

**INDONESIA:  
IMPUNITY VERSUS ACCOUNTABILITY  
FOR GROSS HUMAN RIGHTS VIOLATIONS**

2 February 2001

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**INDONESIA:**

**IMPUNITY VERSUS ACCOUNTABILITY  
FOR GROSS HUMAN RIGHTS VIOLATIONS**

**EXECUTIVE SUMMARY**

This report reviews Indonesia's unimpressive record in bringing to justice those responsible for gross human rights violations. Since May 1998 only four major cases have resulted in convictions. In three of those cases there are significant reservations about the process. While there have been high level inquiries for other major cases, and additional trials may result, other instances of blatant violations from the distant past to the present have not been touched.

One reason for slow judicial progress has been the inadequacy of the legal system. The need for new procedures to deal with gross violations was treated with urgency only after huge international protest over the murder and destruction that followed East Timor's vote for independence. A number of new laws and mechanisms – examined in detail in the report – have now been created, raising the possibility that Indonesia will make further progress at a faster rate. The stakes are high. If Indonesia does not use those laws vigorously, and against some senior military and civilian officials, not merely subordinates, it will convince many that they enjoy impunity to continue human rights abuses. And it will convince victims, particularly in Aceh, Papua and Maluku where rising tensions threaten Indonesia's stability, that the state will not protect them.

This report confirms the experience of other countries in transition that bringing perpetrators of gross human rights abuses in Indonesia to justice will remain as much a political issue as a judicial one and that only a handful are likely to be held to account either by judicial means or other formal processes such as a Truth Commission. This is the direct result of the inability of the civilian government to exercise full authority over the armed forces. But the report also demonstrates the bona fides of some Indonesian government leaders in pursuit of both judicial and political accountability, just as it documents an overwhelming array of obstacles to their efforts.

Time alone will tell whether Indonesia is making the right choices about priorities and tactics in response to those obstacles. But as much as the government and key constituencies want to be left to themselves to decide, other domestic constituencies and the international community cannot readily accommodate the delays and uncertainties of the process. To be a cohesive nation, Indonesia's institutions must deliver protection and justice to all citizens. The continuation of serious human rights abuses in parts of Indonesia is fuelling separatist tensions, making accountability for past abuses both harder and more important and leading many to question the capacity of the Abdurrahman government.

The international community has a particular obligation to ensure accountability for Indonesian perpetrators of serious crimes committed in East Timor in 1999. It has a more general concern for accountability because of its stake in democratisation and stability in an important country. This requires a higher degree of international engagement in Indonesian processes than might otherwise be normal or tolerable.

The prospect of an international tribunal to adjudicate serious crimes committed in East Timor was first raised within the UN in 1999, and judicial processes have been set in train by the UN administration in East Timor for the investigation of such crimes. This international interest and activity will continue to put pressure on Indonesia to set its own house in order. If handled judiciously, it will strengthen those in Indonesia advancing the cause of accountability, but the international community can not expect a quick, neat or comprehensive pay-off.

## **RECOMMENDATIONS**

### **To the Indonesian Government**

1. Amend the constitution to resolve uncertainties about retroactive prosecution for crimes of omission involving cases of gross violation of human rights.
2. Accede to the International Covenant on Civil and Political Rights.
3. Transfer authority to establish ad hoc human rights courts from the parliament and the president to the Supreme Court or another respected non-political body.
4. Avoid premature prosecution of the most senior military officers until the effectiveness of the new human rights laws has been established, but do not delay prosecutions in general.
5. Use prosecution of subordinate personnel to develop evidence for the prosecution of more senior officers and officials, in some cases offering immunity in exchange for testimony.
6. Utilise the ordinary criminal code as much as possible, in particular if uncertainties about the constitutionality of retroactive prosecution for crimes of omission are not resolved.
7. Adopt legislation as quickly as possible to make military personnel subject to civilian courts in criminal cases.
8. Co-operate fully with UNTAET in prosecuting human rights cases.
9. Investigate and, if appropriate, bring to trial in Indonesia military personnel and militia members living in Indonesia who are charged in East Timor.
10. Establish an effective witness protection program.
11. Give the National Human Rights Commission more resources to enable it to carry out its expanded role effectively.
12. Provide additional training in international human rights law to judges and prosecutors.
13. Ensure that the proposed Truth and Reconciliation Commission offers the victims of human rights abuse wide scope to have their voices heard.

## **To the International Community**

14. Monitor and report regularly on Indonesia's efforts to try suspected perpetrators of gross human rights abuses.
15. Monitor closely the movements of suspected perpetrators of gross human rights violations.
16. Devote significantly greater donor resources to judicial reform in order to assist the Indonesian agencies most vigorously involved in pursuing accountability for gross human rights violations.
17. Use both contacts with the military and carefully targeted restrictions on co-operation with it to sensitise senior officers to the broader implications of the accountability issue for Indonesia's national interests.
18. Assist Indonesian groups that participate vigorously in the domestic debates on accountability to gain more access to information, including by releasing currently classified accounts of human rights abuses where these can be sanitised to protect sources.
19. Hold Indonesia to a timetable and criteria for continued progress in prosecuting those responsible for violence in East Timor and take up again the issue of an international tribunal if these are not maintained.
20. Pay particular attention to what is done about the most senior personalities named in the Indonesian Commission of Inquiry into the crimes in East Timor and, where credible evidence is available, help Indonesia flesh out the evidentiary record.
21. Deliver a clear message to Indonesia that if it fails to bring those responsible for gross violations of human rights in East Timor in 1999 to trial, pressures from domestic constituencies are likely to make it impossible for donors to provide the developmental assistance Indonesia needs, well before the last resort of an international tribunal again became an active issue.
22. Give more money to UNTAET's Special Crimes Unit, upgrade the priority of its mission, and provide additional highly qualified personnel to staff its functions.

**Jakarta/Brussels, 2 February 2001**



## INDONESIA:

# IMPUNITY VERSUS ACCOUNTABILITY FOR GROSS HUMAN RIGHTS VIOLATIONS

## I. INTRODUCTION

Gross violations of human rights – including killing, torture and imprisonment without trial – took place with disturbing regularity in Indonesia throughout the 32 years of Soeharto's New Order government. However, until the fall of the regime in May 1998, the surviving victims of human-rights abuse often remained silent for fear of inviting further repression. In the new liberal atmosphere since then, victims and their supporters have been emboldened to raise their voices to demand justice not only in regard to past violations but also continuing abuses in the present era.

This report focuses primarily on gross violations perpetrated by state officials, mostly military or police personnel, either as a matter of state policy or on their own initiative. During the New Order, the violation of human rights had become an essential part of the government's political strategy to maintain its grip on power. Popular protest movements were routinely repressed by violent means, and dissidents were often imprisoned after farcical trials. It was only when particular violations were so grave as to attract the attention of the world community that limited 'damage-control' measures were taken leading to the sentencing of a small number of perpetrators to short terms of imprisonment. Although the fall of Soeharto was followed by far-reaching liberalisation involving the lifting of restrictions on political opposition and the undermining of the military's political influence, military and police violations of human rights continued to take place on a reduced scale. Indeed, it was often the inability of the security forces to preserve social order in the face of communal conflict that permitted some of the grossest violations of human rights.

Gross violations in Indonesia have taken many different forms and affected different parts of society: communists and communist sympathisers who were massacred or imprisoned in large numbers at the beginning of the New Order era in 1965-66; Muslim political opponents imprisoned in their hundreds in the 1980s; Muslim protestors at Tanjung Priok (Jakarta) in 1984 and Lampung in 1989 who were killed by government forces; and thousands of petty criminals who were systematically murdered during the early 1980s. Gross violations occurred during military operations in provinces where separatist or independence movements are or were active, including Aceh and Irian Jaya, as well as the special case of East Timor.

Violations have not, of course, been a monopoly of state officials. The anti-communist massacres of 1965-66 were perpetrated as much by political organisations as by the military, while the violations arising from the breakdown of public order – such as in anti-Chinese rioting or religious and ethnic conflict – have

deep roots in society itself. In these cases, the state, while not directly responsible for the actions, cannot be absolved completely. The state has a duty to protect its citizens from violence. In some cases, the precise origins of violations remain uncertain. Many observers believe that elements within the military have provoked social conflict in order to further particular political and commercial interests.

Domestic demands for justice have been reinforced by international pressure that reached a peak in the sense of outrage felt at the conduct and aftermath of the 'popular consultation' held in East Timor in August 1999. In particular the killing, forced migration and physical destruction that followed the overwhelming vote in favour of independence focussed international attention on Indonesia and led to a United Nations-sponsored inquiry that recommended the establishment of an international tribunal to try those accused of 'serious violations of fundamental human rights' in East Timor. In response, the Indonesian parliament adopted legislation to establish new human rights courts to try not only those responsible for the violations in East Timor but also in other cases that have occurred in Indonesia.

This report is concerned primarily with two related issues, both of which relate to the central question of whether Indonesia's ambitious democratic reforms will succeed in establishing new legitimacy and tranquillity in the troubled nation. The first is the degree to which the political and court system might satisfy the demand for justice. The privileged position of the security forces, especially the army, during the Soeharto era fostered a 'culture of impunity' that enabled military officers to feel that whatever actions they took in the name of protecting the state were not subject to the application of law. The report examines some of the most prominent recent cases that have been investigated by various official or semi-official agencies and, in a tiny number of instances, brought to court.

The second issue focuses on the inherent limitations of judicial procedures in any country in dealing simultaneously with both the requirements of justice and the need for reconciliation. This has sparked interest in the formation of a Truth and Reconciliation Commission (TRC). There is a range of expectations about what a TRC should achieve but at its core is the belief that national reconciliation cannot be attained without a full exposure of the truth behind gross violations of human rights.

## **II. SEEKING JUSTICE: THE RECORD**

This section of the report describes the moves by the post-Soeharto governments of Presidents Habibie and Abdurrahman Wahid to investigate and prosecute gross violations of human rights perpetrated under the old regime as well as since. Although these investigations have uncovered much evidence of killing and other crimes, they have not produced more than a handful of prosecutions. And even when convictions have been obtained, the sentences have often been extraordinarily light, and suspected 'masterminds' behind the offences have not been charged. The material is divided into three sections: convictions, investigations, and not addressed cases.

## A. Convictions

In only four major<sup>1</sup> cases since May 1998 have perpetrators of gross violations of human rights been brought to court and convicted. Those convicted were, with one exception, military or police personnel. Two of the cases were related to events surrounding the fall of the Soeharto regime in 1998 while the other two involved the murder in 1999 – during the Habibie presidency – of independence supporters in Aceh.

### 1. Trisakti Shooting

In the first trial in August 1998, when the police were still part of the armed forces, two police lieutenants were tried by a military tribunal for failing to observe proper procedures when they ordered troops to fire on demonstrating students at Trisakti University in West Jakarta, killing four. This incident on 12 May 1998 was followed by three days of rioting that prepared the way for the resignation of President Soeharto on 21 May. One of the two officers was sentenced to ten months imprisonment and the other to four months. It had been announced that another sixteen officers, including a lieutenant-colonel, would be tried but they were never brought to court.<sup>2</sup> The failure to go ahead with the trials of the other defendants stimulated public suspicion of a 'cover-up', especially as the students were killed by metal bullets, not the rubber bullets issued to the police. Many observers suspected that the shooting might have been a deliberate attempt by elements within the military to achieve political objectives when demands for the overthrow of the president were rising.<sup>3</sup> In January 2001 a special parliamentary committee began a re-examination of this case.<sup>4</sup>

### 2. Kidnapping by Special Forces

The second trial, from December 1998 to April 1999, was that of eleven members of the army's Special Forces (Kopassus) accused of kidnapping and detaining nine radical activists during the months before Soeharto's fall. The soldiers were found guilty by a military court and sentenced to jail terms ranging from twelve to 22 months. The most senior officer, a major, and four captains were also dismissed from the armed forces.<sup>5</sup>

The trial was considered a whitewash by many human-rights activists, who believed its conduct was closely related to political rivalries within the military. First, the soldiers were only accused of kidnapping and detaining the victims, while the victims themselves claimed they had also been tortured. Second, it was believed that altogether 23 people had been kidnapped but the charges related only to nine, all of whom had since been released. Of the other fourteen, one had been found dead, and thirteen are still missing. Third, there was widespread scepticism about the convicted major's confession that he

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<sup>1</sup> There have also been a few minor convictions. For example, an NCO in Lampung was sentenced to one year of imprisonment for shooting a student during a demonstration in 1999. *Tempo*, 26 November 2000, p.37.

<sup>2</sup> Panji Masyarakat, 31 March 1999.

<sup>3</sup> Keith Richburg, 'Indonesia's Unintentional Martyrs', *Washington Post*, 8 June 1998.

<sup>4</sup> Kompas, 31 January 2001.

<sup>5</sup> Kompas, 6 April 1999, Tempo 13-19 April 1999.



formed the team that carried out the kidnappings on his own initiative. The previous August, a military honour council had 'honourably discharged' the former commander of Kopassus, Lt. Gen. Prabowo Subianto, who accepted responsibility for the kidnappings. The dismissal of Prabowo, President Soeharto's son-in-law, however, was related to his rivalry with General Wiranto, then Minister of Defence and Security and Commander of the Armed Forces. It seemed that the major had taken the blame rather than implicate Prabowo, who might then have implicated the most senior officers in hierarchy as well as the former president from whom Prabowo had become estranged. The limited charges and light sentences seemed to reward the major's co-operation while Prabowo moved abroad.

### 3. Killing of Acehese prisoners

The third prosecution, and first in Aceh, took place in January 1999. In the context of military operations against the Acehese independence movement, a mob dragged seven soldiers from a public bus and killed them. In response the military swept through villages and detained 38 people in a makeshift prison. On 9 January 1999 a major, who was the acting commander of a battalion whose men had been among those killed, led an attack on the prisoners, four of whom died. He was charged with assault rather than murder and sentenced by a military court to six years imprisonment.<sup>6</sup> Four NCOs were also sentenced to periods of 24 to 30 months.

### 4. Killing of Teuku Bantaqiah and Followers in Aceh

The fourth prosecution (the second in Aceh) followed the killing by army troops of a religious teacher, Teuku Bantaqiah,<sup>7</sup> and 56 followers on 23 July 1999 in a village in West Aceh. After several postponements, the trial in April-May 2000 resulted in 24 murder convictions (ten soldiers from Kostrad, the army's strategic reserve command, and thirteen from the local Bukit Barisan regional command, and one civilian). Sentences ranged from eight-and-a-half to ten years. The soldiers claimed they had been attacked though they suffered no casualties. On the other hand, it was admitted that 34 victims were killed on the spot and 23 wounded were killed elsewhere.<sup>8</sup> The highest-ranking officer convicted was a captain while most of the soldiers were privates or NCOs. The commanding officer, Lt. Col. Sudjono, had 'disappeared' and could, therefore, not be charged. His disappearance made it impossible to implicate more senior officers.

That only four major human rights trials could be completed in more than two years has strengthened the impression that military and police personnel continue to enjoy impunity from prosecution. This impression was particularly strong with respect to senior officers as the highest rank put on trial was major while it was obvious that senior officers were involved in at least the Kopassus and Bantaqiah cases, and the initial plan to prosecute senior officers in the Trisakti case was abandoned. The conduct of the military courts also cast doubts on the process. Witnesses complained of intimidation in the Bantaqiah

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<sup>6</sup> *Kompas*, 29, 31 January 1999.

<sup>7</sup> Bantaqiah was a supporter of Acehese independence and had recently been released from detention as part of an amnesty policy introduced by the Habibie government.

<sup>8</sup> *Jakarta Post*, 13 May 2000.

case while the charges in the Kopassus case fell far short of the victims' claims. The 'disappearance' of Lt. Col. Sudjono could hardly have been without connivance.

## B. Investigations

Although only four major cases have resulted in convictions, there has been no shortage of investigations of other human-rights cases by official and semi-official bodies in Indonesia. In all but one of these, special investigative teams prepared preliminary reports. In the other case, the process began with police investigation.

### 1. The Report on the May 1998 Riots

The first commission of inquiry established by the Habibie government was the Joint Fact-Finding Team to investigate the rioting in Jakarta and several other cities between 13 and 15 May 1998. The eighteen-member team was formed on 23 July 1998 under the leadership of the chairman of the National Human Rights Commission (Komnas-HAM), Marzuki Darusman (now attorney general in the Abdurrahman government), and included government officials, military and police officers, members of the Komnas-HAM and NGO activists. Its report in October 1998 noted estimates of the number killed ranging from less than 300 to over 1200. It also estimated that 52 women had been raped during the rioting and recorded massive property destruction. Most of those raped were of Chinese descent and much destroyed property was owned by Chinese. Most of the dead were indigenous Indonesians caught in burning shopping malls.

The report acknowledged that the rioting in some areas had appeared to be spontaneous but it also mentioned 'provocateurs' who took advantage of the situation. The report speculated that 'the riot was created as part of a political struggle in the elite' but admitted that it had not found the 'missing link' connecting this struggle with mass violence. In its recommendations, the report called on the government to continue to investigate the riot and take legal action against those involved, 'both civilian and military'. Although it mentioned by name the then Kostrad commander, Lt. Gen. Prabowo Subianto, and the Jakarta regional commander, Maj. Gen. Syafrie Syamsuddin, it did not lay specific charges against them.<sup>9</sup>

Since then no one has been identified as a provocateur and the 'missing link' has not been discovered. Nor have charges been brought. The rape victims have been unwilling to bring cases to courts either from a sense of shame or because of the difficulties in identifying culprits. There have also been reports of intimidation of rape victims, some of whom have fled overseas.

In July 2000, Marzuki Darusman, by then attorney general, called on the Komnas-HAM to submit a new report on the riot,<sup>10</sup> but there has been no further progress.

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<sup>9</sup> Laporan Akhir Tim Gabungan Pencari Fakta Peristiwa Tanggal 13-15 Mei 1998, Ringkasan Eksekutif (Final Report of the Joint Fact-finding Team, the Event of 13-15 May 1998, Executive Summary), 23 October 1998.

<sup>10</sup> *Kompas*, 25 July 2000.

## 2. The Report on Violence in Aceh

Following Soeharto's fall, the new government took initiatives in Aceh, including apologies for military behaviour by the commander of the armed forces, General Wiranto, and President Habibie. In August 1998 Aceh's status as a 'Region of Military Operations' (DOM) was withdrawn. However, military clashes continued with the armed wing of the separatist movement, the Free Aceh Movement (Gerakan Aceh Merdeka).

In June 1999 the Komnas-HAM asked President Habibie to establish an independent commission to investigate human rights abuses in Aceh during the previous decade. Seeking to combat the growing demand in Aceh that its people, like those in East Timor, be offered a referendum on independence, Habibie agreed to form the Independent Commission to Investigate Violence in Aceh. The commission, most of whose 27 members were Acehnese, was established on 30 July. Its 484-page report in November noted thousands of reported cases of violence and recommended that prosecution of five be given priority.

Three of those cases involved troops firing on independence supporters. On 3 February 1999, seven people were killed when troops shot into a large group listening to a pro-independence sermon in a mosque in Idi Cut, East Aceh.<sup>11</sup> On 3 May 1999, 29 were killed and 125 wounded when troops fired on independence supporters at Kreung Geukeueh (also called Simpang KKA), near Lhokseumawe in North Aceh.<sup>12</sup> And on 23 July 1999, the Bantaqiah killings occurred, as discussed above. The remaining two cases went back to the Soeharto period. One involved the alleged rape of a girl in Pidie, the other related to what was called Rumah Geudong, a military detention centre where prisoners were tortured and killed.<sup>13</sup>

In response, the Chief of Staff for General Affairs of the Indonesian National Military (TNI), Lt. Gen. Soegiono, claimed that 178 military personnel had been punished for 'crimes against humanity' in Aceh, including some who had been discharged. He assured sceptical reporters that we 'take measures against guilty TNI members even without the public's knowledge'.<sup>14</sup> However, of the five priority cases, only the trial of those involved in the Bantaqiah affair has been held, as described above.

## 3. The East Timor Inquiry

In January 1999 President Habibie promised a 'popular consultation' to allow the people of East Timor to choose between integration with Indonesia and independence. Despite violence and intimidation by the military and pro-integration militias they had established, 78 per cent voted for independence

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<sup>11</sup> *Jakarta Post*, 5, 6 February 1999.

<sup>12</sup> *Kompas*, 4 May, 16 November 1999. The district military commander, Col. Johnny Wahab, claimed that the shooting was 'in accordance with procedures in order to safeguard a guided missile installation which, if it had exploded, would have destroyed the entire town of Lhokseumawe'.  
*Kompas*, 5 May 1999. The likelihood that the Acehnese villages would have known how to fire guided missiles, however, seems slim.

<sup>13</sup> *Kompas*, 10, 16 November 1999, *Jakarta Post* 10 November 1999.

<sup>14</sup> *Jakarta Post*, 23 November 1999.

on 30 August. This sparked massive destruction and killing in Dili and elsewhere. The Indonesian security forces had accepted responsibility for order but were widely seen as encouraging, and probably orchestrating, the devastation.

As the international community began to accuse the Indonesian military of 'crimes against humanity' and the UN Human Rights Commission prepared a special session to consider the situation, the Habibie government gave its approval to the Komnas-HAM to form its own Commission of Inquiry into Human Rights Violations in East Timor between January and October 1999 when Indonesia finally relinquished its sovereignty. The commission, which was formed on 22 September, consisted of five members of Komnas-HAM and four independent human-rights activists.

The government's support for the Indonesian commission was reinforced by the resolution of the UN Human Rights Commission on 27 September 1999, which called on Indonesia to ensure that those responsible for the violence would be brought to trial and asked the Secretary General to form an international commission of inquiry. In a report to the Security Council on 21 December, three special rapporteurs of the UN Commission on Human Rights concluded that there were grounds to believe that the TNI had been responsible for 'war crimes' and recommended that:

Unless, in a matter of months, the steps taken by the government of Indonesia to investigate TNI involvement in the past year's atrocities bear fruit, both in the way of credible clarification of the facts and the bringing to justice of the perpetrators – both directly and by virtue of command responsibility, however high the level of responsibility – the Security Council should consider the establishment of an international criminal tribunal for this purpose.<sup>15</sup>

In its report on 31 January 2000, the International Commission of Inquiry on East Timor, established by the Secretary General, called on the UN to 'establish an international human rights tribunal ... to try and sentence those accused by the independent investigation body of serious violations of fundamental human rights and international humanitarian law which took place in East Timor since January 1999.'<sup>16</sup> However the Security Council has not accepted this recommendation (see below).

In its report presented on 31 January 2000 – the same day as the UN commission's report – the Indonesian commission concluded that 'gross violations of fundamental human rights had been carried out in a planned, systematic and large-scale way in the form of mass murder, torture and assault, forced disappearances, violence against women and children (including rape and sexual slavery), forced migration, a burnt-earth policy and the destruction of property'.<sup>17</sup> It identified more than a dozen specific cases and recommended that the attorney general commence a formal investigation of the involvement of at least 33 people including the governor of East Timor, five

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<sup>15</sup> 'Situation of Human Rights in East Timor', UN General Assembly (A/54/660), 10 December 1999.

<sup>16</sup> Report of the International Commission of Inquiry on East Timor to the Secretary General, January 2000 (A/54/726, S/2000/59)

<sup>17</sup> Clause 60 of the executive report.

district heads, fifteen army officers and one non-commissioned officer, one police officer and ten civilian militia leaders. It specifically stated that the 'crimes against humanity' in East Timor had been due to 'the failure of the Commander of the TNI to guarantee security'. By January 2000, General Wiranto was no longer Commander of the TNI but had been appointed Co-ordinating Minister for Political and Security Affairs in the first Abdurrahman cabinet. Among senior officers named were the Commander of the Udayana army regional command, Maj. Gen. Adam Damiri, and the former head of military intelligence, Maj. Gen. Zacky Anwar Makarim.<sup>18</sup>

President Abdurrahman rejected a trial of Indonesian officers by an international tribunal but supported the investigation and trial of offenders as recommended by the Indonesian commission. In response to the commission's naming of Wiranto, he eventually suspended the general, who later submitted his resignation from the cabinet. In his typical erratic style, the president also promised to pardon Wiranto if a court convicted him.<sup>19</sup>

In May 2000, the attorney general, Marzuki Darusman, who formerly had been a member of the Komnas-HAM commission on East Timor, established a 64-member team to initiate formal investigation of those accused of violations in East Timor. Apart from officials of his own office, the team included members of the military police and the national police. Priority was given to five specific cases. They were the killings of refugees in Liquica on 6 April; the attack on the home of the pro-independence supporter, Manuel Carrascalao, in Dili on 17 April in which at least twelve people were killed; the killings at the home of Bishop Belo in Dili on 5 September; the killing of at least 26 people in Suai on 6 September; and, the murder of Dutch journalist Sander Thoenes on 25 September.<sup>20</sup>

On 1 September 2000, the attorney general's office named nineteen suspects including thirteen military officers, the most senior of whom were the former Udayana commander, Maj. Gen. Adam Damiri, and the former governor of East Timor, Abilio Jose Osorio Soares.<sup>21</sup> Three militia leaders were also named but one was murdered a few days later.<sup>22</sup> At the beginning of October, another four suspects were named including the militia leader, Eurico Guterres.<sup>23</sup> Among those not included were General Wiranto and Maj. Gen. Zacky Anwar Makarim, whose vulnerability had been reduced by a recent constitutional amendment (discussed below). Rather than risk a premature move against Wiranto, the attorney general preferred to prosecute his subordinates first, in the hope new evidence would emerge in their trials.<sup>24</sup>

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<sup>18</sup> Clauses 73 and 74 of the executive report.

<sup>19</sup> *Jakarta Post*, 7 February 2000.

<sup>20</sup> *Kompas*, 20 April 2000.

<sup>21</sup> *Kompas*, 2 September 2000.

<sup>22</sup> According to the human rights activist who was also a member of the commission of inquiry, Munir, the murdered man, Olivio Moruk, 'certainly had great potential to "sing", as we experienced when interrogating him at the commission of inquiry on East Timor'. Munir added that Moruk knew a lot about the involvement of Indonesian officials. *Kompas*, 8 September 2000.

<sup>23</sup> *Kompas*, 3 October 2000. In January 2001 Guterres was put on trial on separate charges related to an incident in West Timor where he disrupted the surrender of arms by militia members to the authorities.

<sup>24</sup> ICG interview with the Attorney General, Marzuki Darusman, 10 January 2001.

The Attorney General has said he hopes the first East Timor trial can be held early in 2001, and the case will involve the three most senior military and police officers on the suspect list.<sup>25</sup> However, as explained below, the ad hoc court provided for under the new Law on Human Rights Courts has yet to be established.

#### 4. The Tanjung Priok Inquiry

In September 1984, troops fired on angry demonstrators demanding the release of local Muslim leaders at Jakarta's port, Tanjung Priok. The exact number killed was not known because the military took away many corpses and buried them secretly. The shooting occurred when Muslim protest against the Soeharto government was growing stronger. The commander of the Armed Forces at the time was General Benny Moerdani, a Catholic, while the regional army commander in Jakarta was Maj. Gen. Try Sutrisno, a future Vice President. The failure to conduct a proper inquiry has rankled Muslim organisations ever since.

In the wake of the East Timor inquiry, Muslim organisations revived their demand for an official inquiry into the Tanjung Priok affair, and at the end of February 2000, the Komnas-HAM decided to establish a commission for this purpose. After hearing testimony from nearly 100 witnesses, including Benny Moerdani and Try Sutrisno, the commission submitted its report in June to the DPR.<sup>26</sup> It stated that it had 'not found evidence of a deliberate and planned massacre', or of 'mass burial' and accepted the military's claim that the shooting had taken place in 'forced circumstances' (*force majeure*). Nevertheless, it concluded that troops had killed 24 demonstrators, severely wounded 36 and tortured detainees. It blamed the clash equally on the 'uncompromising attitude' of the demonstrators and the 'unresponsive attitude and lack of preparedness' of the troops. It noted that 'the masses' had been responsible for the deaths of nine members of a Chinese family. It recommended that the government take steps to 'resolve all aspects of the affair' including apologising to, rehabilitating, and providing proper compensation for victims and families. It also called on the Commander of the TNI to investigate all personnel who 'perpetrated or were responsible for violations of human rights'.<sup>27</sup> The report outraged the Muslim organisations that had called for the inquiry since it seemed to have largely accepted the military's account. They accused the Komnas-HAM of bias, contrasting the vigour of the inquiry into abuses perpetrated against Catholics in East Timor with the weak recommendations on abuses against Muslims in Jakarta.<sup>28</sup>

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<sup>25</sup> Kompas 17 November 2000. The three are Maj. Gen. Adam Damiri, Brig. Gen. Tono Suratman and Police Brig. Gen. Timbul Silaen.

<sup>26</sup> Unlike the East Timor inquiry which submitted its report directly to the Attorney General's office, the Tanjung Priok report was submitted to the DPR because of the DPR's rejection of the regulation on which the inquiry was legally based. The debate over the regulation (Perpu 1/1999) will be discussed below.

<sup>27</sup> Kompas, 17 June 2000; Republika, 21 June 2000.

<sup>28</sup> The Minister of Law and Legislation, Yusril Ihza Mahendra, who was also chairman of the Muslim Crescent and Star Party, accused Komnas-HAM of applying double standards. 'When investigating East Timor they were serious, but when investigating the Tanjung Priok case they are reluctant.' Republika, 16 April 2000. See also Republika, 21 June, 4 July 2000.

In July 2000 President Abdurrahman ordered the Attorney General's office to launch a formal investigation based on the Komnas-HAM's report but the Attorney General's staff requested additional information before it could consider laying charges. In October the commission submitted a further report which recommended that perpetrators be held accountable and named 23 people to be investigated further.<sup>29</sup> By the end of the year, investigations were still continuing, and the names of those likely to be charged had yet to be officially announced.<sup>30</sup>

## 5. Police Investigation of the 27 July Affair

In 1996 President Soeharto was worried about the growing public support for the Indonesian Democratic Party (PDI: Partai Demokrasi Indonesia) led by Megawati Soekarnoputri, the daughter of his predecessor, President Soekarno. In June a government-manipulated party congress unanimously elected a government-backed candidate to replace Megawati who clearly enjoyed the support of the majority of party members. Despite their victory in the party congress, the new leadership was unable to occupy the party headquarters in Jalan Diponegoro, Jakarta, which became the site for daily anti-government rallies until it was attacked by 'unknown' forces on 27 July. It has never been revealed how many PDI supporters died or were wounded while trying to resist the attack but an investigation at the time by the Komnas-HAM of the ensuing riot revealed that five people were killed while 27 had disappeared.

After the fall of Soeharto, Megawati's wing of the party constituted itself as the PDI-Struggle (PDI-Perjuangan) and became the leading party in the 1999 election. Megawati was elected Vice President in October 1999. In the new circumstances, party supporters agitated for an investigation of those responsible for the attack on the party headquarters in 1996.

In February 2000 the newly appointed Chief of Police, Lt. Gen. Rusdihardjo, launched an investigation that questioned 190 witnesses, including 29 police officers and 29 military officers. At the end of May, eleven civilians were declared 'suspects', including the former PDI chairman, Soerjadi, and other PDI officials. The leader of the Golkar-linked Pemuda Pancasila youth movement, Yorrys Raweyai, was also placed on the list with four gang members. The police, however, have no authority to charge members of the military.<sup>31</sup> Following the conclusion of the police investigation of civilians, a joint military-police team took over in July the investigation of the role of military and police personnel. In August it was announced that twelve senior officers were 'suspects'.<sup>32</sup> Among them were Lt. Gen. Syarwan Hamid (former armed forces chief of staff for political and social affairs); Lt. Gen Sutiyo (governor of Jakarta and former Jakarta regional army commander); Maj. Gen. Zacky Anwar Makarim (former head of the Military Intelligence Agency); and, Police Inspector General Hamami Nata (former chief of police in Jakarta). Among those questioned but not named as suspects were former Commander of the Armed Forces, General Feisal Tanjung, and former Army Chief of Staff, General R. Hartono. So far, however, neither the generals nor any other suspects have been brought to court.

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<sup>29</sup> *Kompas*, 15 October 2000.

<sup>30</sup> However, the magazine *Tajuk* published a list of 23 names including Moerdani and Try Sutrisno. *Tajuk*, 26 October 2000.

<sup>31</sup> *Jakarta Post*, 30 May 2000.

<sup>32</sup> *Jakarta Post*, 11 August 2000.

## **6. Not Addressed Cases**

Many other cases of human rights violations took place during the New Order period but most were not investigated thoroughly or, more commonly, not investigated at all. Some of the most blatant violations were in regions where separatist sentiment was strong, particularly East Timor, Aceh and Irian Jaya. In 1989 in Lampung, South Sumatra, a large number of Muslim villagers were killed by troops in what was portrayed as a religious revolt but also involved land disputes. During the 1970s and 1980s Muslim organizations were a major target of military intelligence operations, and many were detained for long periods without trial or after farcical trials. Even a senior military officer, Lt. Gen. Dharsono, the former commander of the Siliwangi (West Java) regional army command and former secretary-general of ASEAN, was imprisoned for many years on blatantly trumped-up charges. In the early 1980s thousands of petty criminals in Jakarta and other cities were the victims of an extermination campaign. Earlier, at the beginning of the New Order, hundreds of thousands of members of the Indonesian Communist Party and their allies - who were not among the half million killed after the communist-supported coup attempt in 1965 - were detained without trial for up to fifteen years. Others were sentenced to longer periods of imprisonment in trials which fell far short of international standards. In many cases, the victims of military violence were tried rather than the perpetrators.

Illegal force by military personnel, however, did not end with the Soeharto regime, as continuing killings in Aceh, Irian Jaya and Maluku (and, of course, East Timor) showed. In Jakarta, too, fatal shootings of students by members of the security forces continued – most notably the shooting of demonstrators at the time of the 1998 People's Consultative Assembly (MPR)<sup>33</sup> session in November 1998 and during the protest against a proposed new security law in September 1999 (referred to as the Semanggi I and Semanggi II incidents after the location where they took place).

## **III. THE LEGAL FRAMEWORK**

Indonesia's legislation for dealing with gross violations of human rights is almost complete, although uncertainty remains about how the laws will be applied in practice.

### **A. The Criminal Code**

Indonesia's criminal code (KUHP – Kitab Undang-Undang Hukum Pidana) covers such crimes as murder, assault, torture, kidnapping, rape and destruction of property. It is, therefore, possible for gross human rights offences to be prosecuted under this code, as, indeed, were the four human rights prosecutions discussed above. However, the code has a number of inadequacies for dealing with gross human rights offences.

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<sup>33</sup> The MPR is Indonesia's highest legislative body. It has authority to amend the constitution and adopt decrees for the guidance of the parliament. It also elects the president and vice president.



First, the courts continue to be almost hopelessly corrupt so there is no guarantee that trials will be conducted fairly. When prosecutors do not deliberately leave huge loopholes in their case, judges themselves will often find technical reasons for a not-guilty verdict. The most spectacular examples since 1998 have involved corruption cases<sup>34</sup> but the same problem exists throughout the judicial system. There are honest judges but they are not plentiful.

Second, although the ordinary criminal law recognises the planning or organising of a crime as a crime in itself,<sup>35</sup> it is usually much easier to find evidence to convict the perpetrators than the 'masterminds' whose involvement is not visible to witnesses. In the case of political crimes, it is usually even more difficult to identify and implicate initiators who might be senior state officials separated from the perpetrators by a long chain of command. This means that it can be extremely difficult to find witnesses who can identify the masterminds behind human rights offences. Usually such witnesses are deeply involved themselves and unwilling to risk providing incriminating testimony.

Third, many gross violations of human rights have been committed by military and police personnel obeying orders issued by military commanders in implementation of national policies adopted by the president and his government and considered legal at the time. Criminal law is not well equipped to deal with this type of violation.

Fourth, although military personnel are subject to the criminal code, they have normally been tried in military courts with military prosecutors and military judges.<sup>36</sup> The Trisakti shooting, the Kopassus kidnapping and one of the Aceh cases mentioned above were all tried by military courts. Civilians strongly suspect that military courts 'protect their own'. In none of these cases were senior officers charged, and the sentences were relatively light. In the fourth case, the Bantaqiah affair, a different procedure was followed which allows for a joint military-civilian court when military personnel and civilians are jointly charged with the same offence.<sup>37</sup> Although the sentences were relatively heavy in this case, no senior officers were charged. In August 2000 the MPR adopted a decree on the roles of the military and police in which it declared that military personnel would be subject to military courts in cases involving military law and civilian courts in cases involving ordinary criminal law. It also declared that members of the police force would be subject to civilian courts.<sup>38</sup> A bill is currently being drafted to implement this decree.<sup>39</sup>

In response to public demands and international pressure, the two post-Soeharto governments have adopted legislation to provide for stronger protection of human rights and more effective legal means to ensure the accountability of violators.

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<sup>34</sup> For example, the Tommy Soeharto case in 1999 and several related to the Bank Bali in 2000.

<sup>35</sup> KUHP, Clause 55.

<sup>36</sup> Law 31/1997 on Military Courts.

<sup>37</sup> In such cases, called koneksitas cases, the trial can be in either a military or civilian court. If in a military court, the military judges are joined by civilian judges. (Law 14/1970 on Judicial Authority Provisions and Law 35/1999 amending Law 14/1970).

<sup>38</sup> Decree VII/MPR/2000, Clause 3.4.a and 7.4.

<sup>39</sup> *Jakarta Post*, 9 October 2000.

## **B. The Law On Human Rights**

On 23 September 1999, a month before the presidential election, President Habibie signed Law No.39/1999 on Human Rights in implementation of Decree XVII on Human Rights adopted by the MPR at its session in November 1998. It set out a long list of internationally recognised human rights that Indonesia is obliged to protect. In view of later developments, it is worth noting that the law included as part of the 'right to justice' a clause forbidding prosecution on the basis of laws not in existence at the time of the crime (Clause 18.2 and also Clause 4).<sup>40</sup> The law also stated that 'Provisions of international law in regard to human rights that have been accepted by the Republic of Indonesia become national law' (Clause 7.2).

The law strengthened the powers of the Komnas-HAM, which had been established by presidential decision in 1993 to monitor and report on human-rights abuses.<sup>41</sup> Most importantly for its future investigative role, the new law gave the commission the legal power to enforce the attendance of witnesses, including those against whom complaints had been made (Clause 89.3.c and d, Clause 95). This power was soon used to require senior military officers to give testimony before the East Timor and Tanjung Priok inquiries.

The new law also foreshadowed the establishment of a special human rights court 'within at the most four years' to hear cases involving 'gross violations of human rights' (Clause 104). An explanatory note defined 'gross violations of human rights' as mass murder (genocide), arbitrary or extra-judicial killing, torture, forced disappearance, slavery, and systematic discrimination (Note on Clause 104).

## **C. The Government Regulation On Human Rights Courts**

The Human Rights Law had been prepared and debated for many months before its adoption by the DPR in September 1999. At that time it was envisaged that human rights offences would be tried in ordinary courts until new human rights courts were established within four years. However, the destruction and killing in East Timor after the referendum on 30 August made establishment of new courts a matter of urgency. In particular, a UN-sponsored commission of inquiry threatened to lead to the establishment of an international court to try 'crimes against humanity' unless Indonesia dealt with these crimes itself. The Habibie government had to take urgent steps to show that it was serious. Instead of the time-consuming task of presenting a new bill to the DPR, it issued on 8 October 1999 a government regulation in lieu of a law (Perpu) to establish special human rights courts.<sup>42</sup> The constitution provides that the president can issue a Perpu in urgent circumstances but the regulation needs to be ratified by the DPR at its next sitting.<sup>43</sup>

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<sup>40</sup> The explanatory notes attached to Clause 4 of the law, however, state that 'the right not to be prosecuted on the basis of a retroactive law can be waived in the case of gross violations of human rights that are included among crimes against humanity'. The official explanation attached to a law is usually considered as an integral part of the law.

<sup>41</sup> Presidential Decision No 50/1993.

<sup>42</sup> Government regulation in lieu of law (Perpu) 1.1999.

<sup>43</sup> Constitution, clause 22.

With East Timor in mind, the regulation provided that the initial investigation could only be conducted by the Komnas-HAM (Clause 10). The Komnas-HAM would then present its recommendations to a team co-ordinated by the attorney general that was obliged to complete its investigations within six months (Clauses 12 and 13). To facilitate investigation of military personnel, the Perpu explicitly invalidated clauses in the Law on Military Courts (Clause 17). The attorney general would then prosecute in the newly established human rights court. The regulation stated, however, that violations of human rights that occurred before the issuing of the Perpu would be subject to existing criminal law (Clause 24).

The new Perpu, therefore, strengthened the legal basis for the Commission of Inquiry on East Timor set up a fortnight earlier. It also became a focus for demands to establish commissions to inquire into other cases of gross violation of human rights.

However, the Perpu, which needed ratification by the DPR, was rejected unanimously at the government's request on 13 March 2000. The Minister for Law and Legislation, Yusril Ihza Mahendra, argued that the regulation did not satisfy the community's aspiration for justice because it did not allow prosecution of past human rights offences in the new human rights courts.<sup>44</sup> In fact, a strong consideration was fear that the lack of a retroactive clause might fail to satisfy the international community's demand that those responsible for gross violations in East Timor be tried. Instead, the government prepared a new bill on human rights courts that specified a wider range of human rights offences and provided for retroactive prosecution.

#### **D. The Law On Human Rights Courts**

The Bill on Human Rights Courts underwent several revisions before it was presented to the DPR in June and adopted in November, 2000 (Law No.26/2000). The new law covered internationally recognised gross violations of human rights, in particular 'genocide' and 'crimes against humanity', that are not adequately covered in the criminal code. It defined genocide as 'any action intended to destroy or exterminate in whole or in part a national group, race, ethnic group, or religious group' (clause 8) and crimes against humanity as 'actions perpetrated as part of a broad or systematic direct attack on civilians' (clause 9).

Preliminary inquiries can only be conducted by the Komnas-HAM, which submits its report to the attorney general for further investigation. Prosecution must commence within 70 days of completion of the investigation.<sup>45</sup> The human rights courts will consist of five judges, two of whom will be career and three ad hoc from outside the present judiciary who will be appointed for five-year terms.

The new law introduces the concept of 'crime of omission' alongside 'crime of commission'. Not only direct perpetrators can be prosecuted but also those in authority who knew of, but failed to prevent, violations committed by subordinates. The law specifically makes military commanders responsible for gross

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<sup>44</sup> *Kompas*, 14 March 2000.

<sup>45</sup> This provision could pose a potential problem in the East Timor case where the investigation has been completed but prosecution could not begin because the court has not been established. However, officials in the Attorney General's department say they are confident that this will not be an obstacle.

violations committed by their troops where they knew 'or under the prevailing circumstances ought to have known' that they were perpetrating or had recently perpetrated gross violations of human rights and where they failed to take action to prevent or stop such actions. Police and civil leaders were also made responsible for failure to control subordinates (clause 42).

The new law, therefore, provides a strong basis for the prosecution of *future* gross violations of human rights. But what of *past* violations? The provisions relating to 'crimes of omission' were obviously directed at senior military officers who were accused of being ultimately responsible for murder and destruction in East Timor that they did not physically carry out. The 'crime of omission' clause, however, could not be applied to the East Timor and other earlier cases unless accompanied by a provision on retrospective application.

The provision for retrospective application of the new law on human rights courts proved to be very controversial. Retroactive prosecution conflicts with Indonesian statutes (Clause 1 of the Criminal Code stating that an offence can be tried only if illegal at the time of the crime, and Clauses 4 and 18 of the Law on Human Rights adopted in 1999). It also conflicts with a general principle of law common to most of the world. When the Human Rights Courts bill was taken to the DPR in June 2000, the retroactive principle was criticised particularly by the military and Golkar representatives who had been most identified with the New Order regime.<sup>46</sup> The majority, however, accepted that without retroactive prosecution of 'crimes of omission' it would be at least extremely difficult to convict those most responsible for human rights violations in East Timor and elsewhere and to persuade the international community that Indonesia was making a serious effort to hold those responsible for gross violations accountable.

The final version of the law reflects compromise on this issue. It provides for special ad hoc human rights courts to try gross violations of human rights that occurred before the new law came into force. However, as a safeguard, such courts can only be established to try specific cases through a special procedure. The president may establish an ad hoc court by decree only on the explicit recommendation of the DPR (clause 43). Provision is also made for the resolution of gross violations through a Truth and Reconciliation Commission to be established by a later law (clause 47).

In the end, the Law 26/2000 on Human Rights Courts was unanimously adopted by the DPR in November.

## **E. The Constitutional Amendment and Retroactive Prosecution**

Although the Law on Human Rights Courts was eventually adopted with its retroactive clause, a potential obstacle was produced by the MPR at its annual session in August while the bill was still being debated in the DPR. During the previous nine months, an Ad Hoc Committee of the MPR's Working Committee had been preparing a detailed set of alternative constitutional amendments. In the spirit of reform and commitment to human rights, this included a wide range of proposed amendments to the chapter of the constitution dealing with human rights. Among the 26 sub-clauses on human rights that were eventually adopted unanimously by the MPR, the new Clause 28.i read:

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<sup>46</sup> *Kompas*, 16 June 2000.

The right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognised as a person before the law, and the right not to be prosecuted on the basis of a retroactive law are human rights that cannot be diminished under any circumstances.

It is possible that most members of the MPR had been so preoccupied with the political manoeuvres surrounding an attempt to impeach the president and overwhelmed by the number of proposed constitutional amendments and other resolutions considered during the 12-day session that they failed to recognise the significance of the human rights amendment. The chairman of the MPR, Amien Rais, who had been a strong critic of human rights abuses committed by the military, claimed he had not been aware of the legal implications and acknowledged that the leaders of the MPR's Commission that considered the amendment did not know much about legal and human rights issues.<sup>47</sup> The inclusion of the right not to be prosecuted retroactively is of course commonly recognised internationally. The wording of the amendment is almost identical with Clause 4 of Law 39/1999 on Human Rights. But it is hard to believe that none of the MPR's 700 members, including the 38 military and police members, were unaware of its potential implications for the prosecution of senior officers in human rights cases. Certainly, the Minister of Foreign Affairs, Alwi Shihab, was fully aware of its implications after its adoption. 'The Ministry of Foreign Affairs will certainly find it very difficult to explain the article to the world in the midst of our effort to avoid an international tribunal', he said.<sup>48</sup>

Despite the plain wording of the new Clause 28.i of the constitution, the Minister of Justice and Human Rights, Yusril Ihza Mahendra, has argued that it does not invalidate ad hoc courts to try gross human rights cases retroactively.<sup>49</sup> According to the minister, Clause 28.i needs to be read together with new Clause 28.j.2, which provides:

In exercising their rights and freedoms, each person is obliged to observe limitations established by laws with the intention of guaranteeing recognition and respect for the rights of others and to meet just demands in accordance with moral considerations, religious values, security and general order in a democratic society.

Yusril's interpretation is echoed in the explanatory notes attached to the Law on Human Rights Courts, which argue that Clause 28.j.2 means that laws guaranteeing human rights must be observed. Thus this clause is said to reinforce the protection of human rights through retroactive prosecution and in effect waive application of Clause 28.i. Many lawyers, however, are very sceptical about this argument. The alternative interpretation is that Clause 28.j.2 simply asserts that respect for the limitations imposed by law is essential for the preservation of human rights and does not limit the applicability of Clause 28.1.

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<sup>47</sup> *Jakarta Post*, 18 August 2000.

<sup>48</sup> *Jakarta Post*, 21 August 2000.

<sup>49</sup> *Kompas*, 1 September 2000; *Jakarta Post*, 1 September 2000; *Republika*, 8 November 2000.

Another argument advanced by Yusril is based on the principle that a specific law overrides a general law. In this case the constitution is the general law and the retroactive provision of the Law on Human Rights Courts is the specific law.<sup>50</sup> This argument has also been received with scepticism because the constitution is considered, as in most jurisdictions, superior to ordinary laws. The recent session of the MPR adopted a decree (No III/MPR/2000) that reaffirmed the hierarchy of the sources of law and places ordinary laws third beneath the constitution and MPR decrees. This MPR decree explicitly states that 'legal rules that are lower cannot conflict with legal rules that are higher' (MPR Decree No.III/MPR/2000, 4.1).

It has also been suggested that international customary law could be used to prosecute 'extraordinary' crimes retroactively. It could be argued that in applying retroactivity to serious crimes such as genocide, the bill was merely embodying a principle of customary international law invoked in the Nuremberg trials that certain acts are criminal under the laws of civilised nations (*jus cogens*) even if not specifically legislated for in a specific jurisdiction. More recently, the international tribunals for ex-Yugoslavia (1993) and Rwanda (1994) have tried 'crimes against humanity' committed in jurisdictions where those specific offences were not explicitly provided for by the criminal code. The International Covenant on Civil and Political Rights (1966) upholds the principle that prosecution should not be retroactive but explicitly makes an exception for 'any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations'. Although the Indonesian constitution makes no reference to international law, the Law on Human Rights No. 39/1999, as noted above, states that 'Provisions of international law in regard to human rights that have been accepted by the Republic of Indonesia become national law' (Clause 7.2).<sup>51</sup> However, Indonesia is not a signatory to the International Covenant on Civil and Political Rights. There is, therefore, doubt that its judges would accept the argument that retroactive prosecution of crimes of omission can be applied on the basis of customary international law.<sup>52</sup>

Notwithstanding debate around the full implications of the constitutional amendment on retroactive prosecution for crimes of omission, there is no doubt that convictions can be achieved under the normal criminal code for serious crimes such as occurred in East Timor. However, this will only occur with considerable difficulty and with a higher success rate for junior than senior officers.

## F. The Ad Hoc Human Rights Courts

The uncertain constitutional status of retroactive prosecution is not the only obstacle to the trial of senior officers involved in past violations of human rights. The Law on Human Rights Courts requires that the DPR recommend to the president that an ad hoc court be established by presidential decree to hear a specific case. As many human rights activists have pointed out, the launching of such prosecutions will also depend on the political calculations of the president and the parties in the parliament.

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<sup>50</sup> This argument is outlined briefly in Komnas-HAM's newsletter, FaktaHAM, No. 13, 25 October 2000.

<sup>51</sup> One example is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which Indonesia ratified in September 1998.

<sup>52</sup> See FaktaHAM, No.13, 25 October 2000.

The DPR, as a result of the election held in June 1999, is fragmented between five major parties and a number of minor ones. Public support for President Abdurrahman has declined, and moves might be made to impeach him, possibly sooner rather than later. Recent moves in the parliament, censuring the president over his role in two corruption scandals underline his vulnerability to political attack. In this context, any initiative by the DPR to recommend establishment of an ad hoc court will be inextricably mixed with considerations of party politics.

While sections of the parliament feel strongly about certain issues, others are less concerned. In many cases the attitude adopted by a particular party will be based more on day-to-day political manoeuvring and calculations of political advantage than on any perception of justice. Both the president's supporters and his opponents will be reluctant to alienate the support of the 38-strong group representing the military and police. It also needs to be remembered that 500 of the 700 MPR members who unanimously endorsed the constitutional amendment prohibiting retroactive prosecution are also members of the DPR, which would decide whether to recommend retroactive prosecution of specific cases before ad hoc courts. And it should not be forgotten that the president made no effort to prevent adoption of the constitutional amendment. Of course, consistency has not been a strong point of either parliament or president but their records remind us that the mere adoption of the Law on Human Rights Courts does not guarantee establishment of ad hoc courts for specific cases.

#### **G. Is The Law Adequate?**

Despite the adoption of new human-rights laws, the road to successful prosecution for human-rights offences is far from smooth. Certainly junior officers and ordinary soldiers will continue to be vulnerable under the criminal code, especially when a new law is adopted permitting members of the military and police to be tried in civilian courts. It is also possible under the criminal code to prosecute senior officers who gave orders that led to human-right violations by subordinates but this will often require other officers to break the 'military honour code' by testifying against them. Under the Law on Human Rights Courts, senior officers will be vulnerable to prosecution for future 'crimes of omission' but there are two legal obstacles in the way of successful prosecution of past offences. First, despite the reassurances of government ministers, the constitutional amendment on retroactive prosecutions introduces great uncertainty. Second, the requirement that ad hoc courts to try retroactive cases can only be established by Presidential Decree on the DPR's recommendation makes such cases hostage to a host of political calculations.

#### **IV. THE POLITICS OF PROSECUTION**

The decision to prosecute gross human rights violations will ultimately be based on political as much as legal considerations. The formal decision lies with the attorney general, who is appointed by the president and attends cabinet meetings. His decisions can, therefore, be influenced by politics and, presumably, the president. The current president and his attorney general both have long records of protesting military abuse of human rights during the Soeharto era. The latter is a former chairman of Komnas-HAM. But the president's need to maintain political support has clearly influenced his decisions in corruption cases and could also be expected to be taken into account in human rights cases.

The political pressures determining whether the DPR will start the process of retroactive prosecutions under the new law by proposing to the president that he establish an ad hoc court by decree will vary from case to case. It is not at all certain that the DPR will adopt the necessary resolution in the East Timor case even though it has been given priority by the government.<sup>53</sup> It is widely believed, including by influential members of the main parties, that Indonesia has been the victim of an international conspiracy to deprive it of part of its territory. Some believe this was a first step intended to destroy the country. Those who hold these views regard the military officers and East Timorese militia leaders who fought to keep East Timor under the Indonesian flag as dedicated patriots, not war criminals. This attitude was reflected, for example, by the Speaker of the MPR, Amien Rais, and the Speaker of the DPR, Akbar Tanjung, when the militia leader, Eurico Guterres, was arrested in October. Amien Rais, who is also the leader of the National Mandate Party (PAN: Partai Amanat Nasional), accused the government of discarding Guterres like 'fruit from which all the sweet juice had been sucked'. Akbar Tanjung, who is also the national chairman of the Golkar party, reminded the government of Guterres's services in fighting to keep East Timor part of Indonesia.<sup>54</sup> Guterres had meanwhile joined Vice President Megawati Soekarnoputri's PDI-P. The votes of the 38 appointed military members of the DPR may also be important. Although military leaders often state that those guilty of human rights violations should be punished, most believe it would be unjust to single out officers for prosecution in regard to offences committed while carrying out duties on behalf of the nation.<sup>55</sup>

On the other hand, prominent DPR members have indicated support for an ad hoc court for East Timor, partly because of concern for Indonesia's international reputation. Indeed, the most compelling political pressure comes from the international community. Indonesia faces the possibility that the UN will establish a tribunal to try 'crimes against humanity' committed by Indonesian military personnel and others in East Timor if it is not satisfied with the steps taken within Indonesia itself. Although the president has said he would never hand Indonesian officers over to an international tribunal, the government wants to avoid the international harassment likely to follow a failure to hold accused accountable through Indonesian judicial processes. The 'national interest' in avoiding 'pariah status' is an important factor in MPR calculations.

There is therefore much uncertainty about whether an ad hoc court on East Timor will be established. The main parties do not have clear positions. For many DPR members, the question is not a priority so their positions may be affected by other influences, including, in some cases, money.

Nothing has attracted international pressure on the same scale as East Timor. However, there are strong domestic reasons for pursuing the cases identified for early prosecution by the Independent Commission to Investigate Violence in Aceh. Since the fall of Soeharto, and particularly East Timor's referendum, the demand for independence – or at least a vote on independence – has won overwhelming support in Aceh. Although it is not possible for the government in Jakarta to

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<sup>53</sup> No consensus emerged in ICG's discussions with members of the DPR and government officials. Some expected that the necessary resolution would be adopted; others were doubtful.

<sup>54</sup> *Kompas*, 5 October 2000.

<sup>55</sup> ICG discussions with senior military officers, December 2000.



assuage the deep-seated and multiple grievances of the people of Aceh through a single policy reform, it is hard to see how any progress could be made without addressing the widespread outrage felt by many Acehnese at the apparent legal impunity enjoyed by military personnel in the province. If the government is serious about seeking a compromise that would have any prospect of undermining support for independence in Aceh, it must take action against soldiers involved in mass killing and other abuses.<sup>56</sup> The unsatisfactory outcome of the Bantaqiah case and delay in pursuing the other four cases identified by the Independent Commission more than a year ago suggests that military resistance is strong. Current law normally requires that charges against military personnel be heard in military courts with military judges and prosecutors so these cases are still under investigation by military prosecutors.<sup>57</sup> Following adoption of the Law on Human Rights Courts with its retroactive provisions, cases involving military personnel could now go to ad hoc human rights courts if the DPR were to adopt the necessary recommendation to the president. Although Komnas-HAM must initiate investigations under the new law, it might be able simply to endorse the earlier inquiry in the interest of a speedy trial.<sup>58</sup>

The Tanjung Priok case attracts vigorous but less widespread support. The leading role has been taken by Muslim organisations seen as 'radical' or 'fundamentalist'. In the DPR, the establishment of an ad hoc court could be expected to win support from the non-traditionalist Islamic parties as well as the predominantly Muslim PAN, one of whose deputy chairmen, A. M. Fatwa, was among those imprisoned after dubious trials for alleged involvement in the Tanjung Priok riot.<sup>59</sup> The main targets of the Muslim campaign over the last sixteen years have been retired Generals Benny Moerdani - a Catholic - and Try Sutrisno, who might be vulnerable through the 'crime of omission' clause. However, the final report of the Komnas-HAM inquiry does not seem to have produced direct evidence implicating them. Non-Muslim parties have given no indication they oppose an ad hoc court although the military's opposition is likely.

There are, of course, many other cases of gross violations of human rights that could be brought before ad hoc human rights courts for retroactive prosecution but some could also be prosecuted under the KUHP (Criminal Code). In particular, the military attack on the PDI's headquarters in July 1996 has so far been investigated by a joint military-police team and seems intended for prosecution in a joint military-civilian 'koneksitas'<sup>60</sup> court. Prospects for convictions have been enhanced by the tendency of senior, mainly retired, officers to exonerate themselves during interrogation by accusing each other and more senior officers or officials.

So far Komnas-HAM has launched no other investigations of potential retroactive cases. Instead it has formed two new Commissions of Inquiry into Human Rights Violations in Aceh and Papua, which will focus on violations perpetrated in December after the passage of the Law on Human Rights Courts. The Aceh inquiry

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<sup>56</sup> The Speaker of the MPR, Amien Rais, includes trials of military violators of human rights among the three measures that need to be implemented immediately in Aceh. *Kompas*, 16 May 2001.

<sup>57</sup> Marzuki Darusman explained that 'These cases are still being handled by the military investigation team ... Until now there is no information. We hope this can be settled quickly. One of the reasons for the upheaval in Aceh is because the government has not been fast enough in processing violations of human rights in Aceh'. *Kompas*, 14 December 2000.

<sup>58</sup> ICG interview with the Attorney General, Marzuki Darusman, 10 January 2001.

<sup>59</sup> Fatwa is one of the Deputy Speakers of the DPR.

<sup>60</sup> See footnote 35.

will look into the murder of four humanitarian workers while the Papua inquiry will examine a clash in which two policemen and a civilian were killed in Abepura.<sup>61</sup>

Ultimately, the issue of the constitutionality of retroactive prosecution needs to be resolved. The spectacle of major trials foundering on clause 28.i of the constitution would be greeted with enormous cynicism by the public and, in the case of East Timor, could have serious international consequences. The alternative of going ahead with prosecutions of junior personnel under the criminal code while senior officers continue to enjoy effective impunity would result in no less negative domestic and international reactions.

## V. THE TRUTH AND RECONCILIATION COMMISSION

The Law on Human Rights Courts recognised that not all gross human rights violations could be resolved judicially so it provided for a Truth and Reconciliation Commission (TRC) that would be established through a separate law (Clause 47).

The initial drafting was entrusted to ELSAM (Lembaga Studi dan Advokasi Masyarakat - Institute for Policy Research and Advocacy), an NGO engaged in legal research and reform. ELSAM prepared successive versions that were considered by a working group set up by the Department of Law and Legislation (since August 2000, the Department of Justice and Human Rights). The working group included representatives of various departments and Komnas-HAM. Dialogues and seminars were also held with a wide range of community groups and representatives of countries – including South Africa, South Korea and various Latin American states – that had TRCs. The final draft bill is expected to be sent to the DPR early in 2001.

The penultimate draft provides for the establishment of a TRC to ‘reveal the truth’ about gross violations of human rights that occurred during the New Order (under President Soeharto) and the Old Order (under President Soekarno). The 27 members of the TRC will be selected by the Komnas-HAM and appointed by the president. The TRC will consist of three sub-commissions carrying out its three main functions – investigation of past violations, consideration of amnesty for perpetrators of abuses, and consideration of appropriate compensation and rehabilitation for victims. The TRC will have legal authority to summon witnesses and to obtain official documents – both civil and military. The draft requires the TRC to complete its work within three years.<sup>62</sup>

The debate about the form of the TRC has revealed a range of expectations about its main purposes. One view sees the TRC as supplementary to the courts. The government's goal will still be to prosecute major past cases of human-rights violation in the ad hoc human rights courts but it is recognised that convictions will be difficult to obtain where evidence is no longer available, and witnesses cannot be found or have died. Indeed, if such cases are prosecuted in court, it is possible the defendants will be found not guilty. In that case the result would most likely only aggravate the anger of victims and make reconciliation more difficult. Rather than take this risk, it has been argued by the Minister of Justice and Human Rights,

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<sup>61</sup> *Kompas*, 11 January 2001.

<sup>62</sup> This summary is based on the 7<sup>th</sup> draft of the law that was discussed at Komnas-HAM 6<sup>th</sup> Annual Seminar on Human Rights in Surabaya on 21-24 November 2000.

Yusril Ihza Mahendra, that the TRC should investigate such cases and announce its conclusions even though those responsible could not be convicted.<sup>63</sup>

Following the South African example, it is hoped that past perpetrators of gross violations of human rights could be persuaded to express remorse and confess crimes in exchange for amnesty. One function of the TRC's sub-commission on amnesty, according to the draft, is to determine criteria for amnesties. The difficulty with this approach, of course, is that those accused of gross violations would have little incentive to confess if they already knew that the Attorney General lacked sufficient evidence to prosecute in court.

A broader view of the TRC concept is based on belief that reconciliation between perpetrators and victims of human rights violations requires complete exposure of the truth behind the event. As the Deputy to the Minister of State for Human Rights, Asmar Oemar Saleh, put it, it is necessary 'to give the victims the opportunity to speak and receive an explanation about the big incidents involving human rights'. This, it is hoped will lay the foundation for reconciliation.<sup>64</sup> According to Ihdahl Kasim, the executive director of ELSAM, the TRC's main concern will not be with individual cases but major events in which large numbers of people experienced gross violations of their rights. Among such envisaged themes are the mass killings of communists in 1965-6, the repression of Muslims in the 1980s, aspects of the Tanjung Priok affair not exposed in court, the killing of peasants in Lampung in 1989, human rights violations in Aceh and Irian Jaya, and the circumstances around the invasion of East Timor in 1975. An important criterion for investigating would be that violations were part of a general and systematic repression and not simply individual cases.<sup>65</sup>

Excessive dependence on the South African model has come under criticism from those – including the chairman of the Komnas-HAM, Djoko Sugianto – who believe Indonesia needs its own model to take account of the wide range of human rights violations.<sup>66</sup> The Muslim intellectual, Dawam Rahardjo, warned against adopting any single method of handling human-rights violations. 'The cases are all different so they have to be handled in different ways', he said.<sup>67</sup> Similarly, the former Minister of State for Human Rights, Hasballah M. Saad, warned that a single national model could not be applied in all regions.<sup>68</sup> In its newsletter, Komnas-HAM described how 'In many places, traditional and local methods will probably be more successful, especially at places where both victims and perpetrators must continue to live side-by-side'. It therefore proposed that, once established, the TRC should open regional offices with wide autonomy.<sup>69</sup> The Muslim legal scholar, Fajroel Falakh, went further by drawing attention to possible counter-productive intervention by the TRC in past conflicts. He warned that 'We must also be careful if local societies have already achieved reconciliation and have reached a point of exhaustion where they want to forget the past. In those conditions the TRC should not come later and cause them to revive their memories of the past and to seek justice that could invite the return of conflict'.<sup>70</sup>

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<sup>63</sup> Yusril's views can be found in *Republika*, 19 April 2000 and *Kompas*, 14 June 2000.

<sup>64</sup> *Republika*, 29 November 2000.

<sup>65</sup> Interview with Ihdahl Kasim, 8 December 2000.

<sup>66</sup> *Republika*, 2 November 2000.

<sup>67</sup> *Kompas*, 29 June 2000.

<sup>68</sup> *Kompas*, 18 November 2000.

<sup>69</sup> Komnas-HAM, FaktaHAM, No. 15, 8 November 2000.

<sup>70</sup> *Kompas*, 18 November 2000.

There is considerable debate over the time period to be covered by the TRC's investigations. ELSAM, in the fifth draft of the bill, proposed that the period should be from 1965 – the year of the massacres of communists and pro-communists – but the Department's response in draft seven takes the period back to 1959. The significance of the different dates lies in what took place in those years. The advocates of 1965-1998 see this as covering the period of Soeharto's rule when the repression was conducted largely by the military and for which reconciliation has yet to be achieved. Those who prefer to begin in 1959 want to take into account the repression of anti-communists, especially those associated with the Muslim party, Masyumi, before 1965.<sup>71</sup> It is believed, however, that the final draft will probably leave it to the commission itself to decide what events it will investigate. On the other hand, there is no major disagreement between the drafts over when the period should end. Human rights violations occurring after the end of the Soeharto regime will fall within the jurisdiction of the courts, not the TRC. Perpetrators of human rights violations in East Timor in 1999 and in Aceh and elsewhere after May 1998 will not be able to seek amnesty from the TRC as an alternative to trial before an ad hoc human rights court.

The draft TRC law has been criticised for failing to make clear the criteria for deciding whether a case should be heard by an ad hoc court or by the TRC. It is not impossible that both could investigate the same case simultaneously. Minister Yusril does not see this as a major problem. The criterion is whether there is sufficient evidence for a court case. 'If, in its investigation, the TRC concludes that the case can still be proved in court, then hand it over to the court', he has said.<sup>72</sup> Others, however, would like criteria to be stated clearly in the law.

In some cases, the victims of gross violations, especially those in the more distant past, seem less interested in punishing their oppressors than searching for what they see as truth. Thus, many families of victims of the anti-communist massacres and others who spent years in prison without trial or were deprived of employment and educational opportunities because of real or suspected association with the Communist Party – which at the time was a legal party – seem more concerned that government and society acknowledge their injustices and remove the stigma with which they have been living.<sup>73</sup> For example, they want removal of regulations discriminating against former political prisoners, the return of confiscated land and restoration of pension rights. But, as the Secretary-General of the Komnas-HAM, Asmara Nababan, pointed out, the compensation does not always have to be money. It might take the form of a monument commemorating their sufferings.<sup>74</sup>

The emphasis on reconciliation has been criticised by those who believe it is difficult to achieve without a sense of justice, and that amnesties for perpetrators of human rights violations will only extend their impunity. But the TRC's effectiveness cannot be assessed in isolation from the new human rights courts – particularly the ad hoc courts. The answer to critics who demand justice first will lie not in the TRC but in the courts. If the courts fail to provide justice in recent cases of gross violations, there will be no need to grant amnesties to the perpetrators because they will be free in any case.

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<sup>71</sup> In this context it might be noted that the Minister of Justice and Human Rights is also the leader of the Crescent and Star Party, which sees itself as a descendant of the Masyumi. Yusril's father was a local Masyumi activist.

<sup>72</sup> *Republika*, 16 April 2000.

<sup>73</sup> This impression was obtained by ICG at a meeting of representatives of various organisations concerned with former political prisoners detained in the years immediately after 1965.

<sup>74</sup> *Kompas*, 28 March 2000.

## VI. INTERNATIONAL INVOLVEMENT

Soeharto's fall in May 1998, the Habibie Presidency until October 1999, and the election of President Abdurrahman Wahid brought successively stronger waves of optimism in the international community (as in Indonesia) that the most serious crimes of the New Order regime would be punished. This optimism was as prevalent in many governments and international organisations as among the Western NGO community that had been the most vocal critic of the Soeharto era. But as the reality of the new Indonesian politics became more apparent, and governments began to absorb the experience of other countries in achieving accountability in transitional political systems, this commonality of interest began to dissipate. Governments increasingly cited a need to address broader issues of political stability, economic development and security. By early 2001, the split was quite marked. Governments were less certain that high levels of accountability could in the short term promote the broader goals of political stability, rule of law and democratic governance in Indonesia. Some were influenced by claims that aggressive pursuit of accountability might even upset Indonesia's fragile political balance.

As discussed above, international pressure has been a significant force for change in Indonesian policies. It was only after Indonesia found itself under heavy international pressure following the atrocities committed in East Timor that the establishment of new legal institutions to deal with gross violations of human rights became a high priority. Although the UN-mandated international commission of inquiry for East Timor recommended on 31 January 2000 that an international tribunal be formed to try those accused of gross human-rights violations in East Timor, the Security Council chose to give the Indonesian authorities the opportunity to deal with the East Timor case themselves.

The Secretary General's letter to the Security Council transmitting the report of the commission of inquiry reads in part:

The International Commission of Inquiry found that the United Nations and the international community had a particular responsibility to the people of East Timor in connection with investigating the violations, establishing responsibilities, punishing those responsible and promoting reconciliation. I believe the United Nations has an important role to play in this process in order to help safeguard the rights of the people of East Timor, promote reconciliation, ensure future social and political stability and protect the integrity of Security Council actions.<sup>75</sup>

In the immediately preceding paragraphs, the Secretary General outlined his faith in the Indonesian system:

In facing this challenge, I am encouraged by the commitment shown by President Abdurrahman Wahid to uphold the law and to fully support the investigation and prosecution of the perpetrators through the national investigation process under way in Indonesia. I have also been strongly assured by Foreign Minister Alwi Shihab of the Government's determination that there will be no impunity for those responsible.

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<sup>75</sup> UN Docs, A/54/726, S/2000/59, 31 January 2000.

He then outlined his strategy of further reliance on the investigative mechanisms to be set up under the United Nations Transitional Administration in East Timor (UNTAET):

As the report indicates, there is a need for conducting further systematic investigations of the violations that took place in East Timor during the period from January 1999. With a view to bringing justice to the people of East Timor, I intend to pursue various avenues to ensure that this task is accomplished adequately, inter alia, by strengthening the capacity of UNTAET to conduct such investigations and enhancing collaboration between UNTAET and the Indonesian Commission of Inquiry into Human Rights Violations in East Timor (KPP-HAM).

The Security Council endorsed the Secretary General's view that broad political considerations of reconciliation and stability are important while also encouraging Indonesia to 'institute a swift, comprehensive, effective and transparent legal process, in conformity with international standards of justice and due process of law'.<sup>76</sup> This balanced approach suggests the international community is likely to act on the recommendation of the commission of inquiry only if Indonesia fails egregiously in its commitments. Commentary at the time by the head of the commission of inquiry, prominent human rights advocates and some governments expressed scepticism that the Security Council would back an international tribunal for East Timor in current circumstances.<sup>77</sup>

In the year since, and notwithstanding pleas of a number of human rights groups and occasional rhetoric from some government and international officials, a consensus seems to have developed that the Security Council does not wish to move on an international tribunal. The United States, one of the likelier supporters of an international tribunal, has made no strong statement of support since just after Security Council deliberation of the killing of UN workers in West Timor in early September 2000. The approach of the new US administration is still unknown. Whatever the US position, it is unlikely that the Security Council could presently find the political will necessary to establish an independent international tribunal of the type established for the former Yugoslavia or Rwanda.<sup>78</sup> In these still relatively early days of the post-Soeharto era, Indonesia's deficiencies in delivering suspects to trial are not viewed too negatively by many governments given their broader political objective of supporting the political stability of the young Indonesian democracy.

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<sup>76</sup> UN Docs S/2000/137, 21 February 2000.

<sup>77</sup> See, for example, press reports citing the head of the inquiry, Ms Sonia Picado (*Sydney Morning Herald*, 2 February 2000), an UNTAET official and prominent human rights activist, Sidney Jones (*Deutsche Presse-Agentur*, 3 February 2000), and the Australian Prime Minister, John Howard, after a meeting with Kofi Annan (AAP, 21 February 2000).

<sup>78</sup> There seems to be no possibility at the present time that other international organisations like the World Bank will attempt to make aid conditional on Indonesia's meeting any strict performance tests in terms of justice for the international crimes in East Timor in 1999 or earlier. See the exchange of letters in September 2000 between a Western human rights group, the International Federation for East Timor, and the President of World Bank, James Wolfensohn, on the subject of making aid consultation conditional on movement on the accountability issue. Wolfensohn expressed concern on the accountability issue but said he was also concerned about the 'fragile democratic transition' and the 'plight of millions of poor people in Indonesia struggling to recover from the economic crisis'.

UN officials and some governments continue to refer publicly to the possibility of returning to the idea of an international tribunal if Indonesia's efforts slacken too much. Most, however, seem to see their public statements as part of a complex process of private and public diplomacy designed to prompt the Indonesian government to prosecute the major cases and adhere more consistently to the principles involved in delivering accountability and combating impunity. This makes sense in present circumstances since the Indonesian record, while mixed, includes some positive signs. Notwithstanding sustained domestic rhetoric against compromising sovereignty, the Indonesian government has on several occasions shown itself willing to respond to strong international encouragement.

If creation of an international tribunal of the ICTY or ICTR type is not likely or necessary at this stage, what is a reasonable stance for the international community? Possibilities include:

- continued encouragement of the Indonesian Attorney General and Komnas-HAM in their pursuit of accountability;
- relatively heavy dependence on the activities of the special crimes unit of UNTAET;
- reliance on domestic jurisdictions of some countries such as the US and Australia to prosecute perpetrators when and if they come into the relevant national jurisdictions.<sup>79</sup>

Indonesia is gradually putting in place what could become a significant process for prosecuting serious crimes committed in East Timor though the verdict on its effectiveness must remain open. Beyond this, some international actors put considerable store in the positive influence UNTAET investigations exercise on Indonesia's justice system.

#### **A. UNTAET Investigation**

UNTAET decided in December 1999 to establish an international panel of the Dili district court and a Serious Crimes Investigation Unit to investigate 'international crimes' committed between 1 January and 25 October 1999 when Indonesian forces finally left the territory. UNTAET's investigations, therefore, cover the same crimes as those being investigated in Indonesia and are based on the Indonesian criminal code, which was the law of East Timor when the violations were committed. Although there is no clear understanding about which crimes should be tried in Indonesia and which in East Timor, UNTAET and the Indonesian government signed a Memorandum of Understanding (MOU) on 6 April 2000 to cooperate in their investigations. This agreement paved the way for an Indonesian team from the Attorney General's office to visit East Timor in July where they, through UNTAET investigators, questioned about thirty witnesses.<sup>80</sup>

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<sup>79</sup> In taking such action, care must be taken to select the right targets. In April 2000 a civil law suit was served in the US on Lt. Gen. Johnny Lumintang, a former deputy chief of staff of the army. In fact Lumintang had no authority over operations in East Timor and the suit was based on a misreading of an order that he had signed. By issuing the premature suit against Lumintang, the plaintiffs in effect only succeeded in warning those responsible for gross violations about the risks they would be taking if they visited the US.

<sup>80</sup> Human Rights Watch, 'Unfinished Business: Justice for East Timor' (Press Backgrounder, August 2000).

According to a number of sources, the activities of the special crimes unit of UNTAET have been hampered by poor training, low funding and unworkable bureaucratic procedures.<sup>81</sup> Nevertheless, there is a notable difference between the situation in East Timor and in Indonesia. In East Timor about 70 suspected militia members have been detained, while in Indonesia not one suspect is under detention (except Eurico Guterres, who was detained on other charges). UNTAET investigations may, therefore, constitute a significant lower-level means of maintaining international pressure on Indonesia to pick up its pace.

In December, UNTAET's investigators completed dossiers containing charges against eleven suspects who were accused of thirteen murders in Los Palos, East Timor. Nine suspects were members of the Alpha militia and already held in prison in East Timor while one had not been captured. The final suspect is an Indonesian lieutenant in the Special Forces who was accused of torturing, mutilating and murdering an East Timorese opponent of integration at the Alpha's base in Los Palos on 21 April, 1999.<sup>82</sup> The lieutenant has returned to Indonesia. While it is expected that Indonesia will not hand over military personnel to UNTAET's prosecutors, failure to prosecute in Indonesia would seriously impair international confidence in the Indonesian government's commitment to pursue cases through the Indonesian judicial system.

That confidence has already been damaged by Indonesia's failure to allow UNTAET prosecutors to question Indonesian witnesses and suspects in the way that UNTAET, in accordance with the MOU, had facilitated the questioning of East Timorese witnesses in July. When an UNTAET team arrived in Jakarta in December at the invitation of the attorney general, the TNI commander, Admiral Widodo, bluntly declared that 'in regard to the legal process, no Indonesian officer will be investigated or questioned by UNTAET'.<sup>83</sup> Widodo's attitude was strongly supported by nationalist elements within the DPR.<sup>84</sup> Thus the attorney general was unable to arrange the meeting of the UNTAET prosecutors with Indonesian witnesses and suspects.

If the number of Indonesian military personnel charged by UNTAET increases over the next few months, and the desire of the attorney general to cooperate continues to be stymied by the TNI, Admiral Widodo's assertion that 'we reject any foreign intervention in the process – we have our own procedures and legal system',<sup>85</sup> could look increasingly hollow. Pressure from human rights groups for the establishment of an international court would then likely strengthen. It is possible that governments would begin to consider more extensive options. In the first instance, they would likely experience pressure from their own vocal domestic

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<sup>81</sup> See for example, *Ibid.*

<sup>82</sup> *Jakarta Post*, 13 December 2000.

<sup>83</sup> *Kompas*, 13 December 2000.

<sup>84</sup> One dissenting voice in the army, however, was that of Lt. Gen Johny Lumintang, the governor of the National Resilience Institute (Lemhannas), who said 'If we try to hide things or to complicate the investigation, it will be more obvious that we are guilty'. *Jakarta Post*, 14 December 2000.

<sup>85</sup> *Jakarta Post*, 13 December 2000. The same newspaper reported on 26 January 2001 that UNTAET's prosecutors obtained their first conviction that month when a 22-years-old former member of the 'Red and White' militia pleaded guilty to murdering a pro-independence village chief at Maliana on 8 September 1999. The man, who claimed that he had been ordered to kill independence supporters by Indonesian army officers, received a relatively light sentence of 12 years in exchange for his willingness to be a witness in future cases.



human rights constituencies that could make it difficult for them to provide some of the financial assistance Indonesia requires. They might then again look more favourably at the international tribunal option.

While international pressure has focussed primarily on the East Timor case, continuing violence in Aceh and Irian Jaya, where the government faces strong separatist movements, is also attracting international attention. Indonesia has been actively seeking assurances from other countries that no support should be extended to separatist rebels. In giving such assurances, Western countries in particular have taken the opportunity to press upon Indonesia the need to respect human rights and to make perpetrators of gross human-rights violations accountable for their actions. In other cases discussed in this report, such as Tanjung Priok, the July 27 1996 attack on PDI headquarters, and various shootings of demonstrators, international pressure seems far less significant.

## VII. CONCLUSION

Indonesia's record in obtaining appropriate convictions of the perpetrators of gross violations of human rights is not impressive. Of thousands of allegations, only a handful of cases have been tried. Often the sentences have bordered on the farcical. This failure is in part caused by the government's reluctance to take the substantial political risk of putting 'justice' above everything else.

First, the main perpetrators were members of the security forces. Although the military has lost much political power, it is still a force to be reckoned with, and an insecure civilian government will tread carefully. Second, in the new democratic era, with power fragmented between competing political forces, leaders often seem more concerned with the ongoing struggle for political power than vigorous pursuit of sensitive human rights prosecutions. Third, the domestic constituency calling for prosecutions is small, segmented and sometimes mutually antagonistic. Fourth, some participants in the debate fear pursuit of justice at all costs could prejudice reconciliation.

Some might question the wisdom of pursuing a program to prosecute military officers responsible for past violations of human rights. Far from strengthening new democracy, it is sometimes feared – in part based on experience in other countries – that prosecution especially of senior officers might lead to a backlash that would endanger political stability and possibly create conditions allowing the military to return to power. The opposite view, supported by vocal segments of public opinion, argues that failure to end impunity for human rights crimes will further undermine respect for law, not deter continuing human rights violations, and, perhaps most seriously for the nation's life, make it impossible to preserve Indonesia's territorial integrity. It is argued that a window of opportunity exists because anti-military sentiment is strong, and a demoralised military lacks coherence and confidence to regain its power. On the other hand, of course, low-level resistance from small groups of military personnel has to be expected.

Indonesia now has in place new legislation designed to bring perpetrators of at least some of the most serious crimes to account. However, major obstacles remain. The legal and judicial system is riddled with corruption, and many of those likely to be charged possess vast financial resources. The Law on Human Rights

Courts provides for special courts and permits retroactive prosecution of crimes not specifically recognised in the existing criminal code. But procedures are cumbersome and politically difficult. There is a risk that the provision for retroactive prosecution of crimes of omission – those to which senior military officers and high civilian officials would be most vulnerable – could be struck down as invalid under Indonesia's constitution. That legal issue should be resolved, through a new amendment of the constitution and reinforced by ratification of the International Covenant on Civil and Political Rights. Additionally, in order to avoid possible politicisation of the decision to establish ad hoc courts, that law could be amended to transfer the establishing power from the DPR and the president to the Supreme Court or another respected body created for that purpose.

If ad hoc courts are eventually used to try past offences retroactively, it is important that the attorney general move carefully against senior military officers until the effectiveness of new laws has been established. Premature prosecution could lead to 'not guilty' verdicts on technical rather than substantive grounds. If uncertainties about the constitutionality of retroactive prosecution are not resolved, the ordinary criminal law should be used first to prosecute those accused of direct violations in the field. Those cases should then be used to gain evidence against officers and civilians higher up the chain of command. In any case, the ordinary criminal code is adequate to deal with many gross human rights violations.

Finally, in considering gross violations of human rights, it is most important not to forget the victims. It is here that the proposed TRC can make an important contribution. In some cases victims continue to demand justice and the punishment of perpetrators but in other cases, especially those of the more distant part, they place priority on removal of social stigma and the restoration of dignity. Indonesia's TRC is not intended as an alternative to prosecution but as a means to expose the truth about past violations. In order to facilitate the emergence of the truth, an effective witness protection program is needed.

Indonesia cannot simply apply a borrowed template to address crimes committed in its unique historical and political circumstances. International actors must be sensitive to these circumstances and subtle in applying lessons learned elsewhere. The international community has several significant opportunities to influence views and practices in Indonesia for promoting accountability and ending impunity. These include welcoming trials where individual perpetrators are brought to justice, but they extend to a wide range of additional activities.

Governments, international organisations, such as the UN Human Rights Commission, and NGOs need to remain vigilant as Indonesian institutions proceed to try suspected perpetrators. Regular monitoring and reporting will remain a powerful influence, both by way of support for like-minded Indonesians and pressure on the less accommodating forces. Movements of suspected perpetrators of gross human rights violations should be monitored closely by international actors such as the US, Canada, Australia, Japan and the EU.

In supporting Indonesia's efforts, other governments and international organisations should give much closer attention to three areas of policy.

First, visible material support should match rhetorical support. Of course, development assistance is a two-way negotiation. Many in Indonesian ministries most connected with aid negotiations have no special interest in delivering resources to the Indonesian agencies most directly able to promote accountability. And most governments have not placed sufficient priority on support for judicial reform relative to social and economic development. Some such as Canada, have done so, and international NGOs, such as the American Bar Association, offer limited financial help for judicial reform. But the institutions most directly involved with accountability for past human rights abuses, such as the attorney general's office and Komnas-HAM barely figure in the overall strategies of bilateral co-operation, either in political relations or levels of assistance. There is room for a large increase in funding for development programs of these key bodies. Given the role law should play in ensuring democracy's foundations, including the security that would come with an end to impunity for human rights abusers, governments should consider a strategic shift of significant resources to support judicial reform.

Second, Indonesia's partners should review their policies on support for military reform, particularly in devising ways to sensitise senior officers to the broader implications of the accountability issue. The US Congress imposed tight restrictions on military co-operation in response to East Timor developments in the 1990s, especially the events of September 1999. This type of pressure is narrowly focussed on the Indonesian military itself and can help to persuade military leaders not to oppose prosecution of at least some military personnel.

Third, public information programs can have a powerful impact on how a country deals with the issue of accountability and impunity. It is not appropriate for external actors to play a direct role in domestic debates about the choice of national strategies but governments should help Indonesian groups that participate vigorously in those domestic debates gain more access to information. Indonesia's partners should also publish accounts of human rights abuses in Indonesia that are currently classified provided they are sanitised to protect sources.

The international community will lose its credibility if it ceases to insist on trials of gross human rights offenders where Indonesia has undertaken its most visible obligation, namely with respect to events in East Timor in 1999. But more than credibility is involved. At bottom the international community's continued involvement with the accountability issue is grounded in a belief that its own interests are deeply involved in Indonesia's efforts to establish a stable, territorially secure democratic society since Indonesia is one of the world's most populous and significant countries. It is difficult to see how Indonesia can succeed in this unless it gives all its citizens, including those interested in pursuing independence options, tangible proof that accountability for gross human rights abuses, not impunity, is the new order of the day.

Indonesia has proceeded a fair way down this path but the international community should set a clear timetable and criteria for continued progress in prosecuting those responsible for violence in East Timor. It should insist that if the benchmarks are not met, an international tribunal will be very much back on the agenda.

As the process continues, the judgements governments and the UN must make may become more difficult. There is no set number of defendants Indonesia must prosecute to prove good faith. Nor can trials pre-suppose convictions. The international community should pay attention less to numbers than to quality, including how trials are conducted and the types of defendants they involve. It will obviously be insufficient if only junior officers and officials are indicted. Governments and international bodies such as the UNHRC and the Security Council should give particular heed to what is done about the most senior personalities named in the Indonesian commission of inquiry into the crimes in East Timor. If they possess credible evidence, external actors should also flesh out the documentary record where it may throw light on the culpability of other officials and officers merely questioned by the Indonesian commission.

Indonesia's friends should remind it that as a practical political matter, any backsliding on accountability would create pressures from their own domestic constituencies that would make it more difficult to provide the developmental assistance Indonesia desires, well before the last resort of an international tribunal again became an active issue.

Lastly, the international community has an opportunity in East Timor, through UNTAET, to advance accountability through court processes. By vigorously exposing and prosecuting the crimes in East Timor in a context freer of political constraints than in Indonesia, UNTAET sets an example for Indonesia to do the same. UNTAET's influence is unlikely to be profound, however, unless its Serious Crimes Investigation Unit and the related judicial institutions, including if necessary public defenders for the accused, are staffed and funded appropriately and operated with clear and simple lines of responsibility. Because of UNTAET operational problems identified by Human Rights Watch, UN agencies in particular need to make larger budget allocations, upgrade the priority for the mission, and co-opt governments to provide additional highly qualified personnel to staff functions. This will be difficult given commitments elsewhere, but ICG believes the case is buttressed by the consideration that this activity is as much about Indonesia's future as it is about the crimes in East Timor in 1999.

**Jakarta/Brussels, 2 February 2001**

## LIST OF ACRONYMS

ASEAN	Association of South East Asian Nations
DOM	Region of Military Operations
DPR	Parliament
ELSAM	Institute for Policy Research and Advocacy
EU	European Union
Komnas-HAM	National Human Rights Commission
Kopassus	Special Forces
Kostrad	Army Strategic Reserve Command
KUHPP	Criminal Code
MOU	Memorandum of Understanding
MPR	People's Consultative Assembly
NCO	Non-commissioned Officer
NGO	Non-government Organisation
PAN	National Mandate Party
PDI	Indonesian Democracy Party
PDI-Perjuangan	Indonesian Democracy Party - Struggle
Perpu	Government regulation in lieu of a law
TNI	Indonesian National Military
TRC	Truth and Reconciliation Commission
UN	United Nations
UNHCR	United Nations High Commission for Refugees
UNSC	United Nations Security Council
UNTAET	United Nations Transitional Administration in East Timor
US	United States of America