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Accountability for Human Rights Atrocities
in International Law:
Finding Justice for Past Human Rights
Abuses

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Abbreviations

CTF	Commission on Truth and Friendship
HRC	Human Rights Commission
ICJ	International Court of Justice
ICC	International Criminal Court
ICTY	International Criminal Tribunal for former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ILC	International Law Commission
UNAMET	United Nations Mission in East Timor
ICIET	International Commission of Inquiry for East Timor
KUHAP	Indonesian Criminal Code of Procedure
RANHAM	National Action Plan on Human Rights
UNTAET	United Nations Transitional Administration in east Timor
UNMIK	United Nations Mission in Kosovo
UNAMIL	United Nations Mission in Sierra Leone
UNMISSET	United Nations Mission of Support in East Timor

1 Introduction

1.1 Background

Human rights violation that occurred in the months preceding, and in the immediate aftermath of the August 1999 ballot in East Timor has added to the long list of human right violation throughout Indonesia. This violence called the international community's attention to the country, which already had quite a long history of conflict between the Government and people in East Timor. The conflict began long before the Referendum (officially called a 'Popular Consultation'), and occasioned a lot of violence as a result of which civilians had to endure many hardships.

The conflict began in 1975 with the annexation of East Timor to Indonesia thus making it the twenty-seventh province of the country and continued even beyond 1999 when the Indonesian government gave two options to East Timorese people, allowing them to choose whether to accept special autonomy within Indonesia or for their territory to granted full independence.

Before and prior to the Popular Consultation, there was a lot of violence between the pro-integration group (which preferred that East Timor should remain within Indonesia) and the pro-independence group. This got even worse when most of East Timorese people voted to be separated from Indonesia and to become independent.

It is noteworthy that the violence, which occurred prior to the Popular Consultation, attracted the attention of the international community, as a result of which the United Nations (U.N) through the Security Council passed a resolution that condemned all acts of violence in East Timor and demanded that those responsible for the violence should be brought to

justice.¹ The Security Council noted that the crimes committed in East Timor, were carried out systematically as a pattern, and constituted a gross violation of international human rights and humanitarian law. These crimes included mass murder, torture, assault, forced disappearance, forcible mass deportations, the destruction of property, rape and other sexual violence against women and children. Thus, the Security Council recognized its responsibility to ensure that those who committed heinous crimes would not go unpunished.²

On its part, in September 1999 during a special session, the Human Rights Commission (HRC) affirmed that all persons who commit or authorize violations of human rights are individually responsible and accountable for those violations. The Commission therefore emphasised that the international community had to exert every effort to ensure that those responsible for crimes against the East Timorese people were brought to justice.³

Even prior to the Popular Consultation of 30 September 1999, three special rapporteurs had visited Indonesia and issued a joint report describing the role of the Indonesian military in the violence. The Rapporteurs therefore recommended in their report that the Security Council should consider establishing an international commission of inquiry, that would look into this state of affairs.⁴ Thereafter, the U.N. Secretary-General Kofi Annan set up the International Commission of Inquiry on East Timor that held an investigation in early 2000 and concluded that the systematic and large-scale nature of the crimes warranted the establishment of an international human rights tribunal.⁵

¹ Resolution 1264/1999

² In Resolution 1264 (1999) and 1272 (1999).

³ Amnesty International, Indonesia & Timor Leste "International Responsibility for Justice", pg. 2.

⁴ U.N. Document A/54/660 "Situation of Human Rights in East Timor," 10 December 1999, pp. 72, 74.

⁵ U.N. Document A/54/726, S/2000/59 "Report of the International Commission of Inquiry on East Timor to the Secretary General," January 31, 2000, pp 123, 153.

The Indonesian National Commission on Human Rights (Komnas HAM) also created the 'Commission for Human Rights Violations in East Timor (KPP HAM)' to look into the issue. KPP HAM produced a comprehensive report, which stated that Indonesian and East Timorese officials and military leaders had been responsible for grave violations of human rights.⁶

There was therefore a great expectation that an international criminal tribunal for East Timor would be established under the U.N. This however did not materialise, as the Secretary General did not endorse the recommendation for a separate international tribunal. He instead agreed to give the Indonesian Government a chance to try the suspects, stressing that full cooperation should be given to its efforts to prosecute the crimes. The Security Council also accepted Indonesia's assurances that it would try the suspects and therefore delayed acting upon recommendations for an international tribunal.⁷

In response to international criticism on how it had handled the East Timor atrocities, and in an attempt to stave off calls for an international tribunal to look into the matter, the Indonesian Government established an *ad hoc* tribunal referred to as the *Ad hoc* Human Rights Court.⁸ This tribunal replaced a previous one that had been created under an executive regulation.⁹

The law creating the *Ad hoc* human Right Court roughly paralleled the substantive legal standards of the Rome Statute of the International Criminal Court (ICC), but extended only to genocide and crimes against humanity, and not to war crimes.

Nevertheless, from the time the *ad hoc* court began to work in 2002 to date, there has dissatisfaction with its performance. The ability of the court to

⁶ Komnas HAM, "Report of the Indonesian Commission for Human Rights Violations in East Timor (KPP-HAM), Jakarta, January 31, 2000.

⁷ Human Rights Watch, *Justice Denied for East Timor*, pg. 4.

⁸ Established under Law 26/2000

⁹ Perpu 1/1999

prosecute those most responsible for the crimes has been questioned, and there has been international condemnation toward some of the judgments made by the *ad hoc* court with doubts whether the process met the international standards.

In this regard, the U.N. created a commission of inquiry with the object of reviewing the process of the trial within *Ad hoc* Human Rights Court. The commission compared the decisions made in the trial in East Timor under U.N. supervision and in Jakarta. They found that the *ad hoc* process in Jakarta was manifestly inadequate and showed scant respect for, or conformity with the relevant international standards. The commission of inquiry felt that the work of the prosecutors was inadequate, the verdicts rendered by the court lacked consistency, and cases of manifest impunity were never challenged.¹⁰

This thesis will therefore try to review the process of the trial of the perpetrators of the East Timor violence within the *ad hoc* Indonesian court. It will analyse whether the process meets international standards for prosecution of international crimes, especially for the crimes against humanity that occurred in East Timor in 1999.

The thesis will endeavour to elaborate on the accountability mechanisms that were chosen by Indonesia and their relevance in international law, and assess the possibility for the establishment of a new way of accountability for past human right atrocities through a hybrid court as has been practised in several countries.

This work has been divided into various chapters: The first chapter briefly highlights the condition that occurred in East Timor prior to its independence and how international community reacted to human rights violations there.

¹⁰ See report to the Secretary General of the Commission of Experts to review the Prosecution of Serious Violations of Human Rights in Timor Leste in 1999, released on May 26, 2005.

The second chapter gives a theoretical analysis of the accountability mechanisms for human rights atrocities within international law. This will include the concept of accountability, accountability mechanism and impunity as the antitheses of accountability.

The third chapter will elaborate the trial process within the Indonesian *ad hoc* human rights court for East Timor and will make assessments on some pertinent aspects of the trial.

In the last chapter, the thesis will explore recent developments in East Timor, emphasising on the efforts that have been put in by both governments of East Timor and Indonesia to expedite justice. It will also discuss the new emerging model of accountability mechanisms of hybrid court and its practice in several countries and what can be learnt from them.

2 Accountability for Human Rights Atrocities in International Law

2.1 A brief History of Accountability

Many years have passed since the International Tribunal at Nuremberg and Tokyo held trial for the leaders of defeated Axis powers by the victorious Allies. The establishment of these tribunals was a major development in international law, where for the first time individuals were considered as being subject to international law and tried for their role in the war; for quite a long time, States had been the centre point and the only subject of international law.

Obviously, the Nuremberg and Tokyo Trials were the turning point, when individuals were made accountable for the atrocities they had committed during the war. In the trials, it was pointed out that international law imposed duties and liabilities upon individuals as well as upon States since crimes against international law were committed by men and not by an abstract entity. It was therefore felt that international law could only be enforced by punishing individuals who committed such crimes.

In the trials, the crimes that the tribunals was empowered to try were those that required individual responsibility. These were therefore clearly stipulated to include crimes against peace, war crimes and crimes against humanity.

However, since the end of the Second World War, there have been many conflicts occurring in almost every region in the world. Yet, only a few of those who were responsible for such atrocities have been prosecuted. Many of the perpetrators have availed impunity because of the absence of a post-conflict justice mechanism. This has mostly resulted from the fact that the

international community has focussed itself on providing retributive and restorative justice in aftermath of violent conflict rather than rebuilding and enhancing the failed and weakened national justice system.

The first significant effort to establish a comprehensive regime stipulating for individual criminal responsibility was began in 1947 when the General Assembly asked for International Law Commission to elaborate the content of IMT charter that would include provisions for individual criminal responsibility for violations of the laws and customs of war, and to draft code of offences against the peace and security of mankind. However, this process faced some constraints. After the formulation of the Nuremberg principles in 1950 and the completion of a draft code in 1954, some states insisted that the General Assembly should first agree on a definition of aggression (the first crime in the Draft Code). Thereafter, the ILC postponed its work on the code and was only able to complete a new draft in 1996.¹¹

On another front, the United Nations Security Council took major step in 1992 (47 years after Nuremberg) to establish a commission of expert to investigate violations of international humanitarian law in the former Yugoslavia. Despite the fact that the world community was unable to agree on the establishment of an international criminal justice system, the establishment of the commission of experts was a major step, which more or less answered the world community's expectation for international justice for the crimes in the territory of former Yugoslavia.

The Commission of Expert was mandated to investigate the violations of international humanitarian law in the former Yugoslavia and was the first step that ultimately led the Security Council to establish the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and later in 1994, the international Criminal Tribunal for Rwanda (ICTR).

¹¹ Steven R. Ratner, Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law, beyond the Nuremberg Legacy*, Oxford University Press, Second edition, 2001, pg. 8.

Thereafter, the road was opened for the establishment of a permanent international criminal court to ensure accountability for international crimes, which had been in the pipeline since the First World War. This led to the Rome treaty establishing a permanent international criminal court that was opened for signature in Rome on 18 July 1998, entered into force on 1 July 2002 after sixty six states (with sixty ratification required), deposited their instrument of ratification to the UN Secretary General.

The term accountability itself in human rights law is attributed to a process for holding individuals personally responsible for human rights abuses that they have committed. This imposes a duty to the international community to bring individuals to some form of justice for human rights abuses. In practice however, peoples who have committed violation of human rights are granted immunity from prosecution under domestic law by reason that they were carrying out government functions when such acts were committed. It is therefore sometime quite difficult to hold the perpetrators of criminal acts accountable when the State governments protect them from prosecution.

Contradictions on the notion of accountability emerge from countries under a transitional justice system. Indeed, in this situation, governments face a great challenge on how to deal with past crimes against humanity and human rights abuses. They find themselves in a dilemma when faced with a decision whether to punish the perpetrators from the old regime or to grant them immunity in order to maintain stability within their countries. Here the term ‘transitional justice’ refers to measures pursued by new and democratic regimes in order to address the human rights abuses by their repressive predecessors.¹²

In the next part, this thesis will elaborate on the notion of accountability in international perspective in relation to international crimes.

¹² Taina Jarvinen, *Human Rights and Post Conflict Transitional Justice in East Timor*, The Finnish Institute of International Affairs, 2004, pg. 37.

2.2 International Law Principles on Accountability

The general duty for States to punish human rights violations are not explicitly enshrined in the U.N. Charter or in any other general human rights treaty. However, most treaties contain a general obligation on the State parties to ensure respect for the rights enshrined under them.

In all major human rights treaties, there is thus a general obligation undertaken by member-States to respect and ensure that human rights are protected. This approach can be seen in the International Covenant on Civil and Political Rights (ICCPR)¹³ as well as in the International Covenant on Economic, Social and Culture Rights (ICESCR).¹⁴

Further, in the ICCPR, the States also undertake to take necessary steps, in accordance with their constitutional processes and within the provisions of the Covenant, to adopt such legislative and other measure as may be necessary to give effect to the rights recognized by the Covenant.¹⁵

There are no particular methods that the States are bound use in order to fulfil their obligation under the treaties apart from the provisions under which States parties are enjoined to adopt legislations in order to safeguard human rights. Nonetheless, the need to penalise serious violations of human rights is implicit in the notion of ‘securing’ or ‘ensuring’ protection, as it is quite difficult to secure the rights genuinely without apply such measures.

¹³ Article 2 (1)

¹⁴ Article 2 (2)

¹⁵ Article 2 (2)

2.2.1 Treaty-Based Law: Sources of an obligation to Investigate, Prosecute and provide Redress

There are duties and obligations imposed upon States by international law to ensure that human rights are protected. These obligations entail a process for accountability in case of those involved in serious violations of human rights. These are observed from some principles and provisions in international criminal law that relates to accountability. These principles include:

- *Aut Dedere Aut Judicare*

Under this principle, States have a general duty to prosecute or extradite persons suspected of the commission of crimes that contravene *jus cogens* norms.

In his book, Bassiouni notes that there is support for the validity of the principle of *aut dedere aut judicare* in customary international law for international crimes. “Hence, the duty to prosecute or extradite, is found in conventional international criminal law as evidenced by the treaty provisions containing obligations to prosecute or extradite.”¹⁶

This obligation to prosecute or extradite arises for acts of genocide (under the Genocide Convention);¹⁷ for grave breaches of humanitarian law (under the Geneva Conventions¹⁸ and its Additional Protocols¹⁹); and for torture (under the Convention against Torture²⁰). The main purpose behind the principle of *aut dedere aut judicare* is to ensure that those who commit crimes under international law are not granted safe haven anywhere in the world. The principle goes beyond universal jurisdiction by making prosecution mandatory and not just permissive. Indeed, the duty to

¹⁶ M. Bassiouni, *Crimes Against Humanity in International Criminal Law*, Martinus Nijhoff Publisher: Dordrecht, (1999), pg. 500.

¹⁷ Art. I

¹⁸ GC I – art. 49; GC II – art. 50 ; GC III – art. 129; GC IV – art. 146.

¹⁹ Additional protocols art. 85 (1) ; art. 88

²⁰ Art. 4, 5, 7, & 8.

prosecute or extradite been asserted by the General Assembly in its resolution.²¹

The core crimes within international law are considered a derogation of *jus cogens* or peremptory norms of international law. These *Jus cogens* norms would thus definitely include prohibition of genocide, slavery, crimes against humanity and war crimes, and would entail personal responsibility for those involved, wherever place they are found. The authorities in the places that they found are bound either to try the suspect or to extradite them to places, which have the jurisdiction to try them.

- **The Right to a Remedy**

It is a well-established principle in international law that States have a duty to provide remedy to victims of violations of human rights and humanitarian law. This obligation has been enshrined in most of the core human rights treaties.

The Universal Declaration of Human Rights (UDHR) comprehends the right to remedy in article 8, stating that, “Everyone has the right to an effective remedy by a competent national tribunal for acts violating the fundamental rights granted to him by the constitution or by law.” The ICCPR stipulates for the right to a remedy in article 2 (3), stating that each State party to Convention undertakes to ensure that:

- (a) Any person whose rights or freedoms are violated has an effective remedy, notwithstanding that persons acting in an official capacity have committed the violation.
- (b) Any person claiming such a remedy has his rights thereto determined by competent judicial, administrative or legislative authorities, or by any

²¹ GA Resolution 3074 (XXVIII) UN Doc A/9030 (3 December 1973); GA Resolution 2840 (XXVI) UN Doc A/8429 (1971).

other competent authority provided for by the legal system of the state, and to develop the possibilities of judicial remedy, and

(c) The competent authorities enforces such remedies when granted

Besides the ICCPR, which creates a binding obligation on the States parties, there are numerous international declarations, which reaffirm the principle that a State has a duty to provide a remedy to victims of human rights abuses.

Perhaps the most inclusive treatment of this duty is found in the U.N. Basic Principles of Justice for Victims of Crime and Abuse of Power.²² Under these principles, it is stated that victims are entitled to redress and thus it is recommended that states should establish administrative and judicial mechanisms that would enable the victims to obtain adequate redress.

It should be underlined that these Basic Principles are primarily concerned with victims of domestic crimes and can only be appropriately applied when the domestic criminal laws of a given state have incorporated the norms found under human rights or international humanitarian laws.²³

Even though there are no explicitly provisions which impose duties on States to create specific rules of procedures to provide remedy for the victims of human right violation, within the treaties or under customary international law, it is clearly understood that in order to provide “effective” remedy or a just and adequate reparations, actions should be taken by “competent tribunal”. Thus in case that the existing legal system within a State is not adequately positioned to handle such claims, it could be consider that the State concerned has not fulfil the requirement for providing effective remedy.

²² Adopted by General Assembly resolution 40/34 of 29 November 1985.

²³ M. Cherif Bassiouni, *Post-Conflict Justice*, Transnational Publisher, 2002, pg. 47

- **The Right to Reparation**

The right to reparations, which includes restitution, compensation and rehabilitation, are enshrined in several international human rights convention. For example, it is included in article 14 of the Convention against Torture which provides that, “Each state party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependant shall be entitled to compensation.”

The 1998 Rome Statute of the International Criminal Court also elaborates on the provisions on reparations to victims in article 75; here it is provided that, the court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

In sub section 2, it is further stipulated that, the court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the court may order that the award for reparations be made through the trust fund provided for in article 79. In addition, sub section 3 states that before making an order under this article, the court may invite and shall take account of representations from or on behalf of the convicted person, victim, other interested persons or interested states.

The affirmation of the duty of States to provide reparations can also be found in the proposition of the Permanent Court of International Justice (PCIJ) in the Chorzow Factory Case where it stated that:

It is a principle of international law that the breach of an engagement involves an obligation to provide reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.²⁴

It is therefore obvious that the international community has accepted the duty of States to provide reparation as a norm within international law. Thus, a failure by a State to make reparation can be perceived as being in breach of its duty under international law.

In 2000, the special Rapporteur on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights M. Cherif Bassiouni, submitted his final report to the UN Commission on Human Rights. He attached to it a draft Basic Principles and Guidelines on the Right to Remedy and Reparation for Victim of Violation of International Human Rights and Humanitarian Law (the Van Boven-Bassiouni Principles).

In these basic principles and guidelines, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition were acknowledged as forms of reparation. It also recommend that States should develop means of informing the public and victims of violations of these rights and remedies and of all available legal, medical and other services to which victims may have a right to access.

International Treaties Related to General Obligation to Prosecute:

- **GENOCIDE CONVENTION**

The 1948 Convention on the Prevention and Punishment of the crime of Genocide provides an absolute obligation to prosecute persons responsible for committing acts of genocide.

²⁴ Ibid, pg. 48.

Under the convention, genocide has been defined as any of the following acts when committed “with the intent to destroy, in a whole or in a part, a national, ethnical, racial or religious group, as such”:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group

Further, the genocide convention stipulates that certain specific actions shall be punishable. These actions include genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity to commit genocide.²⁵

The Convention stipulates that persons accused of committing genocide should be tried by a competent tribunal of the State in the territory of which the act was committed or by an acceptable international tribunal, and that parties should punish convicted offenders through effective penalties.²⁶

However, the Convention does not oblige State parties to prosecute all offenders in their custody, nor does it explicitly address prosecution of all offenders irrespective of their location. Thus under article VI, parties are obliged only to exercise domestic jurisdiction pursuant to the territorial principle, with offenders being tried by a competent tribunal of the State where the crime was committed, or by an international penal tribunal that may have jurisdiction.²⁷

It is noteworthy that even before the Genocide Convention had been drafted, genocide had already been considered as an offence against the law of nations. Thus in 1946, the General Assembly had adopted a resolutions

²⁵ Convention on Prevention and Punishment of the Crime of genocide, article III.

²⁶ Id, article IV, V and VI

²⁷ Id. article 6.

affirming the Nuremberg principles²⁸ and declaring genocide to be an international crime.²⁹

It is therefore clear that genocide as well as war crimes and crimes against humanity constitute gross crimes under customary international law and give rise to universal jurisdiction. Thus, every State has the customary right to exercise universal jurisdiction to prosecute offenders for committing genocide, wherever and by whomever it is committed. The Genocide Convention does not derogate from that obligation. However, under it States parties expressly oblige themselves to prosecute offences committed inside their territory.

• **TORTURE CONVENTION**

The condemnation of acts of torture finds explicit expression in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),³⁰ which currently has 142 parties,³¹ and is accepted as being a peremptory norm in human rights law.

Under CAT, torture has been defined to mean, any act by which severe pain or suffering; whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination or any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person

²⁸ Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal, G. A. Res. 95, 1 U.N. GAOR, U.N. Doc. A/64/Add. 1 at 188 (1946), as restated in article written by Christopher C. Joyner in "Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability, pg. 604.

²⁹ G.A. Res. 96, 1 U.N. GAOR, U.N. Doc. A/64, at 188 (1946), as restated in article written by Christopher C. Joyner in "Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability, pg. 604

³⁰ Adopted by General Assembly resolution 39/46 of 10 December 1984.

³¹ <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp>

acting in official capacity. This does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.³²

The Torture Convention obliges State parties to ensure that all acts of torture are made criminal offences under their domestic law.³³ It enjoins them to established jurisdiction over the offences when, *inter alia*, the alleged perpetrators or victims are nationals of these States.³⁴ If a state does extradite an alleged offender, the government is required to “submit the case to its competent authorities” for prosecution.³⁵

Further, the Convention prohibits any “exceptional circumstances”, including conditions or threats of war, internal political instability, or public emergencies from being used by a government to justify acts of torture.³⁶ Even orders from a superior officer or public authority cannot be used to justify acts of torture.³⁷

Compared with the Genocide Convention, the Torture Convention had certain weakness in its application. Whereas the Genocide Convention explicitly asserts distinct duties mandating that offenders “shall be punished”,³⁸ and persons accused of committing genocide “shall be tried by a competent tribunal of the State in whose territory the act was committed” or by an acceptable international tribunal,³⁹ and requires States to “provide effective penalties” for persons found guilty of genocide.⁴⁰ The Torture Conventions only requires parties to “submit” cases of alleged torture to their competent authorities for the purpose of prosecution, and makes acts of torture punishable simply by appropriate penalties.⁴¹ Thus, the Torture Convention fails to explicitly provide that prosecution must occur for all

³² Torture Convention, article 1.

³³ Article 4, para. 1.

³⁴ Article 5, para. 1.

³⁵ Article 7, para. 4.

³⁶ Article 2, para. 2.

³⁷ Article 2, para. 3.

³⁸ Article IV.

³⁹ Article VI.

⁴⁰ Id, article V.

⁴¹ Id, article 7, para. 1; para 2.

alleged cases of torture. It also fails to stipulate that, without exception, severe penalties should be handed down for persons found guilty of committing torture.

- GENERAL HUMAN RIGHTS CONVENTIONS

General Human Rights Conventions include the International Covenant on Civil and Political Rights (ICCPR)⁴², The European Convention on Human Rights (ECHR),⁴³ the American Convention on Human Rights⁴⁴ and African Charter on Human and Peoples' Rights.⁴⁵

As a common feature, these treaties do not expressly require states to prosecute violators. However, they do obligate states to “ensure” the rights enumerated therein are enjoyed by all. In practice, the duty to “ensure” that rights are enjoyed also implies a duty to prosecute violators if violations occur. Within the States, the competent authorities are expected to take action to ensure that people’s rights are protected. One of the methods to guarantee these rights is by prosecuting the offenders.

In addition to the provisions on the ‘duty to investigate grave human rights violation,’ most major human rights instruments include the duty to prosecute violators, a right to remedy, and a right to compensation.

It is to be noted that not all countries are parties to all human rights instrument that would make them bound to uphold their provisions, but these countries would still be bound to respect the obligation to investigate and prosecute human rights violators since these obligations have attained the status of customary law and general principle of law.

⁴² Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 23 March 1976

⁴³ Adopted by the Council of Europe on 4 November 1950, Rome. Entry into force: 3 September 1953

⁴⁴ Adopted by the Organization of American States on 22 November 1969, San Jose, Costa Rica. Entry into force: 18 July 1978

⁴⁵ Adopted by the Organization of African Unity at the 18th Conference of Heads of States and Government on 27 June 1981, Nairobi, Kenya. Entry into force: 21 October 1986

2.2.2 Non Treaty Sources of the Obligation to Investigate and Prosecute

- **Customary International Law: Crimes against Humanity**

It has generally accepted that the obligation to prosecute the perpetrators of crimes against humanity is one of the customary international law. It is therefore considered a violation of international law if those people who commit the crimes are granted amnesty.

The practise of prosecution of war criminal after World War II highlighted state obligation to investigate and prosecute human rights violations: First, the prosecution acknowledged the importance of official accountability in aftermath of state sponsored crimes and showed that one of the objectives of the trials was to find the truth on what had happened. Justice Robert Jackson, chief U.S counsel at Nuremberg made it clear that one major purpose of the trials was to establish a true and complete record of events; by providing the full record, it was expected that future generations would learn how to prevent such crimes from being repeated.⁴⁶

Secondly, the prosecutions affirmed that crimes that were committed by State official against their own people were subject to international law, giving rise to both State and individual responsibility, and that official status provides no immunity to the individuals.

Further, the prosecutions were very important in that they provided the initial definition of crimes against humanity and characterized these as international crimes.

There are several definitions of crimes against humanity in international law. These include the definition provided in the Charter of International tribunal at Nuremberg and the one provided in the Rome Statute of

⁴⁶ Roht-Arriaza, *Impunity and Human Rights in International Law and Practise*, Oxford University Press, 1995, pg. 50

International Criminal Court. The former defined crimes against humanity to include murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before and during the war, or prosecutions on political, racial and religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where it was perpetrated.⁴⁷ The later provides that:

“Crimes against humanity means any of the following act when committed as part of a widespread or systematic attack against any civilian population, with knowledge of the attack:

- (1) Murder
- (2) Extermination
- (3) Enslavement
- (4) Deportation or forcible transfer of population
- (5) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law
- (6) Torture
- (7) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of comparable gravity;
- (8) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the court;
- (9) Enforced disappearance of persons
- (10) The crime of apartheid, and

⁴⁷ The Charter of International Military Tribunal (IMT), annexed to the London Agreement for the prosecution and punishment of major war criminal of the European axis, Aug 8, 1945, art. 6(c)

- (11) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health.⁴⁸

It is thus noteworthy that there are many similarities in these definitions. However, certain characteristics distinguish crimes against humanity from other crimes as well as from human rights violations, even if these violations are categorised as being gross human rights violations. First, murder, enslavement and the likes are crimes in the world's major systems. However for these crimes to achieve the status of crimes against humanity, there must be an additional international element, which Bassiouni characterized as "State action or policy;" that is where State officials or agents of a State carry out these acts in furtherance of an action or policy based on discrimination and/or persecution of an identifiable group.⁴⁹

Unlike war crimes, crimes against humanity need not have a trans-national element; and unlike genocide, they are not limited to cases in which an intent to destroy a racial, ethnic or religious group can be proved.

The most significant efforts to combat crimes against humanity are indeed focused on encouraging States to try the violators within their national tribunals, backing it up with an international universal jurisdiction. This position is supported by the Principles of International Cooperation in the Detention, Arrest and Extradition and punishment of Persons Guilty of War Crimes and Crimes against Humanity,⁵⁰ which in principle 2 states that every State has the right to try its own nationals for crimes against humanity.

⁴⁸ Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, U.N. Doc. A/CONF.183/9 (17 July 1998)

⁴⁹ See Velasquez ronderiquez case, Inter American Court of Human Rights. The definition of what constitutes "state action or policy", of course must be broad enough to take into account situations in which the states condones, encourages, or fails to take appropriate action to prevent or punish the acts of others, whether of its officials or private parties

⁵⁰ G.A. Res. 3047 – 1973

In practice, crimes against humanity have been the subject of numerous national prosecutions. This includes the trials of German suspects carried out under Allied Control Council Law 10 and later within German law, under British, French and Russian authority, and under the German and other European national courts.

The effort to try perpetrators of crimes against humanity has also been made by the Indonesian government in the East Timor cases. Under international pressure, the Indonesian government insisted on it being allowed to prosecute the actors behind the violence under its own national criminal jurisdiction.

- **Security Council Resolutions**

Under chapter VII of the U.N. Charter, the Security Council has authority to make resolutions that are binding, creating obligations on member States to bring individuals responsible for international crimes to justice.

An example of this was the Council's Resolution 748, which required Libya to surrender two of its officials charged with bombing Pan Am Flight 103 to the United States or United Kingdom for prosecution. Others resolutions include, Resolution 837 adopted to call for the arrest of Somali Warlord Mohamed Farah Aideed, who was allegedly responsible for the murder of 24 UN Peacekeeper, and Resolution 827 and 955, imposing an obligation on all States to surrender indicted persons to the Yugoslavia and the Rwanda Tribunal for their prosecution.⁵¹

⁵¹ Supra note 23, pg. 95

2.3 Accountability Mechanism

The notion of accountability comes to the fore at a period in which there have been many human rights abuses that raises the question on how to deal with the past violations.

In this regard, there are two broad approaches. The first approach is based on *retributive justice*, emphasising on punishment for the perpetrators of human rights abuses through criminal trial on the one hand. The second approach, on the other hand is based on *restorative justice*, which aims at restoring and enhancing the justice systems which had failed or had become weakened as a result of the internal conflict. The second approach is thus based on the methods of reconciliation and amnesty through a truth telling process.

The establishment of the United Nations *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY), to try past human rights atrocities committed in the former Yugoslavia evidences the first approach. This tribunal was established by Security Council under Chapter VII of the U.N. Charter. The second approach is epitomised by the South African Truth and Reconciliation Commission (TRC) that would appear to be the successful domestic truth commission.

Under the above two broad approaches, there are several other accountability options available. They include:

- (a) International prosecution,
- (b) International and national investigatory commissions,
- (c) Truth commission,
- (d) National prosecution,
- (e) National lustration mechanism, and
- (f) The mechanism for the reparation of victims⁵²

⁵² Supra note. 23, pg. 27

This thesis will therefore attempt to elaborate on each of these options below.

- **International Prosecution**

International prosecutions primarily target crimes that contravene *jus cogens* norms. These include crimes of genocide, crimes against humanity, war crimes and torture. The legal obligations for these crimes include States' duty to prosecute or to extradite, the duty to provide legal assistance, the obligation to eliminate statutes of limitation and the obligation to eliminate immunities for superior officers for crimes committed.

Prosecutions at the international level are considered important for reaching and holding the leaders, senior executive officers, and policy-makers accountable for their actions. Sometimes within the national systems, those most responsible for the atrocities cannot be reached by the law, due to major positions they hold in government or high ranks in the military that are granted blanket immunity by the State laws or by the governments. These persons can therefore only be tried when subjected to an international system.

To date, the Security Council has established two *ad hoc* international criminal tribunals. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were created in response to the atrocities that occurred within the territories of these States, namely, the ethnic and civil wars resulting from the break up of former Yugoslavia, and the four months intensive massacre that occurred in Rwanda. It is to be noted that the jurisdiction of these tribunals was limited to specific times in which and territories over which the breaches to peace and security occurred.

The focus of these two tribunals were to punish the most responsible actors; leaders and senior architects, similar to the two other prior international

prosecutions at Nuremberg and Tokyo and addressed individual criminal responsibility for the crimes committed.

Where international trials are carried out, it is noteworthy that at same time, the national courts still retain the power to proceed with cases over those responsible. However, the international tribunal in such cases would possess the primacy of jurisdiction over the suspects and might request for deferral of a national proceeding at any stage in order to prosecute the suspects itself.

Now, a permanent international criminal court has been established within the international criminal justice system. The court has jurisdiction over the crimes of genocide, crimes against humanity, and war crimes. However, this court (the ICC) only exercises its jurisdiction prospectively and over individuals who are nationals of the State parties to the treaty establishing it, or to persons who have committed crimes in the territory of a State party.

The main principle of the ICC is based on complementarity to national criminal jurisdiction of member States. This means that the States concerned are allowed to solve their own internal problem in accordance with their own constitutional procedures before accepting the jurisdiction of an international mechanism that comes in as a last resort.

- **International and National Criminal Investigatory Commissions**

International criminal investigatory commissions entail internationally established committees or designated individuals who are assigned with the duty to collect evidence of criminality, in addition to other fact-finding information of a more general nature.⁵³ The main task of these commissions or individuals is to document possible violations of international law, and to provide information that could be used for future prosecutions. An example

⁵³ Supra note. 23, pg. 30

of such arrangement is the Commission of Experts for the former Yugoslavia.⁵⁴

These types of commissions actively investigate and collect evidence during periods of open hostilities or ongoing human rights violations by repressive regimes. Typically, their mandate is to evaluate a situation in the first instance in order to advise political decision-maker as to an appropriate course of action to remedy the situation.⁵⁵

At glance, there are similarities between these investigatory commissions with other accountability mechanisms such as the truth commissions. These include similarity on their operating procedures and their goals. Indeed these two commissions share the over-reaching goal of ascertaining the truth about a given conflict, by collecting evidence that would form the initial base for prosecution. However, there is a principal distinction between these two types of bodies, which lies in the timing of their establishment and their immediate purposes. Investigative commissions mainly focus on making an immediate assessment and initial record of what is occurring, while truth commission are focused on making sense of what happened and thus establish a somewhat permanent conclusion.

- **International and National Truth Commission**

One of the methods to establish the record of grave human rights crimes following a conflict is through a commission of inquiry commonly referred to as a “truth commission”. These fact-finding investigative bodies have a duty to investigate situations and submit reports of their findings but have no power to impose criminal fines or sentences.

Mainly, these truth commissions have four primary purposes, these are:

- (1) To establish historical records;
- (2) To obtain justice for the victims;

⁵⁴ Establish pursuant to Security Council Resolution 780 (1992)

⁵⁵ Supra note. 23, pg. 31

- (3) To facilitate national reconciliation; and
- (4) To deter further violation and abuses.⁵⁶

Through the establishment of such a commission, it is expected that it would create a credible account of human rights violation, and most importantly allow the society to learn from the past in order to prevent such violence from occurring again in the future. The truth commissions serve the needs of accountability as they try to discover the whole truth, and may in addition facilitate criminal prosecutions, as these commissions can be a significant precursor to judicial action. In case a State has not already endorsed a full-scale prosecution, formation of a truth commission may be an important step to finding justice. However, truth commissions cannot be regarded as the substitute of prosecution, especially over genocide, crimes against humanity, war crimes and torture; crimes that contravene *jus cogens* norms.

A truth commission can be a supplement to prosecution by establishing complete records of what happened; from the perspectives of both the victims and the perpetrators. Though the commissions can work alongside or operate in tandem with prosecution, it may be useful for the prosecution stage if the truth commission could gather some information and preserve evidence and testimonies for the sake of the trial.

- **National Prosecution**

In spite of demands by the international community for establishment of international criminal tribunals to prosecute offences that are considered as international crimes, national criminal jurisdiction remains at the heart of prosecution of international crimes. Thus, this notion appears in the complementary principle within the Rome Statute. The ICC statute stresses on the fact that court is to complement the national criminal tribunals in their functions. This means that at the first instance the States concerned are enjoined to make the best effort to prosecute crimes in their territories

⁵⁶ Michael P. Scharf, *The Case for a Permanent International Truth Commission*, pg. 379

relying on the national criminal system. ICC would only come in if a State were unwilling or unable to prosecute.

The national criminal jurisdiction is important because in general, the international prosecution only focuses on the senior officers or high-level decision-maker and leaders and the major players. Thus, national prosecutions are expected to reach all persons who committed the crimes without limitations made by the international court that punishes only major crimes contravening *jus cogens* norms.

National prosecution are conducted mainly within the jurisdiction of the State where the violations occurred, and there is an established State practise, wherein international criminal laws are incorporated within the domestic criminal codes of States to enable them to punish the commission of such crimes.

- **National Lustration Mechanism**

In common parlance, lustration means purification or illumination. This has been categorized as an administrative mechanism for accountability which entails the disqualification, and where in office, the removal of certain categories of officeholders who served under previous regimes, from certain public or private offices under the new regime.⁵⁷

Most of the former Soviet bloc countries choose to deal with their past, after separating from the U.S.S.R. through lustration, by disqualifying former communist officials and collaborators, by sidestepping their criminal prosecution; these lustration laws were sometimes referred to as “de-Communization laws.” Thus for example, lustration statutes were passes in the Czech Republic and Slovakia (1991), Albania (1992), Bulgaria (1992, 1997, 1998), Poland (1992, 1997, 1998), Hungary (1994, 1996) and

⁵⁷ Laura Olson, Mechanism Complementing Prosecution, ICRC publication Vol. 84 no. 845, March 2002, pg. 181

Romania (1998). However, only Albania, the former Czechoslovakia and Germany conducted purges affecting large numbers of individuals.⁵⁸

This method has caused many dilemmas. Governments have had recourse to lustration statutes during a period of transition to democracy, purging people from offices for being part of a now condemned group. Questions therefore have arisen of how far these disqualifications should extend, and what should be done to those who were truly innocent in the former regimes. Harmful effects of lustration extend to families and friends of those purged, even though they may not have any connection with the prior violations. The danger of this mechanism is that it tends to deal with classes or categories of people without regard to individual criminal responsibility, and may thus occasion a lot of injustices to many individuals.

- **Mechanism for the reparation of Victims**

One of the fundamental components of the process of restorative justice is the provision on remedies and reparation for victims. The national legal system serves as the main vehicle for the enforcement of human rights. Hence, there exists a State responsibility to provide remedy and reparations, which forms a cornerstone in the establishment of accountability for violations and achieving justice for the victims.

According to Bassiouni, the most important goal of restorative process is the “re-humanization” of the victims and their restoration as functioning members of the society.⁵⁹ Thus, even though monetary compensation might be central to this process, frequently victims and their survivors expect their suffering to be acknowledged as wrongful, the violators to be condemned, and their dignity to be restored through some form of public remembrance. Indeed, the attainment of restorative goal is fundamental to both peace and

⁵⁸ Id.

⁵⁹ Supra note. 23, pg. 38

security of any State since it eliminates the possibility of future revenge and secondary victimization that may result from the initial violations.

As a result of the widespread abuses of human rights in recent history, there is a move by the international community to provide a legal framework that ensures the redress for violations of human rights. This is seen from the formulation of the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Basic Principles of Justice). The Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, which produced the Draft Guidelines on Victims Redress, continued on this move. Provisions addressing compensation of victims were also included in Rome Statute of the ICC.

The latest manifestation of this concern was evident in the 1998 resolution of the United Nations Commission on Human Rights that highlighted the importance of addressing the question of redress for these victims in a systematic and thorough manner at both national and international levels.⁶⁰ This resolution reaffirmed faith in the General Assembly Resolution on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.⁶¹

Undeniably, monetary compensation is important in the process of restorative justice. However, this should not be deemed as the only available remedy, because it would give rise to a new problem in societies that cannot absorb the economic implication of such expenditures. Thus, non-monetary forms of compensation should also be developed, for example by providing an accurate historical record of the wrongful acts and by public acknowledgment of violations. This can be achieved through investigatory and truth commission and domestic or international prosecutions. There

⁶⁰ Resolution 1998/43

⁶¹ Resolution 60/147

should also be guarantees of non-repetition by means of punishment for the perpetrators and their removal from power.

Therefore, accountability mechanisms form an important aspect in the effort to ensure peace and reconciliation within a country, and must be fair, credible and as exhaustive as possible. Ideally, this should be in conformity with the fundamental principles of accountability, namely:

- (a) Cessation of the conflict and thereby ending the process of victimization,
- (b) Prevention and deterrence of future conflict (particularly conflict which may be initiated directly after the cessation of the conflict being addressed)
- (c) Rehabilitation of the society as a whole and of the victims as a group
- (d) Reconciliation between the different peoples and groups within the society.⁶²

According to Bassiouni, these accountability mechanisms are not mutually exclusive; they are complementary and should not be taken as standing alone. Rather, they should be combined with others to be more effective.⁶³ There exist no guidelines or pattern under which these mechanisms should be used in dealing with certain conflict, but it might be necessary to have some guidelines in order to create common bases for the application of these mechanisms in order to avoid abuses and denial of justice. If these principles were well applied, ideally it would restore the condition within society and eliminate the sense of injustice.

⁶² Supra note. 7 pg. 40

⁶³ Supra note. 23, pg. 42

2.4 Impunity : Hindrance to accountability

The efforts to find accountability for past abuses always contradict with the issue of impunity. These two notions are reflected in government policies; whether they want to prosecute the perpetrators of crimes or not.

Impunity manifests in two forms: In the *de facto* form where the State's judicial machinery is simply manipulated to ignore the crime, and in *de jure* form; the more notorious form, where the state adopts formal legal means of exempting those concerned from legal liability, for example through an amnesty.⁶⁴

Under the Vienna Declaration and Programme of Action, adopted in 1993, the World Conference on Human Rights enjoined States to abrogate legislations leading to impunity for those responsible for grave violations of human rights, through acts such as torture, and to prosecute such violations, thereby providing a firm basis for the rule of law.

2.4.1 The Scope of Impunity

There is a lot of and widespread human rights violations throughout the world today, that occurs within the national and international spheres. These violations have victimized millions of peoples around the world by subjecting them to genocide, crimes against humanity, non-judicial executions, torture, arbitrary arrests and unlawful detentions.

Even though these are considered as core crimes within international law, only a few persecution and accountability, either nationally or internationally, are undertaken for these grave violations of human rights that cause pervasive suffering. In fact, only a few actions have been taken in order to give remedies for the victims of these massive violations. There are only a handful of citeable actions taken. The most well known are the

⁶⁴ Nigel S. Rodley, Breaking the Cycle of Impunity for Gross Violations of Human Rights: The Pinochet Case in Perspective, *Nordic Journal of International Law* 69: pg 14, 2000 *Kluwer law International*.

establishment two special tribunals for the former Yugoslavia⁶⁵ and Rwanda⁶⁶. Other examples are the Truth and Reconciliation Commission in South Africa, and lustrations in some East and Central European countries.⁶⁷

Ideally, impunity should not be allowed for the core crimes in international law, constituting war crimes, genocide and crimes against humanity, under any circumstances. In reality however, political consideration have always been inevitable and have affected governments' response to human rights violations.

2.4.2 The Nature of Impunity

Impunity has authoritatively been defined by one United Nations rapporteur as the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account –whether in criminal, civil, administrative or disciplinary proceedings– where the perpetrators are not subject to any enquiry that might lead to their being accused, arrested, tried and if found guilty, sentenced to appropriate penalties, and to make reparations to their victims.⁶⁸ Thus, impunity means “exemption from punishment or penalty,” and within the context of human rights law, implies the lack of or failure to apply remedies for victims of human rights violations.⁶⁹

The question arises as to why the international community should care about impunity and the human rights situation within a particular State. Doesn't

⁶⁵ See Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted at New York, May 25, 1993 [hereinafter ICTY Statute]

⁶⁶ Statute of the International Criminal Tribunal for Rwanda, adopted at New York, Nov 8, 1994 [hereinafter ICTR Statute]

⁶⁷ Christopher C. Joyner, Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability, *Denv. J. Int'l L & Pol'y* Vol.26:4, pg. 594.

⁶⁸ Rama Mani, “Ending Impunity and Building Justice in Afghanistan”, *Afghanistan Research and Evaluation Unit-Issues Paper Series*, 2003, pg. 6.

⁶⁹ *Supra* note 21, p. 596. See also progress report on the Question of Impunity of perpetrators of Human Rights Violations, prepared by Mr. Guisse and Mr. Joinet, pursuant to Sub-Commission Resolution 1992/23, Sub-Commission on Prevention and Protection of all Minorities, E/CN.4/Sub. 4/1993/6

this fall within domestic jurisdiction, and therefore no one should intervene in the internal affairs of a sovereign State?

Indeed, the basic rule of international law is that States have no right to encroach upon the preserves of internal affairs of other State because of the considered equality and sovereignty of States, as mirrored in article 2 (7) of the UN Charter. However, this rule can not be used as a bar to international concern and consideration of internal human rights situation, especially for those crime that contravene *jus cogens* norms, where States bear an unbreachable responsibility to prosecute the offenders.

3 Indonesia and East Timor

3.1 Overview of Human Right in Indonesia

The year 1998 was one that saw an improvement in the enjoyment and respect for human rights in Indonesia. It marked the fall of the “*new order*” regime under Suharto, which had been in power for over than 32 years. It is commonly recognized that under Suharto’s authority, there were many cases of human right violations, most of which were highlighted only after the fall of his regime.

The new government that took over from the junta undertook a process for redress for human rights violations under the old regime. The government opened cases against persons from the former regime for grave human rights violation, and established *ad hoc* human rights court to prosecute the perpetrators. This included cases of violations in Tanjung Priok and the case of the 1999 East Timor violence.

There is now some improvement on the protection of human rights in Indonesia. An amendment to the Constitution gives in more details the provision regarding protection on human rights that was never enshrined in it before. A new chapter (XA) stipulating for protection of human rights was added to the Constitution.

Under this amendment, each person has the right to live and to defend his/her life.⁷⁰ Article 28b provides for the right of each person to form a family and to continue the family line through legitimate marriage. Each child has the right to a viable life, growth and development and to protection from violence and discrimination.

⁷⁰ Article 28a

Under article 28c, each person has the right to develop themselves through the fulfilment of their basic needs, the right to education and to obtain benefit from science and technology, art and culture, in order to improve the quality of their life and the welfare of the human race. All persons also possess a right to advance themselves in struggling to obtain their collective rights to develop their community, their people, and their nation.

Article 28d stipulates for the right to the recognition, security of person, the protection and the certainty of just laws and equality in treatment before the law. Each person has the right to work and to receive just and appropriate rewards and treatment in their working relationships and citizen possesses the right to obtain the same opportunities in government. The right of citizenship is also guaranteed.

The freedom of religion is guaranteed under article 28e. Under it, all persons are free to profess their religion and to worship in accordance with their religion. All persons have the freedom to possess convictions and beliefs, and to express their thoughts and attitudes in accordance with their conscience. This article also provides for the rights of all persons to choose their education and training, their occupation, their citizenship, their place of residence within the territory of the State, and their right to leave and return to such place, and the freedom of association; for persons to gather, and express their opinions.

Article 28f: stipulates that, each person has a right to communicate and to obtain information in order to develop him/herself and his/her social environment. The right to seek out, obtain, possess, store, process, and transmit information using any means available, is also protected.

The new regime provides under Article 28g that each person has the right to the protection of him/herself, his/her family, his/her honour, his/her dignity; property is in his/her control, and the right to feel safe. Torture or treatment

that lowers human dignity has been prohibited, while all persons are granted the right to obtain political asylum from other countries.

Article 28h provides that each person has a right to physical and spiritual welfare, to have a home, to have a good and healthy living environment and to obtain health services. The right to assistance and special treatment in order to gain the same opportunities and benefits in the attainment of equality and justice is also addressed in this article. Each person has the right to social security that allows his or her full personal development as a human being. In addition, each person has the right to private property, which may not be arbitrarily interfered with.

Article 28i stipulates for the right to live, the right not to be tortured, the right to freedom of thought and conscience, the right not to be enslaved, the right to be individually recognized by the law, and the right not to be prosecuted under retrospective laws as basic human rights that may not be interfered with under any circumstance.

Free from discriminatory treatment on any grounds is guaranteed, and all persons have the right to obtain protection from such discriminatory treatment under the law. Cultural identity and the rights of traditional communities are to be respected in accordance with the continuing development of civilization over time.

The protection, advancement, upholding and fulfilment of these rights is the responsibility of the State, and in order to uphold and protect basic human rights in accordance with the principle of democracy and rule of law, the implementation of human rights are to be regulated and provided for in respective legislation.

Article 28j obliges each person to respect the basic human rights of others for insurance of orderly life in the community, as a people, and as a nation. In the enjoyment of their rights and freedoms, each person is obliged to

submit to the limits determined by law, with the sole purpose of guaranteeing recognition and respect for the rights of others and to fulfil the requirements of justice and taking into consideration morality, religious values, security, and public order in a democratic community.

The amendment of the Constitution is regarded as a good sign for implementation of human rights in Indonesia. It elaborated the rights in a more specific way, which is more in conformity with international human rights norm. However, article 28i of the amended constitution created a little controversy regarding the prosecution of offences that were committed before the laws regulating the crime were enacted. This it seems prevents prosecution even where the act committed clearly violate customary international law or are considered crimes against humanity, in order to give effect to the prohibition of retroactive (criminal) law in this article. However, it could be argued that this provision complies with international law and with human rights treaties that prohibit retroactive criminal laws.⁷¹

Article 43 (1) of Law 26/2000⁷² seems to contradict with article 28i of the Constitution. Article 43 of the Act underlined that the serious human rights violations that took place before the stipulation of this law would be prosecuted and preceded against by the *Ad hoc* Human Rights Court. This article implicitly allowed retroactive application of the law in the prosecution of past human right abuses committed before it was enacted.

On the hierarchy of laws,⁷³ the Constitution is superior to all other laws, and no laws can be applied in Contradiction to the constitution. Article 28i of the Constitution 1945 is thus considered as a claw-back to the progressive development that has been reached through the enactment of law 39/1999. It certainly, limits the possibility of bringing the perpetrators of past human rights violations to justice through the *ad hoc* Human Rights Court. The

⁷¹ 1948 Universal Declaration of Human Rights, art. 11 (2); 1966 ICCPR, art. 15 (1); the 1950 ECHR, art. 7; 1969 ACHR, art. 9; 1981 African Charter on Human and People's Rights (ACHPR), art. 7 (2).

⁷² Regarding the creation of the Human Rights Court

⁷³ See Law 10/2004 regarding Hierarchy of Law

inclusion of non-retroactive law clause in the Constitution seems to lead to failure to prosecute past human right abuses, thus serving as a safe heaven for perpetrators of human rights violations.

In spite of the controversy of that provision, human rights cases are still being tried under Law 26/2000 that applies retroactively to past human rights atrocities. This is similar to the practice under ICTY that used retroactive provision to punish crimes committed in former Yugoslavia.⁷⁴

Even before its amendment, the 1945 Constitution acknowledged basic human right provision enshrined in most of the international convention, and Indonesia had ratified several core conventions on human rights. It is a party to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1984,⁷⁵ the Convention on the Right of the Child (CRC) 1989,⁷⁶ the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) 1979,⁷⁷ and the Convention on the Elimination of All Forms of Racial Discrimination (CERD) 1965.⁷⁸

In 2005, the government also decided to ratify ICCPR⁷⁹ and IESCR,⁸⁰ as part of the government's agenda in the National Action Plan on Human Rights (RANHAM) that was enacted by Presidential Decree no. 40/2004. This National Action Plan was established by the government in order to develop respect for and enjoyment of human rights, including religious values, and the ethnic and traditional culture in. RANHAM is intended to serve as a guideline and general plan for the government for the period 2004-2008 in order to help it fulfil its goal to improve the human rights

⁷⁴ See article 1 ICTY Statute, adopted on 25 May 1993 by Resolution 827

⁷⁵ CAT was ratified by Law no. 5/1998

⁷⁶ CRC was ratified by Presidential decree

⁷⁷ CEDAW was ratified by Law no. 7/1984

⁷⁸ CERD was ratified by Law no. 29/1999

⁷⁹ ICCPR was ratified by Law no. 12/2005

⁸⁰ ICESCR was ratified by Law no. 11/2005

situation in the country, by also protecting certain groups including children and women.

Beside the ratification of international conventions, the government also declared an agenda to establish institutions to carry out the programme of harmonizing national legislations with human rights norm, to disseminate human rights education, and to apply the human rights norms in practice, as part of RANHAM.

The government is also still making an effort to solve the problem of past human rights violations. Good progress has been made in certain cases, for example in 2005 the government signed a “peace agreement” with Free Aceh Movement (Gerakan Aceh Merdeka) that ended 29 years of internal armed conflict and opened a new avenue for people of Aceh to get due recognition of their human rights and dignity.

However, there are certain cases that are still in progress that have not been finalised. The case of East Timor still has not found the best solution, even though there have been several judgements made by the *Ad hoc* court against the perpetrators.

Beside the efforts to resolve human rights cases through judicial means, the government has also planned to set up a truth and reconciliation commission (TRC) as recommended in Law 26/2000 as an alternative way to solve the pending cases. The TRC concept is based on the belief that reconciliation requires full exposure of the truth. Indonesia enacted Law no. 27/2004 for the creation of the Truth and Reconciliation Commission, but the Commission itself has not come into being.⁸¹ Several provisions remain controversial. For example, article 27 of the law provides for compensation and rehabilitation, stipulating that compensation and rehabilitation could be given after amnesty has been granted to the perpetrators.

⁸¹ http://www.elsam.or.id/more.php?id=487_0_1_0_M26

Normally, the duty to give compensation and rehabilitation in international law bears on the State, and does not have any prerequisite condition for granting of amnesty. Such stipulation would contradict the principle enshrined in Basic Principle and Guidelines on the Right of Remedies and Reparation for Victim of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law, and also would contravene the Guiding Principles for Combating Impunity for International Crimes.⁸²

There are certain proposals for changes on law on TRC being considered, and it is expected that thereafter, the Truth Commission will run under a robust mandate and function as an alternative to the *Ad hoc* Human Rights Court to help settle East Timor cases.⁸³

3.2 An Overview of the Conflict in East Timor Prior to their Independence

3.2.1 Background of the Conflict

The Portuguese had influence over the island of Timor beginning from the first half of the sixteenth century when they established a colony in the Solor Islands, east of Flores. From that time, East Timor became Portuguese colony for a period stretching almost 500 years.

However, in the 1960s, the U.N. rejected Portugal's claim over east Timor and placed the island on the list of non-self governing territories under Chapter XI of its Charter⁸⁴. In 1974, the Portuguese Government accepted this condition and prepared a plan for the territory's self-determination that would result into a political shift within the country.

⁸² See Part B on Victim Redress

⁸³ See article 47 Law 26/2000 on Human Right Court

⁸⁴ Security Council Resolution 384 of 22 December 1975, preamble and para.3

There were two options offered to the Timorese people, who were asked whether they wanted full independence and continued relationship with Portugal or if they would prefer to be integrated into Indonesia, their neighbouring country. Two major parties in Timor took opposing side, the Democratic Union of Timor (UDT) favoured progressive autonomy within Portugal, while Fretilin (revolutionary Front of Independent Timor-Leste) favoured immediate independence. Another smaller party called APODETI (Timorese Popular Democratic Association) supported the integration of East Timor into Indonesia.

Soon after, East Timor declared itself independent from Portuguese colonial rule. A conflict between East Timor and Indonesia began when Indonesia invaded the island on December 7, 1975 and declared it to be its twenty-seventh province. This sparked an armed conflict between the armed forces of Indonesia and Fretilin troops (which later became Falintil), that lasted for 24 years.

In the international arena, the U.N. never formally recognized East Timor as part of Indonesia, and the island's status remained the Organisation's agenda as an unresolved issue. This status of things remained until the events of 1999 erupted. Thereafter, the U.N. General Assembly, under a resolution,⁸⁵ set a stage for a process of negotiation between the representatives of Indonesia and Portugal, but this was after many gruesome events including the Santa Cruz massacre of 1991.⁸⁶

⁸⁵ under Resolution 30/37 of 1982

⁸⁶ Santa Cruz massacre happened in November 1991 when Indonesian troops shot 273 East Timorese at the Santa Cruz cemetery after a funeral had turned into a peaceful demonstration. See James Dunn, *Crimes Against Humanity in East Timor*, January to October 1999-Their Nature and Causes, pg. 13

3.2.2 The transition to independence and the events of 1999

The economic crisis in Indonesia that had occurred in the late 1997 brought about a change of regime from General Suharto (who had led the so-called “new order” regime that ruled for almost thirty-two years) to its successor B.J Habibie, in May 1998.

Soon after B.J Habibie became president, he made a surprising and decision concerning East Timor, agreeing to a popular consultation and that offered the people of East Timor a choice between autonomy and full independence. This was considered as a breakthrough since series of negotiations between Portugal and Indonesia had not been able to achieve a satisfying result and had made no noteworthy progress, even under the observation of the U.N. Secretary General since 1983.⁸⁷ Thus, arrangements were made with the support of the U.N. for popular consultation on May 5, 1999. The U.N. authorised UNAMET to set up the popular consultation.

However, even as preparations were going on for the plebiscite, widespread extra judicial killing, summary/arbitrary executions, mass murder, and individual killing as well as torture and violence against women, were taking place, beginning January of that year. These crimes were well planned and were systematically carried out, mainly targeting the pro-independence activists, and other known supporters East Timorese Nationhood, were deported or deprived of shelter.

In September 1999, even priests and nuns also became targets of the attacks, not only because the pro-independence supporters sought sanctuary in the churches, but also because the churches were seen by some TNI (the Indonesia army) commanders and militia leaders as being opposed to the autonomy option.

⁸⁷ UN General Assembly Resolution 37/30 (1982) tasked the Secretary General to seek a “just, comprehensive and international acceptable” solution to the conflict in East Timor.

After being rescheduled twice because of the violence, the U.N.-organized referendum took place on August 30, 1999 and the results were announced on 4 September 1999. The East Timorese had voted overwhelmingly for independence from Indonesia, and when the results were announced, the region descended into a state of anarchy.

Obviously, the responsibility to restore the condition that existed prior to violence was in the hand of Indonesian government. However, it seems that Indonesia failed to fulfil its responsibility under international law. It put up very little effort in handling the violence despite demands for actions from the international community. Thus, even with opposition from the Indonesia, the Security Council passed a resolution authorizing a 'humanitarian intervention' under Chapter VII of the UN Charter as a response to "the grave humanitarian situation resulting from violence in East Timor".⁸⁸ Finally, the Indonesian government consented to the deployment UN troops to the territory. A multinational force was established under the command of Australia. This force, named INTERFET, was given the task of restoring peace and security in East Timor by protecting and supporting the UNAMET in facilitating humanitarian assistance.

The resolution provided INTERFET with a mandate to take "all necessary measures" to reach its objectives, which was one of the strongest mandates ever issued by the Security Council.

In addition, in response to violence that had taken place in East Timor prior to popular consultation of August 1999, other UN human rights mechanisms were activated. The U.N. High Commissioner for Human Rights, Mary Robinson, visited Darwin and Jakarta on the 11th to the 13th of September, and the Commission on Human Rights convened, for a special session on

⁸⁸ SC/RES/1264 15 September 1999.

the situation of East Timor, in Geneva on the 24th to the 27th of September 1999.⁸⁹

The Commission managed to pass a resolution at that special session and requested for appointment of thematic rapporteurs to go on a mission into East Timor.⁹⁰ It further called on the Secretary General to establish an international commission of inquiry to gather information on possible human rights violations and other acts, which might constitute breaches of international humanitarian law, and to provide the Secretary-General with its conclusion, and recommendation for future action.⁹¹

The fourth special session of the Commission of Human Rights and its initiatives for an international commission of inquiry was the first step that led to the setting up of an international tribunal for East Timor. Earlier, the same procedure had led to the establishment of two other UN *ad hoc* human rights tribunals when it had been convened in 1992 and 1993 on the situation in the former Yugoslavia and in 1994 on Rwanda. In both cases, the commission of Human Rights had first initiated commissions of inquiry, which had eventually led to the *ad hoc* tribunals.⁹²

Thus in November 1999, the three special rapporteurs conducted a joint mission to East Timor and recommended that the Security Council consider the establishment of an international tribunal unless the Indonesia government provided a credible investigation and brought the perpetrators to justice “in a matter of months”. According to the report if the Security Council decided to set up an international tribunal, it should preferably have the consent of the Indonesia government, although this was not be considered a prerequisite.

⁸⁹ Supra note no. 8, pg. 40

⁹⁰ The Special Rapporteurs on extrajudicial, summary or arbitrary executions, Ms. Asma Jahangir, the Special Rapporteurs on the question of torture, Sir Nigel Rodley, and the Special Rapporteurs on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy.

⁹¹ Commission of Human Rights Resolution 1999/S-4/1 of 27 September 1999.

⁹² Supra note no. 8. pg. 41

Meanwhile, the report of the International Commission of Inquiry on East Timor (ICIET), published on the 31 January 2000, came up with similar conclusion as the Special Rapporteurs. However, the wording of the recommendations made by this commission for the establishment of an international criminal tribunal was much stronger and did not recommend giving Indonesian government an opportunity to prove its willingness to pursue justice.

In reaction to the reports of the Special Rapporteurs and the ICIET, the Indonesian government insisted that it was opposed to any international involvement in what it considered an internal affair. This elicited a lot of debate even within the Security Council, where the question of international tribunals was a sensitive one. It was for example; felt that China and Russia opposed any moves to create such tribunals because of their own policies in Tibet and Chechnya respectively.

3.3 The Indonesian *Ad Hoc* Human Rights Court's Role on Punishing East Timor Perpetrators

INTRODUCTION

The Indonesian authorities had made a great effort to convince the international community of their commitment to a credible national judicial process in the months immediately after the international intervention (the deployment of UN troops). In September 1999, the Indonesian Human Rights Commission (KOMNAS HAM) set up a commission KPP-HAM⁹³ to investigate human rights violations in East Timor. In its report KPP-HAM concluded that gross human rights violations had been committed in East Timor, and that the militias, who were mostly responsible for the violence, had close connection to Indonesian military, the police and the civilian administration. The report listed the names of 33 Indonesian official and

⁹³ Indonesian Commission of Inquiry into Human Rights Violations in East Timor (KPP-HAM)

militia leaders, it felt were involved. Human Right Watch described this report as “thorough and professional” and having made “remarkable achievements” in trying to consolidate justice. However, the inquiry did not receive similar praised in Indonesia, and KPP-HAM members were accused of bias at the National People’s Consultative Assembly.⁹⁴

The U.N. Secretary-General took into consideration the fact that Indonesia was opposed to any international process in East Timor, which at the time of the events was considered as a part of Indonesia and fell under the jurisdiction of national courts. The Secretary General felt that Indonesia had shown its seriousness for trying the most responsible actors behind the violence by taking several steps, which included the establishment of KPP-HAM and the Commission of Truth and Friendships (CTF).

3.3.1 The Creation of the *Ad Hoc* Human Rights Court by Law 26/2000

The Indonesian parliament enacted Law 26/2000 in November 2000, establishing the Human Rights Court as a special chamber within the existing legal system. This court had jurisdiction over gross violation of human rights occurring prior to the coming into force of this law.⁹⁵ The establishment of this *Ad Hoc* Court to try the perpetrators of human rights violations was thus made under parliament’s recommendation, and enacted by Presidential decree 53/2001 (which stipulated for the establishment within national court of first instance). Presidential Decree 96/2001, which emphasized on the *locus delicti* and *tempus delicti* within court jurisdiction later, replaced presidential Decree 53/2001. This new decree specifically addressed the scope of court jurisdiction, limiting it only to the violations that had occurred in *Liquica*, *Dili*, and *Soae* within East Timor within the period between April 1999 and September 1999.

⁹⁴ See <http://www.hrw.org/backgrounder/asia/timor/etimor-back0829.htm>

⁹⁵ Article 43 (1) Law 26/2000 stated: Gross violations of human rights occurring prior to the coming into force of this Act shall be heard and ruled on by an ad hoc Human Rights Court.

Further, Law 26/ 2000, which was adopted by the Indonesian parliament in November 2000, provided for the establishment of four permanent Human Rights Courts, in Jakarta, Medan, Surabaya and Makassar. Significantly, the Act also permitted the establishment, by presidential decree, (on the recommendation of parliament) of *ad hoc*, or temporary, human rights courts, to try cases of gross human rights violations committed before the Act was adopted.

On the organisation of the *ad hoc* court, the judges comprised of both career judges and *ad hoc* appointees, selected by the Indonesian Supreme Court on a closed session, most of who came from university law faculties.

On the procedures, each case is assigned to a panel of five judges, consisting of three *ad hoc* and two career judges, with one of the career judges presiding. However, only a limited number of judges have training, experience or knowledge in international law or human rights. Nevertheless, a few of the *ad hoc* judges have expertise in international criminal law and human rights law, and have played a very important role in the deliberations of the panels to which they were assigned.

The court has jurisdiction over crimes against humanity and crimes of genocide. The definition of the crime against humanity and crimes of genocide within Law 26/2000 is almost similar to the definition given in the Rome Statute, with a distinction on the interpretation of the element of crimes especially on crimes against humanity. This will be elaborated in the next section.

3.3.2 Assessment on the Trials

This part will generally review the whole trial process under the *ad hoc* court, pointing out several important aspects. Eighteen military and police officers, civilian officials, and militia members were indicted in January 2002. The first three trials began on 14 March 2002, and involved the

former provincial police commander of East Timor, *Timbul Silaen*; an Indonesian, the former governor, *Abilio Osorio Soares*; an East Timorese, and other five Indonesian army and police officers assigned to Covalima district that were accused of involvement in the Suai church massacre. All were indicted for committing crimes against humanity, under Law 26/2000.

3.3.2.1 Legal Provisions underlying the Court

a. Concept of Crime against Humanity

In the *Ad Hoc* Human Rights Court, the indictments were for crimes against humanity. This was defined in article 9 of Law 26/2000, as follows:

“Kejahatan terhadap kemanusiaan sebagaimana di maksud dalam Pasal 7 huruf b adalah salah satu perbuatan yang dilakukan sebagai bagian dari serangan yang meluas atau sistematik yang diketuinya bahwa serangan tersebut ditujukan secara langsung terhadap penduduk sipil...” (Crime against humanity as referred to in article 7 point b is an action conducted as part of an attack that is widespread or systematic which is known that the attack is directly against civilian community, ...)

Compared to the Rome Statute, this provision has a basic weakness on account of the unclear definition of crimes against humanity, based on the three important elements of *widespread*, *systematic* and *intention*. This vagueness opens the space for various interpretations in the court.⁹⁶ Therefore, the procedure and process of proof for the perpetrators indicted by the same article (article 9 Law 26/2000) becomes difficult as the indictment becomes ambiguous.

⁹⁶ As a comparison see the interpretation in the Rome Statutes where “intention” is clearly defined. See article 30 (2) & (3). Rome Statutes regulating on mental element: for the purpose of this article, article person has the intent where: (2) (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to article consequence that person means to cause that consequence or is aware that it will occur ordinary course of events. (3) For the purposes of this article, “knowledge” means awareness that a circumstances exists or consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.

In practise, in interpreting the law concerning crimes against humanity, for example at the Nuremberg trial, ICTR, and ICTY, the judges interpreted the element of “widespread” focusing on geographic width and massiveness of victims, and the element of “systematic” focusing on the way of implementation of policy indicated by a certain, repetitive and methodical pattern of conduct.⁹⁷ Concerning law 26/2000, there are no specific provisions, which instruct the court to adopt such international customary law practises.

Another problem associated with the interpretation of this law lies on the translation given to the phrase “*directed against any civilian populations*” in article 7 of the Rome Statutes that was translated to become “*directly against civilian community*” in Law 26/2000.

Under that interpretation, the word “*directly*” could be taken to imply that only direct perpetrators can be indicted with this provision. The word “civilian community” instead of “any civilian population” has limited the subject of the law by using the boundary of areas, and significantly limited the targets of the crime and victims to only the citizens of the State where the crime occurred.

The ICTR and ICTY panel of judges adopted a wide understanding on “civilians’ population”. In order to protect those who had the potential to be victims of the crimes. Thus, anyone who at a specific time was actively involved in an incident where he was in the position of defending him/herself in a certain condition was also considered as a victim of crime against humanity in the definition of the word “civilian population”. This

⁹⁷ See for example Opinion and judgement on Akayesu case, ICTR (case no. ICTR-96-4-T), 2 September 1998, paragraph 580; Tihomir Blaskic case, ICTY (Case no. IT-95-14-T), 3 March 2000, para 203 and 206. See also similar determination in Draft Code of Crimes against the Peace and security of mankind, International Law Commission report at Annual Meeting 48th session (UN Doc. A/51/10) para 94-95 (Commentary on Article 18 part 4): “... committed in article systematic manner meaning pursuant to article preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts... committed on a large scale meaning that the acts are directed against article multiplicity of victims.”

included members of a separatist movement who had surrendered and had been unarmed.⁹⁸ In the case of East Timor, members of separatist movement were considered “armed rebels” and not “civilian population”.

b. Command Responsibility

The provision for criminal responsibility in the Law 26/2000 has included ‘command responsibility.’ However, article 42 (1) of the law contains several problematic aspects that carry major legal consequences.

The definition of ‘command responsibility’ in the Law is such that a military commander or someone who effectively acts as a military commander would be held accountable under the *ad hoc* Human Right court, if an act(s) is/are done by the troop under his/her effective command and control.

The law uses the term ‘*shall/could,*’ but this has not been interpreted to implicitly provide that the ‘command responsibility’ in cases of gross violations of human rights as regulated in the Law are compulsory or automatic. Indeed, the same article affirms that the interpretation of “crimes against humanity” as contained in article 9 are directed towards the direct perpetrators and therefore, the prosecutor tends not to try the commanders but only the direct perpetrators. Moreover, article 42 (1) (a) puts a condition that for ‘command responsibility’ to be incurred, the commanders too “should have known that the troops *were committing or had just committed* gross violation of human rights.” In the Rome Statute under article 28 (1) (a), it is clearly explained that in order for the military commander to incur responsibility, he/she should have known that the troop(s) was/were about to commit the crime.⁹⁹

⁹⁸ See “opinion and judgement” in the Tadic case (ICTY).

⁹⁹ Article 28 point 1 (a) Rome Statutes : *that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.*

The alteration in the terminology from the Rome Statute to the Indonesian law could be considered as neglecting the responsibility of person in command to prevent a crime. This neglect is however rectified by article 42 (1) (b) which stipulates that “the military commander who failed to take appropriate and necessary action(s) to prevent criminal action being committed under his or her jurisdiction or in preventing or ceasing the action ...” is responsible. However, there is no strict definition and parameter on what is considered as “appropriate” and “necessary” action that should be taken by the commander.

The article could also be taken to imply that the court has to focus attention to the process; whether or not the act was necessary (as obligation of conduct), and to automatically neglect the issue as to whether the action conducted by the person in command had successfully prevented or halted the crime (as obligation of result).

Under article 7(3) of ICTY Statute, which can be considered to interpretatively reflect the standard of international customary law, there is criminal accountability for a persons who knew or had reason to know that the behaviour of his/her subordinates were criminal. This responsibility arises from the failure to prevent the commission of the crime, or obscuring the act that violates the law by the subordinates, or failure to punish those who have committed a crime. Here, there is an indication that the criminal accountability would be eliminated if preventive steps had been taken by the person in charge but the crime/violation by the subordinate still occurred.¹⁰⁰

c. Inappropriate Law of Procedure

It is clearly understood that crimes under the jurisdiction of the court are considered as extra ordinary crimes. However, the Law 26/2000 is not equipped with an extra-ordinary criminal procedural law. In fact, it

¹⁰⁰ Ad Hoc Human Rights Court for East Timor is below standard, Lembaga Studi dan Advokasi Masyarakat, pg. 6.

explicitly refers to the common procedural of criminal law (Criminal Code of Procedure or KUHAP) as the applicable source of procedural rules. This has diminished the chances of the court trying to use any other alternative procedural law in trial of offences stipulated under the Act.¹⁰¹

KUHAP as the basis of the procedural law used by the *Ad Hoc* Court has several basic weaknesses when applied to cases of crime against humanity since KUHAP was not enacted within the context of processing cases related to gross violation of human rights. Provisions in KUHAP have low co-responsiveness with international standards used in the prosecution of perpetrators of gross violation of human rights.

Ideally, its own extra-ordinary procedural law should accompany a court created for trial of extra ordinary crimes, because existing criminal procedure laws would be inappropriate in their application by a human right court. This inappropriateness can be seen for instance, in the verification section of Indonesian criminal procedure code. In KUHAP, it is regulated that acceptable means of verification would include only (1) testimonies, (2) expert statement, (3) official letter and/or document, (4) hard evidence, and (5) defendant statement. These five means alone would not be adequate in proving gross violation of human rights, in which case, the prosecutor need a wider parameter of operation to be effective.

Another issue arising from KUHAP is that in the proving procedures, the witnesses and all evidence have to be presented upon the court. This is problematic because the crime scene (*tempus delicti*) was in East Timor, far away from the seat of the court. Thus, KUHAP does not regulate the implementation of long-distance testimony through teleconference or videoconference).¹⁰²

¹⁰¹ Article 10 Law 26/2000

¹⁰² The breakthrough of this system made in the criminal case of Bulog Corruption, the Panel judges headed by Lalu Mariyun was permitting teleconference or video conference for the testimony of BJ Habibie who resides in Germany (see, amongst various sources, *Hukum Online*, June 5, 2002). This can be a precedent in the criminal law system in Indonesia.

Therefore, many witnesses find it difficult to attend the session of the court in order to give their testimonies, with the lack of any specific formulation on witness accommodation and protection, not to mention the problem that may arise in relation with the extraction of witnesses from East Timor to Indonesia, two different state territories.

3.3.2.2 The Substance and Quality of Indictment

Indictment is an important part of the criminal procedure, because the judges will proceed with the case based on what it contains. The indictment is the parameter, which indicates the extent to which the judges can probe and pass a verdict upon a case. Therefore, indictments should be based upon investigations, the witnesses' testimonies and upon other evidence, including expert opinions and the coroners' report.

In the East Timor case, the first three indictments taken as examples have shown that the defendants are indicted first, on crime against humanity (under article 7 of Law 26/2000); and for killing and persecution (under article 9 of Law 26/2000) made as a part of widespread or systematic attacks targeting civilians. Secondly, the indictments relate to command responsibility for the defendants who come from both military and civilian backgrounds, on the fact that as commanders, they failed to exercise effective control in the correct manner over those under their charge.¹⁰³

However, the prosecutors have failed in these cases to convince the court that manslaughter and persecution fall within the ambit of 'widespread' conduct, due to failure to factually show the extend of these incidents. The indictment failed to show the geographical correlation between the events in order to prove the 'systematic' element, and the prosecutor could not prove "a chain of actions upon civilian population as an extension of the policy of

¹⁰³ As provided under article 42 of Law 26/2000

the power-holder or organization.¹⁰⁴ In order to show the ‘systematic’ element in the crimes, the main backbone of these cases, the prosecutor should have proposed in the indictment an intention to prove that the occurrence of incidents were as the result of the policy of the authority or related to an organization.

In the formulation of indictments under article 9, the central focus of these violations is ‘omission,’ by letting subordinate officers commit violations without taking actions to prevent and stop, and to punish those who are guilty of criminal activities.

It can therefore be asserted that the indictments that are made within the *Ad Hoc* Human Rights Court are too minimal, even though the criminal sanctions articulated in the Act seem to be significant, with possible penalty of imprisonment to a maximum period of 20 years.

In proving command responsibility, the indictments made before the *ad hoc* court have normally not contained accurate formulations. This has resulted from the fact that the prosecutors in the indictments have emphasized only on the formal requirements.

In *Timbul Silaen* case for example, it was only stated that the accused was the Commander of the Security Control Commandos for East Timor post, at the time when the New York Agreement was signed on May 5, 1999.¹⁰⁵ However, in proving crimes against humanity, it is not enough to present only the formal command responsibility; the indictment should also have included all authorities that the accused had in executing his command responsibility. To be effective, the indictment should have shown the entire network of command by conveying all the forces and facilities utilized, and if possible all open statements and documents supporting the statements. In

¹⁰⁴ Explanation on article 9 law 26/2000: “... a serial of actions committed against civilian community as a result of a state policy or a policy related to organization)

¹⁰⁵ New York agreement is agreement between the Republic of Indonesia and the Portuguese Republic under UN supervision to set up a popular consultation in East Timor.

other word, the indictment should have shown the real ‘command responsibility’ and how it worked.

3.3.2.3 Process and Quality of Witnesses’ Testimony

Witnesses’ testimonies are crucial evidence in strengthening an indictment. In order to support the indictment, witnesses should be relevant to the case and have knowledge of the facts or should have directly witnessed the incidents contained in the indictments.

Therefore, in proving the element of ‘systematic’ and ‘widespread’ conducts in crimes against humanity, those who directly participated in the making of the policies and in their implementation should be called to testify. It would be important at this stage therefore that the prosecutor should have the indictment clearly formulated and containing all the element of crime, as provided in the KUHAP, as in the KUHAP, it is provided that the testimony of the witnesses forms the main evidence in the process of a trial.

These witnesses are subjected to cross-examination in order to determine the veracity of their evidence. The cross-examination of witnesses is an attempt to obtain an explanation on issues related to the points in the indictment. This attempt is made through questions posed to the witnesses by the court. The extend of the witnesses’ knowledge of the incident is necessary in order to find the truth of the matter in the trial. This is especially important because a weak indictment presented by the prosecutor would make the witnesses’ cross-examination the pillar in proving the elements of crime in the case.

The provision contained in the criminal procedure law emphasizes on the importance of the court’s cross-examination of the witness, as the statement

of the witness given before the court is central to the judgement to be arrived at by the court.¹⁰⁶

The witnesses testimony centres on the explanation given by a person on a criminal incident; what he/she has heard, seen or experienced, stating the reasons behind his/her knowledge. The testimony should not be centred on an opinion or prediction from the witness' thought or knowledge gained only from another person's story (hearsay). However, there are places where testimonies of witnesses can be taken as the opinion or expression of witnesses' feelings over the issues.¹⁰⁷

Normally, witnesses should not go into the courtroom if they are to be examined, but in practise, they have been allowed in, to see the examination of other witnesses, or to sit outside the courtroom where they are able to hear other witnesses being examined. The human rights court in central Jakarta courthouse does not have a specific waiting room for witness, so they can enter the courtroom and listen to other witnesses being examined.

The essence of preventing witnesses from listen to other witnesses being examined is to ensure that their testimony is not influence by those of others. However, the Human Rights court in Jakarta does not have such a mechanism.

Another issue of relevance in the gathering of evidence concerns witnesses' protection. Article 34 (1) of Law 26/2000 stipulated that, "every victim and witness in the gross human rights violations cases is entitled to physical and physiological protection from threat, intimidation, terror and violence from all parties."

¹⁰⁶ See article 185 (1) KUHAP; the regulation minimize the possibility in implementing alternative model in the witness examination by judge, especially in relation with victim-witness.

¹⁰⁷ For example the testimony of Wiranto and Adam Damiri for the case of Abilio Soares

Ideally, the court should supervise the witness protection programme in order to ensure even though there might not be any direct physical attack or threat, the witnesses would be willing to testify. In fact, at an early stage of trials, pro-integration groups and observers who always yelled at the witness, as well as TNI chief officers attended court sessions, in order to exert pressure on the witnesses not to incriminate them.¹⁰⁸

Beside security problem for the witnesses, financial constraint made the court unable to enforce attendance of victim-witnesses, as the court was not sufficiently funded in order to undertake such procedures. In fact, the East Timorese prosecutor's office tried give input to the process by offering to avail the victim witnesses who could not attend the proceedings by carrying out investigation and offering teleconference, video and audio recording facilities, But Indonesia has yet to respond to the offer.

Language barrier for the witnesses is also an issue of concern in these trials. For witnesses from East Timor who have less knowledge of Indonesia language, having an interpreter is an important element in the investigation process. There is therefore need for the human rights court to have good interpreters who understand both the Indonesian and Tetun (the East Timorese language).

In practice however, the use of interpreters is rare. In the trial of *Herman Sedyono* case, for example, Dominggos dos Santos Mauzinho was brought to court to testify.¹⁰⁹ The prosecutor informed the court that the witness could not understand the Indonesian language, and therefore an Indonesian-Tetun interpreter was needed. The court however failed to provide an interpreter. Even after the United Nations Mission of Support in East Timor (UNMISET) proposed to bring one from East Timor, the court rejected the offer for the reason that the interpreter had no certificate to prove his proficiency. This was despite the fact that Tetun is an uncommon language,

¹⁰⁸ Lembaga Studi dan Advokasi Masyarakat, *Ad Hoc* Human Right Court for East Timor is below standard, preliminary conclusive report, 2002, pg. 18.

¹⁰⁹ Id, pg.19

not used in standard international communication and therefore it is impossible to get certification of proficiency in it.

In international law, the right to avail the services of an interpreter for persons who do not understand the language of the court is protected under the rights to fair trial, which is provided under article 14 (3) of the ICCPR. This right is also enshrined in the KUHAP under article 177 which provides that a judge can appoint an interpreter if a witness or the defendant does not understand the Indonesia language.

4 Accountability for Past Human Rights Abuses

4.1 Seeking justice for East Timor

The failure of the government of Indonesia to punish those most responsible for the human rights violation in East Timor showed the weakness of judicial system in proceeding with past atrocities.

Many of those accused of these violation, most of who were high-ranking officials in the military were released. This indeed, brought the international community to question the accountability of the government towards the victims of East Timor atrocities and their families.

The international community thus demanded for the establishment of an international tribunal, to try these suspect, but the Indonesian government, which favoured the application of domestic jurisdiction, rejected these demands, and set to show its ability and willingness to solve the issue.

4.1.1 Recent Development : Commission for Truth and Friendships (CTF)

4.1.1.1 Introduction

On March 2005, the Indonesia government and Timor Leste government¹¹⁰ signed a joint declaration on the Commission of Truth and Friendship (hereinafter called CTF). This agreement established the CTF, which had been discussed before by the heads of government of both States on December 14, 2004 in Denpasar, Bali. The establishment of this Commission was intended to solve the case of gross human right violations in East Timor in 1999.

¹¹⁰ Timor Leste formerly called East Timor. The name changed as the Timorese people gained their independence in 1999.

Apparently, this joint declaration was considered as a temporary solution as its role in solving the case was doubtful. This was because its effectiveness was solely dependent on the political conditions and the law enforcement within the two countries. Besides that, it also depended on the extent that the CTF could accommodate the voice of Timorese people, especially the victims and their family.¹¹¹

Though it should be born in mind that the agreement to establish CTF was one of the ways to avoid international intervention in the process of prosecutions of East Timor suspects, from both countries perspectives, the settlement of human rights violation in East Timor could be solved by bilateral arrangement.

Thus on one hand, this solution could be considered as being accommodative and thus the proper solution to violations that occurred, as long as both governments guarantee political stability inside these countries. Each government has to be able to ensure that the Commission carries out its duties based on its mandate, and come out with facts and evidence that could be used as a record the truth on violations that occurred prior to popular consultation.

On the other hand, it seems that this Commission was created as a replacement to the prosecution process that had begun. Even though this was not explicitly stated, the Term of Reference of the CTF, on the principles in part (c), stated that the CTF process would not lead to any prosecution and would instead emphasize on institutional responsibilities. It could thus be concluded that this was clearly perceived as the way to close the dark case of the past in the smooth manner.

However, if that were the case, it would really be dangerous to choose to settle cases considered as grave breaches of human rights, through means

¹¹¹ Romli Atmasasmita, paper on the Dilemmas on the establishment of CTF between Indonesia and Timor Leste on the settlement of gross violation of human rights prior to popular consultation in 1999.

that are outside the judicial system. The fact that both government decided to create this Commission would be, in this case, a bad precedent for the judicial system in both States. This could lead the public to perceive that crime involving government official or important persons in the government are settled outside the judicial system, leading to an abuse of power. This could consequently impede democratic reforms and reforms on the law enforcement system in Indonesia as well as in Timor Leste.

In addition, although the CTF has been formed, it should be critically observed in order avoid the repetition of failures of past joint declaration. In 2000, a Memorandum of Understanding (MoU) was signed by the head of UNTAET, Sergio de Mello and the General Attorney of Indonesia, Marzuki Darusman, on the cooperation of exchange of proofs and evidences, and witnesses. However, this MoU could not be implemented properly. Even though Timor Leste provided and accommodated attorneys from Indonesia, sent to gather information and facilitate the transfer of witnesses to the *Ad Hoc* Human Rights Court in Jakarta, Indonesia did not reciprocate.

Beyond the controversies arising from the establishment of CTF, we should appreciate the efforts of both governments in trying to reach a peaceful settlement to the dispute that arose from the gross violation of human rights in East Timor prior to the popular consultation.

4.1.1.2 Analysis to substantial content on the Term of Reference of Commission of Truth and Friendship (CTF)

Some basic questions arise as to whether the Commission created, is the appropriate forum or right solution for the settlement of East Timor fiasco. This part will try to point out several problems that emerge from the terms of reference of CTF by critically analyzing some of the provisions.

First, even though the establishment CTF was based on friendly and mutual relation between the governments of Indonesia and Timor Leste, it obviously disregard the main principle of the criminal law for settling gross human rights violation as enshrined in Law 26/2000 and the Statute of International Criminal Court 1998.

As it is known, gross violation of human rights creates a criminal responsibility for individual persons, beyond the State responsibility for the concerned country. The consequence of that principle is that, for gross violation of human rights, the persons responsible incur individual liability distinct from the responsibility of the State.¹¹² In this regard, the States have a responsibility not to give protection to the individual perpetrators (referred to as the 'no safe heaven principle') and to make every effort to bring such persons to account.

Individual criminal responsibility is of great essence for crimes that are categorized as grave human rights violation, as has been shown in State practise since the Nuremberg trial and Tokyo trial, to recent times through the trials by ICTY and ICTR.

The establishment of CTF proposes to find justice without a prosecution process, and gives amnesty/pardon to the perpetrators. It is thus stipulated in term of reference in part (c) that the CTF process would not lead to prosecution but would emphasize on institutional responsibility. This principle stresses on the taking over of criminal responsibility to the state, and clearly deviates from the principles of international criminal law principle.

Besides, the establishment of CTF has left few problems for both countries. As seen in the ICC Statute strict emphasis is put on the premise that there should be no impunity for those who commit serious international crimes, especially those who commit genocide, crimes against humanity, war crimes

¹¹² See article 25 of ICC Statute regarding individual criminal responsibility.

and crimes of aggression. Persons who commit such crimes should be held accountable for their action.

In order to review the performance of both governments in the prosecution of the perpetrator of the 1999 violence in East Timor, the UN established an international commission of inquiry. Thus, the establishment of CTF having the same objective as the UN commission of inquiry duplicates the work undertaken and serves little purpose to redress the violations that occurred.

Further, the International Commission of Inquiry came up with recommendations for the creation of an international *ad hoc* criminal tribunal to try the individuals responsible. This means that the door is still open for taking recourse to international prosecution.

Within the national sphere, the establishment of CTF leads to problems that are related to its content. There is a basic distinction between the concepts of reconciliation under the CTF and the principle enshrined in Law 27/2004. These are shown on the table below.

Concept of reconciliation enshrined in Law 27/2004 on the Truth and reconciliation Commission	Concept of reconciliation within ToR of Truth and Friendship Commission
<p>Based on the facts collected by the commission, the perpetrators of the grave human rights violations that occurred before the enactment of Law 26/2000 are to be identified. They are to admit their fault, express their regret and apologize to the victims and their families. They could also ask for amnesty from the President.</p> <p>Article 29 (3) law 27/2004 states that in case the perpetrator does not want to admit guilt for the crime, he/she loses their right to ask for amnesty and will be brought to the <i>ad hoc</i> human rights court.</p>	<p>The preamble of ToR of the CTF states: “based on and benefiting from our shared experience, and motivated by our strong desire to move forward, we are determined to bring to a closure the chapter of our recent past through joint effort. A definitive closure of the issues of the past would further promote further bilateral relations”. Hence, we can conclude that principally the CTF does not lead to prosecution.</p>

From the preamble and the provisions of the terms of reference of the CTF, it will be observed that both governments want to put a closure to the past. Thus in one of the provisions, it is stated Indonesia and Timor Leste have opted to seek truth and promote friendship as a new and unique approach rather than pursuing the prosecutorial process.

Closely observed, the provision contained in the terms of reference of the CTF creates a misunderstanding on the interpretation of 'gross human rights violation' and leads to its over-simplification where it is stated,

“True justice can be served with truth and acknowledgement of responsibility. The prosecutorial system of justice can certainly achieve one objective, which is to punish the perpetrators; but it might not necessarily lead to the truth and promote reconcile action.”¹¹³

4.2 The Hybrid Model

4.2.1 Introduction to the Hybrid Court

Over the past decade, the issue of accountability and reconciliation in aftermath of mass atrocities have increasingly dominated the field of international human rights law. Indeed, the development made in both the international and national court, by truth commissions, through lustration and through other mechanism for confronting past atrocities has emerged in the context of transitional justice.¹¹⁴

The way peoples address gross human rights abuses may be answered through many kind of accountability mechanism that exist, and give us an

¹¹³Preamble of Term of Reference part 10

¹¹⁴ See generally Steven R. Ratner & Jason Abrams, *Accountability for Human Rights Atrocities*

idea on how to deal with future crimes. It has also opened up the possibility for innovations and creative adaptations.

In transitional justice, the focus given on the four accountability mechanisms has proved to be both significant and controversial. First, the establishment of international criminal tribunals, such as the ICTY and the ICTR lent credence and made a great contribution to the establishment of the International Criminal Court (ICC). Secondly, the growing use of truth commissions, that was pioneered in Latin America, and famously developed in South Africa, is now increasingly being used in many countries, including in Indonesia.

Further, trans-national accountability efforts, such as that made by Spain's attempt to get Augusto Pinochet extradited for torture and other human rights violations committed in Chile has created awareness that for the violations by dictator in office, accountability will suffice.

Finally, the use of the Alien Tort Claims Act in the United States to allow civil tort claims brought by victims of human rights abuses has also been significant in the establishment of substantive redress to violations of individual's rights, although it continues to be controversial.

There has been however less focus on a newly emerging form of accountability and reconciliation through a hybrid of domestic and international courts.

The notion of a hybrid court emerged in the aftermath of the first generation tribunals at Nuremberg and Tokyo and the second generation of the *ad hoc* tribunal, the ICTY and ICTR, which led to the establishment of the third generation courts; a "hybrid" criminal body that combines international and local structures.

The hybrid courts are those in which both the institution and the applicable laws consist of a blend of the international and domestic laws, and foreign judges sit alongside their domestic counterparts to try the cases, in which the prosecutor and defence teams consist of both local and international lawyers. The judges apply domestic laws that have been reformed to include international standards. Typically, these tribunals have been used in cases where no politically viable full-fledged international tribunals exist, as in the cases of East Timor and Sierra Leone, or where an international tribunal exist but cannot cope with the sheer number of cases, as in the case of Kosovo.

Currently, several hybrid courts exist in diverse jurisdictions, and were created between 1999 and 2001 in East Timor (in the Serious Crimes panels of the district Court of Dili), in Kosovo (under “regulation 64” as panels in the court of Kosovo) and in Sierra Leone (as the Special Court for Sierra Leone). The fourth hybrid court to address crimes committed by the *Khmer Rouge* in Cambodia (existing as an extraordinary Chambers in the courts of Cambodia) has been negotiated between the UN and the Cambodian government, and has been ratified by the Cambodian National Assembly.¹¹⁵

These “internationalized domestic tribunals” in Cambodia, Kosovo, Sierra Leone, and East Timor are as a result of a new approach to international justice by the United Nations. They are not *ad hoc* international tribunals created by Security Council under Chapter VII of the United Nations Charter, nor are they are domestic court.

They can be seen as the product of partnerships between the States concerned and the United Nations, which has a considerable input into the design and structure of the court. In East Timor for example, the United Nations as a *de facto* authority, adopted and implemented the necessary legislation, and also funded and administrated the project through the

¹¹⁵ Ethel Higonnet, *Restructuring Hybrid Court: Local Empowerment and National Criminal Justice Reform*, 2005, pg. 5.

provision of materiel and international personnel. The project in Cambodia on the contrary will be administered and controlled by Cambodians but with extensive international support.

It is to be noted that even though there have existed several hybrid court, there is no single model for a hybrid court. Each has to be tailor-made to address the unique imperatives of the country or region in which it has to operate.

4.2.2 Review of the Prior Use of Hybrid Tribunal in Several Country

4.2.2.1 Cambodia

The first major involvement of United Nations in dealing with post conflict situation was in Cambodia. Here, the organisation tried to address the issue of restoration of peace, but was unable to address the issue of post-conflict justice arising out of that conflict.¹¹⁶

The conflict in Cambodia occurred between April 17, 1975 and January 7, 1979. This internal conflict arose from a Maoist insurrectional group named the Khmer Rouge that was trying to take over power from the government. It is estimated that 1.5 million people were killed by the regime. However, since the crimes were committed against people of same ethic group as the perpetrators, the conflict was not considered as genocide.¹¹⁷

The conflict finally came to an end after the signing of the 1991 Paris Accord between the protagonists. The Paris Agreement called for the establishment of United Nations Transitional Authority in Cambodia

¹¹⁶ M. Cherif Bassiouni, Introduction to International Criminal Law, Transnational Publishers, 2003, pg. 548.

¹¹⁷ Article II of the Genocide Convention 1948, refers only to ethic, religious or national groups, thus exclude crimes committed within the same group of persons from the scope of prohibition. The convention excludes social and political group as well.

(UNTAC), to organise and conduct elections while maintaining peace and political neutrality.

However, afterward the election in 1993, the new government did not undertake any prosecution for the Khmer Rouge who had been responsible for mass crimes during the conflict period.¹¹⁸ It was not until the spring of 1998 that the U.N. Secretary General Kofi Annan appointed a Group of Expert to investigate and review the potential for a Cambodian tribunal.¹¹⁹

The group of expert concluded in their report that existing evidence justified investigation and prosecutions for crimes against humanity, genocide, war crimes, forced labour, crimes against internationally protected persons and violations of pre-1975 Cambodian criminal law.¹²⁰

The idea for the five accountability mechanism options also appeared, which would entail either the use of fully domestic trials under Cambodian law, the use of a tribunal established by the UN, a mixed tribunal under UN administration, or for an international tribunal established by a treaty, and trials undertaken outside Cambodia, but under Cambodian domestic law.

The group expert suggested for the establishment of international tribunal for the reason that the Cambodian courts lacked the capacity and independence to try the remaining Khmer Rouge leaders, but the Cambodian government opposed the establishment of an international tribunal in the form of those in the Former Yugoslavia and Rwanda. Thus, in 1999, the Cambodian government approached the United Nations for assistance in drafting domestic legislation to establish a special court with jurisdiction to try Khmer Rouge officials and with international participation.

¹¹⁸ Supra note 116, pg. 549

¹¹⁹ The Group of Expert for Cambodia was established pursuant to General Assembly Resolution 52/135 in 1998-1999.

¹²⁰ Supra note 116, pg. 551

In August 2001, the Cambodian government introduced a Law for the establishment of Extraordinary Chambers in the Court of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea (The Special Law).

The Cambodian government rejected some of the proposal of amendment to structure and composition of the tribunal in order to follow the established international standards of justice, fairness and due process of law. Consequently, the Secretary General concluded that the only option acceptable to the Cambodian government was for a national court with the structure and organisation envisaged in the Special Law. However, after two and a half year of negotiation, the United Nations withdrew from the process, because it felt that the proceedings of the Extraordinary Chambers would not guarantee the international standards of justice required for the United Nations to continue to work towards their establishment.¹²¹

4.2.2.2 Kosovo

In June 1999, after the North Atlantic Treaty Organization (NATO)-led bombing campaign had helped halt the ethnic cleansing and other mass atrocities that were being committed primarily by Serb forces against the ethnic Albanian population in Kosovo, the United Nations Security Council established the United Nations Interim Administration Mission in Kosovo (UNMIK).¹²² As in the case of UNTAET in East Timor, UNMIK was empowered to exercise all legislative, executive and judicial authority in Kosovo.

Primarily, the mission in Kosovo was a nation-building mission. Its mandate was threefold: It has to administer Kosovo, reconstruct institutions and other

¹²¹ Suzannah Linton, *New Approaches to International Justice in Cambodia and East Timor*, pg. 21.

¹²² Through Resolution 1244 (1999)

conditions necessary for Kosovo to exercise substantial self-government, and facilitate a political process to determine Kosovo's final status.¹²³

This was not an easy task, especially since the previous law enforcement and judicial structure has collapsed. Many of the physical infrastructures of the judicial system, like court buildings, law libraries, and equipments had been destroyed or severely damaged during the conflict. Moreover, local lawyers and judges were few, and even those available lacked experience, as most ethnic Albanian had been barred from the judiciary for many years, while the Serb judges and lawyers had mostly fled or refused to serve.

Thus, devastated by the conflict and by years of discrimination against the ethnic Albanian minority, the local judicial system did not have the capacity or the independence to conduct such trial. Therefore, a special court called the Kosovo War and Ethnic Crimes Court was created. The court was to function as an intermediary between local courts and the ICTY which by virtue of Security Council Resolution 827 (1993) had jurisdiction over all territories that were once part of the former Yugoslavia.

The court in Kosovo has jurisdiction over war crimes, other serious violations of international humanitarian law, and serious ethnically motivated crimes. It possesses concurrent jurisdiction with the ICTY, but focuses on less-profile offenders that the ICTY lacks the capacity to try. The law that applies in the court is a blend of international and domestic laws.

At the beginning, UNMIK declared that the applicable law in Kosovo would be the Federal Republic of Yugoslavia (FRY)/Serbian law, modified to conform to the international human rights standards. This was however found unacceptable by many ethnic Albanian Kosovars, who identified FRY/Serbian law with the oppressive Serbian regime, and Kosovar

¹²³ Supra note no. 116, pg. 554

Albanian judges refused to apply the law, causing widespread confusion.¹²⁴ Thus, UNMIK issued a new resolution making the applicable law to be a hybrid of pre-existing local laws and international standards. The local laws were to be applicable to the extent that they did not conflict with international human rights norms.

Though at first the international judges had minimal impact, as they did not comprise a majority on the trial panels, later on they obtained a majority status and the court finally could hear all cases of war crimes, with the prosecution also undertaken by a majority of international prosecutors.

4.2.2.3 East Timor

In the aftermath of the violence that took place after the popular consultation in East Timor in September 1999, both the Indonesian government through KPP-HAM and the United Nations through its Special rapporteurs and International Commission of Inquiry concluded that crime against humanity had been committed. Both Special Rapporteurs and the International Commission of Inquiry suggested the establishment of an international tribunal. Since the Indonesian government rejected the idea, the UN gave orders to the United Nations Transitional Administration in East Timor (UNTAET) to establish a process that would provide meaningful accountability for serious violations of human rights.

In fact, the capacity of the local judiciary in East Timor was even weaker than in Kosovo. Only a few East Timorese had been trained as lawyers, and the physical infrastructure of the country had almost been destroyed. There was no domestic court system in existence that could allow for any meaningful trial. Unlike Kosovo, there also existed no international court. Thus, UNTAET issued regulations providing that serious crimes that involved war crimes, crimes against humanity, and genocide, as well as

¹²⁴ Laura A. Dickinson, *The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo*, *New England law journal review* 1059, pg. 5.

murder, sexual offences, and torture were to be tried by a special unit of the court in Bali.

By June 2002, the serious crimes unit had issued forty-two indictments for 112 individuals and obtained twenty-four convictions.¹²⁵ In the process of the prosecution, the serious crimes unit faced many restraints, such as lack of funds, inexperienced personnel and unfilled vacancies in key positions. Currently, the appellate panel cannot function because very few judges have been hired, and there have been times when trials have been suspended because of the lack of personnel.

Nevertheless, in spite of these problems, trials are proceeding and it appears that the hybrid court will continue to play an important role in the process of accountability for the human rights abuses there.

4.2.2.4 Sierra Leone

The conflict in Sierra Leone, between the government and the Revolutionary United Front (RUF) erupted in 1991 and last over decade, resulting into an estimated fifty to seventy thousand deaths, and widespread atrocities including mutilation and sexual violence.¹²⁶ It appeared that the conflict would end when negotiations in 1999 resulted in the Lome agreement and a mandate by the U.N. Security Council for a peacekeeping force, UNAMSIL (U.N. Assistance Mission in Sierra Leone), but despite the agreement, fighting and atrocities continued, along with further attacks on UNAMSIL.

In May of 2000, RUF leader Foday Sankoh was captured, leading to discussions on the possibility of an international tribunal to prosecute him and other war criminals from that conflict, and in June, the government asked the U.N. to set up a court to try such cases. The U.N. created a special

¹²⁵ See generally Summary of Serious Crimes Cases, Judicial System Monitoring Program, could be found in <http://www.jsmp.minihub.org>.

¹²⁶ Chandra Lekha Sriram, Wrong-sizing international justice? The hybrid tribunal in Sierra Leone, pg. 3.

court through an agreement with the government of Sierra Leone and pursuant to U.N. Security Council resolution in August 2000.¹²⁷ It should be underlined that in creating the court, the Security Council did not act under Chapter VII.

The court's statute was completed on January 2002, and gave the court powers to prosecute persons who bore the greatest responsibility for the serious violation of national and international humanitarian law since November 30, 1996. The crimes within the ambit of the court included crimes against humanity, violations of common article 3 of the Geneva Convention and additional protocol II, other serious violations of international humanitarian law, and crimes under national law.

In March 2002, the agreement for the court was formally ratified, creating a hybrid court. The court is staffed with both international and domestic actors, with eight to eleven judges having international backgrounds sitting on the court. Following the agreement between the United Nations and the government of Sierra Leone, each of the trial chambers consists of three judges, one appointed by the government and two by the U.N Secretary-General, based on nominations made by member-States of the UN. Five judges serve on the appeals chamber, two of which are selected by the government and three by the Secretary-General.

The Special Court is an exceptional institution, that it is not a part of the regular judiciary of the country. It is unusual also since addresses crimes under international law as well as some crimes under Sierra Leonean laws. The special court may prosecute persons for various offences under Sierra Leonean law for offences including the abuse of girls, abduction of a girl for immoral purposes, wanton destruction of property, and setting on fire dwelling places.¹²⁸

¹²⁷ Resolution 1315

¹²⁸ Statute of Special Court, in art. 5

The special court has concurrent jurisdiction with the courts in Sierra Leone whether prosecuting crimes under national or international law.¹²⁹ However, as in the case of ICTY and the ICTR, the Special Court has primacy over the domestic courts, and may issue binding orders to the government of Sierra Leone. However, similar to UN-sponsored courts in East Timor, and unlike the ICTY and the ICTR, the special court cannot assert primacy over the national court of other States or order the surrender of an accused person located in the territory of another State. It is hoped that this restraint will not compromise the Court's operation, since most of the suspects are in custody within Sierra Leone.

From the examples above, we can see that there is a growing practice of using hybrid court as one of the mechanism for confronting past human rights abuses. Facing the reality of shortcomings that international courts are unable to try lower ranks of perpetrators of violations, and the lack of proper domestic court systems, the hybrid approach has come in, accommodating some aspects of the formal international criminal justice models while seeking to include local actors and develop local norms.

In order to learn the effectiveness of hybrid courts and the extent to which their role in confronting past human rights abuses is applicable; it will be beneficial to compare the hybrid model to purely international and purely domestic alternatives.

4.2.3 National, International, and mix national-international tribunal

Generally, the success of any effort to confront past atrocities, whether through criminal trials, truth commission, civil compensation schemes or some combination thereof, will depend on social, political and cultural context. If the governments have the best intentions to prosecute the perpetrators of past human rights abuses, and allow certain accountability

¹²⁹ Id, art. 8.

mechanism, this would benefit the efforts to find justice in all cases of human rights violation.

The emerging accountability mechanism of hybrid courts could be one of the effective alternatives in the settlement of human rights violations. However, even with all its benefits to the States concerned, which differ from one country to another, still some weaknesses exist in its use. The choice of hybrid courts as solution has always met with some hesitations from States some of which prefer using pure national tribunals while others advocate for an international process.

The reasons why certain country prefers to take a mixed national-international tribunal, rather than a purely national or international tribunal are on an account of certain problems in the systems:

First, is the legitimacy issue. Hybrid courts may have greater legitimacy in the adjudication over serious human right crimes than either purely domestic trial, or purely international processes. In post conflict situation, the capacities of the domestic institutions are often in question. The judiciary, for example may have their physical infrastructures critically damaged, and the available personnel likely to have been severely compromised by their association with the prior regimes, or lacking in essential skills.

The legitimacy of a purely international process on the other hand is often difficult to establish on an account of overlaps, for example in the case of Kosovo, where an international tribunal, the ICTY did exist as a forum to try those responsible for the gross atrocities.

Moreover, establishing the legitimacy of an international institution such as the ICTY, within a country that does not support its creation, it quite difficult. Security Council established the ICTY, without the consent of the Federal Republic of Yugoslavia, in light of the continuing ethnic tensions

within the region and the scale of the atrocities. Thus, the creation of an international court based in The Hague, removed from the scene of the crimes, and run by international judges and staff, may have been necessary to create the kind of independence required to impose individual criminal responsibility. However, the establishment of such a court outside the conflict area brought up several issues, where many peoples inside the country did not get enough information on ICTY's work and were often suspicious of its motives and results. In addition, the ICTY failed to publicize its work within Bosnia, particularly within the legal community and the lack of participation from local actors and observers did not help.

Secondly, hybrid tribunals offer the advantages of capacity building. The side-by-side working arrangement allows for on-the-job training that may prove more effective than abstract classroom discussions of formal legal rules and principles. Teamwork allows for sharing of experiences and knowledge for both sides; international actors have the opportunity to gain greater sensitivity to local issues, local culture, and local approaches to justice while at the same time local actors learn from them.

The inclusion of local judges makes the work of the court faster by eliminating the problem of language barrier, and because they possess a better understanding of local law and customs, and bring into the proceedings the political values of the people. Since the hybrid tribunal, which, composed of domestic and international judges are often mandated to utilize a combination of domestic and international law, experts in both fields are required in the tribunals. The application of both systems takes away the risk of political manipulation that domestic court face and, unlike international tribunal, they are better suited to the needs of countries emerging from conflict.

However, despite the benefits that are offered by the hybrid courts, still certain aspects become problematic and create obstacles on the performance of hybrid court. For instance, frequently there exists the problem of lack of

resources. Hybrid courts have enormous mandates but are normally not supported by sufficient funding to carry these mandates. Court personnel lack even the most basic equipment necessary for them to do their jobs. Translators and other administrative personnel are in short supply, and perhaps most significantly, the courts have had the trouble of attracting and retaining qualified international personnel to serve as judges, prosecutors and defence counsel.

Besides this, since the establishment of hybrid courts is by joint agreement between States concerned and the U.N., Chapter VII of the Charter is not invoked. The lack of Chapter VII powers restrict the ability of the courts to exercise their function, for example, in obtaining information from suspect and witnesses located outside the country. There has to be a separate agreement on extradition between the States concerned and the country where the perpetrators are located.

Moreover, the absence of any monitoring mechanism to ensure compliance with the provisions of the UN agreement lead to questions on the effectiveness of sanctions that could be employed if State does not fulfil their obligations under the agreement.

In fact, such hybrid relationships can raise questions as to who is really controls the process. When international actor exercises more power than local officials do, for example, when the majority of a given panel is international, or when the local prosecutors merely serve as deputies to the international prosecutors, some may charge that the international actors control the process, overriding the national authority of the States concerned. On the other hand, too little international control may lead to concern about the independence and impartiality of overly locally controlled process.

4.2.4 Hybrid Court in Indonesia?

An international-domestic hybrid court would be necessary if it is proved that, the national judicial system is weak. It should be noted that the establishment of a strong judiciary is an essential foundation for lasting peace.

In Indonesia, most of the suspected perpetrators of the crimes were released for diverse reasons, mostly related to the weak indictments. Thus, from the practise of the *ad hoc* human rights court, it seems that serious cases of grave breaches of human rights could not be punished. This has left room for sceptics to argue that the possibility of the future offence being tried justly and the responsibility of the government to protect its citizens and guarantee the full enjoyment of their rights are non-existent.

Therefore, the establishment of a hybrid court could bring some benefit to both the process in and the performance of the judiciary, and to the government's compliance with international human rights standards. If Indonesia were to have a hybrid court, the addition of international judges and prosecutors to cases involving serious human rights abuses would enhance the legitimacy of the process, in both the eyes of the local population and of the international community. The arrangement for the foreign judges and domestic judges to together and the appointment of foreign prosecutors to team up with local prosecutors, would help to create a degree of collaboration that would generally enhance the perception of legitimacy in the system.

However, it is granted that some objections might emerge if a hybrid court were to be established for East Timor case. Indonesia might object that this process would interfere with the defendants' rights to be protected from double jeopardy.

However, the double jeopardy concern poses no real barrier to the application of this strategy, because the Indonesian prosecutors did such a

poor job in the first place, and most of the highest-level perpetrators have also never been charged. Double jeopardy only bars re-prosecution for the same offence. A principal advantage of this approach is that it could contribute significantly to the process of building the rule of law and institutional capacity to Indonesia's fledging human rights institutions.

Such a hybrid judicial process could provide the best way of assuring accountability and providing measures for avoidance of future crimes. However, the hybrid domestic-international tribunals should not be the only forum to hold the perpetrators accountable for their action. Other domestic, trans-national, and international accountability mechanisms still have a role to play.

The mixed domestic-international tribunal would serve the role of transitional justice to ensure accountability for the perpetrators and guarantee that those responsible will not go unpunished.

5 Conclusion and Recommendation

5.1 Conclusion

Accountability for past human rights abuses is crucial for the course of justice. The violations of human rights norms that occur within many countries cause a lot of concern to the international community. There is a need to hold the perpetrators accountable in order to make sure that there is compliance with human rights standards.

Commonly, the notion of accountability exists in situations of past conflict and in transitional justice where a post-conflict government is faced with difficult political, legal and moral concerns on how to deal with the legacies of the past while it seeks to consolidate the structures and processes of a new democratic system, to meet the challenges of reconstruction.

In order to provide justice for the victims and their families and to ensure compliance with human rights standards, the concerned State needs to put in place several accountability mechanisms. Indeed, domestic legal system remains the primary recourse for holding the perpetrators of violations accountable. National prosecution represent the starting point of all accountability options, since national tribunals are closest to the scene, the perpetrators and the victims of atrocities.

National prosecution will yield benefits only if the judicial system is fair and effective. In practise it not easy to fulfil this condition. Thus, international criminal tribunal also play an important role to supplement the national tribunals to meet the hallmarks of fairness and justice. When national tribunals are ineffective or unavailable, international tribunals may represent option for addressing atrocities. Usually the Security Council hold initiatives to enforce a resolution to create an *ad hoc* international tribunal

under Chapter VII of UN Charter where there is threat to the peace, breach of the peace, or act of aggression. With the establishment of the ICC, some foresee that the relevance of *ad hoc* tribunals in adjudicating human rights abuses will diminish, although they could still be used in cases where the ICC lacks jurisdiction.

Besides prosecutions, there are other non-prosecutorial options of accountability, including international and national criminal investigatory commissions, truth commission, national lustration mechanism and mechanism for reparation of victims. These methods could be used in combination with each other. So far, there is no set of international guidelines stipulating for the type of conflicts for particular accountability processes to apply, though ideally, there should be guidelines to create common bases for the application of these mechanisms. The governments therefore have to decide which mechanism to use in reaction to certain abuses, but have to make sure that the step taken complies with international standards.

In responding on atrocities that occurred in east Timor, the Indonesian government decided to take national prosecution through establishment of an *ad hoc* human rights tribunal in Jakarta. The formation of this court was very crucial in promoting human rights and providing justice for the victims of gross violation of their rights. It is perceived that the success of the court would increase not only the credibility of the court but also of the whole of Indonesia's legal system in general.

However, even as the trial held have resulted in judgement against the perpetrators, most of the high-ranking military officials have ended up being released, as a result of which questions have arisen as to the capacity of government to try those most responsible for the violence in East Timor. There are several weaknesses on the prosecution and trials, for example, the lack of knowledge of international human rights norms by the judges and prosecutors has resulted in them forming a weak indictment that cause

failure to punish those responsible. Nevertheless, efforts taken by the Indonesian government to try those perpetrators should be hailed; the enactment of Law no. 39/1999 and Law no. 26/2000 showed the government's willingness to accommodate and guarantee basic human rights as stipulated in many international human rights convention.

Besides the accountability mechanisms that commonly used, there is an emergence of hybrid courts as alternative solutions to confronting past human rights abuses. National and international tribunal with their weaknesses and benefits notwithstanding, the hybrid tribunal play an important role in confronting human rights violation in post-conflict societies. Compared with other international human rights tribunal such as ICTY or ICTR, established under Security Council resolutions with more strict procedure, the hybrid tribunal are established by a joint agreement between the States concerned and the United Nations, and are less complicated in procedure as well as less expensive.¹³⁰ The hybrid tribunals are usually established under the State's national judicial system.¹³¹

Indonesia chose both judicial and non-judicial accountability mechanism to prosecute perpetrators of atrocities that happened in East Timor. Principally, government decided to try the perpetrators through an *ad hoc* tribunal established under Law no. 26/2000 that legalized the prosecution of crimes against humanity, and crimes of genocide. At the same time, government enacted law no. 27/2004 , setting up a truth and reconciliation commission, to establish a historical record of abuse and to investigate the causes and consequences of these abuses by holding public hearings, conducting fact-finding missions and taking statements from victims, witnesses and even

¹³⁰ The annual budget for the former Yugoslavia and Rwanda are approximately \$96 and \$80 million, while, for example hybrid court in Sierra Leone only total \$57 million for the first three years, as mentioned in Chandra Lekha Sriram, *Wrong-sizing international justice ?The hybrid tribunal in Sierra Leone.*

¹³¹ Commonly the hybrid tribunal which establish in East Timor, Cambodia, and Kosovo were a part of national judiciary system, while in Sierra Leone it was not a part of regular judiciary system and has concurrent jurisdiction with the court of Sierra Leone

perpetrators. It is expected that establishment of this commission will facilitate long-term stability and prevent future abuses.

5.2 Recommendation

Thus, it is noticeable that some accountability mechanisms have been put in place by the Indonesian government to solve the cases of violence that took place in East Timor by the establishment of an *ad hoc* human rights tribunal to try perpetrators of the violence.

Moreover, by accepting to establish the Commission of Truth and Friendship (CTF) and through observing its objectives and structures, it is clearly understood that both governments of Indonesian and of East Timorese bound themselves to use this commission to solve the grave breaches of human rights. From the Term of Reference of the CTF, the establishment of this commission is intended to close prosecution process for the perpetrators of the East Timor violence. There are therefore several recommendations regarding government policy and steps that could be considered by the authorities in addressing accountability under the process that has already been taken by Indonesian government to confront past human rights abuses.

First, considering the result of the trial by the *Ad Hoc* Human Rights Court in Indonesia, it is observed that there are several weaknesses in the process arising from the lack of procedural law to try grave breaches of human rights. Although Law 26/2000 finally regulated crimes committed in violation of human rights by covering crimes against humanity and crime of genocide, there is a need for the government to formulate specific procedural law to try these crimes. The law also ought to distinguish between ordinary crime and international crimes involving grave breaches of human rights law. The provisions of the Criminal Code of Procedure (KUHAP) were not design to deal with extra ordinary crimes, and therefore there is need to widen the provisions on procedures to include crimes that

occurred in East Timor, for example by inclusion of long distance (teleconference or videoconference) in the trial. This will help in the conduct of trials that are held quite far from the crime scene.

Secondly, the *Ad Hoc* Human Right Court is Indonesia's first legal experience in dealing with past human rights violation. There is therefore need for the trial judges, prosecutor and other personnel involved to be trained and equipped with knowledge of international human rights standards as well as with the substance of international humanitarian law. They should be well informed and should familiarize themselves with the practise of international criminal justice, through for example the study of the process in ICTY and ICTR, to be acquainted with the emerging international criminal justice system that entails the use of hybrid courts.

Third, from the experience of the process of accountability in Sierra Leone that combined the process of prosecution through Special Court and a truth and reconciliation programme, Indonesia can use such a system to solve its past problems. There should be a conjunction of the judicial process to help seek justice for the victims. Truth commissions and trials have their own particular institutional competencies. Thus, their concurrent operation and cooperation may enhance the performance of the judiciary.

Overall, Indonesia is still on the way to strengthening its judicial system and finding the proper and most suitable mechanism to try those who responsible for violation of human rights.

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