¹⁷ The Military Court (*Makhamah Militer*) only deals with serious criminal offences, such as serious assault, killings and theft as set out in KUPHM, which mirrors the relevant provisions of the civilian Criminal Code. The taking of life is covered by several articles such as Articles 336, 338 and 351; insubordination by Article 102; and abuse of authority by Article 12. See generally Capt. Djaelani, “The Military Law System in Indonesia” (1973) 59 *Military Law Review* 177. One such trial followed the massacre of civilians at the Santa Cruz cemetery in Dili, East Timor, on 12 November 1991. Between 29 May 1992 and 6 June 1992, 10 low-ranking members of the security personnel involved in the events of 12 November 1991 were tried and convicted before Military Courts in Denpasar, Bali. Sentences ranged from 8 to 18 months and all were dishonourably discharged. See “East Timor: The Courts-Martial” *Asia Watch* 4: 16 (23 June 1992); “Remembering History in East Timor: The Trial of Xanana Gusmo and a Follow-up to the Dili Massacre” *Asia Watch* 5:8 (8 April 1993).

¹⁸ See Eddy Darman & Robert N. Hornick, “Indonesia’s Formal Legal System: An Introduction” (1972) *Am.J.Comp.L.* 492 at 515-517. There are also joint-force courts known as *Makhamah Bersama Angkatan Bersenjata* or Joint Military Courts.

¹⁹ *Ibid* at 492, 515-517.

²⁰ This is further to *Law Number 35 of 1999 amending Law Number 14 of 1970 on Judicial Power (UU 35/1999, Perubahan Atas Undang-Undang Nomor 14 Tahun 1970 Tentang Ketentuan-Ketentuan Pokok Kekuasaan Kehakiman)*.

²¹ My understanding of Rule of Law is as follows. Like “justice”, it is a fluid term and often means different things to different people. From the lawyer’s perspective, Rule of Law occurs where all members of a society are governed by fair and just laws that are known to all rather than by the arbitrary decisions of rulers (Rule of Man). These laws are non-discriminatory and are equally applied to all. Citizens live by these rules and know the consequences of deviance. Rule of Law is fundamentally linked to liberal democracy, encompassing the notion of democratically elected rulers being bound by the laws of the land and acting to preserve and protect the rights of individuals enshrined in those laws. A state governed by Rule of Law holds its executive organs subject to independent review and, like individuals, its officials are accountable before the courts. The central enforcers of this legal system are the courts, prosecutors, and the police, and in this the presence of impartial and independent judges is crucial. A simplistic definition of Rule of Law would be that it is the opposite of anarchy, impunity and lawlessness. Sometimes referred to as “*rechtstaat*” or “*Etat de Droit*”, Rule of Law is a concept that is essential to both civil law and common law systems.

²² “U.N. legal expert ends controversial Jakarta trip” *Reuters* (23 July 2002); *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, Dato’ Param Cumaraswamy, submitted in accordance with UN Commission on Human Rights Resolution 2002/43, Report on Mission to Indonesia, 15-24 July 2002, UN Doc. E/CN.4/2003/65/Add.2 (13 January 2003).

that the judiciary is regarded by the public as the third most corrupt institute, coming in behind the traffic police and customs.²³

III. HUMAN RIGHTS VIOLATIONS OF THE PRESENT AND FUTURE

The blueprint for strengthened human rights protections for the present and future in post-Soeharto Indonesia is contained in the Law on Human Rights.²⁴ Passed into law on 23 September 1999 (just over a year after the fall of Soeharto), Law 39/1999 explicitly draws on the nation's legacy of gross violations of human rights and injustice and has been heavily influenced by the human rights movement. In fact, the law reads like a charter of rights and responsibilities of citizens and the State.

A. Komnas HAM

Established by President Soeharto through Presidential Decree Number 50 of 1993, Komnas HAM was widely regarded as a public relations gimmick to divert attention from the intense international pressure mounted on the Indonesian government in the wake of the 1991 Santa Cruz massacre in East Timor, where security forces shot and killed some 200 demonstrators. The decree was issued one week before the World Conference on Human Rights in Vienna and shortly before the Consultative Group for Indonesia (CGI) meeting. Today, the institution is revamped and technically independent, but continues to have strong military and police representation. It has had a patchy record ranging from inexplicable failure to act in some very serious situations (such as the 2001 massacre at PT Bumi Flora in Aceh) to the issuing of ineffective and weak reports (Maluku) to making robust recommendations for prosecution (*e.g.*, in the cases of East Timor in 2001, and Abepura in Papua in 2002). Because of its structural linkage to the regime, Komnas HAM has always suffered from a perceived lack of independence from the executive.²⁵ Many of its members have, and continue to have, close links to the establishment, and even "ties to prior human rights violations by the Soeharto regime".²⁶ However, under new leadership, it is showing promising signs of fulfilling more of its promise although the lack of progress in the Soeharto-era investigations suggests continuing internal resistance.

In the period 1999-2004, there were thirteen official investigations into gross human rights violations, ten of which were conducted by Komnas HAM, the others by way of commissions of inquiry appointed by the President or Parliament.²⁷ Komnas HAM remains a fully domestic institution, but the Law on Human Rights enhanced its role in investigating human rights violations. The commission is tasked with the development, promotion and protection of human rights through study, research, dissemination of information, monitoring and mediation of disputes. Under Article 89(3) of the Law on Human Rights, it may monitor the implementation of human rights and compile reports, investigate and examine

²³ Partnership for Governance Reform, Finding E1.2, Final Report, February 2002. Note that Transparency International's Global Corruption Report for 2005 places Indonesia as the 133rd most corrupt country (out of 146 countries), see Indonesia Country Report online at <http://www.transparency.org/publications/gcr/download_gcr/download_gcr_2005>.

²⁴ *Law on Human Rights (Undang-Undang 39/1999 tentang Hak Asasi Manusia)*, 23 September 1999, Supplement to the Official Gazette No.3886.

²⁵ This has however, never deterred complaints coming in. In 1996, it received 1,200 complaints. This has risen by 10-20% each year since. Didiek Supriyanto, ed., *Lima Tahun Komnas Ham: Catatan Wartawan* (Jakarta: Forum Akal Sehat, INPI-Pact, 1999) at 3.

²⁶ Monika Talwar, "Indonesia's National Human Rights Commission: A Step in the Right Direction?" (1997) 4(2) Human Rights Brief, online: <<http://www.wcl.american.edu/hrbrief/v4i2/indo42.htm>>.

²⁷ See *supra* note 6 at 10-12 for a summary table, 20 for a summary of the cases that went to trial, and the entire publication for a comprehensive study of the struggle for accountability in post-Soeharto Indonesia.

incidents which by their nature or scope may constitute human rights violations, summon complainants, victims and accused to obtain information, visit crime scenes and other relevant sites. With the approval of the court, it may provide input when the court is hearing cases involving human rights. It is also entitled to make recommendations to the parties for resolving conflict through the courts and to submit recommendations concerning cases of human rights violations to the Government as well as to the *Dewan Perwakilan Rakyat* (House of Representatives, or DPR).

Since receiving enlarged powers to make recommendations for the prosecution of gross violations of human rights, Komnas HAM has made several such recommendations for various parts of Indonesia. One such case was that of Abepura in Papua/West Irian, which concerned police attacks on civilians (this case was tried by the one and only functioning regular Human Rights Court, in Makassar, see below). Recommendations that the crimes in Wasior in 2001 and Wamena in 2003 be prosecuted as crimes against humanity have yet to be followed. Another case where human rights violations were found to have been committed was in relation to a military operation launched by the TNI against one of the groups involved in internal armed conflict in Maluku (Kebun Cengkih).²⁸

B. Four Permanent Human Rights Courts

Article 104 of the Law on Human Rights envisaged the establishment of a special court within four years *i.e.* by 2003, to try cases of gross violations of human rights. The Law on Human Rights Courts was passed to give effect to this vision in November 2000 (the substantive content is discussed in Part III (D) below).²⁹ This law was heavily influenced by the East Timor situation and the pressure from the international community to investigate and prosecute those responsible for the murderous mayhem committed in the course of the half-island's breakaway from Indonesia in 1999. In addition to the exercise of territorial jurisdiction, Article 5 allows for the Human Rights Courts to take jurisdiction over gross violations of human rights "perpetrated by an Indonesian citizen outside the territorial boundaries of the Republic of Indonesia", in other words using the active personality principle of jurisdiction.³⁰ The jurisdiction of the court is divided amongst four new courts

²⁸ On 25 June 2001, Komnas HAM approved the setting up of a fact-finding team to investigate a TNI attack on a medical centre run by the Laskar Jihad at Kebun Cengkih in Ambon. On 14 June 2001, a joint battalion known as Yon Gab, along with infantry battalions 408 and 407 of the Central Java Military Command, were involved in a "sweeping" raid on Laskar Jihad camps in the predominantly Moslem areas of Galunggung and Kebon Cengkih, Ambon. It was alleged that during the assault the military fired on patients and paramedics at a Laskar Jihad clinic, killing at least 17. Some 30 others, including members of the battalion, were injured during three consecutive days of gunfights with the group. On 5 September 2001, the team's head reported that Yon Gab had committed a gross violation of human rights. More interesting is the finding that Yon Gab had attacked the clinic and its occupants in violation of the "Geneva Conventions". The team reported to Komnas HAM on 23 November 2001 with findings that there had been violations of human rights including extrajudicial killings and torture. See Komnas HAM decision No. 030/KOMNAS HAM/VII/2001; Komnas HAM Decision No. SK 030/KOMNAS HAM/VII/2001, 12 July 2001. Komnas HAM, Laporan Kegiatan Sub Komisi Pemantauan Pelaksanaan Hak Asasi Manusia, online: <http://www.komnasham.or.id/berita/sub_komisi_pemantauan.html>. See also "Human rights team to visit Ambon" Transcript *ABC News/Radio Australia* (26 June 2001); "Indonesia: The Search for Truth in Maluku" *International Crisis Group* (8 February 2002); "Yon Gab TNI Lakukan Kekerasan Di Klinik Laskar Jihad Di Ambon" *Media Indonesia Online* (29 June 2001).

²⁹ Law No. 26/2000 on Human Rights Courts (*Undang-Undang Republik Indonesia Nomor 26 Tahun 2000 Tentang Pengadilan Hak Asasi Manusia*), 23 November 2000, published in the Official Gazette of the Republic of Indonesia Year 2000 No. 208 (hereafter "Law on Human Rights Courts"). See Amnesty International, *Comments on the Law on Human Rights Courts (Law No.26/2000)* (9 February 2001, AI Index: ASA 21/005/2001).

³⁰ The official Commentary to the law observes that this is to "protect" Indonesian nationals who commit gross violations of human rights outside the national territory, in the sense that they will nevertheless be subject to the law of their country of nationality.

in Makassar, Surabaya, Jakarta and Medan, but to date only one court (Makassar) has been established; they should have all been established in 2003.³¹ Like all other judicial mechanisms in Indonesia, the Human Rights Courts are strictly domestic enterprises—there is no international participation in the investigation process, the prosecution, the defence or on the bench.

For over a year after its much delayed establishment, the Human Rights Court in Makassar was engaged in trying its first case. The Abepura case came from Papua/West Irian, where there is a long-running but low-intensity conflict underway. This case was recommended for prosecution as a crime against humanity by Komnas HAM, who identified twenty-five police officers as suitable candidates for prosecution under the Law on Human Rights Courts.³² Komnas HAM made other recommendations for crimes against humanity prosecutions in the province: in 2001 in Wasior, police allegedly killed twelve civilians following an attack on a police post that left five policemen dead, and in Wamena in 2003, dozens of residents of the Central Highlands area of Kuyowage were allegedly tortured by unknown parties during a military operation that followed the April 2003 break-in at the Wamena armoury.³³ The Commission found that soldiers and police had committed gross human rights violations, including murder, evictions, and torture. None of them have been referred to the court for trial by the Attorney General's Office.

The following details of the alleged events surrounding the Abepura case are substantially derived from Human Rights Watch's report, *Indonesia: Violence and Political Impasse in Papua*.³⁴ In the early hours of 7 December 2000, unknown persons attacked a police post near the market in Abepura, killing two policemen and a security guard, and set fire to shops at the Abepura market. In response, a group of riot police (Brimob) stormed the Ninmin dormitory and conducted similar operations in four other student residential areas in the Jayapura area, rounding up and brutalising people as they went, often in broad daylight. The detained students were kept at various police stations in Jayapura. Within twenty-four hours of the initial attack on the police station, three highland students had been killed, and one hundred individuals had been detained, dozens of whom were badly beaten and tortured. A Swiss journalist, Oswald Iten, witnessed police officers beating detainees who were in police custody in Jayapura for an alleged visa offence.³⁵

Komnas HAM set up a commission of inquiry, which reported on 20 April 2001 after a difficult investigation.³⁶ The factual findings confirmed those alleged by Human Rights Watch above, and that torture, summary executions, assault on the basis of gender, race and

³¹ Under Article 104 of the Law on Human Rights, the courts should have been established within 4 years of the date of passing of the law, being 23 September 1999. Under Article 45 of the Law on Human Rights Courts: "The judicial territory of Human Rights Courts as referred to in clause (1) shall correspond to the judicial territory of the District Court in: (a) Central Jakarta, which encompasses Greater Jakarta, and the Provinces of West Java, Banten, South Sumatra, Lampung, Bengkulu, West Kalimantan, and Central Kalimantan; (b) Surabaya, which encompasses the Provinces of East Java, Central Java, Special District of Yogyakarta, Bali, South Kalimantan, East Kalimantan, West Nusa Tenggara, and East Nusa Tenggara; (c) Makassar, which encompasses the Provinces of South Sulawesi, Southeast Sulawesi, Central Sulawesi, North Sulawesi, Maluku, North Maluku, and Irian Jaya; (d) Medan, which encompasses the Provinces of North Sumatera, the Special District of Aceh, Riau, Jambi, and West Sumatera."

³² Komnas HAM reported on 20 April 2001; see Ringkasan Eksekutif, Komisi Penyelidikan Hak Asasi Manusia, (KPP HAM) Papua/Irian Jaya, 8 Mei 2001.

³³ U.S. State Department, "Country Reports on Human Rights Practices, Indonesia (2004)" 28 February 2005, online: <<http://www.state.gov/g/drl/rls/hrrpt/2004/41586.htm>>.

³⁴ "The Abepura Case and Its Aftermath" (Chapter 5) in "Indonesia: Violence and Political Impasse in Papua" (July 2001) Vol. 13.2(c) *Human Rights Watch*, online: Human Rights Watch <<http://www.hrw.org/reports/2001/papua/index.htm#TopOfPage>>.

³⁵ Oswald Iten "Swiss Journalist witnesses torture in West Papua jail" *Neue Zürcher Zeitung* (22 December 2000). The fact that Jayapura police officers were openly assaulting detainees and explaining their actions to the Swiss journalist is indicative of the extent of the problem of impunity in Papua: they didn't see anything wrong with torture or cruel inhumane and degrading treatment of detainees.

³⁶ Komisi Penyelidikan Hak Asasi Manusia Papua, *supra* note 32.

religion, arbitrary detention and violation of property rights had been committed in Abepura as part of a systematic and widespread attack that predated the incident at hand. A total of twenty-five Police and BRIMOB (Riot Police) officers were recommended for investigation and prosecution by the Attorney General under the Law on Human Rights Courts in the confidential report. The national chief of police publicly criticised the commission, alleging that it had prejudged the case.³⁷

But with persistent N.G.O. pressure, this case became the first ever to be tried at a permanent human rights court under the Law on Human Rights Courts. On 24 April 2004, the Human Rights Court at Makassar began the trial of two of the recommended twenty-five individuals, Brigadier Johnny Wainal Usman and Kombes Daud Sihombing, for crimes against humanity. N.G.Os complained of the inability of the court to relate to the events in Papua or understand the socio-cultural aspects of the Papuan people, *i.e.* the reasons for the tensions between the indigenous population and the security forces.³⁸ They pointed out that there had been no field visits due to the lack of funding, and that witness protection measures were unsatisfactory.³⁹ This case saw the rejection of claims for compensation on the basis of Articles 98-101 of KUHAP and a class action claim under Supreme Court Regulation No.1 of 2003, although there remained the standard victims' claim for compensation accompanying the criminal complaint (fifty individuals are claiming 1.5-2 billion Rupiah). The issue of reparations is examined later in this paper in Part III.D.2(b). On 8 and 9 September 2005, the accused were acquitted of the crimes against humanity charges laid against them, and with that the claim of compensation filed by the victims was also dismissed.⁴⁰

C. *Koneksitas Courts*

Crimes committed jointly by military and civilian actors are tried by a mixed panel of civilian and military judges (*Koneksitas* court). Two judges, including the President, are civilian judges and one is a military judge. There is a right of appeal to the Supreme Court. The Chief Justice of the Supreme Court retains the power to refer the matter for trial before a military court.⁴¹

One such trial was the first trial of gross human rights abuses in Aceh. It involved one civilian and twenty-four soldiers from one of the TNI's territorial commands in Aceh, and from the army's strategic command, Kostrad (totalling 1 captain, 2 lieutenants, twenty-one non-commissioned officers and privates). All the accused were convicted of taking part in a July 1999 attack on a religious school run by Teungku Bantaqiah in Beutong Ateuh, leading to fifty-six civilian fatalities. The trial was welcomed for being a first, but condemned for being seriously flawed.⁴² N.G.Os had argued against a *koneksitas* trial, on grounds that the massacre had been part of a strategic military operation in Aceh, with the purpose of

³⁷ Antara, "Polri Protes KPP HAM Abepura", 24 April 2001.

³⁸ International N.G.O. Forum on Indonesian Development, *Written Statement to the 61st Session of the UN Commission on Human Rights*, March-April 2005.

³⁹ *Ibid.*

⁴⁰ See Amnesty International, *Indonesia: Killing and torture acquittals demonstrate failure of justice system* (8 September 2005), AI Index: ASA 21/018/2005).

⁴¹ *Law Number 35 of 1999 amending Law Number 14 of 1970 on Judicial Power (Perubahan Atas Undang-Undang Nomor 14 Tahun 1970 Tentang Ketentuan-Ketentuan Pokok Kekuasaan Kehakiman)*, 31 August 1999, Supplement to the Official Gazette, No. 3879.

⁴² See "Bantaqiah trial: an examination of the indictment by TAPOL" *TAPOL Report* (25 April 2000) [TAPOL Report, 25 April 2000]; "Human Rights Trial Gets Underway In Aceh Province" *TAPOL Report* (19 April 2000) online: ABC <<http://www.abc.net.au/ra/asiapac/archive/2000/apr/raap-20apr2000-1.htm>>; "Indonesia: Aceh Trial — Amnesty International and Human Rights Watch Call for Full Accountability" *Human Rights Watch* (17 May 2000) [Amnesty International & Human Rights Watch]; George Aglionby, "Lower Ranks Take Blame For Killing", *Guardian Unlimited* (18 May 2000).

intimidating and terrorising civilians.⁴³ It therefore had to be treated as a crime against humanity and tried at a Human Rights Court.⁴⁴ The then-Attorney General, Marzuki Darusman, spoke publicly of his preference for a trial before a Human Rights Court.⁴⁵ The then-Secretary General of Komnas HAM, Asmara Nababan, agreed that a Human Rights Court would be more appropriate for being more impartial.⁴⁶

After five postponements, the trial began on 19 April 2000 before a *koneksitas* court comprising of two military officers and three civilians.⁴⁷ An earlier Presidential commission of inquiry had named eight individuals including two colonels, two lieutenant colonels, one major and three captains. By the time the case went to trial, twenty-four low-ranking military personnel were accused, along with one civilian.⁴⁸ Given that the indictment itself described the direct involvement of three lieutenant-colonels in the military operation, it was striking that only their subordinates were on trial.⁴⁹ At trial, soldiers testified that they had been ordered by their commanding officer to “school” the youth, a term the soldiers said was used by local commanders as a euphemism for killing a detainee; one of the officers identified as a suspect by earlier investigations, appeared instead as a witness and admitted to having ordered troops to bring back Teungku Bantaqiah, dead or alive.⁵⁰ The soldiers insisted they opened fire after being attacked by the followers of the Muslim preacher and alleged separatist leader, Teungku Bantaqiah. But no weapons were recovered and eye witnesses said the troops shot the victims in cold blood at point-blank range, forced other villagers to bury the bodies in mass graves and set fire to several houses in the village.⁵¹

⁴³ “Seeking justice in Aceh still has a long way to go” *TAPOL Report* (13 April 2000).

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ “Human Rights Trial Gets Underway In Aceh Province”, *supra* note 42.

⁴⁸ *TAPOL Report* 25 April 2000, *supra* note 42.

⁴⁹ The factual allegations in the indictment can be summarized as follows: The operation mounted against the religious school run by Teungku Bantaqiah on 23 July 1999 took place on the orders of Lieutenant-Colonel Syafnil Armen who was commander of the 011/Lilawangsa district military command in North Aceh. Syafnil Armen had obtained information to the effect that Teungku Bantaqiah and his followers were in possession of one hundred firearms which had been hidden in the grounds of the school premises and that the school had a force of 300 men. Acting on the basis of this information, Lieutenant-Colonel Syafnil Armen sent a cable on 15 July 1999 to five army units which ordered that an operation be launched “to search for, find, approach and arrest leaders of the GPK (the term used for the Free Aceh Movement) and sympathisers, alive or dead”. Of these five officers, two were commanders of district territorial commands, two were commanders of Kostrad air-borne units and one was his own intelligence officer, Lieutenant-Colonel Sudjono. On the basis of this order, a joint force of 215 men was set up under the command of Lieutenant-Colonel Heronimus Guru, commander of the 328 Kostrad infantry battalion based in Cilodong, West Java who acted as the field commander during the operation, while Lieutenant-Colonel Sudjono, intelligence chief of the 011/Lilawangsa district command was appointed to supervise the operation and lead the way to the site. The section of the joint force under Lieutenant-Colonel Heronimus Guru was divided into two teams; one was charged to capture and overpower the victims while the other provided the back-up. The first team was under orders to arrest the targets alive or dead. The back-up team was under the command of Major (Infantry) Endi whose task was to protect the team responsible for capturing the victims. All derived from *TAPOL Report*, 25 April 2000, *supra* note 42.

⁵⁰ Amnesty International & Human Rights Watch, *supra* note 42; see “Landmark Trial Finds Military Guilty Of Human Rights Abuses In Aceh” (17/05/2000), online: ABC <<http://www.abc.net.au/ra/asiapac/archive/2000/may/raap-18may2000-1.htm>>: “Judge Ruslan also commented on the lack of remorse shown by the twenty-four soldiers and one civilian who slaughtered religious leader Tengku Bantaqiah and his followers last year in West Aceh.... It was really surprising looking at these soldiers they didn’t have any regrets on their faces. They didn’t look like they really regretted that they’ve committed these murders, they think that they were not going to be served, or sentenced for the time of years they are going to be serving. They were even singing when they were held in their cells after the court.... They were mostly singing Indonesian songs like nationalism Indonesian songs.”

⁵¹ “Lower Ranks Take Blame For Killing”, *supra* note 42.

On 17 May 2000, all twenty-five accused were convicted and sentenced to verdicts ranging from eight and a half years to ten years.⁵² Recognising the significance of this first trial of gross human rights abuses in Aceh, Amnesty International and Human Rights Watch nevertheless expressed serious misgivings about the trial process and the absence of military commanders among the defendants.⁵³ The organisations emphasised the government's failure to prosecute commanding officers and the absence of key witnesses, such as a Lieutenant Colonel with a key role who went missing and victims who were eyewitnesses.⁵⁴ One such witness was the younger of Teungku Bantaqiah's two wives, who gave detailed accounts to the media.⁵⁵ She was reported in the local media on 30 April 2000 as saying that she wanted to testify but had not been summoned; she later fled, seeking protection after threats were made.⁵⁶

D. Substantive Legal Issues

1. Subject matter jurisdiction

There are just two categories of crime that may be prosecuted as gross violations of human rights under Indonesian law: genocide and crimes against humanity. Indonesia has therefore chosen not to enable domestic enforcement of international humanitarian law, despite the fact that the Geneva Conventions of 1949 have long been incorporated into Indonesian law (although grave breaches have never been criminalised).⁵⁷ It is no accident that Law on Human Rights Courts avoids dealing with Indonesia's most pressing human rights violation—war crimes in internal armed conflict.

Also absent is a stand-alone provision criminalising torture. There exist several options for dealing with maltreatment in domestic law,⁵⁸ but there is no provision on torture itself, despite the fact that Indonesia is party to the *Convention against Torture, Cruel Inhuman and Degrading Treatment*.⁵⁹ It is only where torture is committed as part of a "broad or systematic direct attack on the civilian population" that it may be prosecuted as a crime

⁵² Amnesty International & Human Rights Watch, *supra* note 42.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ Lindsay Murdoch, "The enemy within: Shoot first ... Indonesian troops on the move in Aceh", *Sydney Morning Herald* (14 August 1999).

⁵⁶ Amnesty International & Human Rights Watch, *supra* note 42.

⁵⁷ See Law 59/1958 *Concerning the Ratification by the Republic of Indonesia of all the Geneva Conventions of 12 August 1949* (UU 59/1958, *Ikut Serta Negara Republik Indonesia Dalam Seluruh Kompensi Jenewa Tanggal 12 Agustus 1949*), 30 September 1958, Official Gazette including supplement 1958 which has been republished.

⁵⁸ Article 422 criminalises forced confessions or information by an official in a criminal case. Under Article 427, any official, who in the exercise of his official duties, after recognising that a person has been unlawfully deprived of his liberty, with deliberate intent omits to give instant notice thereof to an official charged with the tracing of punishable offences is liable to a maximum of three months imprisonment or a fine. Maltreatment, defined as intentional injury to the health, is governed by Chapter XX of KUHP. For example, Article 351 renders the person who maltreats another to maximum imprisonment of two years and eight months or a fine, if it results in serious physical injury to maximum five years imprisonment and if death results, to seven years. Serious maltreatment committed with premeditation is punishable by maximum imprisonment of twelve years. Rape is prohibited under Article 285, and carries a maximum penalty of twelve years imprisonment.

⁵⁹ Indonesia signed the Convention against Torture on 23 October 1985, but only ratified it on 28 October 1998. Since 18 August 2000, torture has been prohibited under Article 28(g) of the Constitution, and under Article 4 of Law 39/1999 on Human Rights. But it has yet to be criminalised in domestic law. Also see *Conclusions and Recommendations Of The Committee Against Torture: Indonesia*, UN OHCHROR, 27 Sess., UN Doc. CAT/C/27/Concl.3 (2001). For a comprehensive study of the issue of torture and reparation for torture in Indonesia, see REDRESS, "A Survey of Law and Practice in 30 Selected Countries (Indonesia Country Report)", online: REDRESS <http://www.redress.org/country_indonesia.html>. Note also that torture is a grave breach of the Geneva Conventions 1949, to which Indonesia is a party. See *infra* note 60.

against humanity. It may also be covered by the genocide prohibition. A quick perusal of the reports of Amnesty International and Human Rights Watch reveals there has been, and continues to be, a serious problem with severe maltreatment amounting to torture in the custody of State officials. This seems to be a rule that is very well honoured in the breach. Reluctance to prosecute State officials for a practice that is so common that it could be seen as condoned by the State, probably explains the selective approach on torture. To put such persons on trial is tantamount to putting the State on trial. Such trials would be happening constantly if the law worked as it should, with serious impacts on the legitimacy of the government.

In light of such reasoning, one can see how the higher threshold crimes are more attractive—the likelihood of conviction is low. The Indonesian legislation also omits any jurisdiction over situations involving armed conflict, whether international or non-international. This reflects an extreme sensitivity about scrutiny in areas such as Aceh and Papua, where low intensity armed resistance has been ongoing for years (in the case of Papua, since the early 1960s). There is therefore reluctance to allow the courts jurisdiction, given that the majority of the crimes committed in such areas appear to be perpetrated by the military on civilians or captured rebels. Here too, the high threshold required for genocide and crimes against humanity serves to inhibit rather than encourage prosecutions. The exclusion of war crimes allows the State to avoid the spectacle of public litigation on issues of whether wars of national liberation, secession or simply non-international armed conflict are being waged on Indonesian soil. Also, given that the East Timor catastrophe was the dominant issue at the time of drafting, it is also possible that the law was deliberately restricted so there would be no public argument about the legal status of East Timor (Indonesia insists that East Timor was its twenty-seventh province and not an occupied territory to which Geneva Convention IV⁶⁰ applied).

(a) *Genocide*: Genocide is defined in Article 8 of the Law on Human Rights Courts as

any action intended to destroy or exterminate in whole or in part a national group, race, ethnic group, or religious group by: (a) killing members of the group; (b) causing serious bodily or mental harm to members of a group; (c) creating conditions of life that would lead to the physical extermination of the group in whole or in part; (d) imposing measures intended to prevent births within a group; or (e) forcibly transferring children of a particular group to another group.

This definition is consistent with the Genocide Convention.⁶¹ The omission of the ancillary crimes such as conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide are not necessarily fatal for they can be caught under the differing heads of criminal responsibility under KUHAP.⁶²

(b) *Crimes against Humanity*: Crimes against humanity are defined in Article 9 of the Law on Human Rights Courts as those actions

... perpetrated as part of a widespread or systematic attack with the knowledge that the said attack was directly targeted against the civilian population, in the form of:

- a. killing;
- b. extermination;

⁶⁰ *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S 135.

⁶¹ *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S 277.

⁶² Under Article 55, direct perpetration of a crime includes ordering, incitement, procurement of the crime through threats, inducements, providing opportunities, means, assistance and advice. Aiding a crime includes those who intentionally provide assistance at the time of the crime and those who provide the opportunity, means or advice to commit the crime (Article 56). No crimes by way of omission are possible; however, the Law on Human Rights Courts allows for crimes by way of omission by the introduction of the doctrine of command responsibility.

- c. enslavement;
- d. enforced eviction or movement of civilians;
- e. arbitrary appropriation of the independence or other physical freedoms in contravention of international law;
- f. torture;
- g. rape, sexual enslavement, enforced prostitution, enforced pregnancy, enforced sterilisation, or other similar forms of sexual assault;
- h. assault of a particular group or association based on political views, race, nationality, ethnic origin, culture, religion, sex or any other basis, regarded universally as contravening international law;
- i. enforced disappearance of a person; or
- j. the crime of apartheid.

This provision is an adaptation of the crimes against humanity provision in the Statute of the International Criminal Court (ICC).⁶³ As a non-party, Indonesia was and is not obliged to ensure its domestic laws are identical, but its legislation should nevertheless comport with customary international law.⁶⁴

There are several anomalies which have an impact upon the efficacy of the provision as a means of repressing crimes against humanity. The *chapeau* requires that there is a widespread or systematic attack directly targeted against the civilian population, that the accused knew that the said attack was directly targeted against civilians, and that his or her actions were actually part of that widespread or systematic attack. The direct targeting requirement suggests reintroduction of an armed conflict nexus. This may be interpreted to mean that there is no crime against humanity unless there is a “direct attack on the civilian population” in the sense of an armed attack, which would rule out a significant proportion of the frequent and systemic attacks on the civilian population that seem to have often taken place in Indonesia, such as torture, rape, arbitrary arrest and detention, or more subtle but persistent and serious forms of discrimination which may amount to persecution. It introduces the notion of “direct” into the action of “targeting” which in the Indonesian language creates ambiguities about whether the person has to be taking a direct role in the attack.⁶⁵ Both make the burden of proof for the prosecution very onerous.

There is no explanation of the meaning of the term “civilian population”. Ordinarily, one should not have too much difficulty with an approach rooted in international humanitarian law: civilians are non-combatants, persons who do not take a direct part in hostilities. But in reality, it can be hard to draw the line⁶⁶ and in the Indonesian situation, the lack of

⁶³ 17 July 1998, 2187 U.N.T.S 3.

⁶⁴ Much of the criticism by the Commission of Experts for East Timor of the Law on Human Rights Courts is based on the extent to which it differs from that of the Rome Statute, see *Report to the Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999*, UN SC, 2005, UN Doc. S/2005/458, 1 at 104 (hereafter “Report of the East Timor Commission of Experts”). The Commission was established to assess the progress made in bringing to justice those responsible for serious violations of international humanitarian law and human rights in East Timor in 1999, to determine whether full accountability has been achieved, and to recommend future actions as may be required to achieve accountability and promote reconciliation. The Commission reported on 26 May 2005 and castigated the process in the Indonesian courts. My assessment, as an official observer of those trials, is that this was wholly justified. But, on the other hand, despite superficial inquiries and access to many independent reports pointing out very serious problems with the East Timor trials conducted by the United Nations in partnership with East Timor, the same Commission had no qualms about showering glowing praises on the deeply troubled judicial process within East Timor itself.

⁶⁵ The point is also made in *Monitoring Pengadilan HAM Tim-Tim*, (Indonesia: ELSAM, 28 January 2003) at 14.

⁶⁶ Under the jurisprudence of the ICTY and ICTR, the targeted population must be predominantly civilian in nature but the presence of certain non-civilians in their midst does not change the character of that population (see *Prosecutor v. Dusko Tadic*, IT-94-1-T, Judgment, 7 May 1997 para. 638; *Prosecutor v. Clement Kayishema and Obed Ruzindana*, ICTR-95-1-T, Judgment, 21 May 1999, para. 128). The ICTY’s Appeals

definition is a dangerous loophole, for there has long been a tendency on the part of the State and its organs to treat civilian supporters of rebel groups such as GAM in Aceh and OPM in Papua/Irian as tarred by the same brush and therefore legitimate targets of attack.⁶⁷ This was also very much the case in East Timor, where clandestine supporters and civilians who provided moral, material or other support to the resistance were often the target of attacks by the Indonesian security forces.

Furthermore, the Official Commentary annexed to the Law on Human Rights Courts explains that the term “*attacks directly targeted against civilians*” requires a course of conduct stemming from decisions of authorities or as a result of organisational decisions. While requiring “*a course of action*”, this Indonesian adaptation of Article 7(2)(a) of the ICC Statute does not expressly require that there be “*multiple commission*” of the core crimes. That is probably covered by the requirement of a widespread or systematic attack against the civilian population, which is retained in the *chapeau*. The ICC provision was the result of careful compromise linked to the debate about whether the attack should be “*widespread and systematic*” or “*widespread or systematic*”. It was meant to ensure that only the most serious cases, namely, those that clearly involve the State or an entity with sufficient organisational capacity, should reach the court.

Article 7 of the ICC Statute, it should be recalled, is the only international instrument to include policy as an integral part of the definition of the crime against humanity; it does so in a way that draws in both State and organisational policy. The Indonesian provision retains that requirement of proof of policy, which renders successful prosecutions in the absence of the elusive “smoking gun” highly improbable, even if it is loose enough to capture the actions of both State and non-State actors. In customary international law, policy is not an additional requirement but can be inherent in an attack on the civilian population that is widespread or systematic. After some inconsistency in the caselaw, the point was finally clarified by the judgement of the International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber in *Blaskic*, which found that policy may be evidentially relevant but it is not a legal element of the crime against humanity.⁶⁸

The impact of Article 9 of Indonesia’s Law on Human Rights Courts on the mental element is unclear—does the person also have to have known that the attack directly targeted against civilians was part of a course of conduct stemming from the decisions of authorities or organisational decisions, and that his or her actions were actually part of that widespread or systematic attack, as well as having the necessary element for the core criminal act (for example the *mens rea* of murder)? If so, this has the potential to limit prosecution to high level perpetrators, and inhibit the effectiveness of the provision. In reality, the issue has been moot in Indonesia for the Ad Hoc Court for Human Rights Violations in East Timor and Tanjung Priok did not have to go into such detailed analysis. The cases have in general been so badly presented that it is even difficult to see how an accused is at all linked to what happened, let alone consider whether the person knew about policies.

Chamber in *Kunarac* emphasised that that: “... the use of the word ‘population’ does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian “population”, rather than against a limited and randomly selected number of individuals.” (*Prosecutor v. Dragoljub Kunarac et al.*, IT-96-23-A & IT-96-23/1/A, Appeals Judgment, 12 June 2002, para. 90). The expression “directed against” means that the civilian population is the primary object of the attack (*Kunarac* Appeal Chamber Judgment, para. 90). For a perspective on the legal developments, see Margaret McAuliffe deGuzman, “The Road from Rome: The Developing Law of Crimes against Humanity” (2000) 22 Hum. Rts. Q. 360 at 364.

⁶⁷ *Supra* note 65 at 14-15.

⁶⁸ *Prosecutor v. Blaskic*, IT-95-14, Appeals Judgment, 29 July 2004, para. 100. The picture is in fact not as clear as the judgement suggests, see Margaret McAuliffe deGuzman *supra* note 66 at 368-374.

The list of crimes is exhaustive, but without a “catch-all” provision, such as Article 7(1)(k) of the Statute of the ICC: “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”. This means that apart from the few situations listed, other acts of brutality such as sexual violations and cruelty or inhumanity that do not meet the specific categories of core acts may not be considered crimes against humanity. Statutory elaborations of several of the crimes are also very restrictive, in particular for extermination,⁶⁹ enslavement⁷⁰ and torture.⁷¹ Article 9(h) refers in Bahasa Indonesia to “*penganiayaan*”. It has been acknowledged in the Commentary to the law that the entire article was taken from the Statute of the ICC, which includes the now well-established offence of persecution as a crime against humanity.⁷² However, the ordinary meaning of “*penganiayaan*” in English is “assault”, and “*penganiayaan*” is regulated in Chapter XX of the KUHP. There is no crime in Indonesian law which resembles what international lawyers know as “persecution”. The fact that the Official Commentary to the law considers the crime of “*penganiayaan*” as self-evident and needing no clarification points towards this referring to the Indonesian offence of “assault” and not “persecution”. All proceedings to date have in fact been carried out on the basis that it is in fact assault, *i.e.* “*penganiayaan*” as under the KUHP.⁷³ Thus, the very specific features of the crime against humanity of persecution, involving gross violations of human rights as serious as the crimes of extermination and torture, are not addressed.

(c) *Command Responsibility*: Command responsibility is the legal doctrine in international criminal law whereby military commanders may be held responsible for acts of subordinates. Generally, it arises if there was a superior-subordinate relationship; the superior knew or had reason to know that the criminal act was about to be or had been committed; and the superior failed to take reasonable measures to prevent the criminal act or to punish the perpetrator. Command responsibility of military and civilian commanders was introduced into Indonesian criminal law for the first time in the Law on Human Rights Courts (Article 42), which is roughly based on the definition employed in the Statute of the ICC.⁷⁴ Prior to this, there was no such head of criminal liability in Indonesian law, meaning that no one could

⁶⁹ See Amnesty International *supra* note 29: “...extermination [is defined] as encompassing “deliberate action taken to cause suffering, including action to obstruct the supply of food and medicines that causes the extermination of a part of the population”. This narrow reading of extermination was expressly rejected during the drafting of the Rome Statute which provides that extermination “includes the intentional infliction of conditions of life, inter alia the deprivation of access to food, calculated to bring about the destruction of part of the population”.

⁷⁰ *Ibid*, “...enslavement is said to ‘include trade in humans, particularly the trading of women and children’”. Amnesty International is concerned that this does not fully reflect the definition of enslavement under international law concerning contemporary forms of slavery which is broader, containing provisions for the exercise of any or all powers attaching to the right of ownership over a person, including trafficking in persons.

⁷¹ *Ibid*; Under the General Provisions, torture is defined as “deliberately and illegally causing gross pain or suffering, physical or mental, of a detainee or a person under surveillance”. Amnesty International is concerned that this definition is too narrow and should be amended to reflect the definition in the Rome Statute which states that torture “means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused...”. The use of the word “illegally” in Paragraph (f) should also be clarified to ensure that it means contrary to international law and not just national law. The definition is narrower than that under the Convention against Torture (see *Considerations of Reports submitted by States Parties under Article 19 of the Convention: Indonesia*, UN OHCHROR, 492nd Mtg, UN Doc. CAT/C/SR.492 (2001), para. 14, remarks of Mrs. Gaer).

⁷² The definition of the crime against humanity adopted in Article 7(1)(h) of the ICC Statute was more progressive than that existing in customary law at the time. The prohibited acts are more extensive, and for persecution the targeted groups include those identifiable by gender, national, ethnic, religious or cultural criteria, or on other grounds that are universally impermissible under international law.

⁷³ For example, all the East Timor cases involved charges of “*penganiayaan*” as a crime against humanity, albeit in different forms, and none involved evidence that indicated anything apart from physical assault was at issue for court and parties.

⁷⁴ For critique of the substance of this provision per se, see ELSAM, *supra* note 65 at 15-17.

have been held criminally liable for the acts of subordinates. The issues arising from the use of command responsibility to prosecute historic crimes are addressed in the following section.

The Report of the Commission of Experts for East Timor pointed out anomalies in relation to the actions of the commander under the Indonesian version of the doctrine.⁷⁵ While international law requires the commander to prevent actions of those under his command that are about to take place and to curtail those that have already begun and take action against perpetrators, Article 42(1) of the Law on Human Rights Courts speaks of the duty to act where troops are perpetrating or had just perpetrated (*sedang melakukan atau baru saja*) unlawful acts. This means that under the Indonesian law, the obligation is merely to act when the conduct is going on or had just occurred, but not when they are about to occur. This applies to the civilian command responsibility concept as well, set out in Article 42(2).

2. General issues

(a) *Witness Protection*: Article 34 of the Law on Human Rights Courts provides that victims and witnesses of gross violations of human rights have “the right to physical and mental protection from threats, harassment, terror, and violence by any party whosoever” and that such protection is “an obligatory duty of the law enforcement and security apparatus provided free of charge”. There is no elaboration on how to implement this. A government regulation on witness protection in cases before the human rights courts was rushed through as the first of the East Timor trials was beginning.⁷⁶ There are just three options for protection in Section 4 of the regulation:

- a. protection of the victim or witness’ personal security from physical or mental threats;
- b. confidentiality of the identity of the victim or witness;
- c. testifying to the court out of the presence of the accused.

While this is the first witness protection measure as such, it does not set down a specialised witness protection regime. Not all of its provisions are new to Indonesian law. The basic rule is that witness testimony is given in person, and in the presence of the accused. But Article 153(3) of KUHAP authorises closed session hearings for cases concerning “morals” or where the accused is a child. Article 173 provides exceptional discretion for testimony to be given with the accused not being present (the grounds for exercising that discretion are not specified).

The witness protection regime proved to be inadequate in the East Timor and Tanjung Priok trials (the cases are discussed in Part IV (A)).⁷⁷ The Ad Hoc Court for East Timor and Tanjung Priok operated out of the Central Jakarta District Court, a Dutch-era building that was simply not suitable from a witness protection perspective, with no private entrance, exit, toilet or secure room for witnesses and victims.⁷⁸ None of those involved, from judges to prosecutors to police to court staff, were given specialised training on witness and victim issues in advance of the trials. The various protective measure options were not presented to victims and witnesses. Police were provided to “secure” the East Timorese witnesses who

⁷⁵ *Report of the Commission of Experts for East Timor*, para. 179. The Commission’s comment in paragraph 181 about Article 42(2) on civilian command responsibility omitting the requirement of effective control is not correct, for it is indeed a requirement under the official version of the law in the Indonesian language.

⁷⁶ *Peraturan Pemerintah Nomor 2 Tahun 2002 (Government Regulation Number 2 2002)*.

⁷⁷ See ELSAM, “Perlindungan Saksi dan Korban: Catatan atas Pengalaman HAM Ad Hoc Tim-Tim”, undated; *supra* note 13; Suzannah Linton, “Unravelling The First Three Trials at Jakarta’s Ad Hoc Court for Human Rights Violations in East Timor” (2004) 17:2 *Leiden Journal of International Law* 303; ELSAM, *Progress Reports #1-3, Monitoring Pengadilan Hak Asasi Manusia Kasus Tanjung Priok* [Trial Monitoring Reports].

⁷⁸ The following, unless referenced, are personal observations from my own monitoring of the first three trials. See Linton, *ibid.* at 324-327.

came to testify, but that is hardly reassuring for a witness who comes to testify that members of the police force perpetrated gross violations of human rights.⁷⁹ Equally unsatisfactory in the particular circumstances of the East Timorese was the placement of “safe” accommodation (marked with a sign outside saying “Safe House”) within an Indonesian police compound. Individuals associated with the defence, including one particularly notorious militia leader, were allowed access to at least one victim-witness. Court personnel were not spared from harassment: a number of judges were harassed through telephone calls and email messages.⁸⁰ The audience was packed with aggressive, sometimes heckling militia and uniformed military personnel (including high ranking officers) who could have been ejected from the courtroom for being disruptive, but were not.⁸¹ Defence counsel were allowed to harass witnesses, and judges sometimes did so too. The aggressive and hostile treatment of earlier witnesses discouraged others from attending and this had an impact on the prosecution cases across the board. Trial monitors reported that the situation in the Tanjung Priok trials was even more extreme, emphasising intimidation of victims and witnesses leading to the retraction of previous statements that had incriminated accused persons.⁸² Observers noted how victims appeared to be on trial for their audacity in taking on the military as an organ of State.⁸³ As with the East Timor trials, accused military officers appeared in civilian courts in full uniform, sending the clear message to the court that on trial was not the individual but the institution. Members of units directly involved in the Tanjung Priok event and from the notorious Special Forces (Kopassus) flooded the court. There were even military formations on the premises. The military presence was so oppressive as to render the concept of an open trial meaningless. In desperation, victims sought protection from the court, from the Attorney General, from the Police and even from the military.⁸⁴

(b) *Reparation*: Under Article 1365 of the Indonesian Civil Code,⁸⁵ every wrongful act that violates the law and causes loss to others shall obligate those responsible to compensate for such loss; there is also the right of compensation as part of criminal proceedings under Articles 98-101 of the KUHP. This is supplemented by a provision on reparation for gross violations of human rights in the Law on Human Rights Courts, which provides in Article 35 that every victim of a violation of human rights or his or her beneficiaries shall receive compensation, restitution and rehabilitation and that any such awards are to be recorded in the judgment of the court.⁸⁶ This was further developed in Government Regulation No. 3/2002 on compensation, restitution and rehabilitation for victims of gross violations of human rights, which only applies to the cases before human rights courts.⁸⁷ No requests for compensation were made during the East Timor cases. But, in the Tanjung Priok case, reparation was sought by eighty-five victims.⁸⁸ Awards totalling 658 million Rupiah (material damages) and 357.5 million Rupiah (non-material damages) were granted

⁷⁹ In the Abepura case, victims refused the protection of the police, whose members were in fact on trial for their abuse of civilians, and were instead accompanied by representatives of an N.G.O.

⁸⁰ *Supra* note 13 at 49-50.

⁸¹ On this problem, even if there were a will, it is hard to see how the court personnel could actually take on large numbers of uniformed security personnel, some of whom were armed.

⁸² Trial Monitoring Reports, *supra* note 77.

⁸³ Transcript of interview with Usman Hamid, “Peradilan HAM Indonesia Hanya Layani Kepentingan Tentara” *Warta Berita-Radio Nederland* (23 August 2004).

⁸⁴ Tiarna Siboro, “Priok Witnesses Ask for Protection” *Jakarta Post* (28 October 2003).

⁸⁵ Article 1365 Chapter III Third Book, Code of Civil Procedure, Pasal 1365 Bab III Buku ke-III Kitab Undang-Undang Hukum Perdata (*Burgerlijk Wetboek voor Indonesie*) Staatsblad 1847-23.

⁸⁶ See Amnesty International, *supra* note 29 for their comments on reparation.

⁸⁷ *Peraturan Pemerintah Nomor 3 Tahun 2002 tentang Pemberian Kompensasi, Restitusi dan Rehabilitasi Kepada Korban Pelanggaran HAM yang Berat*.

⁸⁸ Suara Merdeka, “13 Pelaku Kasus Priok dituntut 10 Tahun” (10 July 2004).

to thirteen victims.⁸⁹ The court took into account the “*ishlah*” (private Islamic peace agreement) entered into by the majority of the claimants with senior military officials and this was considered to be restitution as defined in the Law on Human Rights Courts.

The vast majority of human rights violations appear to have been (and continue to be) committed by State agents who are usually either military or police, otherwise individuals acting under their control. Their actions place the State in the role of violator of human rights. But, through the tactical concessions of permitting criminal justice and then shifting all the blame onto individual scapegoats, the responsibility of the State for those violations is conveniently ignored. As noted above, Indonesian law does allow for victims to claim reparations, but it is linked to the individual perpetrator rather than the State. There have been attempts at groundbreaking class action litigation: a first attempt was rejected by the Human Rights Court in Makassar, but a class action case based on Indonesia’s Civil Code was filed against five Indonesian Presidents on 17 December 2004 by an N.G.O. acting on behalf of seven groups of victims of the anti-Communist backlash after the alleged coup in 1965.⁹⁰

IV. HUMAN RIGHTS VIOLATIONS OF THE PAST

The current setup allows the Indonesian authorities three options for dealing with historic crime: do nothing, establish an *ad hoc* court or refer it to the truth and reconciliation commission. There is no obligation to prosecute gross violations of human rights. In fact, the preference for a non-judicial solution becomes clear when one considers that the creation of an *ad hoc* court has to go through the obstacle course of a political screening involving recommendation by Parliament and approval by the President, while the amnesty-granting truth commission procedure is technically automatic on receiving a complaint.

Despite what we can now describe as a blueprint, Indonesia has not had a coherent “transitional justice” strategy. The situation has evolved on a highly ad-hoc basis in line with the political circumstances, rather than by adherence to a principle or legal obligation such as that of the State to investigate, prosecute and punish perpetrators or its duty to provide an effective legal remedy for gross violations of human rights. The Ad Hoc Court for East Timor and Tanjung Priok is illustrative. There was resistance all the way,⁹¹ and its establishment was entirely linked to the pressure that the government came under from the international community rather than as part of a coherent strategy for addressing the crimes of the past in order to take the nation forward as a democracy respecting the rule of law. Without the pressure from the international community, there is little doubt that there would not have been a court established and there would have been no prosecutions.⁹² The other key factor in the establishment of the East Timor court was domestic politics — the Presidential Decree establishing the *ad hoc* court was issued by President Wahid on 24 April 2001, at a time when he was fighting to stay in office and was in need of supporters.⁹³ He had to balance the international and the domestic pressures, and having given way on the creation of a special court for East Timor, domestic politics influenced his deliberate restrictions on the mandate of the court when examining East Timor (the TNI would be placated, as the direct perpetrators of crimes in September 1999 were mainly militias of

⁸⁹ “Korban Tanjung Priok Peroleh Kompensasi” *Suara Pembaruan Daily* (21 August 2004); interview with Usman Hamid, *supra* note 83. The reparations remain unpaid.

⁹⁰ See TAPOL, “Class Action Against Five Presidents By Victims of 1965”, TAPOL (20 April 2005); “Hakim Peradilan HAM Abepura Tolak Class Action” *Tempo Interaktif* (7 June 2004).

⁹¹ Linton, *supra* note 77 at 308-311.

⁹² The Deputy Speaker of Parliament publicly admitted that the court was established to counter international attention and avoid international intervention, cited in “Indonesia: Timor war criminals remain free” *Green Left Weekly* (28 March 2001); “To End Impunity” *Inside Indonesia Magazine* (July–September 2001).

⁹³ *Keputusan Presiden No. 53/2001*, (23 April 2001).

East Timorese descent). Likewise, nineteen years of Islamic community pressure forced prosecutions for the 1984 Tanjung Priok case in which dozens of Muslim protesters had disappeared, or were unlawfully killed or imprisoned.

A. *Ad Hoc Human Rights Courts*

For the prosecution of gross human rights violations that occurred before the enactment of the Law on Human Rights Courts, the President, upon the recommendation of the Indonesian Parliament, the *Dewan Perwakilan Rakyat* (Peoples Representatives or “DPR”), has the power to establish an *ad hoc* court. This politicises the process from the very outset.

The jurisdictional subject matter concerns international crimes but the Ad Hoc Courts are strictly domestic enterprises. There is no international participation in the investigation process, prosecution or defence, or on the bench. The only such court to have been created has been the Ad Hoc Court for East Timor and Tanjung Priok, following a powerful investigation conducted by Komnas HAM.⁹⁴ The East Timor court, which tried 18 accused in 12 trials, concluded its work on the 1999 violence and destruction in East Timor to near-universal condemnation for being a sham.⁹⁵ The UN’s Commission of Experts for East Timor confirmed the reports of observers, calling the trials “seriously flawed and inadequate” and also “manifestly deficient”.⁹⁶ The many well-documented failings of the processes are essentially centred around stunning under-performance and calculated incompetence by the prosecution and reflect the continuing influence of the military in Indonesia, ongoing misconceptions about the nature of Indonesia’s twenty-four years in East Timor and the role of the international community, and an unwillingness to hold those responsible to account. What was put on was a carefully planned process, presumably with the belief that the ritual of a judicial proceeding was all that was needed to pacify the international community to stave off the dreaded international tribunal which had been threatened against Indonesia. Uncovering the truth and providing some measure of justice for victims was never the object. The appeals process was equally unsatisfactory, and to this day no one has been held to account for the devastation wrought in East Timor in 1999, let alone before that date and dating back to the full-scale invasion of 7 December 1975.

After completing the East Timor trials, the court moved on to deal with the equally sensitive case of Tanjung Priok. In September 1984, Muslims in Tanjung Priok, the port near Jakarta, took part in a march of thousands who had gone to the police headquarters to demand the release of four mosque officials, who had been arrested following provocative actions by a group of soldiers (entering a mosque without removing their shoes). The police opened fire on the crowd, allegedly without warning. At the time, military authorities claimed sixteen people had been killed, but families and eyewitnesses have consistently maintained that up to four hundred people were slaughtered. The then-Jakarta military commander, Try Sutrisno, later to become a Vice-President of Indonesia, reached a private settlement (“ishah”) with the families of the victims in a bid to stave off his criminal prosecution. It worked.

Having occurred in 1984, the matter was referred to the Attorney-General’s office as suitable for prosecution as a gross violation of human rights by Komnas HAM in 2000.⁹⁷ Komnas HAM began investigating on 7 March 2000, and after severe criticisms of its original report (which made vague statements about the need for the state to apologise and

⁹⁴ KPP-HAM, *Executive Summary of its Report on the Investigation of Human Rights Violations in East Timor* (31 January 2000).

⁹⁵ See ELSAM, *supra* note 65; Cohen, *supra* note 13; Linton, *supra* note 77.

⁹⁶ Report of the Commission of Experts for East Timor, paras. 370 and 371.

⁹⁷ Investigatory Commission for Tanjung Priok, Komnas HAM decision SK No. 012/KOMNAS HAM/VII/200, 12 July 2000.

seek forgiveness and did not name any suspects),⁹⁸ issued a second report on 11 October 2000. This time, it found that there had been unlawful arrest and detention, torture and enforced or involuntary disappearance.⁹⁹ The matter went to trial in September 2003, with 13 military officials, including the commander of the Special Forces Command (Kopassus) accused of crimes against humanity in 4 separate proceedings. Shortcomings similar to those that undermined the effectiveness and credibility of the East Timor trials plagued the proceedings.¹⁰⁰ The tribunal sentenced one officer to ten years in prison and found thirteen others guilty and sentenced them to two to three years in jail, far less than the ten year sentences that prosecutors had requested. Twelve of these have now been acquitted on appeal.¹⁰¹ As with the East Timor cases, all of the convicted persons remained at large pending appeal.

There has been no other *ad hoc* court to try human rights cases from the past. Komnas HAM has already found gross violations of human rights or made recommendations for such prosecution in the cases of the May 1998 riots (which led to the overthrow of Soeharto and during which time there was targeting of the ethnic Chinese community in several cities)¹⁰² and the disappearance/executions of students (in 1997 and 1998).¹⁰³ Very importantly, Komnas HAM is engaged in a wide-ranging investigation into gross violations of the Soeharto era that if properly conducted, will put an extremely complex range of events into context.¹⁰⁴ What will happen to that remains a topic of speculation, but as will be

⁹⁸ “Ringkasan Eksekutif, Hasil Penyelidikan Komisi Penyelidikan Dan Pemeriksaan Pelanggaran Hak Asasi Manusia Di Tanjung Priok (KP3T)” (“Executive Summary, Results of the Investigation of the Inquiry and Examination Team for Human Rights Violations in Tanjung Priok (KP3T)”), 12 June 2000; “Indonesia’s Tanjung Priok inquiry: a safe harbour for human rights abuses?” (Human Rights Feature) *Asia-Pacific Human Rights Network* (20 July 2000). Suspicions were fuelled by allegations of lack of transparency and clandestine meetings with senior military officials.

⁹⁹ “Ringkasan Eksekutif, Laporan Tim Tindak Lanjut Hasil Komisi Penyelidik Dan Pemeriksaan Pelanggaran Hak Asasi Manusia Di Tanjung Priok (KP3T)”, 11 October 2000. At least 24 people were said to have been summarily executed by the military and 9 persons of Chinese ethnicity burnt in the course of the ensuing riots. In addition to recommendations for social justice and improvement of military professionalism, it also called for the prosecution of 14 low-ranking soldiers and nine officers, including 3 captains, 1 major, 1 major general, 1 lieutenant colonel, 1 colonel, 1 brigadier general and 1 general (Benny Moerdani, former head of the Armed Forces). Those who eventually went on trial were: retired Major General Pranowo; retired Army Major General Rudolf Adolf Butar-Butar; Army Major General Sriyanto Mutrasan, the commander of Army Special Forces (Kopassus); and other high-ranking active or former military officers. The senior officers at the time of the incident escaped trial.

¹⁰⁰ See Trial Monitoring Reports, *supra* note 77.

¹⁰¹ “Jakarta Court Clears 12 Soldiers” *BBC News* (7 July 2005), online: BBC News <<http://news.bbc.co.uk/1/hi/world/asia-pacific/4658769.stm>>; Jim Lobe, “Rights-Indonesia: Court Setback Could Set Back US Ties” *Inter Press Service* (11 July 2005).

¹⁰² See Tiarna Siboro, “Gross human rights abuse took place in May riots” *The Jakarta Post* (3 April 2003); Kompas, “Komnas HAM: Ada Kebijakan Terpola pada Kerusuhan Mei 1998” (3 April 2003). However, there is no progress on this for the Attorney General’s Office regards Komnas HAM’s work, which did not identify suspects, as incomplete.

¹⁰³ The DPR refused to recommend establishment of an Ad Hoc Court for these cases, rejecting Komnas HAM’s findings that there had been gross violations of human rights amounting to crimes against humanity. As a result of this, a number of low-ranking security and civilian personnel were tried in the regular and military tribunals.

¹⁰⁴ The investigations spring from a decision within Komnas HAM on 19 December 2002, and put into effect through *Keputusan Ketua Komnas HAM No.07/KOMNAS HAM/II/2003(Decision of the Head of Komnas HAM No.07/KOMNAS HAM/II/2003)* of 14 January 2003 concerning the appointment of members of an Ad Hoc Investigation and Research Team examining gross human rights violations of the Soeharto era. The sheer scale of events necessitated narrowing down the events for focus to the following: (1) 1965 and its associated events including large-scale summary/extra-judicial executions, disappearances, and arbitrary arrest and incarceration on Buru Island; (2) a series of disappearances/killings known as “Petrus”; (3) violations during military operations; (4) an attack on the then opposition PDI party led by Megawati Soekarnoputri on 27 July 1996.

seen below, it appears most likely that the matter will be “resolved” through the Truth and Reconciliation Commission.

B. *Truth and Reconciliation Commission*

The latest mechanism to be thrown into the cauldron that is Indonesia’s accountability challenge is the *Komisi Kebenaran dan Rekonsiliasi* (Truth and Reconciliation Commission, or “KKR”). The law had been in draft form for several years, and was finally passed into law on 6 October 2004 as Law No. 27/2004 on the Truth and Reconciliation Commission (Law No. 27/2004).¹⁰⁵ It finds its roots in one of the MPR’s most important decisions in 2000¹⁰⁶ and two preceding documents: the Law on Human Rights¹⁰⁷ and the Law on Human Rights Courts itself.¹⁰⁸ The early vision for this body was that it would be “established under an Act as an extra-judicial agency charged with establishing the truth by discussing past misuse of authority and violations of human rights, in accordance with prevailing law and legislation, and with undertaking reconciliation in the common interest of the nation”.¹⁰⁹

This is not the first attempt to formalise a truth commission in Indonesia. The law on special autonomy for Papua (*UU 21/2001, Otonomi Khusus bagi Propinsi Papua (Law 21/2001, Special Autonomy for the Province of Papua)*), passed on 21 November 2001 and entered into force on 1 January 2002, introduced the concept of a truth and reconciliation commission as part of a three pronged approach to resolving the human rights problems in the eastern province. Chapter XII of the law allows for a commission for truth and reconciliation to be created by Jakarta to “clarify the history of Papua to stabilize the unity and integrity of the nation within the Unitary State of the Republic of Indonesia” and under Article 46 (2)(a) it is also tasked to “identify and determine measures for reconciliation”. The reason for this is that many Papuans dispute the validity of the method by which Papua came to be part of the Republic of Indonesia through an Act of Free Choice in 1969, and assert that their right to self-determination was denied. It seems unlikely that this is a genuine truth-seeking exercise but one which seeks a version of history that will “confirm” the correctness of the central government’s position on Papua’s incorporation and disprove complaints about self-determination and the Act of Free Choice itself. Nothing has been done to implement these provisions.

The purpose of the nationwide truth commission, as laid down in Article 3 of Law 27/2004 is to “resolve past gross violations of human rights outside of the court of law in order to establish national peace and unity” and “establish national reconciliation and unity in the spirit of mutual understanding.” In fact, the Official Commentary to Article 2(f) states that the commission works on the basis of “openness”, meaning “giving the right to society to obtain information that is true, honest and not discriminative concerning all matters in connection to gross violations of human rights *whilst always protecting individual and group human rights as well as state secrets*”(emphasis mine). The commentary to Article 5 is also revealing. It explains that the commission serves a public institutional function,

¹⁰⁵ *Law Number 27 Year 2004 Concerning a Truth and Reconciliation Commission (Undang Undang Republik Indonesia, Nomor 27 Tahun 2004 Tentang Komisi Kebenaran Dan Rekonsiliasi)* Tambahan Lembaran Negara Republik Indonesia Nomor 2004 No. 4429.

¹⁰⁶ *Tap MPR No V/2000 tentang Pemandapan Persatuan dan Kesatuan Nasional* envisaged the establishment of a truth commission as an extra-judicial mechanism, and part of the reform process.

¹⁰⁷ It “does not rule out the possibility” that gross violations of human rights committed before the passing of the law may, as an “alternative” to prosecution in an Ad Hoc Court, be resolved through a Truth and Reconciliation Commission. See Article 47 and Official Commentary to Article 47, the Law on Human Rights Courts.

¹⁰⁸ “Resolution of gross human rights violations which occurred prior to the adoption of this Act may be undertaken by the Truth and Reconciliation Commission”.

¹⁰⁹ Preamble to Official Commentary to the Law on Human Rights Courts.

meaning to “provide service and protection to the community by being given the authority to establish and express the truth concerning the gross violation of human rights, *which is to be based on the national interest for unity and wholeness of the united Republic of Indonesia*” (emphasis mine).

The handling of gross human rights violations that occurred prior to the adoption of the Law on the Human Rights Courts is now in theory to be divided between specially created *ad hoc* courts and the KKR. The former is founded on Komnas HAM acting as inquirer (it alone is authorised to conduct inquiry; following its recommendations, investigations may be undertaken by the Attorney General with a view to prosecution). Article 3 of Law 27/2004 stresses that the task of the KKR is to “resolve” (no explanation of this mysterious term is provided) gross violations of human rights that occurred before the passing of the Law on the Human Rights Courts “outside of the court of law in order to establish national peace and unity” and “establish national reconciliation and unity in the spirit of mutual understanding”.¹¹⁰ It establishes a process whereby the KKR acts like an adjudicator, receiving complaints of gross violations of human rights, investigating them and making recommendations for amnesty, compensation or rehabilitation as appropriate. Article 7(1)(g) gives it “authority to” refuse a request for compensation, restitution, rehabilitation or amnesty, if the case has been registered at the Human Rights Court. The problem is, of course, that discretion is very unhelpful where there is need for clear division of labour. While the law speaks of simple registration of a claim at the Human Rights Court, such courts do not have jurisdiction over gross violations of human rights that occurred before the passing of the Law on Human Rights Courts. There must first be political consent to the establishment of a special *ad hoc* court, required under Article 18 of the Law on Human Rights Courts. In practice, Komnas HAM will first have to conduct an investigation establishing gross violations of human rights. There is nothing in Law 27/2004 that deals with questions of coordination or divisions of labour or hierarchy between the institutions. Could it be that the KKR is meant to oust Komnas HAM’s role in relation to historic crimes? More specifically, is this mechanism meant to divert attention from the massive rights violations arising out of events in 1965-1966? There is no facility for the KKR to refer cases to either Komnas HAM or the Attorney General; the only provision for referral is in Article 29(3)—if a perpetrator is neither willing to acknowledge the truth and wrongdoing, nor is prepared to show any remorse, then he or she forfeits the “right to an amnesty” and the case will be submitted to the *ad hoc* human rights court. The KKR has no standing under the Law on Human Rights Courts, and if no court exists, nothing can be done and there will be impunity. Finally, under Article 44, cases of gross violations of human rights “resolved” by the KKR may not be brought before the courts; whether amnesty is sought or not, there is a statutory bar on prosecution in cases where some kind of settlement is reached.

In time, the KKR may come to operate as a kind of compensation commission; under Article 24, if the Commission receives a complaint or a report of gross violations of human rights accompanied by a request for compensation, restitution, rehabilitation or amnesty, then it is obliged to settle the matter by giving a decision within a period of no more than ninety days from the date upon which the request was received. The Republic of Indonesia is responsible for compensation “in accordance with the financial capacity of the State in order to fulfil basic needs, including physical and mental health treatment”. Article 27 provides that compensation or rehabilitation can be ordered only if the perpetrator is granted an amnesty.

The commission is very heavily weighed in favour of violators of human rights. Indonesia has been inspired by the South African Truth Commission’s use of amnesty for a supposed “truth” which has magical curative properties believed to be in the exclusive possession

¹¹⁰ Already in Article 47 of the Law on Human Rights Courts, it was foreseen that there would be established a truth and reconciliation commission to “resolve” gross violations of human rights.

of the perpetrator. Yet it does not even require that the whole “truth” be told as part of the bargain. The process even requires both victims and perpetrators to “forgive” each other in order for there to be a recommendation of amnesty.¹¹¹ But that is all beside the point anyway, because even if the victim does not forgive, the commission may recommend amnesty be given to a perpetrator. Noteworthy is the fact that the victim who does not forgive does not get reparation, yet the perpetrator can get away scot-free.

In line with the highly dubious design, this commission is not required to produce a substantive report. This is to omit the compilation of an alleged “truth” that is so heavily touted by the transitional justice industry as an enduring contribution of commissions of this type.¹¹² The Indonesian commission only has the authority to examine individual matters that are referred to it, and so it will not conduct wide-ranging investigations that are able to uncover more about what really happened, why it happened and who is to blame. This is hardly going to help Indonesia understand and overcome the huge and distressing questions surrounding its terrible legacy of massive violations. In any event, like every other truth commission that has existed, this Indonesian commission does not even have standards for assessing the so-called “truth” laid down in law. This smoothes the way for lies to be packaged as truth and truth to be whittled away until it becomes an account that is politically convenient for the powers that be. The absence of a standard of assessment leaves the door open for enormous arbitrariness, inconsistency and lack of professionalism, or in the worst case scenario, enables cover-ups and scape-goating.

As noted earlier, there are problems with the coordination of this mechanism with the work of Komnas HAM. There is also nothing on the relationship of the commission with the law and order mechanisms, namely the police and courts. It is noteworthy that the commission has no power to recommend prosecutions.

The law has been roundly condemned.¹¹³

C. *The Truth and Friendship Commission with East Timor*

The governments of Indonesia and East Timor have established a joint Truth and Friendship Commission.¹¹⁴ This unique commission has been established in spite of the strong grassroots objections in East Timor among victims and survivors of the twenty-four year long occupation by Indonesia, the opposition of the highly influential Catholic Church, the opposition of civil society groups in both Indonesia and East Timor and the recommendations of the UN Commission of Inquiry.¹¹⁵ It appears to represent the worst in truth commissions, with none of the positive attributes.

The Commission comprises five East Timorese and five Indonesian commissioners, co-headed by Benjamin Mangkoedilaga of Indonesia and Dionisio da Costa Babo Soares of

¹¹¹ The Commission may only make recommendations, the power to amnesty is strictly that of the President.

¹¹² Honesty and humility in fact require that these lengthy accounts must be understood as a “version of events” and not the “truth”. These versions of events may form the most comprehensive record in existence, comprising a mixture of facts, personal accounts, speculation and analysis, all of which are compiled using very arbitrary methodology. There is particular emphasis on testimony of victims known within the transitional justice industry as “the truth of victims”.

¹¹³ See, for example, International Center for Transitional Justice, “Comment By The International Center For Transitional Justice On The Bill Establishing A Truth And Reconciliation Commission In Indonesia”, online: International Center for Transitional Justice <<http://www.ictj.org/en/news/press/release/278.html>>.

¹¹⁴ See the *Terms of Reference for the Commission of Truth and Friendship Established by the Republic of Indonesia and the Democratic Republic of Timor-Leste*, online: <<http://www.deplu.go.id>>.

¹¹⁵ See, for example, the Catholic Church of East Timor, “Position on Justice for Crimes against Humanity”, presented to the Commission of Experts appointed by the Secretary-General, 5 April 1999; Aderito de Jesus Soares, “Justice in Limbo: The Case of East Timor”, presented at the Symposium on the International Criminal Court and Victims of Serious Crimes, Faculty of Law, University of Tokyo, 29 March 2005.

East Timor. Bizarrely, some of the East Timorese involved in the project are former commissioners of the East Timor Reception Truth and Reconciliation Commission (CAVR).¹¹⁶ They were even appointed before the work of that officially-sanctioned commission was completed. After much delay, CAVR eventually produced a report covering, *inter alia*, precisely the issues that this Truth and Friendship Commission is now investigating (it is tasked to “establish the conclusive truth in regard to the events prior to and immediately after the popular consultation in 1999, with a view to further promoting reconciliation and friendship, and ensuring the non-recurrence of similar events”). There have already been two United Nations fact-finding commissions, one investigation by Indonesia’s own Komnas HAM and investigations by CAVR leading to a substantial report, not to mention countless NGO and academic studies, all of which are remarkably consistent in what happened. If “truth” is really the objective, one has to ask why yet another report on 1999 is needed.

This commission will also “recommend amnesty for those involved in human rights violations who cooperate fully in revealing the truth”. The commitment of both governments in the agreement to amnesty human rights violations in 1999 are about the commitment to prevent prosecution of crimes that include grave breaches of the Geneva Conventions, torture and crimes against humanity. This will cause both countries to be in violation of treaty and customary law obligations to investigate, prosecute and punish, and the duty to provide an effective remedy for violations of human rights (*i.e.*, Geneva Conventions, Convention against Torture, customary law and obligations owed *erga omnes*).

The United Nations’ Commission of Experts investigating the East Timor issue in 2005 expressed its “grave reservations regarding certain areas of the terms of reference” and advised that international cooperation be withheld until certain fundamental pre-conditions are met.¹¹⁷

D. Substantive Legal Issues

1. Retroactivity and the Constitution

The issue that immediately arises in relation to prosecutions for historic crimes using fixed legal formulations for past, present and future is whether the law offends against the principle of legality. The protection against retroactive prosecution is enshrined in part of Article 28I(1) of the Indonesian Constitution, adopted on 18 August 2000.¹¹⁸ But it has been widely criticised for going beyond that, by stressing that the right not to be prosecuted on the basis of a retroactive law cannot be limited “under any circumstances”. Amnesty International warned of the serious risk that this amendment will be used not to protect human rights but to shelter those responsible for violating them, specifically that it would be used to protect senior military and government officials from being brought to justice

¹¹⁶ CAVR was established by UNTAET Regulation 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, 13 July 2001. CAVR is required to, *inter alia*, establish the “truth” regarding the pattern and scope of human rights violations from 24 April 1974 to 25 October 1999, and to make recommendations on accountability. This covers not just the period of Indonesia’s occupation, but the preceding political conflict between the East Timorese political groups. The commission’s report has been rejected by the East Timorese leadership, and beyond the initial controversy surrounding the President’s refusal to publicise the report, it seems to have had surprisingly (and disturbingly) little impact.

¹¹⁷ See para. 355 of the East Timor Commission of Experts Report. Also see also paras. 333-354 (Analysis of the Commission of Truth and Friendship Terms of Reference).

¹¹⁸ Note that the Constitution is the highest law of the land, and all subordinate legislation must be consistent with it. For a useful discussion on retroactivity and retrospectivity in general and in the Indonesian context, see Ross Clarke, “Retrospectivity and the Constitutional Validity of the Bali Bombing and East Timor Trials” (2003) 5:2 Australian Journal of Asian Law at 10-18, online: <www.law.unimelb.edu.au/alc/assets/ajal_clarke_bali.pdf>.

for crimes not covered by Indonesia's domestic law, such as crimes against humanity and torture.¹¹⁹ However, when one examines the entire text of Article 28I(1), it reads as follows:

The rights to life, freedom from torture, freedom of thought and conscience, freedom of religion, freedom from enslavement, recognition as a person before the law, and the right not to be tried under a law with retrospective effect, are all human rights that cannot be limited under any circumstances.¹²⁰

Freedom from torture, freedom of thought and conscience, freedom of religion and the right to recognition as a person before the law are non-derogable rights and may not be limited in any way. The right to life is absolute too, but there are circumstances when human life is taken but the right to life is not violated, for example, where it is in a country whose laws permit use of the death penalty and where that penalty has been imposed following fair trial and due process in a court of law, with all avenues for appeal having been exhausted. Neither is the right to life violated when a person is killed by another person acting in legitimate self-defence. Nor is the right to life violated when in a situation of armed conflict, a person is killed without there being violation of the laws and customs of war. As for the freedom from retroactive prosecution, it is absolute too; there are no exceptions, if it was not unlawful at the time, it cannot be made unlawful by a later law. But, where acts were already crimes under customary international law such as genocide, even if not expressly prohibited in positive law (*i.e.* legislation), they may be prosecuted using a law passed after the crimes were committed. This is confirmed by the precedent established through the Nuremberg and Tokyo processes, and enshrined in Article 15(2) of the *International Covenant on Civil and Political Rights* (ICCPR).¹²¹ In such a circumstance, the *ex post facto* law simply provides a mechanism for prosecuting what was already criminal, it does not make something lawful unlawful and thus does not violate the prohibition against retroactive prosecution. It is not unlawful to prosecute in such circumstances. So, when Article 28 is viewed as a whole, it is clear that Article 28I(1) is in fact an attempt to highlight that these particular rights, which under the ICCPR are non-derogable rights, are of utmost importance and which require respect at all times. It therefore seems that it is in that context that the phrase "should not be diminished" should properly be read. It is not a provision designed to prevent the prosecution of what was already criminal conduct by using *ex post facto* laws.

The Law on Human Rights Courts was passed on 23 November 2000, after the amendment of Article 28I(1) of the Constitution. It specifically provides in Article 43 that gross violations of human rights perpetrated before that date may in certain circumstances be prosecuted, and the Official Commentary justifies this exception to the prohibition against retroactivity by reference to Article 28J(2) of the Constitution, using the reasoning that retroactive prosecution of gross violations of human rights is permissible because it is done to protect human rights. Such prosecutions are therefore, the reasoning goes, constitutional.

The judges of the Ad Hoc Court dealing with the East Timor and Tanjung Priok cases rejected defence challenges to the validity of the Law on Human Rights Courts on various grounds: because the acts described therein were already criminalised at the time of the

¹¹⁹ Amnesty International, *Indonesia: Retroactivity Amendment Regressive For Human Rights* (AI Index ASA 21/033/2000, News Service Nr. 159, 18 August 2000), online: <<http://web.amnesty.org/library/Index/ENGASA210332000?open&of=ENG-2S3>>.

¹²⁰ An official translation can be found on the website of the Indonesian Embassy in Buenos Aires <<http://www.indonesianembassy.org.ar/Novedades/constitution1.htm>>; the English version, which can be found on the website of the Indonesian Embassy in Ottawa <http://www.indonesia-ottawa.org/indonesia/constitution/fourth_amendment_const.doc>, differs in regard to the absence of a comma after the words "effect". The Bahasa Indonesia version at the website of the MPR omits the comma after the words "surut", see <<http://www.mpr.go.id/h/index.php>>.

¹²¹ "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations".

offences, by way of reference to Article 28J(2) of the Constitution, claiming the legislature obviously intended the Law on Human Rights Courts as a permissible exception to the prohibition against retroactive prosecution, relying on the principle of universal jurisdiction and by preferring justice to legal certainty.¹²² The judges trying the Bali Bombing cases (Amrozi bin Nurhasyim, Iman Samudra *et al.*) also rejected challenges to the constitutionality of prosecutions based on a law adopted after the event.¹²³ At the time, there was no Constitutional Court and the matter had to be decided by those courts or not at all. The Constitutional Court has now been established and has taken a different position. Having been seized of appeals in the Bali Bombing cases, the court accepted the argument that the anti-terrorism legislation passed retroactively in order to permit the prosecution of terrorism as a separate crime violated this Constitutional provision.¹²⁴ The consequences have been much debated, but logically there should either be retrial using the appropriate law or release of Amrozi *et al.*; yet, they remain in detention as convicted persons by way of an obtuse argument that the Constitutional Court's decisions may not apply retroactively. Until this matter is resolved, it is unlikely that another Ad Hoc Court to deal with atrocities predating the adoption of the Law on Human Rights Courts will be established.

2. Retroactivity and the Substantive Law

The other problem relates to the normative content of the law. As discussed earlier, the Law on Human Rights Courts is not fully consistent with international norms, such as those used in the ICTY, the International Criminal Tribunal for Rwanda (ICTR) and ICC. The significant problems with legality that may arise can be illustrated through consideration of the events surrounding 1965. The situation is in fact being investigated by Komnas HAM as a gross violation of human rights. The facts remain disputed but essentially, there was an alleged "coup" by members of the Indonesian Communist Party.¹²⁵ The coup was

¹²² See, for example, decisions on the defence challenges to the indictment: Putusan Sela in the case of *Timbul Silaen* (28 March 2002, transcript of orally delivered decision made by ELSAM, online: <<http://www.elsam.or.id/txt/publikasi>>); Putusan Sela in the case of *Herman Sedyono et al.* (9 April 2002, transcript of orally delivered decision made by ELSAM, online: <<http://www.elsam.or.id/txt/publikasi>>); Putusan Sela in the case of *Eurico Guterres* (18 July 2002, transcript of orally delivered decision made by ELSAM, online: <<http://www.elsam.or.id/txt/publikasi>>).

¹²³ *Peraturan Pemerintah Pengganti Undang-Undang 1/20002*; *Peraturan Pemerintah Pengganti Undang-Undang 2/2002*, adopted by the DPR as *Undang-Undang 15/2003*, all of which came into force after the Bali Bombings. On 12 October 2002, the Indonesian holiday paradise of Bali fell victim to two massive bombs placed at Paddy's Bar and outside the Sari Club in Kuta town. A third bomb exploded outside the Australian Consulate. 202 persons died, and 209 were injured. Australians nationals formed the largest group of foreign tourists killed or wounded, although approximately 20% of victims were Indonesian nationals. The attacks were linked to Jemaah Islamiyah, an extremist Islamist group linked to Al-Qaeda.

¹²⁴ Amnesty International anticipated the issue in its Comments On The Law On Human Rights Courts, "Amnesty International considers the principle of non-retroactivity—that is, of protecting individuals from being prosecuted for acts which did not constitute a criminal offence, under national or international law, at the time of the commission—to be a fundamental one. However, international law does not prohibit retrospective prosecution which merely provides a procedure to investigate, prosecute and punish conduct which, at the time it was committed, was criminal according to the general principles of law recognized by the community of nations". For more, see *Clarke, supra* note 119 at 2-11; Tim Lindsey, Simon Butt & Ross Clarke, "Review is not a Release" *The Australian* (27 July 2004); Tim Lindsey and Simon Butt, "Indonesian Judiciary in Constitutional Crisis", Parts I and II, published in the *Jakarta Post* on 6 and 7 August 2004.

¹²⁵ For a sampling of the enormous and diverse range of literature, see Benedict R. Anderson & Ruth T. McVey, *A Preliminary Analysis of the October 1, 1965, Coup in Indonesia*, (Ithaca, New York: Modern Indonesia Project, Cornell University, 1971); Arnold C. Brackman, *The Communist Collapse in Indonesia* (Singapore: Asia Pacific Press 1970); John Hughes, *The End of Sukarno: A Coup that Misfired, a Purge that Ran Wild* (London: Angus & Robertson 1968); Coen Holzappel, "The 30 September Movement", (1979) 9:2 *Journal of Contemp. Asia* 216; Amnesty International, "Indonesia: The 1965 Prisoners: How many more will die in jail?" *Amnesty International*, (1 August 1996), online: <http://web.amnesty.org/library/Index/ENGASA210431996?open&of=ENG-380>.

swiftly put down by General Soeharto, and it led to the slaughter of hundreds of thousands of suspected Communists as well as arbitrary arrest and incarceration of thousands more. Even the Central Intelligence Agency (CIA), which is widely believed to have assisted in the process, described this as “one of the worst mass murders of the twentieth century.”¹²⁶ Some remained in prison until the late 1990s. All left-leaning political parties were outlawed. Labour, peasant and women’s organisations were banned, purged or otherwise neutralised. Scores of magazines and newspapers were closed down. Family members and those who were released from detention continued to suffer discrimination until well after the fall of Soeharto.

The legal challenges that arise in taking this situation through the courts on the basis of the Law on Human Rights Courts are complex. Does the Law on Human Rights Courts reflect the applicable law at the time? Dutch-based Indonesian law certainly prohibited murder, sexual violence, maltreatment *etc*, and so much of what has been described earlier was unlawful at the time. But the events described go beyond ordinary crime. Even looking at it superficially, there appears to have been a widespread or systematic attack on the civilian population. A particular group, which seems to have been identified on the basis of political belief, was targeted. A wide range of fundamental human rights were grossly and systematically violated. The violations seem so immense, so significant as to amount to attacks on values going beyond the individual, on humanity itself. This bears the hallmarks of what we know today as the crime against humanity, and one that carried on over a long period of time, although not necessarily in identical form throughout. There is no doubt that in 1965-1966, the crime against humanity was already criminalised under customary law.¹²⁷ But exactly what were the elements of the crime against humanity and did that change over the time that the crimes continued? Did the offence in 1965-1966 reflect the elements of Article 6(c) of the Charter of the International Military Tribunal, which was approved by General Assembly Resolution 95(I), affirming the principles of international law recognised by the Charter of the Nuremberg Tribunal and in the judgement of the Tribunal? In 1965-1966, was it an element of the crime that there be a nexus with the armed conflict?¹²⁸ Did the acts committed against the civilian population have to be committed as part of a widespread or systematic attack on the civilian population?¹²⁹ Had the elements

¹²⁶ CIA, Directorate of Intelligence, “Indonesia—1965: The Coup that Backfired”, Report, p. 71, cited in Peter Dale Scott, “The United States and the Overthrow of Sukarno, 1965-1967” (1985) 58 *Pacific Affairs* 239.

¹²⁷ See Charter of the International Military Tribunal at Nuremberg, Article 6(c), Judgement of the International Military Tribunal, General Assembly Resolution 95(I) Affirming the principles of international law recognised by the Charter of the Nuremberg Tribunal and in the judgement of the Tribunal.

¹²⁸ Given that there was no “armed conflict” in Indonesia at the time, the requirement of such a nexus to armed conflict in the chapeau would rule out there having been crimes against humanity. The International Law Commission’s drafts of the elements of the crime against humanity beginning with its 1954 *Draft Code of Offences Against the Peace and Security of Mankind* did not retain a reference to armed conflict. By 1968, the nexus was not cited in the *Convention on the Non-Applicability of the Statutory Limitation to War Crimes and Crimes against Humanity* (26 November 1968, 754 U.N.T.S 73). But the nexus found its way back in through the 1993 ICTY Statute, which defined the crime against humanity as: “the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.” It was not there in the Statute of the ICTR. But by the time the issue came to be examined by the Tadic Appeals Chamber in 1995, the ICTY was able confidently to hold that “[i]t is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict”. Indeed... customary international law may not require a connection between crimes against humanity and any conflict at all”, *Prosecutor v Dusko Tadic*, Case No IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 141.

¹²⁹ Over time, the requirement that the particular actions be part of a widespread or systematic attack against the civilian population has come to form an integral part of the crime in customary law. This is evidenced in the 1993 Report of the Secretary-General accompanying the submission of the ICTY Statute to the Security

of persecution evolved since Nuremburg?¹³⁰ Was it necessary for all the acts to have been committed with a discriminatory intent? Did state or organisational policy matter for a crime against humanity in 1965-1966? What did a person have to know about the wider attack and the location of his or her act within it? What mental element would have been required then, knowledge or specific intent? And how does all of that compare with the definition of the crime against humanity in the Law on Human Rights Courts?

Still on the example of the events of 1965-1966, there are also problems with a one-size-fits-all approach to command responsibility. The basic concept is that a military commander may be held responsible for acts of subordinates if there was a superior-subordinate relationship; the superior knew or had reason to know that the criminal act was about to be or had been committed; and the superior failed to take the reasonable measures to prevent the criminal act or to punish the perpetrator. Command responsibility of military and civilian commanders was introduced into Indonesian law for the first time in the Law on Human Rights Courts (Article 42), which is roughly based on the definition employed in the Statute of the ICC.¹³¹ Prior to this, there was no such head of criminal liability in Indonesian law, meaning that no one could have been held criminally liable for failing to respond appropriately to the acts of subordinates. And, even if international law has recognised the basic concept of commanders being responsible for the acts of subordinates in certain situations since the Nuremburg and Tokyo trials (the fundamentals were set out in cases such as *High Command*¹³² and *Yamashita*¹³³), the precise content of the doctrine has been evolving since then. There are in fact important differences between the command responsibility formulations used in Article 86 of Additional Protocol I, the *ad hoc* international tribunals (ICTY Article 7(3) and ICTR Article 6(3) and the ICC's Article 28.¹³⁴ Which of these reflected the content of the doctrine in 1965-1966 and does the command responsibility formulation used in the Law on Human Rights Courts meet that which applied in customary law?

V. REFLECTIONS AND CONCLUSIONS

On paper, Indonesia has come a long way since the days of Soeharto. This study has examined some of these significant developments, which should be setting the foundations for the promotion of rule of law and democracy in Indonesia. These include regular Komnas HAM investigations into gross violations of human rights and numerous recommendations for prosecution; several military and *koneksitas* trials; one functioning Human Rights Court (Makassar) with the establishment of three others long overdue; the establishment of one *ad hoc* human rights court to try those accused of crimes against humanity in East Timor (1999) and Tanjung Priok, Jakarta (1984); a truth and reconciliation commission which focuses on individual complaints and recommendations of amnesty and compensation for victims; and the truth and friendship commission with East Timor.

Council, which explained that crimes against humanity are "inhumane acts of a very serious nature ...committed as part of a widespread or systematic attack against any civilian population", they are "beyond any doubt part of customary international law". (See Report of the Secretary—General under Security Council Resolution 808, UN SCOR, 1993, UN Doc.S/2504, para 48. The ICTR was the first international instrument to codify "widespread or systematic attack on the civilian population" as an element.

¹³⁰ The IMT Charter enabled prosecution of persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal.

¹³¹ For critique of the substance of this provision per se, see ELSAM, *supra* note 65 at 15-17.

¹³² *United States of America v. Wilhelm von Leeb et al.*, Judgment, 11 Trials of War Criminals Before the Nuremburg Military Tribunals Under Control Council Law No.10 [1948].

¹³³ *In Re Yamashita*, Supreme Court of the United States, 327 US 1 (1946).

¹³⁴ See generally Ilias Bantekas, "The Contemporary Law of Superior Responsibility" (1999) 93 Am. J. Int'l L. 573; Matthew Lipman, "The Evolution and Scope of Command Responsibility" (2000) 13 Leiden J. of Int'l L. 139; W.J.Fenrick, "Article 28: Responsibility of Commanders and Other Superiors" in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court* (Nomos. Baden-Baden, 1999) at 519.

But this study has also shown that qualitatively, there is little to recommend the processes. While there is a comprehensive legal regime in place and some improved statistical data, there is little actual improvement of the human rights situation arising therefrom. Things are still at the stage where the mere fact that there are actually accountability mechanisms and some kind of process in place is the only thing to be cheered, and even then, there is much not to cheer about. Yes, there are now laws allowing for the prosecution of gross violations of human rights, but the Law on Human Rights Courts is deliberately limited in its scope, and three out of the four courts that should have been set up still do not exist two years after the deadline. There are special procedures for the prosecution of historic violations, but the attempt must first pass through significant political vetting. The one court that was established did anything but uphold human rights for the victims and survivors of the tragedies of East Timor and Tanjung Priok, and Indonesians are no closer to having an honest and reliable account of what happened. Indonesia is involved with two truth commissions, but neither has any indicia suggesting *bona fide* mechanisms of reckoning with the past. Those few inroads into accountability through the trial process have been token and highly manipulated, with low-ranking scapegoats taking the blame, detracting attention from those higher up in the civilian and military chains of command, white-washing what happened, and leaving the bulk of violations unresolved. The quality of accountability is so low that the flurry of “transitional justice” has had little impact on changing society and taking Indonesia towards rule of law and democracy. Too often, the course of justice has been grossly perverted.

The record of accountability in Indonesia underlines the vulnerability of the doctrine of human rights. Accountability has too often been hijacked and skilfully used as a platform to further aims that have nothing to do with the fundamental concepts that underpin the human rights paradigm, such as justice, fairness, non-discrimination and individual or State responsibility. The record of the *ad hoc* court and the design of the two truth commissions vividly demonstrate that there is a need for caution in selling concepts such as “justice” or “truth and reconciliation” to nations in transition. Not only do they involve the raising of unrealistically high expectations about redressing of balance or righting of wrongs that is in fact rarely achieved after mass and terrible violence or repression, but worse, there is also tremendous potential for them to be hijacked and manipulated into mechanisms that in fact serve unworthy goals that will in the long term cause even more harm.

Indonesia’s odyssey has been more a “sailing while building the boat” method and most of the time, it is through rough and bad weather.¹³⁵ The challenges are immense and the issues extremely complex. Despite the efforts, it seems unlikely that Indonesia’s unenthusiastic forays into accountability or ratification of international human rights instruments that are quite simply ignored¹³⁶ will make much of a dent in changing the nature of its society and its values until monoliths such as the judiciary, police, Attorney-General’s Office and the TNI are effectively reformed from within.¹³⁷ Reform of all these institutions has been on the agenda for several years, but implementation has been weak and unenthusiastic. As the record of accountability revealed in this paper shows, it has not been meaningful. Indonesia illustrates how it is not possible to advance the rule of law and improve access to justice

¹³⁵ Paper presented by Erna Witoelar, Minister of Settlement and Regional Infrastructure, co-chair of the Partnership for Governance Reform, Interim CGI meeting, Jakarta 25 April 2001.

¹³⁶ In 2005, Indonesia finally became party to the ICCPR. It has not yet signed the Rome Statute of the ICC. Yet, that does not mean it is safe from the reach of the court. The Darfur situation has set a precedent; in the unfortunate event that the situation in Indonesia were to deteriorate substantially and there arose very serious and widespread violations of human rights amounting to international crimes, of such magnitude as to cause a serious threat to international peace and security, the Security Council may draw on its Chapter VII powers to refer the entire situation to the ICC.

¹³⁷ Muningsari Sri Saraswati, “Government Has Failed to Promote Human Rights Protection: Watchdog” *Jakarta Post* (14 January 2004); Muningsari Sri Saraswati, “Judicial reform essential to support democracy” *Jakarta Post* (3 January 2005).

without changing the operations and culture of core legal institutions such as those mentioned earlier, and the mindsets of individuals within them. Using reform of the police force as an illustration, changes cannot be implemented in isolation from the other institutions of State and an effective police force will soon be rendered impotent if prosecutors, judges and prison governors fail in their responsibilities and inadequate resources are provided to cover basic needs and operational costs.¹³⁸ In December 2001, results of an external audit of the Attorney General's Office (which is the office responsible for investigating criminal corruption) conducted by PriceWaterhouse Coopers and the British Institute of International and Comparative Law revealed endemic corruption. The report found that the entire judicial system would "probably collapse" were it not for unlawful payments to the Attorney General's Office which runs on an "institutionalised unofficial budget" and that the web of corruption encompassed not just the Attorney General's Office but also judges, lawyers and police.¹³⁹ A report by Indonesian N.G.O., Corruption Watch, found that corruption within Indonesia's judiciary is glaring and well-organised, involving all players in the legal system and at every stage: "at a criminal court, corruption begins when filing a case with officials who ask for variable registration fees, depending on the wealth and status of the individuals involved in the case, and whether or not they belonged to the country's economic and political elite".¹⁴⁰ Once court proceedings begin, lawyers can choose favourable judges while most "lucrative" cases are handled directly by the district court chief. Verdicts are then subject to negotiations either through the services of the prosecutor or directly with the judges. The UN's Commission of Experts for East Timor recommended that Indonesia

strengthen its judicial and prosecutorial capacity by assembling a team of international judicial and legal experts, preferably from the Asian region, to be appointed by the Government of Indonesia on the recommendation of the Secretary-General with a clear mandate to provide independent specialist legal advice on international criminal law, international humanitarian law and international human rights standards, including procedural and evidentiary standards.¹⁴¹

The TNI continues to be both source and solution to many of Indonesia's human rights woes. Its ongoing influence can be seen in the qualitative failure of the numerous efforts at enforcing individual responsibility of military personnel for gross violations of human rights. Some argue that Indonesia cannot move towards a more open society, towards democracy, towards internal security and, at the same time, ensure defence against external threats, without a responsive, strong and unified military establishment. It is after all, the strongest and most disciplined organisation in the country, cutting across all of the various divides. It is the TNI that has kept, and continues to keep, Indonesia from breaking apart. Others see the hand of the TNI in just about everything that is wrong in Indonesia. This study has shown how, for decades, the military has been at the heart of massive human rights violations in this archipelago of some seventeen and a half thousand islands. For years, the military benefited tremendously from its close strategic alliance with Soeharto and Golkar, the regime's civilian political machine. The military was part and parcel of the New Order and Soeharto thoroughly dominated it during his long reign. Its continuing influence is thus also the continuing influence of the New Order in Indonesia today. Given the immense continuing influence of the TNI on accountability and other areas which have an impact

¹³⁸ "Indonesia: National Police Reform" *International Crisis Group* (20 February 2001), online: The International Crisis Group <<http://www.crisisgroup.org/home/index.cfm?id=1459&cl=1>>.

¹³⁹ "Attorney General Admits Corruption Rampant" *Laksamana Net* (23 May 2002).

¹⁴⁰ Eriko Uchida, "Report Reveals Corruption in Indonesian Court System" (23 July 2002), citing, "Lifting the Lid on the Judicial Mafia: Research inot Patterns of Corruption within the Judiciary" *Indonesia Corruption Watch*, online: <<http://www.antikorupsi.org/docs/liftingthelid.pdf#search=Lifting%20the%20Lid%20on%20the%20Judicial%20Mafia>>.

¹⁴¹ Report of the Commission of Experts for East Timor, para. 514.

upon rule of law and democratisation, the problem that arises is the lack of willingness and direction in dealing with them. This is not unique, for a major dilemma that States in such situations face when embarking on a major reform process is whether to prioritise establishing democratic control or civilian control over the military.¹⁴² Another way of looking at it is that accountability in Indonesia will improve if enough Indonesians demand the taming of the multi-headed hydra. But it should be recognised that there have in fact been some major reforms within the TNI; while some observers are sceptical, saying that the changes are superficial, others acknowledge that very real reforms have taken place.¹⁴³ But there is no doubt that formal subordination of the military to civilian authority and lip service to the language of “civilian supremacy”, democratisation and use of human rights jargon are not enough and must be translated into tangible reform.¹⁴⁴

Adopting laws that are riddled with loopholes and setting up hollow institutions administered without commitment to fundamental principles such as transparency, due process, justice and accountability will do more harm than good in Indonesia. Significant reforms of the kind required are immensely complex and it is a multi-generational project to change mindsets. The politics of reform also need to reach the hearts and minds of ordinary Indonesians. Until these things happen, it is unlikely that the epic struggles for accountability will be able to make Indonesia a better and safer place.

¹⁴² *Democratisation in Indonesia: An Assessment*, Capacity Building Series No.8, Forum for Democratic Reform, (Stockholm: International IDEA, 2000) at 89

¹⁴³ See Harold Crouch, “Indonesia’s Military: Backbone of the Nation or Achilles Heel?”, Proceedings of a USINDO Workshop (25 March 2000) 8. Democratic control means that the military command structure is subject, and accountable, to democratic institutions such as Parliament and courts of law, whereas “civilianisation” means that non-military personnel dominate all defence and military decision making processes, for example, deciding on defence policy, grand strategy or promotions.

¹⁴⁴ See for example, Lt. Col. Agus Widjojo, “Indonesia’s Military: Backbone of the Nation or Achilles Heel?”, Proceedings of a USINDO Workshop (25 March 2000) at 5: “In the future, the Indonesian armed forces will focus its endeavours on being a professional armed force focusing its endeavours to respond to external threats and withdrawing completely and totally from the day-to-day socio-political affairs...We must transform TNI into an instrument that fits in a modern nation State of Indonesia.”

