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The Implementation of Transitional Justice in Post-Conflict Situations: Case Study of Aceh and Papua

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In Memory of M. Yusran Husin: My loving Father and my true inspiration

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A dedication to Rita Arifin, The strongest and most loving Mother that I could ever wish for

Contents

S	UM	MAR	RY	1
Α	вв	REV	IATIONS	3
1	II	NTR	ODUCTION	5
	1.1	His	torical Background of Transitional Justice	11
	1.2	Ind	onesia: Historical Background of the Conflicts in Aceh and	
		Pap	oua	16
		2.1	The Conflict in Aceh	16
		2.2	The Conflict in Papua	23
	1.3	Def	ining Transitional Justice	28
2	T	ΓRΑΝ	ISITIONAL JUSTICE APPROACHES	37
	2.1	Juc	dicial Approaches	38
	2.	1.1	Domestic Courts	38
	2.	1.2	International Ad Hoc Tribunals	40
	2.	1.3	Hybrid Courts	42
	2.	1.4	The International Criminal Court	44
	2.2	No	n-Judicial Approaches	46
	2.	2.1	Truth Commissions	46
	2.	2.2	Reparations for Victims	49
	2.	2.3	Institutional Reform: Vetting and Lustration	55
	2.3	lmp	plementation of Amnesties in Transitional Justice	59
3	T	ΓRΑΝ	ISITIONAL JUSTICE WITHIN THE FRAMEWORK OF	
	I	NTE	RNATIONAL LAW	64
	3.1	Inte	ernational Law and Transitional Justice: Indivisible in Nature	65
	3.2		mand of Accountability in International Law: the Red Thread tween International Law and Transitional Justice	66
	3.3		emma of Transitional Justice Application in Accordance with ernational Law: Bartering Away Justice	70
4		_	STUDY ON INDONESIA: THE IMPLEMENTATION OF INSITIONAL JUSTICE IN ACEH AND PAPUA	78
	4.1	Vio	dicial Approaches taken by Gol to Address Human Rights lations in Aceh and Papua: Law No. 26 on the Establishment of onesian Human Rights Court	81
	4.	1.1	Law No. 26 of 2000 and the Obligation to Address Past Gross Human Rights Violations in Aceh and Papua: Reluctance to Establish an Ad hoc Human Rights Court	85

4.1.	.2	Cases of Gross Human Rights Violations in Aceh and Papua before the Indonesian Human Rights Court: Is there any Hop			
4.2	Ac Im _l An	cure Establishment of Truth and Reconciliation Commissions eh and Papua as Instructed in National Legislations and the olication of Indonesia's Constitution Court's Decision in nulling Law no. 27/2004 on National Truth and Reconciliation mmission	in 97		
4.3		e Implementation of Other Transitional Justice Approaches in eh and Papua	104		
4.3.	.1	Enactment of National Legislations on Special Autonomy	105		
4.3.	.2	Reparation for Victims of Gross Human Rights Violations	107		
4.3.	.3	Legal and Institutional Reform	111		
5 C(ONC	CLUSIONS AND RECOMMENDATIONS	115		
5.1	Со	nclusions	115		
5.2	Re	commendations	123		
BIBLIOGRAPHY 126					
TABLE OF CASES 138					

Summary

Armed conflict, either internationally or internally, has caused great sufferings to the victims and society as a whole. It constitutes a situation where the rule of law is absent and human rights are no longer respected. Even though various preventive endeavours have been campaigned and implemented by the international community, the occurrences of armed conflicts are still inevitable due to political fluxes and fractions or disputes over power, which proved that preventive measures alone are not enough. This grave situation calls for the role of transitional justice to tackle the repercussions of armed conflicts in post conflicts situations, which in the long run can enhance the preventive measures in preventing the reoccurrences of armed conflict.

However, the implementation of transitional justice in post conflict situations showed to be problematic due to various factors. The most prominent factor that impedes the implementation of transitional justice is the preference of States in applying *realpolitik* and amnesty laws to perpetrators of gross human rights violations in order to gain political stability. In responding to this problem, it is of the opinion of this thesis that under international law, accountability for gross human rights violations should remain to be the main purpose of transitional justice in implementing its approaches to establish justice and peace in post conflict situations.

Based on that point of view, this thesis is aimed to discuss the implementation of transitional justice in post conflict situations in general. Firstly, it will discuss the implementation of transitional justice approaches over the history to come to terms with past atrocities and to establish a new starting ground for society in post conflict situations. Secondly, the thesis will also hold a discussion about transitional justice under the framework of international law, especially on the relation between the concept with international human rights law, international humanitarian law and

international criminal law. Lastly, this thesis will use a study case from Indonesia concerning post conflict situations in Aceh and Papua after the downfall of the New Order regime in 1998 as a testing ground to apply the analyses on transitional justice approaches under the framework of international law and to asses the problems occurred in implementing transitional justice approaches in Aceh and Papua.

Abbreviations

AMM Aceh Monitoring Mission

ASEAN Association of South East Asian Nations

Bappenas Badan Perencanaan Pembangunan Nasional (National

Development Planning Agency)

COHA Cessation of Hostilities Agreement

CRC Convention on the Rights of the Child of 1989

DDR Demobilization, Disarmament and Re-integration

DOM Daerah Operasi Militer (Region under Martial Law)

DPR Dewan Perwakilan Rakyat (Indonesian People's

Representative Assembly)

DRC Democratic Republic of the Congo

EU European Union

GAM Gerakan Aceh Merdeka (the Free Aceh Movement)

GoI Government of Indonesia

HDC Henry Dunant Center

ICC International Criminal Court

ICCPR International Covenant on Civil and Political Rights

ICERD International Convention on the Elimination of All Forms of

Racial Discrimination

ICJ International Court of Justice

ICTR International Criminal Tribunal for Rwanda

ICTY International Criminal Tribunal for the Former Yugoslavia

ILC International Law Commission

Kejagung Kejaksaan Agung (Attorney General Office)

KKP Komisi Kebenaran dan Persahabatan (Commission on Truth

and Friendship)

Komnas Komisi Naional Hak Asasi Manusia (National Commission on

HAM Human Rights)

KPP HAM Komisi Penyelidik Pelanggaran Hak Asasi Manusia (Human

Rights Violations Investigation Commission)

MPR Majelis Permusyawaratan Rakyat (Indonesian People's

Consultative Assembly)

MRP Majelis Rakyat Papua (Papua People's Assembly)

NGO Non-Governmental Organization

OHCHR Office of the United Nations High Commissioner for Human

Rights

OPM Organisasi Papua Merdeka (Free Papua Organization)

Pansus Panitia Khusus Undang Undang Pemerintahan Aceh (Special UUPA Committee of the Draft Law on the Regional Government of

Aceh)

PCIJ Permanent Court of International Justice

PDIP Partai Demokrasi Indonesia (Indonesian Democratic Party)

PKI Partai Komunis Indonesia (Indonesian Communist Party)

RAD-PK Rencana Aksi Daerah Pemberantasan Korupsi (Regional

Action Plan on Corruption Eradication)

RAN-HAM Rencana Aksi Nasional Hak Asasi Manusia (National Action

Plan on Human Rights)

RAN-PK Rencana Aksi Nasional Pemberantasan Korupsi (National

Action Plan on Corruption Eradication)

RKP Rencana Kerja Pemerintah (Government Work Plan)

SBY Soesilo Bambang Yudhoyono

TJAT Truth and Justice Advocacy Team (Tim Advokasi Kebenaran

dan Keadilan)

TRC Truth and Reconciliation Commission (South Africa)

Trikora Tri Komando Rakyat (Three Commands to the People)

UDHR Universal Declaration of Human Rights of 1948

UNGA United Nations General Assembly

UNHRC United Nations Human Rights Commission

UNSC United Nations Security Council

UNSG United Nations Secretary General

UNTET United Nations Transitional Administration in East Timor

UNTEA United Nations Temporary Executive Authority

VCLT Vienna Convention on the Law of Treaties of 1969

1 Introduction

Gross violations of human rights and undemocratic governance have been the main issues that evolve around the conflicts that occurred all over the globe. Since the dawn of time, conflict, notwithstanding its nature, is a problematic issue that humanity must face, as if it mocked the international community in applying their commitment to respect and implement human rights comprehensively. Human rights violations, partisan political interests and corrupt government practices undeniably premise the proliferation of conflicts. However, the latest development shows that even the upholding democracy is no longer a guarantee to preventing conflicts. ¹

The concept of transitional justice has played a prominent role since the mid 20th century, notably by the establishment of the Nuremberg Tribunal at the end of World War II. The repeating downfall of regimes in almost every part of the world, which involved gross violations of human rights and undemocratic systems of governance, have nurtured the concept of transitional justice.²

In this day and age, conflicts that occur all over the world has expanded beyond territorial borders of States and their management and resolution have attracted and involved the concern of the international community as a whole. To address this issue of conflict, it is worthy to note the statement of the victims of the Nanking massacre incident in 1937 that stated, "conflict is a tragedy to history and disgrace to humanity," ³ this statement is a warning that humanity must learn from the past so it will not repeat the same mistake.

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¹ Fionnuala Ni Aolain dan Colm Campbell, *The Paradox of Transition in Conflicted Democracies*, Human Rights Quarterly 27(2005), p. 172.

Neil J. Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, United Institute of Press: Washington DC, 1995.

The Massacre of Nanking, it took place in 1937 and in only six weeks since the Japanese army occupied Nanking they killed 340.000 people. For further reference see: http://prion.bchs.uh.edu/~zzhang/1/Nanking Massacre/memorial.html (accessed on 18 August 2007).

Article 1(1) of the United Nations Charter affirms that the main purpose of the international community is to maintain international peace and security and to prevent the occurrence of threats and misconducts that can jeopardize this purpose. Due to the frequent occurrences of conflicts, the obligation of the international community is also becoming more difficult; preventive measures can no longer be considered as the sole priority since it also needs to be paralleled with measures that can tackle the repercussions of conflict and rehabilitation that aim to overcome the negative impacts resulted from a conflict toward the livelihood of the victims and to restore peace and security in the conflict territories. The handling of a post-conflict situation is a crucial element for establishing a solid ground to restore rule of law, peace and the continuity of the victims' way of living in a post-conflict territory; if possible, as it was before the conflict occurred. A territory that had undergone a dreadful conflict is faced by the problematic issue of transitional era that involved the legitimacy of the new government, democracy and enforcement of human rights.⁵

The handling of post-conflict situation in a territory with unstable political condition has given birth to the concept of transitional justice. In the beginning, this concept focused on the implementation of judicial approach to handling a post-conflict situation and the nature of the conflict was cross-border rather than internal,⁶ a subject that will be elaborated further in the following section. Further development of this concept has indicated that transitional justice has become much broader since this concept at present does not only consists of judicial approaches (*retributive justice*) but also non-judicial approaches (*restorative justice*) that aim at the "healing of the victims' condition".

⁴ Charter of the United Nations of 1945 (the UN Charter), article 1(1).

⁵ Alexander L. Boraine, *Transitional Justice: A Holistic Interpretation*, Journal for International Affairs, Vol. 60, No. 1, Fall 2006, p. 17.

⁶ This was mostly went hand in hand with the internationalization process of several crimes into international crimes where criminal individual responsibility was demanded for the first time in large scale such as in the Nuremberg and Tokyo International Tribunals proceedings.

Transitional justice involves various branches of law, both domestic and international, and also economic, political and social issues. Transitional justice is a great and ambitious concept, which tries to harmonize various fields of knowledge in order to establish a holistic justice and peace in a post-conflict territory. With regard to this notion, many problems arise surrounding the concept of transitional justice especially when it comes to the implementation of restorative justice, both in international and internal conflicts, which put more emphasis on non-judicial approaches.

The issues of transitional justice with regard to the handling of gross violations of human rights in conflict areas have been subject to lengthy debates among international lawyers. The questions that arose there are, first, what kind of transitional justice approaches are applicable to post-conflict situations? Secondly, how does the concept of transitional justice work under the framework of international law? Thirdly, does the harmonization of peace and justice feasible in a post-conflict setting? Lastly, how can the establishment of truth commissions serve justice to the victims of past human rights atrocities, especially if these commissions put into use the application of granting amnesty in its practice, in a post-conflict setting?

Furthermore, the application of transitional justice is becoming more and more complicated when it comes to a post-conflict territory where the territory is consisted of diverse ethnicities, cultures, religions and languages, a situation that occur in many regions in Indonesia at present. As a State with diverse ethnicities, cultures, languages and religions, it is inevitable for Indonesia to face the possibility of occurrences of various conflicts. This condition is indicated by the episodes of conflict that happened, among others, in Aceh, Papua, East Timor and Poso that have been taking place in long periods of time, even right after Indonesia's independence in 1945. Together with the culmination of several conflicts in Indonesia, both the international community and the people of Indonesia demand the application of transitional justice in those post-conflict territories, and the

establishment of an *ad hoc* human rights court in 2000 to try gross violations of human rights that took place in those conflicts⁷ was the first step to apply the concept endorsed by the Government. In 2002 and 2005, respectively, the establishment of the Commission for Reception, and the Truth and Reconciliation Commission (KKP) in East Timor followed the creation of Indonesia's *ad hoc* human rights court. ⁸

The implementation of transitional justice in Indonesia has received negative stigma from the international community. The establishment of the *ad hoc* human rights court is considered a mere formality and cannot be trusted to bring about justice for the victims of past human rights abuses in East Timor since 1975; this can be seen from the court's proceedings, which only succeeded in finding 6 (six) people guilty, out of 18 (eighteen) people indicted for gross violations of human rights with their sentences ranging only from 3 (three) to 10 (ten) years. The reluctant tendency of the Government of Indonesia (GoI) in cooperating can also be seen from the Final Report of the Commission for Reception, Truth and Reconciliation in East Timor.

The implementation of transitional justice in Indonesia has also spread to various post-conflict areas such as Aceh and Papua. There will be two more establishments of truth commissions in Aceh and Papua, to address human rights atrocities that occurred in these territories.¹² The future establishment

Republic of Indonesia, Law No. 26 of 2000 on the Establishment of Human Rights Court.
 Commission of Reception, Truth and Reconciliation in East Timor was established in 2000 based on the initiative from the Government of East Timor. Civil Society

²⁰⁰⁰ based on the initiative from the Government of East Timor, Civil Society Organizations, UNHCR and UNTAET. Meanwhile, the Commission for Truth and Friendship (Komisi Kebenaran dan Persahabatan) was established in 2005 based on a *Joint Declaration* signed by the Government of Indonesia (GoI) and the Government of East Timor. Further reference on the matter can be seen on: http://www.easttimorreconciliation.org/bgd.htm#Origins (accessed on 16 August 2007).

As an illustration, see Professor David Cohen, *Intended to Fail: the Trials before the Ad Hoc Human Rights Court in Jakarta*, Occasional Paper Series, International Centre for Transitional Justice, 2003.

¹⁰ *Ibid.*, p. V.

Komisi untuk Orang Hilang dan Korban Kekerasan (Kontras), *Mahkamah Agung Mesin Cuci Pelanggaran HAM*, Press Release, 2 March 2006, http://kontras.org/index.php?hal=siaran_pers&id=290 (accessed on 16 August 2007).

Republic of Indonesia, Law No. 11 of 2006 on the Regional Government of Aceh and Law No. 21 of 2001 on the Special Autonomy for Papua Province.

of these truth commissions invites many pros and cons within Indonesia and from the international community because in the end of 2006, the Indonesian Constitutional Court nullified Law No. 27 of 2004 on National Truth and Reconciliation Commission and this has contributed another dilemma to the already-dilemmatic application of transitional justice in Indonesia. Adding to this problem is the issue concerning transitional justice approaches, which are taken in order to restore 'peace and justice', in post-conflict territories are still very limited and have not yet showed satisfactory results.

There is no doubt that the implementation of transitional justice to address past abuses in East Timor did not give satisfactory results, especially when it comes to the judicial approaches taken by the GoI, as has been illustrated previously, and that there are still so many aspects that can be discussed in relation to post-conflict management in East Timor. However, this thesis will not elaborate any further about transitional justice practices in East Timor but instead it will only focus on the issues of transitional justice in Aceh and Papua. The purpose of this thesis is to address the aforementioned debates surrounding the concept of transitional justice under international law and to examine the implementation of the concept in Indonesia, especially with regard to future establishment of truth commissions in Aceh and Papua, and whether or not the already ongoing transitional justice process has worked in compliance with international law, e.g., judicial approaches, victims' reparation, etc.

The brief outline of the thesis will be as follows; the first chapter is intended to be a general introduction of the thesis, consisting of the analysis on the historical background and the reasoning of the emerging issue of the concept of transitional justice. This chapter will also try to define the notion of transitional justice, its aims and framework.

The second chapter will be dedicated to the discussion of various approaches to transitional justice, both judicial and non-judicial, that can be

implemented in post-conflict situations. The discussion will also include the implementation of amnesties, where examples of granting amnesties in Latin American States and the works of South African Truth and Reconciliation Commission (TRC) will be put into use.

The third chapter will analyse the implementation of the transitional justice concept within the framework of international law. This chapter is going to examine the legal basis of the implementation of transitional justice in post-conflict situations as well as its connection with international human rights law, international humanitarian law and international criminal law. The last part of the third chapter will address the dilemma of justice and peace in the implementation of transitional justice in post-conflict situations based on a State's tendencies in applying *realpolitik*.

The fourth chapter will focus on, first, the judicial approaches taken by the GoI in addressing past human rights violations that had taken place in Aceh and Papua. Secondly, it will discuss the future establishment of the two truth commissions in Aceh and Papua, as they are required under national legislations. Furthermore, it will examine the implication of the Indonesia Constitution Court's decision in annulling Law no. 27/2004 on National Truth and Reconciliation Commission in 2006 on the required establishment of those truth commissions. Finally, this chapter will analyse other transitional justice approaches aside from judicial approaches and establishment of truth commissions, namely, the enactment of special autonomy laws, the reparation mechanism for the victims, and institutional and legal reform, in order to make it easy to assess the proper transitional justice approaches feasible to be implemented in these post-conflict territories. The last chapter will be dedicated to conclusions and recommendations.

1.1 Historical Background of Transitional Justice

The concept of transitional justice is frequently referred to in order to establish peace and justice in a post-conflict situation. According to Teitel, the historical flow of transitional justice development can be divided into three major phases that took place in the 20th century. Each phase of the development is strongly influenced by the political condition and context prevailing at that particular period. 14

The first phase that marked the genesis of transitional justice can be traced back to the post-situation of World War I with the treaty of Versailles. However, it was not until the end of World War II that the concept was implemented widely and successfully with the establishment of the Nuremberg and Tokyo International Tribunals, which tried war criminals individually for their crimes under international law. ¹⁶

As already mentioned above, during this period the concept of transitional justice was implemented in an international setting and more focused on imposing judicial approaches on the losing parties under international law. This phase did not last for long due to the diminishing sovereignty of Germany; the condition gave a basis for Germany to have a fresh start for nation building.¹⁷

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¹³ Ruti G. Teitel, *Transitional Justice Genealogy*, Harvard Human Rights Journal, Vol. 16, 2003, p. 69.

¹⁴ <u>Ibid.</u> See also, Report of the UNSG to the UNSC, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, S/2004/616, 23 August 2004 (the UNSG Report on the Rule of Law and Transitional Justice), p. 8.

¹⁵ Ruti G. Teitel, *Transitional Justice*, Oxford University Press: New York, 2000, p. 31. For further historical background on the establishment of such international tribunal, see also War Crimes Research Office, *International Criminal Law: a Discussion Guide for the Extraordinary Chambers in the Courts of Cambodia*, Washington College of Law, October 2005, p. 53 concerning the trial of Peter von Hagenbach by an international criminal tribunal in the 15th century set up by the Holy Roman Empire and consisted of 27 judges.

¹⁶ Ruti G. Teitel, *Transitional Justice Genealogy*, *supra* note 13, p. 70; *see also*, Alexander L. Boraine, *Transitional Justice: A Holistic Interpretation*, *supra* note 5, p. 17.

¹⁷ Ruti G. Teitel, *Transitional Justice Genealogy*, supra note 13, p. 70.

At this point, it is important to note that the establishment of these international tribunals was not solely to serve the observance of human rights even more: a human rights agenda was not the priority. The emphasis was more on upholding criminal justice to punish war criminals by the winning parties, even on acts that were legal at the time they were committed, and this reflected the big difference between the first and second phases. Since peace is established, political flux stabilized and there is no longer common enemy to the States at that time, it marked the end of the first phase of transitional justice.

The second phase of transitional justice development, according to Teitel, is linked to the acceleration of democracy and political fragmentation that occurred in various States within the period of the Cold War. ²⁰ This period that lasted until the late 1980s was tainted by the occurrence of civil wars that were influenced by international political powers represented by the United States and the Soviet Union. In this phase, the implementation of the transitional justice concept has shifted to the implementation of criminal justice that focused on the promotion of human rights and establishment of democratic government, or nation building, which reached the realm of internal conflict.

This phase was also characterized by the proliferation of Truth Commissions with the first establishment in 1974 in Uganda, under the name of *Commission of Inquiry into the Disappearances of People in Uganda* and later followed by Bolivia in 1982.²¹ However, the establishment of the National Commission on the Disappearance of Persons in Argentina in 1983 under the regime of Raúl Alfonsín was the first to gain

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Marek M. Kamisnki, Monika Nalepa and Barry O'Neill, Normative and Strategic Aspects of Transitional Justice, Journal of Conflict Resolution, Vol. 50, 2006, p. 298.

²⁰ Ruti G. Teitel, *Transitional Justice Genealogy*, supra note. 13, p. 70-71.

²¹ Priscilla B. Hayner, *Fifteen Truth Commissions – 1974 to 1994: A Comparative Study*, Human Rights Quarterly, Vol. 16, No. 4, November 1994, p. 601.

international acknowledgement.²² The main task of this particular Commission was to investigate the fate of the victims of forced disappearance and other human rights violations during the military dictatorship (military juntas) or the so-called National Reorganization Process in Argentina that took place between 1976 and 1983. Even though in 1984 the Argentinean government enacted amnesty laws, granting amnesties to former military juntas' officials nevertheless, these laws remained unpopular and due to lengthy public debates, finally in 2005 Argentinean Supreme Court overturned the amnesty laws. ²³ In the end, the establishment of this Commission had somewhat opened a way for the trials of Argentinean military juntas.

At this stage, the observation of human rights, democratization processes and the settlement of past human rights abuses have become the central attention of transitional justice. Additionally, States mostly took actions related to transitional justice individually rather than collectively by the international community.²⁴

Despite the improvement that has been made by the concept of transitional justice, the implementation of this concept was still strongly influenced by the international political condition and tension between the United States and the Soviet Union. By the end of the 1980s, the tensions of the Cold War finally subsided due to the disintegration of the Soviet Union and signified the end of both the Cold War and the second phase of transitional justice concept.

The third and more stabilized phase of the transitional justice concept started after the end of the Cold War. The scope and methods or approaches of transitional justice have become broader in the third phase; Teitel also

²² Ibid.; See also Michelle Sieff and Leslie Vinjamuri Wright, Reconciling Order and Justice? New Institutional Solutions in Post-Conflict States, Journal of International

Affairs, Spring 1999, Vol. 52, No. 2, p. 762. BBC, Argentine Annesty Laws Scrapped, 15 June 2005, can be accessed through: http://news.bbc.co.uk/2/hi/americas/4093018.stm (accessed on 24 September 2007).

²⁴ Ruti G. Teitel, *Transitional Justice Genealogy*, Supra No. 13, p. 88.

emphasized that during this phase the role of transitional justice in post-conflict situations has extended to regulating intra-state conflict and peacetime relations.²⁵ This phase can be considered a 'steady-state' transitional justice, since in this phase the process of transitional justice is implemented comprehensively in almost all sectors of life that affect the livelihood of society as a whole after the conflict ended.

The broader implementation of transitional justice that occurs in this phase is due to the nature of conflicts taken place after the Cold War, where most of them are internal conflicts that took place because of internal political fluxes rather than international influence. Another important factor that marked this development is the expansion of International Humanitarian Law; it even went so far as to include the justification of an initiation of an armed conflict and the legitimacy of humanitarian intervention. The expansion of International Humanitarian Law and its mergence with Human Rights Law has somewhat enabled the international community to have a more proactive role in putting an end to the culture of impunity and upholding the rule of law in post-conflict situations.

At this stage, the role of the United Nations is of great significance especially in establishing the International Criminal Tribunal for the Former Yugoslavia (ICTY)²⁸ and the International Criminal Tribunal for Rwanda (ICTR) ²⁹ to address human rights atrocities that have taken place in the former Yugoslavia and Rwanda. Furthermore, in 2002 the United Nations and the Government of Sierra Leone agreed to establish a Special Court for Sierra Leone pursuant to United Nations Security Council (UNSC)

²⁵ *Ibid.*, p. 74.

²⁶ David Halberstam, War in Time of Peace: Bush, Clinton, and the Generals, Scribner: New York, 2001, p. 543.

²⁷ Ruti G. Teitel, *Transitional Justice Genealogy*, supra note. 13, pp. 90 – 92.

²⁸ The ICTY was established under S/RES/827 (1993), adopted on 25 May 1993 and prior to that resolution, the UNSC also adopted a series of resolutions addressing the atrocities in the Former Yugoslavia namely, S/RES/713 (1991), 25 September 1991; S/RES/764 (1992), 13 July 1992; S/RES/771 13 August 1992; S/RES780 (1992), 6 October 1992; and S/RES/808 (1993), 22 February 1993.

²⁹ The ICTR was established under a series of UNSC Resolutions namely, S/RES/955 (1994), 8 November 1994; S/RES/978 (1995), 27 February 1995; and S/RES/1165 (1998), 30 April 1998.

Resolution No. 1315 adopted on 14 August 2000. These practices, aside from showing the prominent role of the United Nations in transitional justice, also show a more stabilized phase of transitional justice implementation from a criminal law point of view as a response to the practice of establishing international tribunals in the first phase.

The second indicator of this phase, from a non-judicial point of view, was the establishment of the Truth and Reconciliation Commission in South Africa.³⁰ The objectives of this TRC were to record human rights violations that took place during the apartheid regime, grant amnesties in some cases to the perpetrators of human rights violations that were willing to disclose all relevant facts, make reparations for the victims and rehabilitation.³¹ Unique features of this TRC were, first, it gave priority to the victims rather than the perpetrators, and secondly, it heard stories from both sides since finding the truth was its primary objective rather than to punish perpetrators.

The South African TRC in the third phase of transitional justice development marked fundamental differences with the previous practices of transitional justice in both the first and second phases. The South African TRC clearly contrasted the Nuremberg trials in World War II; it preferred other methods than prosecutions in order to avoid the so-called victor's justice. On the other hand, in relation to the second phase that pointed out the establishment of Argentinean Truth Commission, the South African TRC did not open up a way for prosecutions; its main objective was to know the truth and leaving prosecutions in order to be able to put the past behind.³²

Of course, there are many pros and cons with the practice of South African TRC. South African government and several scholars, at one side, claimed that the TRC was a success since it managed to create reconciliation within

The Truth and Reconciliation Commission was established under the Promotion of National Unity and Reconciliation Act, No. 34 of 1995 (TRC Act).

³¹ TRC Act, Chapter 2, Arts. 3 - 6.

³² *Ibid.*, preamble, par. 3.

the nation, it forced the perpetrators to face their victims and its report had made a thorough documentation of human rights violations that took place during the apartheid regime.³³ However, on the other side, many also claimed the granting of amnesties to the old regime officials had snatched the victims from proper justice and it reflected the practice of impunity, a discussion that will be elaborated further in the next chapter.

The development of transitional justice in the third phase does not stop with prosecutions of perpetrators and establishment of TRC but also expand to include other approaches. The third phase of transitional justice is still taking place and still developing comprehensively, especially in Third Wold Countries.

1.2 Indonesia: Historical Background of the Conflicts in Aceh and Papua

1.2.1 The Conflict in Aceh

Nangroe Aceh Darussalam or formerly known as Daerah Istimewa Aceh³⁴ for the past forty years has been infamous for "the most serious human rights crisis in Southeast Asia".³⁵ Aceh is located on the tip of the Sumatera Island, it is rich in natural resources and it was the only region in Indonesia that has never been ruled under the Dutch colonial power. Aceh played a prominent role during Indonesia's war of independence against the Dutch³⁶ and after Indonesia declared its independence in 1945, Aceh promptly

Paul van Zyl, Dilemmas of Transitional Justice: the Case of South Africa's Truth and Reconciliation Commission, Journal of International Affairs, Vol. 52, spring 1999, pp. 647 – 648.

The GoI decided to follow the will of Acehnese people to change the name of Daerah Istimewa Aceh into Nangroe Aceh Darussalam through the enactment of Law No. 18 of 2001 on the Special Autonomy for Daerah Istimewa Aceh Province as Nangroe Aceh Darussalam Province.

Human Rights Watch, Aceh at War: Torture, Ill-Treatment, and Unfair Trials, Vol. 16, No. 11 (C), September 2004, p. 8.

In the early 1900s, Acehnese started to forge cooperation with other regions in Indonesia to strengthen Indonesian resistance movement against the Dutch. This was clearly shown in its active role, represented by Teungku Nyak Arif, in Indonesian Volksraad (people assembly). *See* http://www.aceh.net/acehinindonesiahistory.html (accessed on 29 November 2007).

confirmed its support to the leadership of Indonesian first President, Soekarno, which marked Aceh willingness to join the Republic of Indonesia.³⁷

Aceh province was established in 1949 under Decree No. 8/Des/W.K.P.H issued by the Indonesian Emergency Government in Sumatera and appointed Teungku Daud Beureueh as the first Governor. After the establishment of Aceh as one of Indonesia's provinces, conflicts started to bloom in Aceh and it was generally due to the GoI plan to divide Aceh, Acehnese dissatisfaction concerning GoI policy on Aceh compared to the Acehnese sacrifices in defending Indonesia and the demand to establish a State that is based on Islamic Sharia Law. Many conflicts that had taken place in Aceh during 1949–1951 finally encouraged Teungku Daud Beureueh to give his support to the Darul Islam separatist movement in Java that aimed to establish an Islamic State and on 20 September 1953 Teungku Daud Beureueh declared the independence of Aceh from Indonesia.³⁸

In response to Aceh's position, the GoI, under President Soekarno's administration, gave Aceh a status as a 'special territory' through Decree No. 1/Missi/1959 that conferred a high degree of autonomy to Aceh on religious, educational and cultural matters.³⁹ In 1963 Teungku Daud Beureueh signed a peace agreement with the GoI marking the end of the Darul Islam rebellion in Aceh. However, the status of 'special territory' of Aceh did not diminish the desire of some Acehnese to establish an independent Islamic State.

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The support from the Acehnese was shown when they gave material support such as buying national bonds to strengthen Indonesian Currency in 1946, donating money to the Government in Yogyakarta at that time to run the office and open representative offices abroad and donating two airplanes. *See* http://www.aceh.net/acehinindonesiahistory.html (accessed on 29 November 2007).

Hilmar Farid and Rikardo Simarmatra, *The Struggle for Truth and Justice: a Survey of Transitional Justice Initiatives Throughout Indonesia*, Occasional Paper Series, International Center for Transitional Justice, January 2004, p. 90; and *see* also http://www.aceh.net/acehinindonesiahistory.html (accessed on 29 November 2007).

Republic of Indonesia, Prime Minister Decree No. 1/Missi/1959 on the Special Status of Aceh Province.

After the toppling of President Soekarno in 1966, Soeharto come into office as Indonesia's second President and established the New Order Regime. The Acehnese welcome this change, which they believe will bring about a change to the State policies that will put more respect to the Islamic values. However, it did not take long until the dissatisfaction of the Acehnese remerged, especially in connection with the GoI new policy on the allocation of revenue from Aceh oil and natural gas resources. They feel that the GoI has been marginalizing the Aceh population and excessively exploiting their natural resources. These dissatisfactions finally amounted to the establishment of the Free Aceh Movement (GAM) by Teungku Hasan M. di Tiro in 4 December 1976 and on the same time di Tiro also declared Aceh independence from Indonesia. 40

This time the GoI responded with military power to the attacks commenced by GAM, which ended with mass arrests of GAM members until early 1980s. In 1983, GAM was defeated by the GoI military forces and forced Hasan di Tiro and his accomplices to flee to Sweden and granted asylum. Indeed the Indonesian military managed to suppress this movement but they failed to win the population's sympathy. Indonesia only managed to put the conflict with GAM under the surface until late 1980s. In 1989 the GAM remerged with reinforcement, it succeeded in training over a hundred of its militias in Libya and transferred them back to Aceh to continue GAM resistance towards Indonesia.

With renewed force, GAM commenced relentless attacks on Indonesian military and police force, and one of the biggest conflicts erupted between the GoI and GAM at that time was the raid of the Indonesian police post in May 1990 where GAM succeeded in looting ammunition and dozens of automatic weapons.⁴¹ In response to this raid, the GoI declared Aceh as a region under martial law (Daerah Operasi Militer, DOM) and this step taken

Hilmar Farid and Rikardo Simarmatra, *supra* note. 38, p. 90.

⁴¹ Human Rights Watch, *Indonesia: the War in Aceh*, Vol. 13, No. 4 (C), August 2001, p. 8; Hilmar Farid and Rikardo Simarmatra, *supra* note. 38, p. 90.

by the Government is considered to be one of the biggest counterinsurgency campaigns in Indonesia since 1960s.⁴²

Throughout the time when Aceh was declared a DOM, GAM launched frequent attacks on Indonesian military and police forces and was retaliated violently by Indonesian military forces. The conflicts led to massive human rights violations and caused immense civilians' losses conducted both by GAM and the military. According to the report prepared by Aceh provincial government in late 1998 there were at least 871 people killed, 387 people missing who later turned up dead and more than 500 people listed as 'disappeared' and never been found. Many other violations of human rights documented by Non Governmental Organization (NGO) actually have taken place in Aceh during the DOM period, done by both sides, including rape and kidnapping of civilians.

On 21 May 1998, President Soeharto stated his resignation, which marked the downfall of the New Order Regime. The downfall of the New Order Regime was welcomed by the Indonesian people all over the country, especially in Aceh. The Acehnese hoped that it will be a start for a new era of peace and stability in Aceh and this view was also shared by the new Government under President Habibie's administration. On 7 August 1998, the commander of Indonesia's armed forces, General Wiranto, stated his formal apology to the Acehnese for what they had undergone during the DOM period, subsequently lifted the DOM status over Aceh and promised to withdraw all of Indonesian soldiers in Aceh. The apology was promptly followed by national apology to the people of Aceh stated by President Habibie, in March 1999. Fact finding commissions were also created by the Indonesian parliament and chaired by Hari Sabarno, who was also the

⁴² Ibid.; Human Rights Watch, Aceh under Martial Law: Inside the Secret War, Vol. 15 No. 10 (C), December 2003, p. 8.

Al-Chaidar, Sayed Mudhahar and Yarmen Dinamika, *Aceh Bersimbah Darah*, Pustaka Al Kautsar: Jakarta, 1998, p. 106; Human Rights Watch, *Indonesia: the War in Aceh*, *supra* note. 228, p. 8.

Hilmar Farid and Rikardo Simarmatra, *supra* note. 38, p. 91; and Human Rights Watch, *Indonesia: the War in Aceh, supra* note 41, p. 8.

⁴⁵ Human Rights Watch, *Indonesia: the War in Aceh*, *supra* note 41, p. 9.

vice chairman of the Indonesian People's Consultative Assembly (MPR) and by the Indonesian National Commission on Human Rights (Komnas HAM), chaired by Marzuki Darussman. Both fact-finding commissions documented an immense list of gross human rights violations in Aceh, done by both sides, and made a long list of recommendations, including the establishment of a truth commission, however, those recommendations were ignored and no follow-up measures had ever been taken. 46

GAM seized the opportunity from the soft attitude of the Government and started to influence the Acehnese to demand a referendum and the prosecution of human rights violations, taking precedent from the referendum in East Timor that resulted in a big demonstration in the capital of Aceh province. Aside from sporadic attacks to the military, GAM also began to set up alternative governments, among others by reorganizing the village administrative apparatus, and it managed to gradually take control over most of governmental functions. These 'modified' forms of resistance by GAM were retaliated by the Government through military campaigns, as usual, and by the end of 1999 the situation got worse with the increasing armed conflicts between the Government and GAM.

In the mid of 2000, the Henry Dunant Center (HDC) came into the scene and played a role as a mediator between the Government and GAM and tried to establish peace talks between the two parties. The effort succeed and in May 2000 a 'humanitarian pause' was produced, which was not exactly a cease-fire agreement, where during the pause both the military and GAM will discuss about security issues and reconciliation between the two parties. ⁴⁹ The 'humanitarian pause' was renewed twice but it did not

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Human Rights Watch, *Indonesia: the War in Aceh*, supra note 41, pp. 9 – 10; and International Crisis Group, *Indonesia: Impunity Versus Accountability for Gross Human Rights Violations*, Jakarta/Brussels, ICG Asia Report No. 12, 2 February 2001, p. 6.

Hilmar Farid and Rikardo Simarmatra, *supra* note. 38, p. 91.

⁴⁸ Human Rights Watch, *Indonesia: the War in Aceh, supra* note 41, p. 10.

⁴⁹ *Ibid.*; and Hilmar Farid and Rikardo Simarmatra, *supra* note. 38, p. 91.

manage to reconcile both parties, armed conflicts still taking place in Aceh after the first month of the first 'humanitarian pause'. 50

In April 2001, the GoI, under President Abdurrahman Wahid administration, issued Presidential Instruction No. 4 that authorized the Indonesian military and police force to launch an operation against GAM.⁵¹ The military operation launched by the Government amounted to more violent conflicts with GAM, which caused civilian deaths and property losses.⁵² After President Abdurrahman Wahid was replaced by Megawati Soekarnoputri, the continuation of the conflicts in Aceh still taking place, the new President once again stated her formal apology to the people of Aceh and a new round of peace talks between the Government and GAM was once again commenced in Geneva, with the assistance of the HDC that produced the Cessation of Hostilities Agreement (COHA) in December 2002,⁵³ but to no avail. Since the intensity of the conflicts kept on rising between 2001 and 2003, finally Aceh was once again being put under the status of DOM, which indicated the Government withdrawal from COHA, based on Presidential Decision No. 28 on the Declaration of a State of Emergency with the Status of Martial Law in Nangroe Aceh Darussalam Province.⁵⁴

In 2004, the DOM status on Aceh was changed into civil emergency and not long after that, Indonesia, once again, experienced another change of Government due to the first direct general Presidential election, Soesilo Bambang Yudhoyono (SBY) was elected as Indonesia's new president. One of the first steps taken by SBY administration was to conduct an official visit to Aceh in November 2004, during the visit in Aceh SBY stated in his

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⁵⁰ Ibid

Republic of Indonesia, Presidential Instruction No. 4 of 2001 on the Comprehensive Measures in Solving the Situation in Aceh Province, points no. 11 and 14.

Human Rights Watch, *Indonesia: the War in Aceh*, *supra* note 41, p. 11.

http://www.indonesia-house.org/archive/061203AceH coha aggrement.htm (accessed on 30 November 2007).

Republic of Indonesia, Presidential Decision No. 28 of 2003 on the Declaration of a State of Emergency with the Status of Martial Law in Nangroe Aceh Darussalam Province, article 1.

speech in front of the Acehnese that the GoI is willing to grant amnesty, economic aid and provincial autonomy to the members of GAM in order to rebuild Aceh together⁵⁵ however, the offer was refused.

The conflict in Aceh finally ended in the end of 2004 when an earthquake of 9.0 on the Richter scale hit Aceh on 26 December. The earthquake was so severe that it triggered a massive tsunami killing over 130,000 people in Aceh alone. The nation was brought to cooperate with each other to face natural catastrophes taking place in several islands in Indonesia. In August 2005, after five rounds of meeting, the GoI and GAM signed a peace agreement in Helsinki (Helsinki MoU). 57

The signing of the Helsinki MoU was soon followed-up by the arrival of 200 peace monitors in Aceh (Aceh Monitoring Mission, AMM) consisting of representatives from the European Union (EU) and the Association of South East Asian Nations (ASEAN) with the aim to conduct an observation mission on the implementation of the Helsinki MoU, which included the release of all GAM prisoners by Indonesian military, the launch of a disarmament program, and a significant reduction of GoI troops in the province. In the first month after the signing of the Helsinki MoU, the situation in Aceh was relatively peaceful; the armed conflict had ceased taking place. The process of Disarmament, Demobilization and Reintegration (DDR) has progressed quite smoothly with no major clashes. The Helsinki MoU also set a requirement to establish an *ad hoc* Human Rights Court and a truth and reconciliation commission to address past human rights violations in Aceh. On 11 December 2006, Aceh held its first

⁵⁵ Republic of Indonesia, Transcript of Presidential Speech in Anjong Non Mata, Nangroe Aceh Darussalam, 26 November 2004, http://www.presidenri.go.id/index.php/pidato/2004/11/26/57.html (accessed on 30 November 2007).

BBC News, Oxfam Warns on Aceh's Homeless, 7 December 2006, http://news.bbc.co.uk/2/hi/asia-pacific/6214666.stm (accessed on 30 November 2007.

Human Rights Watch, *The World Report 2006*, Human Rights Watch and Seven Stories Press, 2006, p. 270; and Christine Susanna Tjhin, *Post Tsunami Reconstruction and Peace Building in Aceh: Political Impacts and Potential Risks*, CSIS, Politics and Social Change Working Paper Series, October 2005, p. 3.

Human Rights Watch, *The World Report 2006*, *supra* note. 57 p. 270 – 271; and Christine Susanna Tjhin, *supra* note. 57, p. 3.

regional election, and Irwandi Yusuf, a former GAM member, won the election.

1.2.2 The Conflict in Papua

At the time when Indonesia proclaimed its independence from the Dutch colonial power on 17 August 1945, the western part of New Guinea (Papua) was still under colonial power. In 1946, the UN General Assembly (UNGA) adopted a resolution, which gave Papua the status of Non-Self-Governing territory⁵⁹ and in 1950; it adopted another resolution confirming the right of Papuan people to self-determination.⁶⁰ Pursuant to those resolutions, the Dutch, which still maintained power over Papua until late 1960s, planned to give independence to the people of Papua by the end of the decade.⁶¹

However, the GoI showed strong opposition toward the idea of 'Independent Papua' since the Indonesian is of the position that Papua should be an integral part of Indonesia. Agreement between Indonesia and Netherlands on the status of Papua could not be achieved and as a reaction to the development made in establishing 'Independent Papua', in 1961 president Soekarno announced the 'Three Commands to the People' (Trikora), which stated that:

- Indonesia shall concentrate its efforts to frustrate the establishment of Papuan 'Dummy State', sponsored by the Netherlands;
- 2. To establish the Indonesian Flag all over Papuan territory; and

UNGA Resolution on Transmissions of Information under Article 73e of the UN Charter, UNGA Res. No. 66(I) of 14 December 1946.

⁶⁰ UNGA Resolution on Development of Self-Government in Non-Self-Governing Territories, UNGA Res. No. 448(V) of 12 December 1950.

The Dutch Government even encouraged the formation of local political parties and establishment of State institutions in Papua. See J. Saltford, The United Nations and the Indonesian Takeover of West Papua, 1962 – 1989: The Anatomy of Betrayal, Routledge: London, 2003, pp. 9 – 10; and Human Rights Watch, Out of Sight: Endemic Abuse and Impunity in Papua's Central Highlands, Vol. 19, No. 10 (C), July 2007, p. 3.

3. Prepare for general mobilization, to defend the independence and unity of Indonesia. 62

The Trikora declaration resulted into the Aru Sea Battle between Indonesia and the Netherlands in 15 January 1962 and it ended when in August 1962 the Dutch agreed to transfer its authority over Papua to the United Nations Temporary Executive Authority (UNTEA), and then to Indonesia within a year. This agreement was achieved under one condition, which was that in the end of 1969 the people of Papua should be given the opportunity to conduct their 'Act of Free Choice' to determine their future status. In April 1969, Indonesia kept its promise to let the Papuan people conduct their 'Act of Free Choice' however, instead of establishing a general referendum process where every Papuan is given the chance to vote; Indonesia chose to hold a referendum through representative assemblies. This referendum was conducted by Indonesia under UNTEA supervision, where the representative assemblies appointed 1,026 people to cast their vote and the result of this referendum was a unanimous vote for integration with Indonesia.

The referendum was recognized as valid by the United Nations and Papua became the 26th province of Indonesia as of 1969 and the name was changed into Irian Jaya. However, for the sake of clarity this thesis will use the term Papua to address the territory.

Unofficial translation of Trikora, for further information, sees T. Tarigan Sibero, Kisah Heroik Merebut Irian Barat, 3 May 2006, on http://www.tni.mil.id/news.php?q=dtl&id=113012006111078 (accessed on 28 November 2007).

Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning Western New Guinea (West Irian), UN Headquarters, New York, 15 August 1962 (New York Agreement), Art. XII.

Ibid., Art. XX; see also Human Rights Watch, Out of Sight: Endemic Abuse and Impunity in Papua's Central Highlands, supra note 61, p. 10.

⁶⁵ Human Rights Watch, Out of Sight: Endemic Abuse and Impunity in Papua's Central Highlands, Ibid., p. 10.

J. Saltford, The United Nations and the Indonesian Takeover of West Papua, 1962 – 1989: The Anatomy of Betrayal, London, Routledge, 2003, pp. 129 – 140; See also Indonesian Constitutional Court Decision on the Divisions of Irian Jaya Province under Law No. 21 of 2001, No. 018/PUU-I/2003, p. 10.

After the referendum, many Papuans felt that they have been cheated of their right to self-determination since the referendum held by Indonesia, which was based on Indonesian principle of 'Musyawarah Mufakat',⁶⁷ is not in accordance with the universal suffrage agreed to in the New York Agreement of 1962.⁶⁸ This dissatisfaction of Papuan people marked the birth of the Free Papua Organization (Organisasi Papua Merdeka, OPM) in 1965 that highlighted another phase of conflict in Papua, this time between OPM and Indonesia.

The OPM movement in demanding another vote of self-determination for the Papuan people, until now, does not gain international support. Nevertheless, it still constitutes a conflict in Papuan territory. Since 1965, the OPM maintained low-level armed guerrilla war mainly targeted at the Indonesian security forces and the GoI, under President Soeharto regime, retaliated by commencing military operations that often caused civilian loss. ⁶⁹ The situation in Papua was further deteriorated by the exploitation of Papuan gold mines in the Central Highlands, where the GoI gave concessions of these mines to foreign company, PT Freeport Indonesia, a subsidiary of Freeport McMoran, a US based multinational company, since 1967 without giving consideration to the rights of local people. ⁷⁰ This issue has contributed to further resistance from the local population, not only from the OPM, in Papua toward both the GoI and PT Freeport Indonesia; it also has caused the forced-displacement of the indigenous population that

⁶⁷ Generally translated, the term *musyawarah mufakat* means unanimous agreement after consultation and deliberation and eventually will become binding to the people that hold such process. *See* Chris Penders, *The West New Guinea Debacle*, Adelaide, Crawford House Publishing Pty Ltd., 2002, p. 446.

⁶⁸ Indonesian Constitutional Court Decision on the Divisions of Irian Jaya Province under Law No. 21 of 2001, case No. 018/PUU-I/2003, p. 10.

The military operations commenced by Indonesia, since 1965 until early 1990s, were reported to constitute violations of human rights. Torture, rape, arbitrary detention and forced displacement are some of the crimes took place in Papua after its integration with Indonesia. For further information of the human rights violations taken place in Papua, see Allard K. Loweinstein International Human Rights Clinic, Indonesian Human Rights Abuses in West Papua: Application of the Law of Genocide to the History of Indonesian Control, Paper Prepared for the Indonesian Human Rights Network, Yale law School, April 2004, pp. 19 – 26.

Allard K. Lowenstein International Human Rights Clinic, *Ibid.*, p. 15; Human Rights Watch, *Out of Sight: Endemic Abuse and Impunity in Papua's Central Highlands*, supra note. 61, p. 12 – 13.

originally resided in the area of the mining camps.⁷¹ Moreover, during the 1980s, the GoI also campaign its policy on a massive transmigration program from other parts of Indonesia to Papua, which resulted in the drastic alteration of the demographic composition of Papua and at the same time nurtured the sense of the Papuan people of being marginalized by the GoI.

After the fall of the New Order Regime, in 1999 the GoI enacted Law No. 45 on the Formation of Central Irian Jaya Province, Western Irian Jaya Province, Paniai Regency, Mimika Regency, Puncak Jaya Regency and Sorong City. This law aims to divide Papua Province into three provinces in 2005, which further induced the resistance from the OPM. Fears that Papua will follow the step of East Timor and the continuing conflict with GAM in Aceh pushed the GoI to make amends to the situation in Papua. In 2001, Indonesia enacted Law No. 21 on the Special Autonomy for Papua Province. This Law tries to encourage the active role of the people of Papua in the governance of the region through the establishment of Papua People's Assembly (MRP), which was established in 2005. The latter consists of representatives from religious leaders, women and customary council.⁷² Based on Special Autonomy Law, the people of Papua has the discretion to manage their resources and conduct governance; the GoI only still holds power over foreign affairs, defense and security, fiscal and monetary policy, religious affairs, and judiciary.⁷³

The GoI gives broad powers to PT Freeport Indonesia over the local population and resources, including the right to take land and other property and to resettle indigenous inhabitants. For further information on Freeport McMoran conducts in Papua, see Contract of Work Dated 7 April 1967 Between Indonesia and Freeport Indonesia, Incorporated: Decision of the Cabinet Presidium, No. 82/E/KEP/4/1967 (Jakarta: Direktorat Pembinaan Pengusahaan Pertambangan, 1967), Article 2, para. (d); Allard K. Lowenstein International Human Rights Clinic, Indonesian Human Rights Abuses in West Papua: Application of the Law of Genocide to the History of Indonesian Control, supra note. 69, p. 15; and Abigail Abrash, Development Aggression: Observations on Human Rights Conditions in the PT Freeport Indonesia Contract of Work Areas with Recommendations, Robert F. Kennedy Human Rights Memorial Center, July 2002, p.

Republic of Indonesia, Law No. 21 of 2001 on the Special Autonomy for Papua Province, Art. 19.

⁷³ *Ibid.*, Art. 4(1).

Not long after the establishment of MRP, there was already another dispute between the GoI with the MRP with regard to Law No. 45 of 1999 and Law No. 21 of 2001. That was due to the plans of the GoI to accelerate the division of Papua Province⁷⁴ where in 2004 President SBY administration proceeded with these plans and established West Irian Jaya Province and held regional elections in West Irian Jaya without holding any consultation with MRP as it is required by the Special Autonomy Law. The case was promptly brought to the Indonesian Constitutional Court however, without any satisfactory result.⁷⁵ However, to put aside the dispute for the betterment of Papua territory, the two governors of the Provinces, and MRP leaders, signed an agreement in April 2007, that West Irian Jaya (at the same time when the agreement was signed the name of West Irian Jaya was changed into West Papua) will come under Special Autonomy and the two Provinces will share the funds provided for it. ⁷⁶ However, no amendment to the Special Autonomy Law has been made and the confusion is still there, since the Special Autonomy Law was not designed to accommodate two Provinces.

In 2006 the OPM leaders held a meeting in Papua New Guinea in which they stated that "they pledged to end their armed struggle and continue their fight for Papua's independence, but through non-violent action", ⁷⁷ and they will only strike back as an act of self-defense. ⁷⁸ In responding to the OPM renewed position toward the conflict, Indonesian military commander,

Republic of Indonesia, Presidential Instruction No. 1 of 2003 on the Acceleration of the implementation of Law No. 45 of 1999.

The Indonesian Constitutional Court held that the Special Autonomy Law indeed superseded Law No. 45 of 1999 however, the West Irian Jaya Province still have to be recognized as its existence was already a political fait acompli. See Indonesian Constitutional Court Decision on the Divisions of Irian Jaya Province under Law No. 21 of 2001, No. 018/PUU-I/2003, p. 137; and see also Human Rights Watch, Out of Sight: Endemic Abuse and Impunity in Papua's Central Highlands, supra note. 61, p. 16.

Cunding Levi, Papua akan Dua, tapi Tetap Satu, Tempo Interactive, 18 April 2007, http://www.tempointeraktif.com/hg/ekbis/2007/04/18/brk,20070418-98199,id.html (accessed on 29 november 2007); see also Human Rights Watch, Out of Sight: Endemic Abuse and Impunity in Papua's Central Highlands, supra note. 64, p. 17.

⁷⁷ ABC, Lateline, *Papua Fighters Promise Non-Violent Future*, TV Program Transcript, 27 July 2006, http://www.abc.net.au/lateline/content/2006/s1699050.htm (accessed on 29 November 2007).

⁷⁸ *Ibid*.

Djoko Suyanto, stated that the military will stay vigilant toward OPM movement and that the military will cease to commence military operations. Instead they will try to 'embrace' members of OPM to re-join the society. The recent development of the conflict in Papua has not yet shown the fulfillment of these commitments made by both parties and the OPM still conducts small-scale armed attack and the Indonesian military forces still apply excessive counter measure towards OPM. 80

1.3 Defining Transitional Justice

The concept of transitional justice throughout history has proven itself to have a crucial role in establishing justice and peace in post-conflict situations. This notion has been realized and supported by various international lawyers, stating that:

Societies shattered by the perpetration of atrocities need to adapt or design mechanism to confront their demons, to reckon with these past abuses... The assumption that individuals or groups who have been the victims of hideous atrocities will simply forget about them or expunge their feelings without some sort of accounting, some semblance of justice, is to leave the seeds for future conflicts.⁸¹

This concept puts the interests of the victims of past abuses and their family at the core of its function to seek accountability in any form.

Since the establishment of the Nuremberg Trial, the term 'Transitional Justice' has become a widely accepted term. ⁸² As in many cases concerning definition in international law, one must emphasize that there is also no

Human Rights Watch, *Out of Sight: Endemic Abuse and Impunity in Papua's Central Highlands, supra* note. 61, pp. 18 – 19.

⁷⁹ Dimas Adityo, Panglima: TNI tetap Waspdai OPM, Tempo Interactive, 31 July 2006, <u>http://www.tempointeraktif.com/</u> (accessed on 29 November 2007).

Neil J. Kritz, Coming to Terms with Atrocities: a Review of Accountability Mechanisms for Mass Violations of Human Rights, Law and Contemporary Problems, Vol. 59, 1996, p. 127.

Louis Bickford, *Transitional Justice*, in: Dinah Shelton (Ed.), *The Encyclopedia of Genocide and Crimes Against Humanity*, Vol. 3, Thomson Gale: Detroit, 2005, p. 1045.

consensus among international law scholars on the term of transitional justice, let alone its definition. Generally, many assume that the definition of transitional justice only focuses on accountability referring to the two classic approaches, the war crime tribunals and truth commission. One cannot see the concept of transitional justice only from a legal perspective alone since it has many social and political aspects contributing in the implementation of transitional justice.

Notwithstanding all of the debates surrounding the term and definition of 'Transitional Justice' one point that is clear, is that the implementation of transitional justice must cover both aspects from legal, social and political points of view. For the purpose of this thesis, the definition of transitional justice that will be elaborated in the following paragraphs will try to cover all points of view, emphasizing the framework of international law. The aim of this idea is to give a clear definition of transitional justice that can cover all of its processes in handling post-conflict situations as well as to give a clear ground on the implementation of transitional justice under international law.

The concept of transitional justice is generally defined by various international lawyers as a set of activities that focused on how societies in a post-conflict situation address legacies of past human rights abuses, mass atrocities or other forms of severe social trauma, including genocide or civil war, with the aim to build a more democratic, just and peaceful future. ⁸³ It is a big concept that analyzes how societies manage themselves to come to terms with legacies of past human rights abuses and the conception of justice in political transitions. ⁸⁴

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Louis Bickford, *Transitional Justice*, *supra* note. 82, pp. 1045 – 1047; Paul van Zyl, *Promoting Transitional Justice* in, in Alan Bryden and Heiner Hänggi (Eds.), *Security Governance in Post-Conflict Peace Building*, Geneva Centre for the Democratic Control of Armed Forces: Geneva, 2005, pp. 209 – 210; Gerhard Thallinger, *The UN Peace Building Commission and Transitional Justice*, German Law Journal, Vol. 08, No. 07, 2007, p.695.

Ruti G. Teitel, *Transitional Justice*, *supra* note 15, p. 3.

A general and well-crafted definition of transitional justice can be drawn from the definition made by the Secretary General of the United Nations (UNSG) in his report to the UNSC in August 2004 concerning the *Rule of Law and Transitional Justice*. In his report, he defined transitional justice as:

The notion of 'transitional justice'...comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth seeking, institutional reform, vetting and dismissals, or a combination thereof.⁸⁵

The UNSG report is a historical moment that marked the next UN stance to transitional justice issues after it previously managed the establishment of the Commission of Truth in El Salvador during the Cold War. This definition given by the UNSG has cast a bright light on how to define transitional justice, which also covers the problem of the philosophical debates in interpreting the term 'justice'. Nevertheless, for the purpose of this thesis, the debate on the terms of 'justice' and 'transitional' would not be discussed in detail.

According to the report of the UNSG to the UNSC, the term 'justice' is defined as:

[A]n ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard to the rights of the accused, for the interests of victims and for the well being of the society at large. It is a concept rooted in all national cultures and traditions and, while its

⁸⁵ UNSG Report on the Rule of Law and Transitional Justice, *supra* note. 14, p. 4.

administration usually implies formal judicial mechanisms, traditional dispute resolution are equally relevant.⁸⁶

The above definition of justice affirmed that the international community has given a basis for the implementation of transitional justice when they set clear prohibitions on impunity and the adoption of the Rome Statute of the International Criminal Court of 1998 (ICC Statute). However, even though the term 'justice' in this concept clearly draws State obligations imposed by international law, it still requires a broad interpretation due to the 'transitional' nature.

In this respect, 'transitional' should be defined in parallel with the term 'justice'. Boraine states that the term 'transitional' signifies that the old order is dying but that the new order has not yet been born.⁸⁷ Furthermore he continued:

A country in transition is a country, which is emerging from one particular order and is uncertain and unsure as how to respond to the challenge of the new order.⁸⁸

This definition seems to share broad acknowledgement when it comes to giving a specific context of justice in the context of transitional justice. The specific context of 'justice', according to Bickford, is frequently viewed as that of "societies, in the wake of repressive rule, progressing towards a more legitimate form of governance and/or peace". Be Drawing from this context, the concept of transitional justice embraces a wide perception of justice.

Due to the 'transitional' element, the concept of transitional justice applies 'justice' not only in the conventional sense, which is criminal justice or

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⁸⁶ Ibid

Alexander L. Boraine, *Transitional Justice: A Holistic Interpretation*, *supra* note. 5, pp. 17–18.

⁸⁸ Ibid

⁸⁹ Louis Bickford, *Transitional Justice*, *supra* note. 82, p. 1045.

retributive justice but also to deliver 'justice' in a restorative sense. 90 The UNSG in his 2004 report also shares this point of view:

The international community must see transitional justice in a way that extends well beyond courts and tribunals. The challenges of post-conflict environments necessitate an approach that balance a variety of goals, including the pursuit of accountability, truth and reparation, the preservation of peace and the building of democracy and the rule of law. ⁹¹

The rationale behind this inclusion of both retributive and restorative justice in the application of transitional justice is to apply a check-and-balance mechanism in establishing justice and peace in a post-conflict setting. In compliance with the main aim of transitional justice, to help the society in a post-conflict setting to face past human rights abuses and to help the establishment of a better future, the need to reconcile has become a great imperative in order for the society to move on.

The main element of retributive justice is the notion that "people should get what they deserve". In other words, people who do good deserve the fruit of their labour, while those who commit evil deserve to be punished, and that people deserve to be treated in the same way they treat others. ⁹² According to Opotow, retributive justice focuses on an offender's accountability to the law and to the state and seeks to redress violations through appropriate punishment. ⁹³ And in the case of where mass violations of human rights have taken place and the society is left to address these crimes, Opotow stated that retributive justice can take the form of criminal justice by

Pierre Hazan, Measuring the Impact of Punishment and Forgiveness: A Framework for Evaluating Transitional Justice, International Review of the Red Cross, Vol. 88, No. 861, March 2006, p. 30; Alexander L. Boraine, Transitional Justice: A Holistic Interpretation, supra note. 5, pp. 18 – 19.

UNSG Report on the Rule of Law and Transitional Justice, *supra* note. 14, p. 9.

Michelle Malese, *Retributive Justice*, May 2004, further information can be accessed on http://www.beyondintractability.org/essay/retributive_justice/ (accessed on 10 October 2007).

Susan Opotow, *Psychology of Impunity and Injustice*, in Bassiouni, M., (ed.), *Post Conflict Justice*, Transnational Publisher Inc: Ardsley, New York, 2002, p. 209.

establishing tribunals and conducting trials.⁹⁴ Therefore, the implementation of transitional justice applies a stricter scope of retributive justice basing it on the parameter of criminal justice and that is also one of the reasons, in the scope of transitional justice, why experts often use the term retributive and criminal justice interchangeably.

However, one must always bear in mind that the implementation of retributive justice or criminal justice ⁹⁵ is not similar to taking revenge. That, is why the ICTY Appeal Chamber stated, in one of its decisions, that it considers retribution not as "fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes", ⁹⁶ and in addition to this judgment, the ICTY Trial Chamber also added that "retribution should reflect a fair and balanced approach to the exaction of punishment for wrongdoing ... the penalty imposed must be proportionate to the wrongdoing". ⁹⁷

The ICTY judges elaborate more on this issue and take the stance of giving the deterrence affect to the implementation of criminal justice by stating that the punishment given by the Court is to "ensure that those who would consider committing similar crimes will be dissuaded from doing so". ⁹⁸ In this sense, by applying criminal justice in a proportionate manner in post-conflict situation has its own merits, as Cassese said, namely, 1) criminal proceedings create individual responsibility over collective assignation of guilt; 2) the retributive characteristic disperses the need for revenge; 3) by imposing penalty to the perpetrator, it helps the victims to be prepared for the reconciliation process with their tormentors; and 4) criminal justice can

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⁹⁸ *Ibid.*, par. 30.

⁹⁴ *Ibid.*; see also Michelle Malese, *Retributive Justice*, *supra* note. 92.

In this context, criminal justice represent as one of the forms of retributive justice, for that reason, in addressing retributive justice in the proceeding paragraphs, the term of criminal justice and retributive justice will be use interchangeably.

⁹⁶ ICTY, *Prosecutor v. Zlatko Aleksovski*, Appeal Chamber, Judgment, Case No. IT-95-14/1-A, 24 March 2000, para. 185.

⁹⁷ ICTY, *Prosecutor v. Stevan Todorovic*, Trial Chamber, Sentencing Judgment, Case No. IT-95-9/1, 31 July 2001, par. 29.

be one of the means to make a comprehensive documentation of the past in order to prevent the future generation from repeating the same atrocities.⁹⁹

However, to apply only retributive justice in a post-conflict situation has proven to be insufficient. It is true that in order to gain justice for past atrocities, perpetrators of those atrocities must be held accountable; nevertheless, accountability is not always necessarily delivered by criminal sentences.

Despite the abovementioned merits of applying criminal justice in a postconflict situation, the implementation of criminal justice is still far from perfect in addressing the whole range of transitional justice issues in a postconflict situation. Problems arising from the implementation of criminal justice in a post-conflict situation, among others, are: 1) the performance of criminal justice in a situation where mass human rights atrocities have taken place will raise serious problems of investigation of the crimes and perpetrators, consequently the prosecutions that will take place are usually directed to those sitting in superior political positions rather than the whole perpetrators; 2) criminal justice only deals with punishing the individuals who were found guilty of committing atrocities; it does not address further about the perpetrators rehabilitation and reintegration to the society; 3) indeed justice is an imperative element to establish peace however, the implementation of criminal justice only touches the surface of initializing peace and does not address peace comprehensively; 4) the application of criminal justice does not engage all of the parties who have been affected by the crime that has been committed, such as the victims and their family, the society and other related parties; and 5) when it comes to proceedings under an international tribunal, the enforcement of their decisions will be difficult since States are reluctant to assist the enforcement of such decisions.

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Antonio Cassese, *Reflections of International Criminal Justice*, The Modern Law Review, Vol. 61, No. 1, 1998, p. 6. Cassese's view also confirmed the views of Kritz on the merits of implementing criminal justice as part of transitional justice; *see also* Neil J. Kritz, *Coming to Terms with Atrocities: a Review of Accountability Mechanisms for Mass Violations of Human Rights, supra* note. 81, p. 128.

In addressing the abovementioned demerits of criminal justice implementation in a post-conflict situation, the transitional justice concept offers to utilize the restorative justice paradigm to cover these weaknesses. Braithwaite define restorative justice as:

A process of bringing together the individuals who have been affected by an offence and having them agree on how to repair the harm caused by the crime. The purpose is to restore victims, restore offenders, and restore communities in a way that all stakeholders can agree is just. ¹⁰⁰

Furthermore, according to Opotow, "restorative justice focuses on redress, but it does so by viewing transgression primarily as harm inflicted on human relationships and, secondarily, as violations of the law". ¹⁰¹ This paradigm is set out to hold the perpetrator accountable to the victims and the society with the aim to restore harmony. ¹⁰² Most importantly, restorative justice also aims at repairing the relationship between the victim and the wrongdoer; and to help the wrongdoer to be re-integrated into the society. ¹⁰³ It utilizes wider approaches to hold the perpetrators accountable, including apology, acknowledgement of the crimes, and reparation, which all in the end lead to reconciliation in a post-conflict situation. ¹⁰⁴

Restorative justice plays an imperative role especially in a society that has just experienced and witnessed massive and widespread human rights abuses since it utilizes innovative methods that make it possible to address various problems occurring in a post-conflict society and in addition, it involves all parties actively in the transitional justice process. The practice of Truth Commissions is usually considered as an obvious illustration of

John Braithwaite, A Future Where Punishment is Marginalized: Utilizing Restorative Justice as an Alternative to Retribution, Vanderbilt Journal of Transitional Law, Vol. 36, 2003, p. 213.

Susan Opotow, Psychology of Impunity and Injustice, supra note. 93, p. 209.

¹⁰² Ibid

C. Eisnaugle, An International Truth Commission: Utilizing Restorative Justice as an Alternative to Retribution, Vanderbilt Journal of Transitional Law, Vol. 36, 2003, p. 213

Ibid. See also, Ruti G. Teitel, Transitional Justice, supra note. 15, p. 146; Pierre Hazan, Measuring the Impact of Punishment and Forgiveness: A Framework for Evaluating Transitional Justice, supra note. 90, p. 24.

restorative justice application. Despite its various characteristics, ranging from the practices of Truth Commission in El Salvador to the practices in Sierra Leone, the performance of Truth Commissions reflects those characteristics of restorative justice, of which a more elaborate explanation will be given in the next section.

In this sense, restorative justice covers many aspects that cannot be covered by criminal justice to restore justice and peace in a post-conflict situation. It suggests many alternatives in addressing the problems arising from a post-conflict situation without leaving behind the necessity of accountability. In other words, the application of restorative justice within the framework of transitional justice represents the non-judicial approaches of transitional justice however, the implementation of restorative justice shall not impede the process of judicial approach within the framework of transitional justice, and both must go hand in hand, an issue that will also be discussed in depth in the subsequent chapter. Therefore, the applications of both criminal and restorative justice in post-conflict situations are in compliance with the abovementioned definition of transitional justice given by the UNSG in his report to the UNSC in 2004. ¹⁰⁵

¹⁰⁵ UNSG Report on the Rule of Law and Transitional Justice, *supra* note. 14, par. 8.

2 Transitional Justice Approaches

During the past two decades, the world has witnessed the unprecedented improvement in the handling of post-conflict situations, the rapid development of transitional justice concept. Van Zyl even argued that these developments of transitional justice have even moved from being aspirational to embodying legal obligations. ¹⁰⁶ New methods are developed, and keep on developing, not only restricted to criminal proceedings and accountability but also reaching the establishment of reconciliation to gain a holistic embodiment justice and peace.

From the abovementioned definition, the concept of transitional justice engages various mechanisms or approaches in its implementation since the process of transitional justice must embrace all aspects that might be contributing to the establishment of future and lasting peace in a post-conflict situation. These mechanisms are, based on the application of both criminal and restorative justice, among others: prosecuting the perpetrators, finding and revealing the truth about past crimes, providing reparations for the victims, public apology, reforming national corrupt institutions and supporting reconciliation. ¹⁰⁷

However, these mechanisms are not exhaustible because each post-conflict situation is usually unique in its own nature and requires different approaches of management. Based on the examples of approaches of transitional justice, it is submitted that the implementation of transitional justice is mostly of a backward looking nature. Nevertheless, due to the inclusion of reconciliation as one of the approaches since the end of World

Michelle Sieff and Leslie Vinjamuri Wright, *supra* note. 22, p. 767.

Paul van Zyl, Promoting Transitional Justice in Security Governance in Post-Conflict

Peace Building, supra note 83, p. 209

¹⁰⁹ Gerhard Thallinger, *The UN Peace Building Commission and Transitional Justice*, *supra* note 83, p. 696.

War II, or the mid 1990s to be precise, the view that the nature of transitional justice is backward looking has gradually changed to a futuristic one. 110

As has been submitted before, based on the application of criminal and restorative justice principles in the framework of transitional justice, the approaches that are applied by transitional justice are mainly classified into two approaches, judicial approach and non-judicial approach. The judicial approach is delivered by conducting criminal prosecutions of the offenders in front of domestic courts, international criminal tribunals, hybrid courts and the International Criminal Court. While the non-judicial approach utilizes the establishment of Truth Commissions, reparations for victims, institutional reform, public apology, lustration and others. These approaches will be elaborated more in the subsequent paragraphs.

2.1 Judicial Approaches

2.1.1 Domestic Courts

The power of a domestic court to try the perpetrators of mass violations in a post-conflict situation is derived from the principle of State sovereignty, where a domestic court has the authority to try criminal violations that took place in its jurisdiction in accordance with its national law and legal system. Domestic courts practicing this authority in post-conflict situations can be seen from the practices of Argentina, ¹¹¹ Indonesia ¹¹² and Rwanda. ¹¹³

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Gerhard Thallinger, The UN Peace Building Commission and Transitional Justice, supra note. 83, p. 697. See also Pierre Hazan, Measuring the Impact of Punishment and Forgiveness: A Framework for Evaluating Transitional Justice, supra note. 90, p. 19.

After the National Commission on the Disappearance of Persons in Argentina published its report, it also opens the door for public prosecution in Argentina for the former *Junta* officials even notwithstanding the Amnesty Law enacted by the Government at that time.

time.

After the referendum in East Timor in 1999 that marked East Timor independence from Indonesia, finally the GoI gave up to international pressure by enacting Law No. 26 of 2000 on the Establishment of Human Rights Court, in order to address human rights violations in East Timor, which in turn expanded to human rights violations that took place in all Indonesian territories.

National prosecutions in Rwanda are complemented with those conducted by the ICTR.

However, there are also domestic courts applying universal jurisdiction in trying offenders of certain international crimes, namely, France, ¹¹⁴ Belgium ¹¹⁵ and Spain. ¹¹⁶ In relation to the latter case, it shows that international law has developed significantly to have great influence on national legal systems and this practice really sends a clear message that perpetrators of international crimes would not go unpunished notwithstanding their rank and position.

Nevertheless, the prosecutions by domestic courts, in practice, heavily rely on the State's political will to address past violations and seek accountability, since it will greatly influence the impartiality of the court itself in trying the perpetrators that are their fellow citizens and those who used to serve (or still serving) as their political leaders. Furthermore, the lack of capacity of judges, prosecutors and police forces, not only due to the conflict but also by corrupt behavior that has been rooted in their work ethos, will also impede the deliverance of justice and peace in a post-conflict situation. Finally, with the example of Rwanda and South Africa, it will be difficult to conduct domestic proceedings in the case where there are no available human resource and supporting legal infrastructure due to the scourge of the conflict.

In 2002 France had taken prosecution measures against the President and the Minister of Interior of the Republic of Congo based on the universal jurisdiction principle, they were charges for committing crimes against humanity. Later on that year, the Republic of Congo brought the case to the International Court of Justice (ICJ).

In the Arrest Warrant case in 2000, the Democratic Republic of Congo filed an application to the ICJ concerning the arrest warrant issued by Belgium against its Minister of Foreign Affairs for committing grave breaches of Geneva Conventions of 1949 and its two Additional Protocols, and crimes against humanity. The arrest warrant issued by Belgium was also based on the principle of universal jurisdiction.

Spain made use of the universal jurisdiction argument to try former Chilean dictator, Pinnochet.

In this case, see the example of Indonesia Human Rights Court when it only manage to deliver judgment only to six alleged perpetrators of grave human rights violations in East Timor during Indonesia's occupation from 1975-1999. See David Cohen, Intended to Fail: the Trials before the Ad Hoc Human Rights Court in Jakarta, supra note. 9, p. 5.

2.1.2 International Ad Hoc Tribunals

The creation of international tribunals delivers a strong message that the international community would not tolerate the commission of such hideous crimes and hopefully that through these tribunals it would create a deterrence effect in the future. So far, there have been two establishments of international *ad hoc* criminal tribunals, namely, the ICTY and the ICTR. The UNSC under Chapter VII of the UN Charter created these two *ad hoc* criminal tribunals, since the atrocities that took place both in the Former Yugoslavia and Rwanda were considered as threats to international peace and security. Both tribunals are subsidiary organs of the UNSC.

Learning from the Nuremberg and Tokyo Tribunals, both the ICTY and the ICTR have limited jurisdiction that only covers specific times and territories where the breaches of international peace and security took place. However, there is a repetition of an important principle from the Nuremberg and Tokyo Tribunals applied by the ICTY and ICTR, stating that,

there is no sovereign immunity for heads of State or government agents; commanders are liable for acts of subordinates if they knew of them or failed to take reasonable measures to prevent them; 'superior orders' constitute mitigation but not a defence.¹²⁰

These tribunals are aiming their endeavours to try the most responsible individual actors and their accomplices for international crimes, notwithstanding their position and rank in the respective governments or in the adverse parties. According to Kritz, international tribunals stand a better

The competence of the ICTY only apply to the serious violations of international humanitarian law committed within the territory of the Former Yugoslavia since 1991, *see* the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute), article 1. While the competence of the ICTR only apply to serious violations of international humanitarian law committed by Rwandans in Rwanda and neighbouring countries between 1 January of 1994 to 31 December 1994, *see* Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), article 1.

UNSC Resolution on the Establishment of International Criminal Tribunal for the Former Yugoslavia, S/Res/827 (1993), 25 May 1993, par. 4; and UNSC Resolution on the Establishment of International Criminal Tribunal for Rwanda, S/Res/955 (1994), 8 November 1994, par. 5.

Geoffrey Robertson QC, *Crimes against Humanity: the Struggle for Global Justice*, 2nd Ed., Penguin Group: London, 2002, p. 319.

chance than domestic courts in achieving this goal because it is easier for them to get physical custody of these criminals in case they have left the country where the crimes were committed or in case the domestic courts found it impossible to prosecute these actors. Another advantage of these tribunals is that their trials ensure some sort of uniformity in the application of international law and can set up a standard for future handling of international crimes. 122

Neither of these tribunals has exclusive jurisdiction over the crimes included in their statutes ¹²³ however, the tribunals have the primacy over national courts' jurisdiction and may request deferral from the national courts, at any stage of the proceeding, in order to prosecute the perpetrators by themselves. ¹²⁴ In addition, the creation of international tribunals also has a strong basis of independence and impartiality rather than retributive ones, ¹²⁵ since the judges are consisted of professional experts from various nationalities and elected by the UNGA from a list submitted by the UNSC. ¹²⁶

In spite of the aforementioned merits of the establishment of the international *ad hoc* criminal tribunals, there are also some problems arising from their practices. The first problem is strongly related to States' cooperation and commitment in helping the works of these tribunals, if States refuse to assist the tribunals in collecting evidence or arresting the suspects, or just by simply doing nothing to help, the tribunals will find it hard to fulfil their mandates. ¹²⁷ The second problem is due to the length of international criminal proceedings; in the ICTY, for example it only managed to get custody of sixty-five indictees out of a hundred, including

Neil J. Kritz, Coming to Terms with Atrocities: a Review of Accountability Mechanisms for Mass Violations of Human Rights, supra note. 81, p. 129.

Antonio Cassese, *International Law*, 2nd Ed., Oxford University Press Inc: New York, 2005, p. 460.

¹²³ ICTY Statute, article 9(1); and ICTR Statute, article 8(1).

¹²⁴ ICTY Statute, article 9(2); and ICTR Statute, article 8(2).

Geoffrey Robertson QC, Crimes against Humanity: the Struggle for Global Justice, supra note. 120, p. 319.

¹²⁶ ICTY Statute, article 13(1); and ICTR Statute, article 12(3).

¹²⁷ Antonio Cassese, *International Law*, *supra* note. 122, p. 461 – 462.

Slobodan Milosevic, in the eighth year of its establishment not to mention the whole process of prosecuting and rendering judgments. 128 The proceedings in the ICTR turn out to be more problematic compared to those of the ICTY; the ICTR had a period of stagnancy in 1998 to 2001 where they only managed to complete eight trials. 129 Third, the problem of language that the tribunals use, usually international tribunals use more than one language and the language does not necessarily have to be the native language of the concerned State, this problem also contributed to the prolongation of the proceedings since it will be more difficult for the tribunals and prosecutors to collect evidence and conduct cross examinations. Fourth, the seat of the tribunals – both tribunals are not seated in the territories where the crimes were perpetrated – in a way does not complement the work of the tribunals. Take Arusha as the seat of the ICTR for example, it is hard to get access to Arusha and it is lacking of media coverage, so it is extremely important to ensure maximum access to the seat of the tribunals for all of the concerned parties to the conflict and the media. 130 Finally, the establishment of these tribunals involved enormous political load, due to the fact that they were created under UNSC Resolutions as its subsidiary organs and directly under the UN control, and their establishment also exhausted great amounts of resources and money, for example, the UN must provide ninety million US Dollar annually to finance the ICTR alone.

2.1.3 Hybrid Courts

The establishment of hybrid courts can be seen as a newly emerging form in applying judicial approach in post-conflict situations. The trend of establishing hybrid courts started by the end of the 1990s as a response toward atrocities that happened during civil wars. Moreover, this tendency

¹²⁸ George Robertson QC, *Crimes against Humanity: the Struggle for Global Justice*, *supra* note. 120, p. 338.

¹²⁹ *Ibid.*, p. 340.

¹³⁰ Ibid.; and Neil J. Kritz, Coming to Terms with Atrocities: a Review of Accountability Mechanisms for Mass Violations of Human Rights, supra note. 81, p. 132.

is also due to the UNSC 'tribunal fatigue' after establishing the two international *ad hoc* criminal tribunals in the Former Yugoslavia and Rwanda that exhausted a lot of funds and resources.¹³¹

'Mixed' or 'hybrid' tribunals, according to Cassese, are judicial bodies that consist of a combination of both international judges and national judges from the States where the proceedings are going to be held. Hybrid courts apply both international and the domestic law that prevails in the concerned State or in other words, the Judges will apply the domestic law of the concerned State that has been adjusted to include international law. The main characteristic of these Courts is that they are established by an agreement signed by the United Nations and the concerned States, where the UNSG plays a prominent role to bridge the United Nations with the States. The international crimes that usually fall under the jurisdiction of the hybrid courts include, among others, crimes against humanity, war crimes and other serious violations of international humanitarian law.

Up until now, ranging from 1999 to 2004, there are already five establishments of hybrid tribunals in several jurisdictions to address post-conflict situations. The first establishment is the creation of the Serious Crimes panels in the district Court of Dili, in East Timor; the second is the creation of special chamber in the courts in Kosovo; the third one is established in Bosnia and Herzegovina; the fourth one is in Sierra Leone; and the fifth hybrid court is the establishment of extraordinary chambers in the courts of Cambodia to address the crimes that were committed by

¹³¹ Antonio Cassese, *International Law*, *supra* note. 122, p. 458.

¹³² *Ibid.*, p. 458 – 459.

¹³³ Ibid., p. 459. See also Yolanda Gamarra Chopo, Peace with Justice: The Role of Prosecution in Peacemaking and Reconciliation, Revista Electrónica de Estudios Internacionales, 2007, No. 13, p. 12 –13, the article can be accessed on http://dialnet.unirioja.es/servlet/listaarticulos?tipo_busqueda=ANUALIDAD&revista_busqueda=2177&clave_busqueda=2007 (accessed on 19 October 2007).

Different with the creation of the ICTY and ITCR, which were created by the UNSC under Chapter VII of the UN Charter, the establishment of hybrid courts usually initiated by the UNSG through his efforts in negotiating with the concern States to establish such courts and pass the recommendation to the UNSC.

Antonio Cassese, *International Law, supra* note. 122, p. 459; Yolanda Gamarra Chopo, *Peace with Justice: The Role of Prosecution in Peacemaking and Reconciliation, supra* note. 133, p. 12 – 13.

Khmer Rouge. Especially with the establishment of the extraordinary chambers in the courts of Cambodia, the creation of these chambers has taken a long process and hard negotiation between the UN and the Cambodian Government; it initially started in 1998, established in 2004 and finally fully functioned since 2006. ¹³⁶

The unique characteristic of these courts also requires a distinctive treatment and practice; there is no well-established standard of hybrid court model until now. Take the court in East Timor for example, the UN sets out almost the whole legislation and provides extensive funds to finance the entire process. While in Sierra Leone, the Government took the important role in establishing all of the required legislations adjusted to international law, with the fund from the UN, and the court established special provisions for juvenile offenders that during the commission of the offences were of the age between 15 and 18 years. The creation of hybrid tribunals as an alternative in criminal proceedings within the framework of transitional justice has shown a deeper involvement of the international community in cooperating with States that have undergone hideous conflicts resulting in mass human rights violations and monitoring States' willingness to fulfil their international obligation to prosecute the perpetrators of international crimes. 138

2.1.4 The International Criminal Court

The birth of the International Criminal Court (ICC) has marked the beginning of a new era for the implementation of international criminal justice and the upholding of international human rights. Not only that it enhances the effort to eliminate the practice of impunity but it also

Ethel Higonnet, Restructuring Hybrid Court: Local Empowerment and National Criminal Justice Reform, 2005, p. 5. See also, War Crimes Research Office, International Criminal Law: a Discussion Guide for the Extraordinary Chambers in the Courts of Cambodia, supra note 15, p. 161.

This is one of the extraordinary aspects of Sierra Lionesses conflict, the Rebels involved juvenile in their raids and killings as part of their army.

Geoffrey Robertson QC, Crimes against Humanity: the Struggle for Global Justice, supra note. 120, p. 266.

symbolizes the huge step taken by the international community to create the first international judicial body to try individuals responsible for international crimes with a permanent nature.

When it comes to jurisdiction, the ICC is better equipped than the ICTY and ICTR since, the ICC has jurisdiction to try serious crimes such as genocide, crimes against humanity, war crimes and the crime of aggression¹³⁹ and its competence covers all of its State parties' territories. Moreover, according to Article 13 of the ICC Statute, the Court can exercise its jurisdiction based on a situation referred to it by a) a State party to the Statute; b) the UNSC acting under Chapter VII of the UN Charter; and c) the Prosecutor, based on his/her initiative to conduct an investigation. However, the ICC only has jurisdiction over the crimes falling within the scope of the ICC Statute committed after the entry into force¹⁴¹ and the Court stands as a last resort if the national court cannot or is unwilling to prosecute the perpetrator, which is actually reflecting the same pattern applied by the ICTY and ICTR.

At present, the ICC is directing its attention to the situations in Darfur (Sudan), the Democratic Republic of the Congo (DRC), Uganda and Central African Republic. All of these situations, except for Darfur, are referred by the State parties themselves to the Court. Darfur is a unique case; the UNSC referred the situation in Darfur since July 2002 to the Court through UNSC Resolution 1593 (2005).

From a transitional justice point of view, the establishment of the ICC has shown a significant development in enabling the victims to take part in the Prosecutor's investigation and in ICC proceedings to express their views

 139 Rome Statute of the International Criminal Court 1998 (ICC Statute), article 5(1). 140 *Ibid.*. article 4(1).

¹⁴¹ *Ibid.*, article 11(1).

¹⁴² *Ibid.*, article 17.

¹⁴³ For more information, see http://www.icc-cpi.int/index.php

and concerns on a certain situation at hand.¹⁴⁴ The Court mechanism also establishes the Office of Public Counsel for Victims in 2006 to ensure effective participation of the victims before the Court.¹⁴⁵ Finally, the ICC statute, in Article 79, creates a Trust Fund for the benefit of the victims, financed by the State parties and yet independent of the Court.¹⁴⁶

2.2 Non-Judicial Approaches

2.2.1 Truth Commissions

As has been submitted in the preceding section, the creation of truth commissions after the end of the Cold World had marked the start of a broader concept of transitional justice that embraces non-judicial alternatives to substitute or complement prosecutions. As in the case of hybrid courts, there is also no well-established standard of a truth commission model. However, several general characteristics can be brought to surface based on the practices of truth commissions that have been established all over the world and, in this regard; Hayner did a splendid effort to explain these characteristics:

First, a truth commission focuses on the past. Second, a truth commission is not focused on a specific event, but attempts to paint the overall picture of certain human rights abuses, or violations of international humanitarian law, over a period of time. Third, a truth commission usually exists temporarily and for a pre-defined period of time, ceasing to exist with the submission of a report of its findings. Finally, a truth commission is always vested with some sort of authority, by way of its sponsor, that allows it greater access to information, greater security or protection to dig into sensitive

¹⁴⁴ ICC Statute, article 68(3). For more information about victims' participation in the ICC, see Ilaria Bottigliero, The International Criminal Court – Hope for the Victims, 32 SGI Ouarterly, April 2003 on

http://www.sgiquarterly.org/english/Features/quarterly/0304/perspective.htm (accessed on 24 October 2007).

¹⁴⁵ ICC Assembly of State Parties, *Report on the Activities of the Court*; ICC-ASP/5/15, The Hague, 17 October 2006, para. 75 and 77.

¹⁴⁶ For more information, see http://www.icc-cpi.int/vtf.html

issues, and a greater impact with its report. Most truth commission are created at a point of political transition within a country, used either to demonstrate or underscore a break with a past record of human rights abuses, to promote national reconciliation, and/or to obtain or sustain political legitimacy. 147

To add to these characteristics, Mattarollo stated that, truth commissions usually are public sector bodies; they usually investigate acts committed in a single country; and that they must safeguard the evidence of the acts committed. In some cases, truth commissions offer amnesties, or forgiveness, to the perpetrators in order for them to be willing to give the facts and acknowledge their crimes; nevertheless, the discussion about amnesty will be elaborated further in the next section. Finally, as has been mentioned before, some truth commissions open the door for prosecutions based on their findings and some do not (they even suggest forgiveness to perpetrators).

Reflecting on the practice of the truth commissions in El Salvador and South Africa, many have said that the creation of truth commissions paved the way to reconciliation in a post-conflict society, since truth commission processes involve participation of both victims and perpetrators; they make it possible for the two sides to face each other. And there is no doubt that the reports from truth commissions have revealed a comprehensive documentation of the atrocities that took place at a particular time in a very detailed manner and within those reports the commissions also include constructive recommendations to achieve reconciliation. The South African TRC in this regards, is an ideal example of establishing a reconciliation process in South Africa. The conditions ruling at the time in South Africa after the apartheid regime ended did not make it possible for the new

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¹⁴⁹ *Ibid.*, p. 302.

¹⁴⁷ Priscilla B. Hayner, Fifteen Truth Commissions – 1974 to 1994: A Comparative Study, supra note 21, p. 604.

¹⁴⁸ Rodolfo Mattarollo, *Definition and Primary Objectives: To Search for the Truth and Safeguard the Evidence*, in Bassiouni, M., (ed.), *Post Conflict Justice*, Transnational Publisher Inc: Ardsley, New York, 2002, p. 295 – 299.

Government to conduct prosecutions of the former apartheid regime officials, due to the dysfunctional justice system and its apparatus. The South African TRC was born from plea bargaining process between the former apartheid regime and the new Government in order to address the grievances of the South African people.

The main aim of the South African TRC, as has been addressed in the previous section, was to put the horrible past of the South African people behind by knowing the truth and leaving prosecutions. During the course of the TRC's works, it managed to identify criminals and shaming them when the responsible individuals gave their testimony in the expense of amnesties or recommending their prosecutions if the responsible individuals refuse to give testimony or did not apply for an amnesty. The TRC's report also succeeded in making a thorough documentation of the atrocities that the apartheid regime did including naming and shaming the perpetrators.

However, the success of a truth commission is strongly dependent on the willpower of the Government to give full cooperation to the commission in order to uncover the truth of past abuses. For example, look at the practices of truth commissions in Latin American States, according to Robertson the creation of truth commission in Guatemala really showed the weaknesses of the truth commission's mechanism. The commission in Guatemala had no power whatsoever even to 'name names' and the government did not take any follow-up action to the recommendations made by the commission in its reports. Moreover, even though it is considered more successful than the truth commissions in Latin America, the report of the South African TRC in the end only served as a remembrance of the past and did not move

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¹⁵⁰ Paul van Zyl, *Dilemmas of Transitional Justice: the Case of South Africa's Truth and Reconciliation Commission*, supra note. 33, p. 651 – 653.

¹⁵¹ TRC Act, preamble, par. 3.

Geoffrey Robertson, Crimes against Humanity: the Struggle for Global Justice, supra note. 120, pp. 292 – 293.

¹⁵³ *Ibid.*, p. 281.

¹⁵⁴ *Ibid*.

the Government to fulfil their obligation to the people by prosecuting the perpetrators based on that report. ¹⁵⁵

Indeed, by establishing the truth of past abuses, to some extent, it will lift the burdens of the victims and answer many of their questions. However, it cannot guarantee that it will heal the nation completely. The creation of truth commissions are very useful in post-conflict situations, especially in a situation where the judicial system cannot work properly, they reflect the goodwill of the new Government to address past abuses and to put an end to it and they deliver another sense of justice to the victims. Nevertheless, the creation of a truth commission alone to address past abuses is not enough to deliver a complete sense of justice, both criminal and restorative; it has to be paralleled and complemented with serious follow-ups by respective Governments by way of prosecutions. Only through such way, truth commissions can really contribute in paving the way to reconciliation in a post-conflict situation.

2.2.2 Reparations for Victims

Under international law, serious violations of human rights and humanitarian law by a State entail an obligation to give reparations to the victims. This obligation to give reparation has been acknowledged through various international law instruments namely, Article 8 of the Universal Declaration of Human Rights (UDHR), Articles 2 and 9(5) of the International Covenant on Civil and Political Rights (ICCPR), Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), and Article 39 of the Convention on the Rights of the

See the judgment of South African Chief Justice, Ismail Mohamed in the case of Azanian People Organization v. President of the Republic of South Africa, (4) SA 671 (CC) (1996) (Azapo case), pp. 683 – 685, as cited in John Dugard, Dealing with Crimes of Past Regime. Is Amnesty still and Option?, 12 Leiden Journal of International Law 1999, p. 1006.

Child of 1989 (CRC), Article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), Article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (Additional Protocol I), and Articles 68 and 75 of the ICC Statute. Moreover, various regional human rights treaties also have acknowledged the obligation of the State to provide reparations for victims of serious human rights law violations. ¹⁵⁶

The availability of reparation measures is required to be guaranteed by national law; this requirement is established, among others, under Article 14(6) of the ICCPR and Article 11 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment. In this sense, States have the legal obligation under international law to provide a reparation mechanism in their domestic laws or at least have the obligation to implement these international provisions that they have ratified.

Reparation for victims is one of the most important approaches in transitional justice. It reflects the close relation between criminal justice and restorative justice in the course of the transitional justice process. The term 'reparation' is used as a general term to cover a wide range of remedial forms including restitution, compensation, satisfaction, rehabilitation and guarantee of non-repetition. Further elaboration of means of reparation,

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The provisions of the regional human rights treaties that include the obligation to provide effective remedy are, namely: article 7 of the African Charter on Human and Peoples' Rights, article 25 of the American Convention on Human Rights and articles 5(5) and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

These two provisions are strongly related to the availability of compensation, which is one of the forms of reparation under international law.

Under customary international law, reparations are usually rendered by judicial decision to amend the grievances suffered by the victims of human rights and humanitarian law to give restorative effect to the victims.

See the International Law Commission Articles on Responsibility of States on Internationally Wrongful Acts 2001 (ILC Articles on State responsibility), article 34; see also, the UN Economic and Social Council, Civil and Political Rights, Including the Question of Independence the Judiciary, Administration of Justice, Impunity: The Right to Restitution, Compensation and Rehabilitation of Gross Violations of Human Rights

which will be given in the subsequent paragraphs, will mainly derive from the ILC Articles on State Responsibility and even though these Articles reflect international customary law that apply to States however, these forms of reparation also apply to persons within the jurisdiction of the felonious State whenever these persons are victims of international human rights violations. 160

Restitution is the first form of reparation and according to Article 35 of the ILC Articles on State Responsibility, restitution means, "to re-establish the situation which existed before the wrongful act was committed ..." Examples of restitution are the release of people wrongly detained (as an example of judicial restitution) or the return of property wrongly seized (as an example of material restitution). 161 Restitution can be considered as a priority in giving reparation; other forms of reparation only can be referred to only if restitution is not a possible solution. This notion is confirmed implicitly by the decision of the Permanent Court of International Justice (PCIJ) in its decision in the *Chorzow Factory* case, which stated:

the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible. 162

One can also interpret from the decision in the *Chorzow Factory* case that giving restitution can be waived as an option if it is materially impossible,

and Fundamental Freedoms, E/CN.4/2000/62, 18 January 2000, Principles X, p. 10, par. 21 and the UNGA Resolution on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human rights Law and Serious Violations of International Humanitarian Law, A/Res/60/147, 21 March 2006 (the Guidelines on the Right to a Remedy and Reparation), Principle X, p. 7, par. 18.

¹⁶⁰ ILC Articles on State Responsibility, Art. 33(2); and Commission on Human Rights, Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report Submitted by Mr. Theo van Boven, Special Rapporteur, Sub-Commission on Prevention Discrimination and Protection on Minorities (van Boven E/CN.4/Sub.2/1993/8, 2 July 1993, p. 18, par. 45.

¹⁶¹ Commentary to article 35 of the ILC Articles on State Responsibility, pp. 238 and 240,

para. 2 and 5.

PCIJ, *Factory at Chorzow*, Merits, (Chorzow Factory case) 1928, P.C.I.J. Series A, No. 17, p. 48.

and not just merely because of legal or practical difficulties. ¹⁶³ Lastly, the performance of restitution must be proportional for both the responsible State and the victim. ¹⁶⁴

The second form of reparation is compensation. Article 36(2) of the ILC Articles on State Responsibility stated, "Compensation shall cover any financial assessable damage including loss of profits as far as it is established". This provision reflects the decision of PCIJ in the *Chorzow Factory* case:

Restitution in kind or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law. ¹⁶⁵

In short, the rendering of compensation can only be available if restitution is considered unavailable or inadequate and that compensation is delivered by payment of a sum of money to the victim. Compensation functions to address the actual loss incurred and can cover both material and non-material damage. Material damage includes loss of earnings and earning capacity aside from other material losses. While non-material damage is understood to cover the loss of loved ones, pain and suffering, humiliation, shame, degradation, loss of social position and the intrusion of the person's home or private life. The Federal Republic of Germany provided the most extensive and comprehensive example of both restitution and compensation

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¹⁶³ Commentary to article 35 of the ILC Articles on State Responsibility, p. 242, par. 8.

¹⁶⁴ ILC Articles on State Responsibility, article 35(b).

¹⁶⁵ Chorzow Factory case, P.C.I.J. Series A, No. 17, 1928, p. 47.

Commentary to article 36 of the ILC Articles on State Responsibility, p. 244, para. 3 and 4

¹⁶⁷ *Ibid.*, p. 252, par. 16

¹⁶⁸ Ibid. Non-material damage is financially assessable and can be made as a basis to claim compensation, a notion that is confirmed under various decisions of international courts, such as Lusitania case, U.N.R.I.A.A., vol. VII, (1923) p. 32; see also Janes Claim case, U.S. v. Mexico (1926), p. 504. 4 R.I.A.A. 82, cited in D.J. Harris, cases and Materials on International Law, 5th Ed., Sweet and Maxwell Ltd., London, 1998, p. 537.

in transitional justice context to the victims of Nazi persecution and one of the modalities that it applied was through the enactment of the Compensation Laws and Agreements (1948) and the Final Federal Compensation Law in 1965. 169

Satisfaction is the third form in the hierarchy of reparation mechanism under international law. It can only be rendered if the damage occurred on the victim cannot be addressed by way of restitution in kind or compensation (usually addressed as 'non-material injury'). 170 It is a form of reparation for damages that cannot be assessed financially and usually of a symbolic character. 171 Satisfaction can take various forms and it is inexhaustible, depending on the situation that requires it. Article 27(2) mentioned examples of satisfaction, however the ILC in its commentary elaborated more examples of satisfaction according to States practices, which can consist of a trust fund to manage compensation payments in the interest of the beneficiaries, disciplinary or penal action against the individual perpetrators, guarantees of non-repetition and a declaration of the wrongfulness of the act by a competent tribunal. 172 Lastly, the ILC also added that one of the most common forms of satisfaction, practiced by States, is apology, either given verbally or written by competent official or even the head of State. 173 In transitional justice context, examples of apology can be seen from the statement of regret made by the Presidents of Serbia Montenegro and Croatia for abuses conducted by their countrymen during the Yugoslavian conflict¹⁷⁴ and the apology stated by German

Kurt Schwerin, German Compensation for Victim of Nazi Persecution, Northwestern University Law Review, vol. 67, No. 4, 1972, pp. 479 – 527, cited in the van Boven Report, supra note. 118, p. 44, par. 107.

¹⁷⁰ ILC Articles on State Responsibility, article 37(1).

¹⁷¹ Commentary to article 37 of the ILC Articles on State Responsibility, p. 264, par. 3.

 $^{^{172}}$ *Ibid.*, p. 265 - 266, para. 5 - 6.

¹⁷³ *Ibid.*, p. 267, par. 7.

BBC News, *Presidents Apologies over Croatian War*, 10 September 2003, further information can be accessed on http://news.bbc.co.uk/2/hi/europe/3095774.stm (accessed on 27 October 2007).

Chancellor, Gerhardt Schoeder, to the Polish people for Nazi's conducts during World War II.¹⁷⁵

The obligation of a State to provide a guarantee of non-repetition of the abuses is stated in Article 30(b) of the ILC Articles on State Responsibility. Even though the obligation to provide a guarantee of non-repetition is not included in Chapter Two of Part Two of the ILC Articles on State Responsibility that deals with forms of reparation nevertheless, according to the Guidelines on the Right to a Remedy and Reparation, adopted by the UNGA in 2006, the obligation of the State to provide a guarantee of non-repetition is considered as one of the forms of reparation. According to the ILC, assurance of non-repetition can be sought by way of satisfaction but the distinct element of guarantee of non-repetition is that it focuses on the future and not the past. States can choose on the modalities to give guarantee of non-repetition and it might not be a firm guarantee, depending to the requirement of a particular situation. In the Guidelines on the Right to a Remedy and Reparation, it is further elaborated that modalities to provide guarantee of non-repetition of past abuses can take the forms of:

- a) Ensuring effective civilian control of military and security forces;
- b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
- c) Strengthening the independence of the judiciary;
- d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
- e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and

¹⁷⁵ BBC News, *Poles Mark 1944 Warsaw Uprising*, 1 August 2004, further information can be accessed on www.warsawuprising.com/paper/bbc news.pdf (accessed on 27 October 2007).

The Guidelines on the Right to a Remedy and Reparation, *Supra* No. 159, Principle X, pp. 8 – 9, par. 23.

Commentary to article 30 of the ILC Articles on State Responsibility, p. 221, par. 11.

¹⁷⁸ ICJ, *La Grand* case (*Germany* v. *United States*), Merits, I.C.J. Report 2001, 27 June 2001, para. 124 – 125.

¹⁷⁹ The Guidelines on the and Reparation, *Supra* No. 159, Principle X, pp. 8 – 9, par. 23.

- training for law enforcement officials as well as military and security forces;
- f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
- g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
- h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

The last form of reparation is rehabilitation, which under international law usually covers medical and psychological care for the victims. 180 Furthermore, it also obliges States to provide both legal and social services. 181 The main aim of providing rehabilitation to the victims of human rights and humanitarian law abuses is to enable a smoother transition of the victims into the society after the conflict ended. Examples of providing victims rehabilitation can be seen from the practices of the South African TRC, where one of its mandates was to provide rehabilitation to the victims of apartheid, and, more recently, the inclusion of rehabilitation provision in Article 75(1) of the ICC Statute concerning the modalities of reparation that the Court can render in its judgment.

2.2.3 Institutional Reform: Vetting and Lustration

In post-conflict situations, especially in territories that have undergone serious human rights and humanitarian law violations, usually the population must face problems of trust and incapability of their public institutions such as, the police force, judiciary, military, prison

¹⁸⁰ The Guidelines on the Right to a Remedy and Reparation, Supra No. 159, Principle X, pp. 8, par. 21. *Ibid*.

administration and State's intelligence establishments. The UNSG in the Report on the Rule of Law and Transitional Justice defines institutional reform as one of the approaches of transitional justice to address such problems in post-conflict situations.

The issue of institutional reform is strongly related to reasserting the rule of law into abusive public institutions in order to establish a sustainable peace in the long term, ¹⁸² to provide assurance to the society of non-repetition of the past abuses by the people in power, ¹⁸³ and to enable the justice and security sectors to provide accountability for past abuses. ¹⁸⁴ Institutional reform aims at renewing and enhancing the already existing institutions in post-conflict situation to be able to, once more, gain the public trust. This aim can be achieved not only by replacing all of the officials from the previous abusive regime but also, in a wider sense, by restructuring the institutions, cutting down levels of bureaucracy, and amending abusive laws that are related to the institutions and even, if it is so required, the Constitution. ¹⁸⁵

The most common examples of enhancing the process of institutional reform in post-conflict situations, according to States' practices, are the enactment of vetting and lustration laws. ¹⁸⁶ In general, both vetting and lustration are used to address the problems of post-conflict institutional reform in former communist States. ¹⁸⁷ The implementation of vetting and

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Christine Bell, Colm Campbell and Fionnuala Ni Aolain, *Justice Discourse in Transititon*, Social and Legal Studies Vol. 13(3), 2004, p. 312.

Office of the United Nations High Commissioner for Human Rights, Rule of Law Tools for Post Conflict States – Vetting: an Operational Framework, United Nations: New York and Geneva, 2006 (OHCHR Rule of Law Tools on Vetting), p. 3.

¹⁸⁴ *Ibid*.

Alexander L. Boraine, *Transitional Justice as an Emerging Field*, presented at the "Repairing the Past: Reparations and Transitions to Democracy" symposium, Ottawa, Canada, 11 March 2004, p. 3 – 4.

Eirin Mobekk, Transitional Justice and Security Sector Reform: Enabling Sustainable Peace, Geneva Centre for Democratic Control of Armed Forces, Occasional Paper No. 13, Geneva, 2006, pp. 69 – 70. See also Louis Bickford, Transitional Justice, supra note. 82, p. 1047.

They were applied in the former Soviet Union countries, Albania, Poland, Hungary, Bulgaria, Former Yugoslavia countries, East Timor, former Czechoslovakia, Germany and Indonesia.

lustration is directed at excluding and making sure that the perpetrators of past abuses will not become a part of public service sectors. ¹⁸⁸

In the scope of transitional justice, vetting is defined as:

The process of carefully examining the background of individuals and based on this information either removing them from their jobs in the security and governance sector via forced retirement or dismissal, or denying these individuals employment in these sectors by setting out carefully selected criteria that must be met by new candidates to these positions. ¹⁸⁹

On the same token, lustration is identified as:

The disqualification and, where in office, the removal of certain categories of officeholders under the prior regime from certain public or private offices under the new regime.¹⁹⁰

Basically, vetting and lustration are similar. Lustration is the term that is principally used by the former Soviet Union countries to exclude former accomplices of the Soviet Union regime from entering their public service sectors. Sometimes, in extreme cases, lustration laws even extended so far as entailing dismissals and purges based on political affiliation or even family ties with the former collaborators.

If the implementation of lustration is mostly based on the removal of public service officials from the former regime on a large scale just based on their

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¹⁸⁸ Eirin Mobekk, Transitional Justice and Security Sector Reform: Enabling Sustainable Peace, supra note. 186, p. 68.

¹⁸⁹ Eirin Mobekk, Transitional Justice and Security Sector Reform: Enabling Sustainable Peace, supra note. 186, p. 68.

Herman Schwartz, *Lustration in Eastern Europe*, in Laura Olson, *Mechanism Complementing Prosecution*, International Review of the Red Cross, Vol. 84, No. 845, March 2002, p. 181.

Laura Olson, *Ibid.*; Eirin Mobekk, *Transitional Justice and Security Sector Reform:* Enabling Sustainable Peace, supra note. 186, p. 68.

Eirin Mobekk, *Transitional Justice and Security Sector Reform: Enabling Sustainable Peace*, *supra* note. 186, p. 68. In the case of Indonesia, up until now, the GoI still applied the prohibition for the descendants or extended families of the former member of Indonesian Communist Party (PKI) from applying a job in Government institutions and several jobs in private sectors.

political affiliation, vetting, on the other hand, applies much more stringent elements. The implementation of vetting is mainly focused on the assessment of individual conduct and integrity, the element of political affiliation of an individual with the former regime serves only as an additional element for consideration. ¹⁹³

Nevertheless, the implementation of vetting and lustration laws does come with some deficiencies. The dismissals of most officials from the previous regime, especially in the field of security and judiciary, will bring up major problems of procedural fairness and due process; moreover the process of those laws can likely be highly politized. ¹⁹⁴

It should be taken into consideration that institutional reform mechanisms do not always take the forms of vetting and lustration laws. There are still many other mechanisms to carry out institutional reform in the scope of transitional justice such as, the inclusion of a comprehensive data management and statistic, a reliable and clean public official recruitment mechanism, management skills training that comply with international standards (especially when it relates to human rights issues), affirmative action measures, codes of conduct, *whistle-blower* statutes, improved management, personnel policies and administration, and establish sounder financial bases. ¹⁹⁵

Additionally, institutional reform, in a way, can also be sought as a means to deliver reparations to the victims of abuses; it can be seen as a way of giving satisfaction or guarantee of non-repetition of the past abuses. These similarities between institutional reform and reparations as approaches of transitional justice are reflected in the recommendation of the then-United Nations Commission on Human Rights as adopted in the UNGA Guidelines on the Right to a Remedy and Reparation, particularly in Principle X.

¹⁹³ OHCHR Rule of Law Tools on Vetting, *supra* note. 136, p. 4.

¹⁹⁴ Laura Olson, Mechanism Complementing Prosecution, supra note. 190, p. 182.

¹⁹⁵ OHCHR, *Rule of Law Tools for Post Conflict States: Mapping the Justice Sector*, United Nations: New York and Geneva, 2006, p. 34.

2.3 Implementation of Amnesties in Transitional Justice

The term Amnesty derives from the Greek word *Amnesis* and the Latin word *Amnestia*, which means 'oblivion' or 'forgetfulness'. Amnesty is defined as:

A sovereign act of forgiveness for past acts, granted by a Government to all persons (or to certain classes of persons) who have been guilty of crime or delict, generally political offences, – treason, sedition, rebellion, draft evasion, – and often conditioned upon their return to obedience and duty within a prescribed time... Amnesty is the abolition and forgetfulness of the offences. ¹⁹⁶

The enactment of amnesty laws in post-conflict situations has evolved into a long-standing practice since time immemorial. The argument that supports the implementation of amnesty laws in post-conflict situations stated that the implementation of amnesty laws is directed to speed-up the reconciliation process, and to help the war-torn society to bury the past. ¹⁹⁷

One argument supporting the implementation of amnesty laws, that is worthy to mention, is from the decision of the South African court in the *Azapo* case, which stated that the South African TRC decisions in giving amnesties are appropriate for a nation that faces the collapse of its judiciary and is struggling to free itself from a repressive regime and undergoing a transition era in order to achieve democracy. ¹⁹⁸ In practice, the rendering of amnesties in post-conflict situations is classified into two, which are general amnesty and conditional amnesty. ¹⁹⁹ Actually, there are some other terms

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¹⁹⁶ Joseph R. Nolan and Jacqueline M. Nolan-Haley, *Black's Law Dictionary*, 6th Ed., West Publishing CO: St. Paul, Minnesota, 1991, p. 83.

John Dugard, Dealing with Crimes of Past Regime. Is Amnesty still and Option?, supra note. 155, p. 1001; David Bloomfield et al. (Eds.), Reconciliation after Violent Conflict: A Handbook, International Institute for Democracy and Electoral Assistance, Stockholm, 2003, p. 26.

¹⁹⁸ *Azapo* case, (4) SA 671 (CC), 1996, pp. 684 – 685.

Eirin Mobekk, Transitional Justice and Security Sector Reform: Enabling Sustainable Peace, supra note. 186, p. 30; David Bloomfield, Reconciliation after Violent Conflict: A Handbook, supra note. 197, p. 108 – 110; and John Dugard, Dealing with Crimes of Past Regime. Is Amnesty still and Option?, supra note. 155, 108, p 1009.

that are commonly used for this classification such as self-amnesty, blanket amnesty, permissible and impermissible amnesty. However, for the sake of clarity, this thesis will use the terms general amnesty and conditional amnesty.

General amnesty covers all crimes committed in a prescribed time and usually done unilaterally by the outgoing elites to pardon their political leaders and army officers. ²⁰⁰ Conditional amnesty is usually rendered if the individual perpetrator could meet the requirements set out by the people granting the amnesty. ²⁰¹ Examples of general amnesty can be seen in the case of Chile, Argentina and other Latin American Countries. Especially in the case of Chile, Pinochet and his collaborators were granted unconditional and total amnesties for crimes committed between 1973 and 1978 by a military decree. ²⁰²

The South African TRC was the first body that used conditional amnesty in their truth-seeking process through an Amnesty Committee, which operated separately from the TRC but still constituted a part of the TRC. The Committee may grant amnesty if the individual stated that he or she has committed an act constituting "a gross violation of human rights", made "a full disclosure of all relevant facts" and the act is "an act associated with a political objective committed in the course of conflicts of the past". Moreover, if the Committee granted a person amnesty, it means that he or she shall not be criminally or civilly liable in respect of the act in question. The south state of the state of the act in question.

With the rapid development in international human rights, humanitarian and criminal law since the end of Cold War, the international community of

²⁰⁰ Geoffrey Robertson, *Crimes against Humanity: the Struggle for Global Justice*, *supra* note. 120, pp. 292 – 293.

²⁰¹ *Ibid*.

Neil J. Kritz, Transitional Justice: How Emerging Democracies Reckon with Former Regimes, supra note. 2, p. 500.

²⁰³ TRC Act., Section 20.

²⁰⁴ *Ibid*.

²⁰⁵ *Ibid*.

States starts to show disapprovals on the implementation of amnesty laws in post-conflict situations where massive human rights abuses had taken place. The implementation of amnesties, especially general amnesties, in post-conflict situations will nurture the culture of impunity and it will be difficult for the society undergoing a transitional process to establish an accountable rule-of-law system when there are no prosecutions for perpetrators of past abuses. Moreover, the general tendency in the international community shows that the implementation of amnesty laws, whether general or conditional amnesty, is no longer gaining international support. This is shown by the decision of the ICTY in the *Furundzija* case, which held that amnesties for torture are null and void. Furthermore, the granting of amnesties to perpetrators of gross human rights violations, war crimes and crimes against humanity is in contradiction to a States' obligation under international law to prosecute perpetrators of such crimes.

On this same ground, it is also important to point out that the granting of general amnesty to the abusive regime does not solve the problems faced by a war-torn society; it even worsens the situation as a result of the absence of accountability. There are many examples where the granting of amnesties were still followed by further abuses, among others, first, the Lomé peace agreement in Sierra Leone included provisions giving full amnesty to the combatants in 1999, nevertheless vast atrocities still took place until 2002.²⁰⁹ The second example can be taken from the situation in Chile,

²⁰⁶ Eirin Mobekk, Transitional Justice and Security Sector Reform: Enabling Sustainable Peace, supra note. 186, p. 34.

Prosecutor v. Furundzija, ICTY Appeal Chamber, case No. IT-95-17/1-T, Judgment of 10 December 1998, para. 151 – 157.

This obligation is reflected in many international law instruments such as: 1) The Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (Genocide Convention), article 4; 2) United Nations Human Rights Committee, General Comment to the ICCPR No. 20 (44), UN Doc. CCPR/C21/Rev. 1/Add 3 (1992), par. 15; 3) The Final Declaration and Programme of Action of the 1993 World conference on Human Rights, Part II, UN Doc. A/Conf/57/24 (1993), par. 60; 4) The Convention on the Non-Applicability of Statutory Limitations to war Crimes and Crimes against Humanity of 1968, articles I – II; 5) the Statutes of both the ICTY and ICTR; and 6) The Four Geneva Conventions of 12 August 1949 and the Protocols Additional to the Geneva Conventions of 1977.

Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (the Lomé Peace Agreement), 7 July 1999, article IX. The

where the granting of amnesties to Pinochet and his collaborators in 1978 and the lack of capability of the Chilean truth commission to carry out its duty did not result in the establishment of justice and peace in Chile.

On the other hand, the implementation of conditional amnesty also still has, even though it is based on individual assessment, its own deficiencies. Conditional amnesty, in the sense of the South African TRC, may serve the right of the victims to know the truth about the atrocities that have taken place and establish a comprehensive picture of the past abuses.²¹⁰ However, as Mobekk argues, conditional amnesty can also be a way for the perpetrators to avoid justice, the perpetrators can walk free after giving their testimony while the victims' sense of justice and their right to reparation may not be fulfilled.²¹¹ Furthermore, the implementation of conditional amnesty in South Africa is actually violating international law since the amnesty was given even to perpetrators of gross violations of international law and what is more, is that the conditional amnesty in South Africa frustrated the implementation of judicial approach under transitional justice framework. The statement of Archbishop Desmond Tutu, which stated that criminal prosecutions should also have been carried out in South Africa, confirmed these deficiencies.²¹²

Regardless of the strong resentment of the international community towards the implementation of amnesty laws in post-conflict situations, it is still up to the concerned State whether or not to enact amnesty laws. State practice still shows many examples of new regimes granted amnesties to the old regimes, even over grave violations of human rights, grave violations of the Geneva Conventions of 1949 (war crimes) and crimes against humanity, in

atrocities in Sierra Leone still continue after the signing of this peace agreement until 2002.

211 Ibid

<sup>2002.
210</sup> Eirin Mobekk, Transitional Justice and Security Sector Reform: Enabling Sustainable Peace, supra note. 186, p. 33.

²¹² BBC, *Tutu Urges Apartheid Prosecutions*, 16 December 2005, further information can be accessed on http://news.bbc.co.uk/2/hi/africa/4534196.stm (accessed on 2 November 2007)

post-conflict situations as one of the ways to bargain their way up to reconciliation. 213

²¹³ John Dugard, *Dealing with Crimes of Past Regime. Is Amnesty still and Option?*, *supra* note. 155, p. 1003. Generally this practice is reflected through the view of national constitutional courts that upheld the validity of amnesty laws as it was in South Africa and El Salvador.

3 Transitional Justice within the Framework of International Law

Despite the strong political influence in the concept of transitional justice, it is beyond doubt that transitional justice derives its origin from international law principles and customs. Based on the history of the genesis and development of transitional justice since the establishment of Nuremberg and Tokyo tribunals after the end of World War II, one can see that transitional justice mechanisms were born to address the violations of international law after a conflict had taken place. Therefore, when it comes to the application of transitional justice in a post-conflict situation one must see the norms of international humanitarian, human rights and criminal law as indivisible.

Furthermore, according to the definition of transitional justice given by the UNSG in his report on the Rule of Law and Transitional Justice, the goals that transitional justice is set to achieve are to "ensure accountability, serve justice and achieve reconciliation". These goals are strongly related to the dynamic development of both international humanitarian and human rights law as manifestations of the international community demanding accountability for violations of international law. In other words, the drive to apply transitional justice in post-conflict situations within the framework of international law comes from the demand of accountability for violations of international law.

This chapter will discuss further all of the issues mentioned in the above paragraphs. Moreover, later on it will discuss about the ongoing debate about justice and peace in the transitional justice process, taking into account the tendency that has been shown by States when it comes to addressing post-conflict situations. The discussion will aim to make a

²¹⁴ UNSG Report on the Rule of Law and Transitional Justice, *supra* note. 14, p. 4.

holistic view on the preference of States and the demand to respect international customs and principles in implementing transitional justice in post-conflict situations.

3.1 International Law and Transitional Justice: Indivisible in Nature

The vigorous development of international law played an important role in the genesis of transitional justice to address post-conflict situations. As has been elaborated above, there are three major areas in international law that endeavour to guarantee the rights and obligations when it comes to international crimes; international human rights law, international humanitarian law and international criminal law. Oftentimes, these branches of international law suggest overlapping provisions on States' responsibility in upholding human rights. According to Mobekk, even though these laws are often overlapping, they have a distinctive nature over the issue:

International human rights and humanitarian law focus on placing obligation on the State and how the State should treat individuals in war, armed conflict and times of peace, whilst international criminal law emphasizes on individual criminal responsibility for acts committed.²¹⁶

The nature of this relation between international human rights law, international humanitarian law and international criminal law in giving a basis for the application of transitional justice in post-conflict situations is indivisible.

As has been pointed out by Mobekk, International human rights law sets the basic human rights and freedoms that must be respected and protected in all situations, while international humanitarian law reaffirm the obligation to respect and protect human rights in armed conflict situations. When it

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²¹⁵ Eirin Mobekk, Transitional Justice and Security Sector Reform: Enabling Sustainable Peace, supra note. 186, p. 8.

²¹⁶ Ibid

comes to the situation after a conflict has ended, both international human rights and humanitarian laws call the role of transitional justice concept to come into play to address past human rights abuses, especially gross human rights violations, that took place during the conflict.

Moreover, Mobekk also stated that international criminal law emphasizes on the individual criminal responsibility for violations of international human rights and humanitarian law, 217 and in relation to the definition of transitional justice and the approaches of transitional justice given in the previous chapter, one can see that there is a harmonized relation between international criminal law and the concept of transitional justice. According to the definition of transitional justice given by the UNSG in his report on the Rule of Law and Transitional Justice in 2004²¹⁸, one of the approaches that must be taken into account in applying transitional justice to address past human rights violations in post-conflict situations is the judicial approach, which utilizes criminal prosecutions to the violators.²¹⁹ In this regard, the role of international criminal law is both as one of the basis to apply transitional justice and as a reflection of criminal justice, utilized as one of the transitional justice approaches, which in accordance with the above given definition of justice embraced by transitional justice concept.

3.2 Demand of Accountability in International Law: the Red Thread **Between International Law and Transitional Justice**

The red thread between international human rights law, international humanitarian law and international criminal law lies on the demand of those laws for accountability for gross human rights violations and the application of transitional justice is set to see that end. According to Bassiouni,

²¹⁷ Eirin Mobekk, Transitional Justice and Security Sector Reform: Enabling Sustainable Peace, supra note. 186, p. 8.

UNSG Report on the Rule of Law and Transitional Justice, *supra* note. 14, p. 4.

²¹⁹ *Ibid*.

accountability mechanisms can be classified into three major categories - truth, justice and redress, ²²⁰ which are the categories that transitional justice put forward in its implementation in handling post-conflict situations. Under international law, these categories of accountability impose upon States the obligations to investigate, prosecute violators and provide redress to the victims.

These obligations are most obviously indicated by the adoption of the provisions on effective remedy and fair trial in the ICCPR and both Additional Protocols to the Geneva Conventions. Article 2(3) of the ICCPR highlights States obligations under international law to investigate and prosecute perpetrators of the most basic Covenant rights, especially those violations that are recognized as criminal in domestic or international law, this Article also point out States' obligation to give reparation to the victims of those violations.

States' international obligation to investigate and prosecute is required to address the crime of genocide, ²²³ grave breaches of international humanitarian law, ²²⁴ torture ²²⁵ and crimes against humanity. ²²⁶ Most importantly, the latest development in international criminal law, through

M. Cherif Bassiouni, Accountability for Violations of International Humanitarian Law and Other Violations of Human Rights, in M. Cherif Bassiouni (Ed.), Post Conflict Justice, Transnationa Publishers: Ardsley, New York, 2002, p. 26.

²²¹ Colm Campbell, *Peace and the Laws of War: the Role of International Humanitarian Law in the Post Conflict Environment*, International Review of the Red Cross No. 839, 2000, p. 628.

Human Rights Committee, General Comment No. 31 [80], *Nature of the General Obligations Imposed on States Parties of the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 15 – 18.

²²³ Genocide Convention of 1948, Art. 1.

The Four Geneva Conventions of 1949, Arts. 49, 50, 129 and 146 respectively; and Protocols Additional to the Geneva Conventions of 1977, Arts. 85(1) and 88.

²²⁵ Convention against Torture, Arts. 4, 5, 7 and 8.

So far, there is no specific convention for the prohibition of crimes against humanity however, since the establishment of the Nuremberg Tribunal there is a growing tendency of customary international law that recognize crimes against humanity as international crime and that every State has an international obligation to investigate and prosecute crimes against humanity. See, Michael P. Scharf and Nigel Rodley, International Law Principles on Accountability, in M. Cherif Bassiouni, Post-Conflict Justice, Transitional Publishers: Ardsley, New York, 2002, p. 94; and Geoffrey Robertson QC, Crimes against Humanity: the Struggle for Global Justice, supra note. 120, pp. 265 – 273.

the ICC Statute, reaffirmed States responsibility to exercise their criminal jurisdiction over perpetrators of international crimes. ²²⁷ Since the gravity of these crimes is so serious, they have been defined as international crimes that invoke individual criminal liability and have risen to the level of *jus cogens*, which induce *obligation erga omnes* on the part of the States. ²²⁸ Therefore, derogations cannot be applied because they will evidently constitute a breach of a treaty obligation under Article 27 of the Vienna Convention on the Law of Treaty of 1969²²⁹ and most importantly also constitute a breach of States' obligation toward the international community as a whole.

In order to ensure the fulfilment of these obligations to address the matter of accountability, the ICC Statute also made a reinterpretation of the principle of *ne bis in idem*²³⁰ and this reinterpretation has also been utilized by the ICTY and ICTR.²³¹ The reinterpretation establishes that an alleged perpetrator of international crime might be tried for a second time if the domestic court was not impartial or independent or was trying to protect the accused from prosecution.²³² This advance step indeed can give some pressure on States to guarantee their domestic prosecution will not be lenient in handling gross human rights violations.

In other words, the reinterpretation of the principle of *ne bis in idem* also implies that if States fail to comply with their international obligation to investigate and prosecute perpetrators of gross human rights violations under their jurisdiction then the obligation falls upon the international community.²³³ The demand of accountability for gross human rights

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²²⁷ ICC Statute, Preamble, par. 4.

²²⁸ M. Cherif Bassiouni, Accountability for Violations of International Humanitarian Law and Other Violations of Human Rights, supra note 220, pp. 14 and 25.

Vienna Convention on the Law of Treaty of 1969 (VCLT), Art. 27.

²³⁰ The principle of *ne bis in idem* in international criminal law underlines the prohibition to try a person twice for the same crime.

²³¹ ICC Statute, Art. 20; ICTY Statute, Art. 9; and ICTR Statute, Art. 10.

²³² See also, Eirin Mobekk, Eirin Mobekk, Transitional Justice and Security Sector Reform: Enabling Sustainable Peace, supra note. 186, p. 10.

²³³ Colm Campbell, *Peace and the Laws of War: the Role of International Humanitarian Law in the Post Conflict Environment, supra* note 221, p. 636.

violations reflects the moral obligation that a State owes to its citizens and the international community and the need to sustain the rule of law, since conflict usually causes deep suffering, especially to the victims, and fractures the society's moral order. It is morally and legally unacceptable that perpetrators should manage to escape punishment, bearing in mind that the path to punishment must be taken in accordance with due process of law. Imperatively, in this sense, the process of transitional justice in post-conflict situations must aim to accommodate the transition process from a condition where the rule of law had ceased to exist to a condition in which the rule of law is once again established.

To establish rule of law in a post-conflict situation is of imperative importance and therefore, no derogation can be made when it comes to gaining accountability for past gross human rights violations. The granting of general amnesty, in accordance with previous discussion, is not conducive to the establishment of the rule of law in post-conflict situations and, furthermore, constituted a breach of international law. Amnesty for perpetrators of gross violations of human rights, whether general or conditional, is not only reflecting a breach of States international obligation to investigate and prosecute but also constitute a breach of another obligation under international law, which is to provide redress to the victims of those violations.

However, history has shown that, borrowing the words of Bassiouni, justice is too often bartered away for political settlements.²³⁶ *Realpolitik* practice by Governments has frequently coloured the implementation of transitional justice and is sometimes inevitable. This aspect has raised the

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Juan E. Mendez, International Human Rights Law, International Humanitarian Law, and International Criminal Law and Procedure: New Relationships, in Dinah Shelton (Ed.), International Crimes, Peace, and Human Rights: the Role of the International Criminal Court, Transnational Publishers: Ardsley, New York, 2000, p. 70.

²³⁵ Colm Campbell, *Peace and the Laws of War: the Role of International Humanitarian Law in the Post Conflict Environment, supra* note. 221, p. 638.

²³⁶ M. Cherif Bassiouni, Accountability for Violations of International Humanitarian Law and Other Violations of Human Rights, supra note 220, p. 7.

misinterpretation of the notion of peace versus justice, which will be discussed further in the next section of this chapter.

3.3 Dilemma of Transitional Justice Application in Accordance with International Law: Bartering Away Justice

It is the opinion of this thesis that accountability, in any form, is an absolute goal that transitional justice must achieve in order to establish justice and peace in a post-conflict situation. Through accountability a path to a sustainable peace in a post-conflict territory can be paved since it addresses the victims' grievances caused by a horrible conflict; it makes it possible for the new Government to gain respect and trust from the society and it has a deterrence effect that can, to some extent, prevent future conflict.

However, over the history of conflict and post-conflict management, one can see that the process to gain accountability for past gross human rights violations is often ignored by States to achieve political settlement, especially in those post-conflict situations where the perpetrators of past gross violations of human rights are officials from the previous regime. To address this tendency, Bassiouni stated:

Justice is all too frequently bartered away for political settlements. Whether in international or purely internal conflicts, the practice of impunity has become the political price paid to secure an end to the ongoing violence and repression. In these bartered settlements, accountability to the victims and the world community becomes the object of political trade-offs, and justice itself becomes the victim of realpolitik.²³⁷

²³⁷ M. Cherif Bassiouni, Accountability for Violations of International Humanitarian Law and Other Violations of Human Rights, supra note 220, pp. 7 – 8.

This tendency of bartering away justice for political settlements usually occurs when the end of a conflict resulted from political negotiation between the former abusive regime and the new, more 'democratic', regime. All in all this result strongly depends on how a particular conflict ends. The end of a conflict can be put into two classifications, which are through military defeat and negotiated settlement. ²³⁸

Based on practices of the handling of post-conflict situations, accountability, in a sense of domestic and international prosecutions, is much more feasible to be achieved in the case where a conflict is ended by a military defeat in which there has been a complete defeat of one party. Clear examples of this instance can be seen through the establishment of the Nuremberg and Tokyo Tribunals after the end of World War II by the Allied parties to try German and Japanese officials and the prosecution of perpetrators of atrocities in Rwanda by the new Government. While in the case where the end of a conflict is achieved by negotiated settlement, usually domestic prosecutions are not likely to take place because both parties stand on an equal ground so neither party can impose their will on another. 240

Another important element in the attainment of accountability *vis-a-vis* domestic or international prosecutions, is the nature of the conflict itself. Generally, accountability is feasible if the conflict was of an international character, nonetheless, it will be quite problematic if the conflict was an internal one or the conflict was due to the abuse of power by a repressive regime.²⁴¹ This is because; conflicts of an international character are sufficiently covered by the Four Geneva Conventions of 1949 and Additional Protocol I, whereas the provisions that regulate internal conflict are less adequate.²⁴² The issue becomes more problematic when a conflict

²³⁸ Michelle Seiff and Leslie Vinjamuri Wright, *Reconciling Order and Justice? New Institutional Solutions in Post-Conflict States, supra* note 22, p. 759.

²³⁹ *Ibid.*, pp. 759 – 760.

²⁴⁰ *Ibid*.

²⁴¹ *Ibid.*; see also M. Cherif Bassiouni, Accountability for Violations of International Humanitarian Law and Other Violations of Human Rights, supra note 220, p. 10.

Provisions on internal armed conflict only derive from common article 3 to the four Geneva Conventions of 1949 and Additional Protocol II of 1977

was caused by political abuses committed by repressive regimes since international humanitarian law does not provide protection for this kind of conflict.²⁴³

Internal conflict and conflict that was caused by abuse of power often end up on the negotiating table where usually criminal prosecution is avoided. In the case of international conflict, even though it ends up with negotiation between the parties, the balance of power between the conflicting States makes it possible to create a check and balance mechanism in gaining accountability, which open the way to prosecution of perpetrators of gross human rights violation. Nevertheless, despite these shortcomings, under international law, accountability for crimes against humanity, genocide, war crimes and torture apply in all of these situations. ²⁴⁴

Albeit international law does not allow any derogation whatsoever on the issue of accountability for past gross human rights violations, States that have undergone conflicts, especially internal conflicts, still applied derogations to avoid accountability *vis-a-vis* prosecutions. As a reiteration to confirm this notion, Bassiouni has correctly stated that it is often the case when it comes to post-conflict situations Governments tend to choose political settlements rather than justice through accountability.²⁴⁵

States often argue that the option of *realpolitik*²⁴⁶ over justice is necessary to ensure that the reconciliation process towards peace in a war-torn society will not be hindered. ²⁴⁷ This is due to the fact that after the end of an internal conflict or the end of a repressive regime, the Governments must sit

²⁴³ M Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Violations of Human Rights, supra* note 220, pp. 10 – 11.

²⁴⁴ *Ibid.*, p. 11 – 12.

²⁴⁵ *Ibid.*, pp. 7 – 8.

Realpolitik is defined as a system of politics that is based on the actual situation and needs of a country or political party rather than on moral principles (policy based on power rather than on ideals), often times also known as practical politics. *See* A.S. Hornby, *Oxford Advanced Learner's Dictionary of Current English*, 6th Ed., Oxford University Press: Oxford, 2000, p. 1056.

This tendency has been showed, among others, by the Government of Cambodia, Chile, Guatemala, El Salvador, South Africa and Argentina.

on the same negotiating table with either their predecessors or adversaries in order to establish a balance of power between them. The balance of power that the new Governments seeks in this matter is aimed to prevent the former abusive regimes or adversaries from using their military power to hamper the peace process, which usually happens in the case where the former regime or the adversary party still has great influence over the military forces, which may likely result in a renewed conflict or repression.²⁴⁸

Based on the very reason that has been submitted above, the new Governments generally enact amnesty laws to pardon former regime's officials or their adversaries for their acts of gross human rights violations. Furthermore, in order to confirm this argument especially in cases of internal conflict, supporters of amnesty laws derive legitimacy to enact amnesty laws from Article 6(5) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977 (Additional Protocol II) that provide:

At the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict...

This argument is acknowledged by the courts' decision in the Salvadoran Supreme Court, the Chilean Supreme Court and the South Africa's Constitutional Court. 249

This practice of giving amnesty as an embodiment of *realpolitik* to authors of gross human rights violations has been shown as common in almost all post-conflict situations all over the world; it has been shown in Cambodia where the former Khmer Rouge officials were still allowed to hold office

²⁴⁸ Garth Meintjes, *Domestic Amnesties and International Accountability*, in Dinah Shelton (Ed.), International Crimes, Peace and Human Rights: the Role of the International Criminal Court, Transnational Publishers: Ardsley, New York, 2000, p. 88.

Naomi Roht-Arriaza and Lauren Gibson, *The Developing Jurisprudence on Amnesty*, Human Rights Quarterly, Vol. 20, No, 4, 1998, p. 864.

within Hun Sen's Government and, in some cases, immune from prosecution. The implementation of amnesty law by the South African TRC is by far the most famous and claimed to be the most successful one too. These are just a few examples of amnesty law implementation in post-conflict situations, which each Government argued to be imperatively necessary to gain balance of power and to smoothen the way of peace process. ²⁵¹

Despite the fact that the enactment of amnesty laws in post-conflict situations, as a means to establish a balance of power and political settlements, is claimed by States to be the most suitable way, or even the only feasible solution, to resolve post-conflict situations, it does not erase the fact that under international law the granting of amnesty to authors of gross human rights violations is indeed an instrument of impunity and not justice. The granting of such amnesty does not lead to the betterment of post-conflict situations nor does it address the grievance of the victims; on the contrary it highlighted the concerned State's failure to come to terms with past violations occurred in its territory and may lead to future conflict.

According to legal perspective, with regard to the argument in favor of amnesty that utilizes Article 6(5) of Additional Protocol II, it shows that there is a great misinterpretation of this Article. First and foremost, international law does not provide any exception whatsoever to States' obligation to seek accountability for gross human rights violations. Secondly, Article 6(5) of Additional Protocol II does not aim at giving amnesty to those that have violated international law; it aims to provide 'combatant immunity', which ensures that combatants will not be punished

Wendy Lambourne, Justice in the Aftermath of Mass Abuses: International Law and Peacebuilding, in Ustinia Dolgopol and Judith Gardam (Eds.), The Challenge of Conflict: International Law Responds, Martinus Nijhoff Publishers: Leiden and Boston, 2006, p. 272.

Amnesty law is also enacted by States in addressing post conflict situation, among others, in Chile, Honduras, El Salvador, Guatemala, Argentina, Peru, Hungary, South Africa, Cambodia, East Timor and Sierra Leone.

²⁵² Garth Meintjes, *Domestic Amnesties and International Accountability, supra* note 248, p. 83; and M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Violations of Human Rights, supra* note 220, p. 12 – 13.

for acts of hostility during the course of an armed conflict.²⁵³ Thirdly, the overreaching implementation of amnesty on authors of gross human rights violations during an internal conflict is in contradiction to the purpose of Additional Protocol II, which emphasizes the need to "ensure a better protection for the victims of those armed conflicts".²⁵⁴ Fourthly, the granting of amnesty to perpetrators of gross human rights violations, either in an international or a non-international conflict, is indeed in contradiction to the very constitution of each State that applies an amnesty law.²⁵⁵

From a practical point of view, the development of transitional justice clearly shows that the granting of amnesty as an implementation of *realpolitik* does not solve the problem and cannot suppress society's demand for accountability, even though a state of 'peace' is claimed to be achieved. This notion has been indicated by recent development that took place in various post-conflict situations after an amnesty law has been implemented. First example, in Cambodia, after the granting of amnesty to former officials of the *Khmer Rouge*, Cambodia people's demand of accountability grew even stronger and due to international support through the active role of the United Nations, finally in 2006 the extraordinary chambers in the courts of Cambodia can fully operate to try former officials of the *Khmer Rouge*. Secondly, even though the Government of South Africa claims that the conditional amnesty applied to address the post-conflict (apartheid) situation in South Africa was a success and that it finally

²⁵³ International Committee of the Red Cross, Commentary of Article 6 of the Protocol Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Non-International Armed Conflict of 1977, p. 1397 – 1400, on http://icrc.org/ihl.nsf/COM/475-760010?OpenDocument (accessed on 22 November 2007).

Additional Protocol II, Preamble, par. 3; *See* Naomi Roht-Arriaza and Lauren Gibson, *The Developing Jurisprudence on Amnesty, supra* note. 249, p. 866.

Each State's Constitution provide basic standard for human rights protection, this notion has been supported by the decision of Argentinean Supreme Court in 2003, which stated that the Argentinean Amnesty Laws of 1986 are unconstitutional. For further information, see BBC, Argentine Amnesty Laws Scrapped, 15 June 2005, can be accessed through: http://news.bbc.co.uk/2/hi/americas/4093018.stm; See also, Naomi Roht-Arriaza and Lauren Gibson, The Developing Jurisprudence on Amnesty, supra note. 249, p. 861.

Wendy Lambourne, Justice in the Aftermath of Mass Abuses: International Law and Peacebuilding, supra note. 250, p. 272 – 273.

brought justice and peace to the people without prosecuting the perpetrators however, peace is still far to be achieved by the South African people, the Apartheid character is still there and Archbishop Desmond Tutu even stated that "We probably should have done what the legislation requires and really prosecuted people". The third example of the development is derived from the situation in Sierra Leone. As has been mentioned in the previous chapter, the granting of amnesty in Sierra Leone proved that amnesty and political settlement clearly cannot establish peace for the Sierra Leonean, the Lomé Peace Agreement of 1999 that granted amnesty to all combatants cannot prevent the continuation of armed conflict and gross violations of human rights taking place in Sierra Leone until 2002.

Political settlements as an exchange for implementing justice clearly do not guarantee the achievement of peace in a post-conflict situation; they only pending the inevitable and will produce further problems in the future since addressing the grievances of the victims is the most important factor as a starting ground to establish peace and this can only be gained by seeking accountability for past abuses. This phenomenon of bartering away justice for political settlements by Government in post-conflict situations has once again highlighted the tragically deceptive dichotomy in the transitional justice process, which is to have peace (with the exclusion of a justice process) or to have justice (which means it will be difficult to establish peace).

History has shown, evidently, that this dichotomy is somewhat deceptive and fallacious. Justice and peace process can be achieved without championing either one; they are not separated means; on the contrary they are strongly related. Peace can only be achieved by the attainment of justice and this relation has been well addressed by the statement of Pope Pius XII to the Sixth International Congress of Penal Law:

²⁵⁷ BBC, Tutu Urges Apartheid Prosecutions, supra note. 212.

A peaceful and ordered social life, whether within a national community or in the society of nations, is only possible if the juridical norms which regulate the living and working together of the members of the society is observed.²⁵⁸

Furthermore, this notion goes hand in hand with the stance held by international law in which no derogation can be made under any circumstances in case of seeking accountability for gross human rights violations. The dichotomy between justice and peace in the concept of transitional justice proves to be no longer valid.

In conclusion, this thesis affirms that justice must be served in order to attain a sustainable peace in a post-conflict situation. Justice may be postponed due to the unstable situation in a post-conflict territory, as it has been shown in Argentina, Cambodia and Sierra Leone, however it cannot be waived, especially by amnesty to perpetrators of gross human rights violations since it will nurture the culture of impunity and the seeds of future conflict. The true dichotomy that actually exists during the course of transitional justice in post-conflict situations is not about the question of choosing between justice and peace but rather about choosing between political settlement and the attainment of peace.

²⁵⁸ His Holiness Pope Pius XII, *International Criminal Justice*, Address to the Sixth International Congress of Penal Law, *cited in:* M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Violations of Human Rights*, *supra* note 220, p. 8 – 9.

4 Case Study on Indonesia: the Implementation of Transitional Justice in Aceh and Papua

Human rights violations have a long-standing history of occurrences in Indonesia. The flow of information on these violations was successfully suppressed by the New Order Regime, mainly through military forces and intelligent operations, for 32 years until its downfall in 1998. Any form of freedom in Indonesia in that period was also restricted, especially freedom of expression. Violence had become a norm, which the GoI employed indiscriminately to those who showed the slightest disagreement with the GoI. 259 To describe the severity of the condition at that time, it is valid to state, "almost every Indonesian has a family member, relative, or acquaintance who is a victim of state violence". 260 Moreover, the culture of corruption that stemmed deep within the Indonesian bureaucracy has added more sufferings to the people. 261

The people's dissatisfactions finally amounted to big riots, taking place in Indonesia's big cities, especially Jakarta, which ultimately forced Soeharto's resignation. The year 1998 marked a dawn of a new era for the people of Indonesia, free of repression and fear, it was a new era, where most of the people believed that after a long period of suffering, their human rights would finally be respected and upheld.

²⁵⁹ Hilmar Farid and Rikardo Simarmatra, The Struggle for Truth and Justice: a Survey of Transitional Justice Initiatives Throughout Indonesia, supra note 38, p. 20. Violent attacks during the reign of Soeharto were directed at, among others, Muslim community that rejected the idea of Pancasila, students and academicians that dare to criticized Government policies, nationalist (supporters of President Soekarno), etc.

²⁶⁰ *Ibid*.

All public service sectors in Indonesia at that time, namely institutions that deal with land ownership, investment, civil registry, courts, and the police applied many layered of bureaucracies and the officials in charge usually demand additional money from the applicant if he or she wants his or her case to be handled as soon as possible.

The process of transitional justice in Indonesia started exactly after the downfall of the New Order regime. Generally, the approaches are directed to address the frequent human rights violations taking place in Indonesia where military forces were often used as a means to suppress political opposition and to maintain national unity.²⁶²

Transitional justice process in Indonesia faces a long and bumpy road towards the establishment of justice and peace, due to the fact that after the fall of the New Order Regime, Indonesia has never had a strong Government and the New Order Regime still retain significant political and military power. Generally, until now, Indonesia is still in an ongoing transitional process, however this thesis is not intended to discuss all of the ongoing transitional justice processes taking place in Indonesia; it only focuses on discussing the transitional justice mechanisms applied to the situations in Aceh and Papua.

After the fall of the New Order Regime in 1998, there have been frequent changes in the structure of GoI; within less than six years, Indonesia has experienced the leadership of four Presidents. Each leadership applied a different policy to address the situation in Aceh and Papua. For example, the separatist movements in Aceh and Papua increased their resistance towards the GoI after the downfall of the New Order Regime. Part of the explanation to this example is that President Habibie's administration's lenient policy at that time allows pro independence movements to organize their respective territories, which in the end resulted in the independence of East Timor from Indonesia. The policy was changed, under President Megawati Soekarnoputri's administration, military forces to suppress the separatist

²⁶² Hilmar Farid and Rikardo Simarmatra, *The Struggle for Truth and Justice: a Survey of Transitional Justice Initiatives Throughout Indonesia*, *supra* note 38, p. 20.

²⁶³ Many of the ministries and members of parliament in the new regimes were also used to hold important positions during the reign of the New Order Regime.

²⁶⁴ Hilmar Farid and Rikardo Simarmatra, *The Struggle for Truth and Justice: a Survey of Transitional Justice Initiatives Throughout Indonesia*, supra note 38, p. 89.

movements and restrictions to civilians in the two territories, especially with regard to GAM, were once again commenced.²⁶⁵

These inconsistencies of policies on Aceh and Papua applied by different leaderships have stalled the transitional justice process. Even though armed conflict between the GoI and the separatist groups hardly exist any longer in Aceh and Papua, it is the inconsistencies in policies or legislations that have made it difficult to implement proper transitional justice mechanisms.

Furthermore, the enactment of Law No. 21 of 2001 on the Special Autonomy for Papua Province and Law No. 11 of 2006 on the Regional Government of Aceh requires the implementation of transitional justice mechanisms in those territories, especially through the utilization of truth commissions. Those provisions are actually an affirmation of the GoI general obligation prescribed under Law No. 27 of 2004 on Truth and Reconciliation Commission, to establish truth commissions in order to address past human rights violations in Indonesia as a supporting mechanism to the Indonesian Human Rights Court. ²⁶⁷

Nevertheless, in 2006 the Indonesian Constitutional Court nullified Law No. 27 of 2004 on Truth and Reconciliation Commission, which also abolished the possibility of establishments of truth commissions in Aceh and Papua. This issue will be one of the main issues discussed in this chapter together with other transitional justice mechanisms that have been and should have been implemented in Aceh and Papua.

²⁶⁵ Ibid

Republic of Indonesia, Law No. 11 of 2006 on the Regional Government of Aceh, Art. 229(1) and Law No. 21 of 2001 on the Special Autonomy for Papua Province, Art. 45(2).

Republic of Indonesia, Law No. 27 of 2004 on the establishment of Truth and Reconciliation Commission, Preamble, para. a and c; and Art. 3(a).

4.1 Judicial Approaches taken by Gol to Address Human Rights Violations in Aceh and Papua: Law No. 26 on the Establishment of Indonesian Human Rights Court

The GoI in 1999, under President Habibie's administration, tried to respond to the people's demands in counting perpetrators of gross human rights violations accountable and upholding their human rights. As a start point, the GoI changed its position concerning the conflict in East Timor and most importantly, the GoI enacted Law No. 39 of 1999 on Human Rights that also marked the first establishment of Indonesian National Commission on Human Rights (Komnas HAM). In September 1999, East Timor gained independence from Indonesia in accordance with the result of the second referendum that was held by the United Nations Transitional Administration in East Timor (UNTAET).

This momentum was used by the international community of States through the United Nations to put pressure on Indonesia to address its past human rights violations and to guarantee the respect and implementation of human rights in the future. In December of 1999, the United Nations Human Rights Commission (UNHRC) held a special session in Geneva, where the United Nations High Commissioner on Human Rights urged the GoI to cooperate with the United Nations to establish an International Commission of Inquiry to address human rights violations taking place in East Timor, especially concerning the riot that took place after the second referendum in 1999. ²⁶⁹ Furthermore, it also affirmed the GoI obligation to prosecute perpetrators of human rights and international humanitarian law violations. ²⁷⁰

²⁶⁸ Republic of Indonesia, Law No. 39 of 1999 on Human Rights, Art. 75 concerning the establishment of Komnas HAM.

Economic and Social Council, Report of the Commission on Human Rights on its Fourth Special Session (Geneva, 23 – 24 September 1999), E/CN.4/1999/167/Add.1,E/1999/23/Add.1, 20 October 1999, preamble.

²⁷⁰ *Ibid.*, Point no. 4 and 5(a).

The GoI was not very enthusiastic about the idea presented by the International Commission of Inquiry on East Timor to establish an international *ad hoc* human rights tribunal to investigate past human rights violations that have taken place in its territory, since it was afraid that this recommendation would infringe its national sovereignty and interest. In response to the UNHRC intention to establish an international *ad hoc* human rights tribunal, the GoI promptly, based on Law No. 39 of 1999, enacted the Government Regulation in Lieu of a Law No. 1 of 1999 on the Establishment of Human Rights Court on 8 October 1999.²⁷¹ The UN eventually endorsed this stance chosen by the GoI.²⁷²

The enactment of Government Regulation in Lieu of a Law No. 1 of 1999 was the legal foundation to establish Indonesian human rights court, later on this Government Regulation in Lieu of a Law was replaced with Law No. 26 of 2000 on Human Rights Court. Law No. 26 of 2000 is the first legal foundation in Indonesia that represents the effort of the GoI to implement a judicial approach in Indonesia's transitional period after the fall of the New Order Regime. Furthermore, it symbolizes the hope of people in post conflict territories, especially the Acehnese and Papuan, to have their grievances remedied.

Law No. 26 of 2000 on Human Rights Court was enacted on 23 November 2000, under President Abdurrahman Wahid's administration. It establishes a permanent human rights court in Indonesia. The human rights court was created as a special chamber within the already existing court system and only addresses gross human rights violations that occurred after the enactment of Law No. 26 of 2000.²⁷⁴ However, the law had an exception, which stated that for certain cases of gross human rights violations that took

²⁷¹ Republic of Indonesia, Government Regulation in Lieu of a Law No. 1 of 1999 on the Establishment of Human Rights Court.

http://humanrightscourt.or.id/develop/ (accessed on 1 December 2007).

Republic of Indonesia, Law No. 26 of 2000 on the Establishment of Human Rights Court.

Republic of Indonesia, Law No. 26 of 2000 on the Establishment of Human Rights Court, Arts. 2 and 47(1); and General Comment to Law No. 26 of 2000, preamble, par. 10.

place prior to the enactment of Law No. 26 of 2000 would be addressed by the establishment of an ad hoc human rights court based on the recommendation made by the Indonesian People's Representative Assembly (DPR) and approved by the President.²⁷⁵ The human rights court has jurisdiction to try gross human rights violations namely, the crime of genocide and crimes against humanity²⁷⁶, which are the crimes that are not covered adequately by the Indonesian criminal code. The law explicitly introduces the term of command responsibility for the first time in Indonesian criminal code that covers the liability of military commanders as well as police and civil leaders for gross human rights violations perpetrated by their subordinates.²⁷⁷

Basically, the enactment of Law No. 26 of 2000 and the establishment of human rights court in Indonesia have shown the good intention from the side of the GoI to address past gross human rights violations as part of its transitional process. Nevertheless, both the Law and the court came with their own shortcomings.

The first shortcoming is with regards to the establishment of human rights ad hoc court to address past gross human rights violations that took place before the coming into force of Law No. 26 of 2000, as prescribed under its Article 43. Such establishment must be based on the recommendation made by DPR and approved by the President. This provision is not conducive in the enforcement of justice and full of political content rather than legal ones since it requires the active role of political bodies. Practically, this provision has not yet responded to the grievances of the victims of gross human rights violations that occurred before the enactment of Law No. 26 of 2000. Even though it is possible to request the DPR to make a recommendation on the establishment an ad hoc human rights court to address a certain issue of gross violations of human rights nevertheless, according to the fact, it will take a long time for the DPR to make a recommendation and usually it is

²⁷⁵ *Ibid.*, Arts. 43(1) and (2). ²⁷⁶ *Ibid.*, Art. 7.

²⁷⁷ *Ibid.*, Art. 42.

unlikely for them to pass a recommendation for such an establishment. ²⁷⁸ So far, there have been two establishments of human rights *ad hoc* court in Indonesia. So far, there have been two establishments of *ad hoc* human rights courts to address gross human rights violations in East Timor between April – September 1999 and in Tanjung Priok in September 1984, based on Presidential Decision No. 53 of 2001, which later on amended by Presidential Decision No. 96 of 2001. ²⁷⁹ However, these institutions have been established following the international threat to establish an international human rights tribunal if Indonesia cannot fulfil its international obligation to address its past gross human rights violations and not because of the internal willingness of the GoI. Nevertheless, these *ad hoc* human rights courts have not fulfilled the public expectation, which can be seen from the number of cases filed and decisions rendered by the *ad hoc* human rights courts where most of the alleged perpetrators were declared as not guilty by the courts. ²⁸⁰

The second shortcoming of the establishment of human rights court in Indonesia is in relation to the jurisdiction of the court that only covers the crime of genocide and crimes against humanity²⁸¹ and leaves out war crimes. The exclusion of war crimes in the jurisdiction of the human rights court undermines the fact that there are many internal armed conflicts taking

Harian Kompas, *Aksi Kamisan: Presiden dituntut Tuntaskan Kasus Pelanggaran HAM*, Kompas, 2 November 2007, http://www.kompas.co.id/kompas-cetak/0711/02/Politikhukum/3967402.htm (accessed on 4 December 2007). There have been some demands from the public asking both the DPR and President to establish another *ad hoc* human rights court for past gross human rights violations however, such demand is hard to be approved. As an example, the case concerning gross human rights violations during the riot of 1998 in Trisakti University and Semanggi has not gained any approval to establish an *ad hoc* human rights court even though it has been included in many of the DPR sessions but not a single recommendation for such establishment has ever been passed until so far.

Republic of Indonesia, Presidential Decision No. 96 of 2001 jo. Presidential Decision No. 53 of 2001 on the Establishment of Ad Hoc Human Rights Court within the District Court of Central Jakarta, Art. 1.

Kontras, Mahkamah Agung Mesin Cuci Pelanggaran HAM, Press Release, 2 March 2006, http://kontras.org/index.php?hal=siaran_pers&id=290 (accessed on 16 August 2007); and Ninuk M Pambudy and Maria Hartiningsih, Belajar dari Pengadilan HAM Ad Hoc, Kompas, 27 August 2005, http://kompas.com/kompas-cetak/0508/27/swara/2001986.htm (accessed on 3 December 2007).

Republic of Indonesia, Law No. 26 of 2000 on the Establishment of Human Rights Court, Arts. 7 – 9.

place in Indonesia, especially in Aceh and Papua. The absence of war crime in the Court's jurisdiction also highlights the grim fact that Indonesia until now has not ratified both Additional Protocols I and II of 1977 to the Geneva Conventions of 1949. The fact that Indonesia has not ratified both Additional Protocol I and II to the 1949 Geneva Conventions of 1977 actually does not exclude Indonesia from its obligation to try perpetrators of war crimes within its territory since Indonesia is one of the high contracting parties to the four Geneva Conventions of 1949 since 1958²⁸³ and therefore, the inclusion of war crimes under Indonesian human court's jurisdiction is obligatory in nature. Furthermore, the inclusion of the term 'command responsibility' in Law No. 26 of 2000, under international law and custom, also refers to the condition of armed conflict as it is confirmed in both Yamashita and Medina case. ²⁸⁴

4.1.1 Law No. 26 of 2000 and the Obligation to Address Past Gross Human Rights Violations in Aceh and Papua: Reluctance to Establish an *Ad hoc* Human Rights Court

Prior to the enactment of Law No. 26 of 2000 on the establishment of human rights court, various bodies and committees have confirmed that gross human rights violations had occurred in Aceh and Papua committed by both the military forces and the freedom movements (GAM in Aceh and

²⁸² ICRC, State Parties to the Following International Humanitarian Law and Other Related Treaties as of 5 December 2007, p. 3, see http://icrc.org/IHL.nsf/(SPF)/party_main_treaties/\$File/IHL_and_other_related_Treaties_pdf (accessed on 5 December 2007).

²⁸³ Ibid

Case No. 21, Trial of General Tomoyuki Yamashita, United States Military Commission, Manila (8 October – 9 December 1945), Judgment of 7 December 1945, UN War Crimes Commission, 4 Law Reports of the Trials of War Criminals, 1948, 3, cited in Edoardo Greppi, The Evolution of Individual Criminal Responsibility under International Law, International Review of the Red Cross, No. 835, 30 September 1999, http://icrc.org/web/eng/siteeng0.nsf/htmlall/57jq2x?opendocument (accessed on 4 December 2007); and the United States v. Medina, C.M. 427162 (1971), cited in Michael L. Smidt, Yamashita, Medina and Beyond: Command Responsibility in Temporary Military Operations, Military Law Review, Vol. 164, 2000, p. 163.

OPM in Papua).²⁸⁵ The violations that had been imposed on the Acehnese and Papuan people constituted genocide crimes against humanity and war crimes under international law and Law No. 26 of 2000.

In relation to the alleged gross human rights violations that have taken place in Aceh and Papua, the current condition shows that the human rights court has not functioned comprehensively in addressing those alleged violations. In 2006, there was no case brought up to the human rights court with regards to gross human rights violations that took place in Aceh and Papua or those that took place in the other parts of Indonesia. Furthermore, there is no continuation by either the DPR or the Attorney General Office (Kejagung) on the investigation reports of alleged past gross human rights violations submitted by various commissions and committees, especially from Komnas HAM reports, that implied that the establishment of an *ad hoc* human rights courts to address the atrocities taken place before the coming into force of Law No. 26 of 2000 is necessary.

²⁸⁵ Gross human rights violations in Aceh can be found in the reports of: 1) Lembaga Studi dan Advokasi Masyarakat (ELSAM), Kondisi dan Proyeksi Pemajuan dan Penegakan Hak Asasi Manusia di Indonesia: Catatan HAM Awal Tahun 2007, January 2007, p. 23; 2) Komisi Independen Pengusutan Tindak Kekerasan di Aceh, DOM dan Tragedi Kemanusiaan di Aceh, January 2000, cited in Kontras, Aceh Damai dengan Keadilan? Mengungkap Kekerasan Masa Lalu, Jakarta, 2006, pp. 71 – 87; 3) Human Rights Watch, Indonesia: the War in Aceh, supra note 41, pp. 14 – 34; 4) Human Rights Watch, Aceh under Martial Law: Inside the Secret War, Supra No. 42, pp. 18 – 44; and 5) Human Rights Watch, Aceh at War: Torture, Ill-Treatment, and Unfair Trials, supra note. 35, pp. 11 – 48.

Gross human rights violations that occurred in Papua can be found in the reports of: 1) ELSAM, *Briefing Paper: Catatan Kondisi Hak Asasi Manusia di Papua*, 2006, pp. 1 – 3; and 2) Human Rights Watch, *Out of Sight: Endemic Abuse and Impunity in Papua's Central Highlands*, *supra* note. 61, pp. 24 – 64.

Lembaga Studi dan Advokasi Masyarakat (ELSAM), Kondisi dan Proyeksi Pemajuan dan Penegakan Hak Asasi Manusia di Indonesia: Catatan Awal Tahun 2007, supra note. 285, pp. 9 – 10.

²⁸⁷ *Ibid*.

²⁸⁸ Ibid. In order to investigate the alleged past gross human rights violations in Aceh, the GoI in 1999 enacted Presidential Decision No. 88 to establish an independent commission to conduct investigation on violence in Aceh (Komisi Independen Pengusutan Tindak Kekerasan di Aceh) both committed by the military and non-military. While concerning alleged past gross human rights violations in Papua, Komnas HAM conducted most of the investigations through the establishment of the Human Rights Violations Investigation Commission (KPP HAM), which also investigate the alleged gross human rights violations taking place in Aceh however, KPP HAM for both Aceh and Papua only investigate those violations occurred after the enactment of Law No. 26 of 2000.

The absence of an *ad hoc* human rights court for Aceh and Papua can be considered as a violation of Indonesia's obligation under international law by failing to prosecute the perpetrators of such hideous crimes. However, aside from the provision in Article 43 of Law No. 26 of 2000, there is no other provision under Indonesian legislation that enables prosecutions of those responsible for past gross human rights violations occurred between 1970s until 2000. Furthermore, even though Law No. 11 of 2006 on the regional Government of Aceh and Law No. 21 of 2001 on the Special Autonomy for Papua Province requires the establishment of a human rights court in Aceh and Papua nevertheless, the court only has jurisdiction over gross human rights violations that took place after the coming into force of these laws. ²⁸⁹ Even the Helsinki MoU that reflect the foundation of peace establishment in Aceh has an unclear provision concerning the relating to what extent the establishment of a human rights court in Aceh can address past gross human rights violations. ²⁹⁰

Despite the lack of a specific legislation, that explicitly gives power to human rights court to try perpetrators of past gross human rights violations taking place before the enactment of the abovementioned laws, Indonesia's obligation to try those perpetrators still exist. The national legal framework has already provided a way for Indonesia to fulfil its obligation and the ratification of ICCPR and ICESCR by the GoI in 2005²⁹¹ is supposed to strengthen the legal foundation for Indonesia to try perpetrators of gross human rights violations in Aceh and Papua. The ratification of ICCPR actually can solve the question of retroactive law and also enhance the applicability of Article 43 of Law No. 26 of 2000. Article 15 of ICCPR

²⁸⁹ Republic of Indonesia, Law No. 11 of 2006 on the Regional Government of Aceh, Art. 228; Republic of Indonesia, Law No. 21 of 2001 on the Special Autonomy for Papua Province, Art. 45(2).

Memorandum of Understanding between the Government the Republic of Indonesia and the Free Aceh Movement, Helsinki, Finland, 15 August 2005, point 2.1. Provision 2.1 of the Helsinki MoU only demand for an establishment of a human rights court in Aceh but it does not explain about to what extent in time can the court exercise its jurisdiction over gross human rights violations.

²⁹¹ Republic of Indonesia, Law No. 11 of 2005 on the Enactment of International Covenant on Economic, Social and Cultural Rights, 28 October 2005; and Republic of Indonesia, Law No. 12 of 2005 on the Enactment of International Covenant on Civil and Political Rights, 28 October 2005.

confirms that a prosecution should not be retroactive however, it makes an exception when it comes to "any act or omission which, at the time it was committed, was criminal according to the general principles of law recognized by the community of nations". This implies that crimes such as genocide, war crimes, crimes against humanity and torture may be punished by means of retroactive domestic criminal laws. ²⁹³

The combined implementation of Law No. 39 of 1999 on human rights, Law No. 26 of 2000 and Law No. 12 of 1005 on the enactment of ICCPR is sufficient enough for the GoI to fulfil its international obligation for the time being to try perpetrators of past gross human rights violations in Aceh and Papua. The establishment of *ad hoc* human rights courts is the only possible way according to Indonesia's legislation to address past gross human rights violations in Aceh and Papua.

Nevertheless, like in all other cases of human rights abuses in any other part of the world, the law, either international or national, never goes hand in hand with the actual implementation and the situations in Aceh and Papua is not an exception. Since the enactment of Law No. 26 of 2000 that enables the establishment of Indonesian human rights court to try gross human rights violations, up till now the court has not shown a significant effort to uphold justice for the Acehnese and Papuan people.

Initial step to address international concern and the grievances of the people of Aceh and Papua has been taken by the GoI through apology statements made by the head of State and the national military commander, and through the establishment of a fact finding team and investigation committees. National reports that identified the occurrences of gross human rights violations in Aceh, prior to the enactment of Law No. 26 of 2000, have been submitted to the GoI and Kejagung by independent committees established

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²⁹² ICCPR, Art. 15(2).

²⁹³ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd revised edition, Germany, N.P. Engel Publisher, 2005, p. 368. According to the *travaux preparatoires* of article 15(2) of ICCPR, this exception is strongly related to the principles of international law recognized in the Nuremberg Charter and judgments.

by GoI and Komnas HAM, namely 1) report from the Fact Finding Team on gross human rights violations during the DOM period of 1989 – 1998;²⁹⁴ and 2) report of the Independent Investigations Commission on the Tgk. Bantaqiyah massacre and Idi Cut massacre in 1999.²⁹⁵ Hitherto, there has not been any official investigation from the GoI with regards to the gross human rights violations committed between 1950s, since the start of DI/TII rebellion, and 1989, prior to the establishment of the first DOM in Aceh. Unfortunately, when it comes to the case of Papua, there is no establishment of fact-finding team or independent investigation commission to investigate the occurrences of gross human rights violations in Papua prior to 2000.

Notwithstanding the short period allocated to investigating the crimes, investigative phase had been concluded and reports have been submitted. It means that the GoI has already been fully aware about the atrocities that took place in Aceh and Papua and measures to follow-up those reports must be taken promptly before the evidence and the memory of the witnesses start to fade. Reports have been submitted to the GoI and yet no significant legal step has been taken so far. Even though the establishment of *ad hoc* courts to address these crimes in Aceh and Papua respectively is possible under Article 43 of Law No. 26 of 2000 however, its implementation has not yet taken place. Neither the DPR nor Kejagung showed an interest in responding to either of the report.

This demonstration of GoI reluctance to address gross human rights violations in Aceh and Papua prior to the enactment of Law No. 26 of 2000, let alone to establish *ad hoc* human rights court in the respective areas, was also clearly demonstrated during one of discussions in the DPR conducted by the Special Committee of the Draft Law on the Regional Government of Aceh (Pansus UUPA) concerning the provision on the establishment of a

²⁹⁴ Bunadi Hidayat, Perlindungan Hak Asasi Manusia sebagai Proses Pengembangan Lembaga Hukum Modern di Indonesia, Yuridika, Vol. 21, No. 4, July – August 2006, Airlangga University, Surabaya, p.441; and International Crisis Group, Indonesia: Impunity versus Accountability for Gross Human Rights Violations, supra note. 46, p. 6.
²⁹⁵ Ibid.

human rights court in Aceh.²⁹⁶ During those discussions, representatives from the Indonesian Democratic Party (PDIP) stated that they strongly favoured the establishment of a truth commission to address past gross human rights violations in Aceh rather than to establish an *ad hoc* human rights court due to the retroactive law issue.²⁹⁷ Furthermore, they also demanded that, in relation with the Helsinki MoU, the GoI should also give amnesty to the members of Indonesian military that were assigned in Aceh and not only to the members of GAM.²⁹⁸ Other political parties' representatives in the Pansus UUPA also shared this view.²⁹⁹

Indeed, this example only serves as one of the indications of GoI reluctances to implement judicial approach in Aceh and Papua. As has been confirmed before, in order to fulfil its international obligation, the establishment of *ad hoc* human rights courts to address past gross human rights violations in Aceh and Papua is the only option under Indonesian legislations however, even the very idea to address those crimes that occurred before 2000 is always been summarily dismissed by the DPR let alone the establishment of an *ad hoc* human rights court.

In other words, there is practically no initiative to establish *ad hoc* human rights court to address the atrocities that took place in Aceh and Papua prior to 2000. Under Article 43 of Law No 26 of 2000, the DPR is supposed to be the key actor in addressing past gross human rights violations but, so far all of the reports submitted by various investigative committees and fact finding teams have never been taken seriously by the DPR or the GoI in general. The legal foundation to address those violations in Aceh and Papua

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²⁹⁶ The discussions were held before the enactment of Law No. 11 of 2006 on the Regional Government of Aceh to evaluate the draft laws submitted by the GoI and Aceh's Regional Consultative Assembly (DPRD Aceh). For further information about the discussions, *see* Kontras, *Laporan Hak Asasi Manusia Tahun 2006: HAM belum jadi Etika Politik*, Jakarta, August 2007, pp. 132 – 133.

²⁹⁷ *Ibid*.

²⁹⁸ *Ibid*.

²⁹⁹ *Ibid.* Only one party, the National Mandate Party (Partai Amanat Nasional, PAN), gave a strong support to provision concerning the establishment of a human rights court in Aceh without objecting to the issue of retroactivity.

between the 1950s and 2000 is there however; the political will of the GoI to implement it so far, is not yet to be found.

4.1.2 Cases of Gross Human Rights Violations in Aceh and Papua before the Indonesian Human Rights Court: Is there any Hope?

The conflicts in Aceh and Papua certainly do not end with the coming into force of Law No. 26 of 2000. As has been mentioned before, after the lifting of DOM status on Aceh in 1998, the tension between the GoI and GAM did not diminish on the contrary it continued to escalate until 2004 in which another period of DOM was imposed to the Achenese. Meanwhile in Papua, the tension between the GoI and OPM escalated after 2000, which also involved resistance from civilians, in fact, unlike the case in Aceh, the independent committees and fact-finding teams were created only to investigate specific cases of gross human rights violations that took place in Papua after the enactment of Law No. 26 of 2000. 301

After the establishment of human rights court in the Indonesian court system in 2000, the court had various cases of gross human rights violations ranging from those crimes committed by Indonesian military in East Timor after East Timor's referendum until those committed in Papua and during the second DOM period in Aceh. Under Law No. 26 of 2000, the duty to conduct investigation on gross human rights violations was to be conducted by Komnas HAM in which they can establish an *ad hoc* team consists of

³⁰⁰ GoI Regulations on the use of force to address the situation in Aceh between 1998 – 2004: 1) Presidential Instruction No. 4 of 2001 on the Comprehensive Measures in Solving the Situation in Aceh Province, points no. 11 and 14; and 2) Republic of Indonesia, Presidential Decision No. 28 of 2003 on the Declaration of a State of Emergency with the Status of Martial Law in Nangroe Aceh Darussalam Province, article 1.

³⁰¹ KPP HAM Papua was established by the Komnas HAM to investigate Abepura incident of 7 December 2000, Wasior incident of 31 March 2001 and Wamena incident of April 2003. For further information, see Elsam, Briefing Paper: Catatan Kondisi Hak Asasi Manusia di Papua, supra note. 285, pp. 13 – 15.

members of Komnas HAM and society.³⁰² Among the first investigation initiatives of gross human rights violations in Aceh and Papua was the establishment of two investigation commissions or KPP HAM by Komnas HAM in 2001 to investigate the alleged gross human rights violations in both provinces after the establishment of the Indonesian human rights court.³⁰³

KPP HAM Aceh has submitted its investigation report to Komnas HAM in 2004 and KPP HAM Papua did the same in 2001 and 2004. RPP HAM Aceh documented that there were at least 70 occurrences of gross human rights violations in Aceh during the second DOM period in 2003 ranging from torture to willful killings. Meanwhile, KPP HAM Papua submitted their first report in 2001 concerning the riot taken place in Abepura in December 2000 and in 2004 concerning the incidents in Wasior and

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Republic of Indonesia, Law No. 26 of 2000 on the Establishment of Human Rights Court, Art. 18.

Kontras, Komnas HAM Bentuk KPP HAM Aceh dan Papua, Berita HAM, http://www.kontras.org/aceh/index.php?hal=berita&id=470&tahun (accessed on 15 December 2007).

All reports done by the KPP HAM on Papua can be accessed on http://www.komnasham.go.id/home/index.php?/43 (accessed on 15 December 2007) however there is no information on the report of KPP HAM Aceh notwithstanding the fact that the report of KPP HAM Aceh is often cited by Komnas HAM Annual Report of 2004 other NGO reports and articles, i.e., ELSAM, Kondisi dan Proyeksi Pemajuan dan Penegakan Hak Asasi Manusia di Indonesia, supra note. 285, p. 23.

KPP HAM Aceh report of 2004, cited in ELSAM, Kondisi dan Proyeksi Pemajuan dan Penegakan Hak Asasi Manusia di Indonesia, supra note. 285, p. 23.

The incident in Abepura occurred on 7 December 2000, which was initiated with an attack on Abepura police post by an unknown group that caused the death of one police officer and injured other police officers. This attack ignited excessive retaliation by the Indonesian police force in the form of indiscriminate search and attack to the population including students. Further information can be found in KPP HAM Papua's Executive summary (in Indonesian), http://www.komnasham.go.id/home/download.php?f=454d421367e63f57e780c108bf11 edf1 (accessed on 17 December 2007); and Human Rights Watch, Human Rights Watch, Out of Sight: Endemic Abuse and Impunity in Papua's Central Highlands, supra note. 61, pp. 65 – 66.

The incident in Wasior on 13 June 2001, started with an armed conflict between the police force and an unknown group, which caused the death of five police officers and one civilian. Police forces from other parts of Papua were instantly dispatched to Wasior to search for those responsible for the murder and in the course of their search, many civilians were victimized and the crimes committed by the police forces were identified by the KPP HAM as torture, rape, willful killing and force disappearance. Further information can be found in KPP HAM Papua's Executive summary (in Indonesian), http://www.komnasham.go.id/home/download.php?f=ba6beca16ab722ab50082b3130926e0b (accessed on 17 December 2007).

Wamena.³⁰⁸ Within these reports KPP HAM Papua found that there were occurrences of gross violations of human rights namely, torture, willful killing, rape, forced disappearance and forced displacement of population.³⁰⁹ In general, all reports submitted by KPP HAM on Aceh and Papua strongly indicated that these violations or unlawful attacks were directed to the civilian population in a systematic or widespread manner.³¹⁰

Furthermore, under Law No. 26 of 2000, after the initial investigation conducted by KPP HAM is completed, KPP HAM should submit its report to Komnas HAM. If the reports identified the occurrences of gross human rights violations, Komnas HAM shall continue the reports to Kejagung for further investigation. Accordingly, if the Kejagung agreed to conduct further investigation based on Komnas HAM initial investigation and if this further investigation confirmed the findings of Komnas HAM then Kejagung will proceed with prosecution of gross human rights violations to the human rights court. Based on the abovementioned description on the procedural matters under Law No. 26 of 2000, the provisions are quite clear. Supposedly, there is no legal impediment whatsoever in processing the KPP HAM reports on gross human rights violations that occurred in Aceh and Papua after the coming into force of Law No. 26 of 2000 until the proceeding phase in front of the human rights court.

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The incident in Wamena on 4 April 2003, it began when an unknown group managed to break in to the police armament warehouse in Wamena and stole 29 guns and 3500 bullets. Additional force was deployed to Wamena to help the local police force to comb the area to search for the doers. In the course of the search, KPP HAM documented testimonies, which confirmed that the police force had committed human rights violations against civilians. Further information can be found in KPP HAM Papua's Executive summary (in Indonesian) http://www.komnasham.go.id/home/download.php?f=ba6beca16ab722ab50082b31309260b (accessed on 17 December 2007).

KPP HAM Papua's Executive Summary on Abepura, Wasior and Wamena, http://www.komnasham.go.id/home/download.php?f=454d421367e63f57e780c108bf11 http://www.komnasham.go.id/home/download.php?f=454d421367e780c108bf11 http://www.komnasham.go.id/home/download.php?f=454d421367e780c108bf11 http://www.komnasham.go.id/home/download.php?f=454d421367e780c108bf11 <a href="http://www.komna

http://www.komnasham.go.id/home/download.php?f=ba6beca16ab722ab50082b313092 6e0b (accessed on 17 December 2007).

³¹⁰ *Ibid*.

Republic of Indonesia, Law No. 26 of 2000 on the Establishment of Human Rights Court, Art. 23.

Komnas HAM has submitted the first KPP HAM report on gross human rights violations concerning the incident in Abepura to Kejagung in 2002 and in 2004, Komnas HAM also submitted KPP HAM report on the incidents that took place in Wasior and Wamena. Unfortunately, there is no adequate follow-up to the report of KPP HAM on gross human rights violations that occurred in Aceh, either by Komnas HAM, Kejagung, the DPR, or the GoI. The report of KPP HAM Aceh mysteriously evaporated without any recollection whatsoever even in the annual report of Komnas HAM since 2005. Various NGO voiced the demands of a continuation of this report but to no avail. The non-existence of both governmental and judicial response to the KPP HAM Aceh report was due to, among others, the Helsinki MoU that subdued the hostilities in Aceh in which the GoI perceived that there is no need to pursue accountability from perpetrators of gross human rights violations and rather to concentrate on the establishment of sustainable peace in Aceh.

Meanwhile, after receiving the reports on the incidents that took place in Wasior and Wamena, Kejagung practically refused to follow up those reports mainly because it considered that the reports were lacking of both material and formal requirements as required by Law No. 26 of 2000. Trustrated by the absence of further investigation by Kejagung, in February and March 2006, Komnas HAM sent two letters addressed to the DPR and the President where Komnas HAM requested the interference of the DPR and President in order to accelerate further investigation of KPP HAM Papua report on Wasior and Wamena incidents by Kejagung.

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Komnas HAM, *Human Rights Annual Report of 2004*, Jakarta, p. 82; and Komnas HAM, *Human Rights Annual Report of 2006*, Jakarta, p. 93. Further information can be accessed on http://komnasham.go.id/home/index.php?/24 (accessed on 17 December 2007).

Elsam, Kondisi dan Proyeksi Pemajuan dan Penegakan Hak Asasi Manusia di Indonesia, supra note. 285, p. 23; Indria Fernida, Labirin Impunitas atas Kejahatan Kemanusiaan, Berita Kontras, No. 02/III-IV/2007, Kontras, Jakarta, p. 7.

Suzannah Linton, *Accounting for Atrocities in Indonesia*, Singapore Yearbook of International Law and Contributors, 10 SYBIL, 2006, pp. 2 – 3.

Komnas HAM, *Human Rights Annual Report of 2006*, *supra* note. 312, p. 93; Kontras, *Berita Utama: DPR Menjelma dalam Modus Impunitas HAM*, Berita Kontras, No. 02/III-IV/2007, Kontras, Jakarta, p. 3.

³¹⁶ Komnas HAM, *Human Rights Annual Report of 2006*, *supra* note. 312, pp. 93 – 94.

Nevertheless the effort to bring the case of Wasior and Wamena in front of the human rights court has been fruitless until now, the report of KPP HAM Papua on these incidents remain as another inventory in the Kejagung's drawer.

KPP HAM report on the incident in Abepura is indeed the only report that managed to proceed to the human rights court. KPP HAM report on Abepura incident was submitted to Kejagung in 2001 and further investigation was conducted, which resulted into the prosecution of two alleged perpetrators out of 25 people that were listed in the KPP HAM Papua report, both were high rank police officials. On 24 April 2004 the proceeding was held in front of human rights court in Makassar where both defendants were acquitted on the first instance in 2005. Alongside with the acquittal of the defendants, the Court also dismissed victims' demand of compensation. Kejagung filed an appeal to the Supreme Court and until now, the case is still in the examination process at the cassation level.

Based on the above observation, it is important to reiterate and emphasize that the mechanism established by Law No. 26 of 2000 provide no legal impediment for the reports of KPP HAM on gross human rights violations in Aceh and Papua that took place after the enactment of this law to proceed to the Indonesian human rights court. However, as in the case of no establishment of *ad hoc* human court to address violations that took place prior to the coming into force of Law No. 26 of 2000, the GoI is even reluctant to bring those who are responsible for gross human rights violations that took place after the enactment of Law No. 26 of 2000 to trial. In addition, based on the trial by the Indonesian human rights court in the case of Abepura, it is obvious that the Indonesian human rights court

³¹⁷ *Ibid.*, p. 95

Jibid. See also Komnas HAM, Ringkasan Eksekutif Komisi Penyelidikan Pelanggaran Hak Asasi Manusia (KPP HAM) Papua/Irian Jaya, Jakarta 8 May 2001, the report can be accessed on http://komnasham.go.id/home/index.php?/43 (accessed on 19 December 2007).

³¹⁹ Suzannah Linton, *Accounting for Atrocities in Indonesia*, *supra* note. 314, p. 11.

³²⁰ Komnas HAM, Human Rights Annual Report of 2006, supra note. 312, p. 95.

apparatuses including the judges are not well-prepared and trained in trying gross human rights violations.³²¹ Furthermore, due to the lack of knowledge and preparation of the judges concerning the elements of gross human rights violations, the acquittal of the defendants was mostly declared because of insufficient evidence and testimonies that did not, according to the judges' opinions, fulfill the required elements of crime under Law No. 26 of 2000, in contrast to the findings of KPP HAM Papua and Kejagung.³²²

One point is also of a great importance concerning Indonesian human rights court and post conflict situation like Aceh and Papua is the obligation of the GoI to establish human rights court in Aceh and Papua. Law No. 21 of 2001 on the Special Autonomy for Papua Province and Law No. 11 of 2006 on the Regional Government of Aceh, require the establishment of human rights court in Aceh and Papua. 323 Both establishment of human rights court in Aceh and Papua shall comply with Law No. 26 of 2000 as the umbrella legislation for such establishment. Nonetheless, until now, the implementation of this obligation has never been realized. This condition surely denies the legal certainty for post conflict territories.

Again, political will of the GoI plays an undeniably important role in order for the Indonesian human rights court to function according to its mandate under Law No. 26 of 2000. The law has provided tools to seek accountability from perpetrators of gross human rights violations and yet there are still many reforms that need to be done within the GoI and the judiciary and its apparatus to enhance the implementation of Law No. 26 of 2000. The hope to bring perpetrators of gross human rights violations that were committed after the coming into force of Law No. 26 of 2000,

³²¹ Human Rights Watch, Out of Sight: Endemic Abuse and Impunity in Papua's Central Highlands, supra note. 61, pp. 66 – 67; Elsam, Kondisi dan Proyeksi Pemajuan dan Penegakan Hak Asasi Manusia di Indonesia: Catatan HAM Awal Tahun 2007, supra note. 285, p. 22.

³²² *Ibid*.

Republic of Indonesia, Law No. 21 of 2001 on the Special Autonomy for Papua Province, Art. 45(2); and Republic of Indonesia, Law No. 11 of 2006 on the Regional Government of Aceh, Art. 228(1).

Republic of Indonesia, Law No. 21 of 2001 on the Special Autonomy for Papua Province, Consideration pt. 15.

especially in Aceh and Papua, still exist but it will diminish gradually without the support of the GoI and if there is no change in the work of the human rights court and its supporting apparatus.

4.2 Future Establishment of Truth and Reconciliation Commissions in Aceh and Papua as Instructed in National Legislations and the Implication of Indonesia's Constitution Court's Decision in Annulling Law no. 27/2004 on National Truth and Reconciliation Commission

The establishment of a truth commission in a post conflict situation as a body that can complement the judicial approach is an important element within the framework of transitional justice. Like any other post conflict situations all over the world, the situation in Aceh and Papua is no exception, establishment of truth commission as an important part of non-judicial approach is greatly necessary to support the implementation of judicial approach and finally paved the way towards sustainable peace. It is the obligation of the GoI to establish truth commissions in Aceh and Papua as instructed under Law No. 21 of 2001 and Law No. 11 of 2006. Turthermore, Law No. 26 of 2000 also endorsed this obligation by stating in Article 47 that in the case of gross human rights violations that took place before the coming into force of this Law can be addressed by the establishment of a truth and reconciliation commission.

Republic of Indonesia, Law No. 21 of 2001 on the Special Autonomy for Papua Province, Art. 45(2); and Republic of Indonesia, Law No. 11 of 2006 on the Regional Government of Aceh, Art. 229(1).

Republic of Indonesia, Law No. 26 of 2000 on the Establishment of Human Rights Court, Art. 47. This provision was included as an alternative to the establishment of *ad hoc* human rights court in addressing past gross human rights violations before the enactment of this law.

In order to demonstrate its commitment, the GoI enacted Law No. 27 of 2004 on Truth and Reconciliation Commission as a legal foundation for the implementation of Article 47 of Law No. 26 of 2000. Law No. 27 of 2004 generally adopted the truth commission model from the South African TRC, which is highly debatable due to the differences of post conflict situation between Indonesia and South Africa. Law No. 27 of 2004 is aiming at the establishment of a nationwide truth and reconciliation commission as an extra judicial alternative to address past gross human rights violations taken place before the enactment of Law No. 26 of 2000.

In the mid of 2006, the Truth and Justice Advocacy Team (TJAT) requested the Indonesian Constitutional Court to do a judicial review on Law No. 27 of 2004 contesting some of the provisions of this Law on the basis that those provisions were in contradiction with the Constitution of Indonesia. The contested provisions were Articles 1(9), 27 and 44 of Law No. 27 of 2004. The provisions in these Articles are indeed controversial and they provide as follows

Article 1(9): Amnesty is a form of pardon granted by the President to the perpetrator of gross human rights violation taking into account the consideration of the DPR.

Article 27: Compensation and rehabilitation under Article 1(9) can be given only if the plea for amnesty has been granted.

Article 44: Gross human rights violation that has been revealed and solved by the Commission can no longer proceed to the ad hoc human rights court. 330

It is obvious, from international law perspective, that these provisions are thick with the air of impunity. First, Article 1(9) of Law No. 27 of 2004, as a basic normative clause, stated explicitly that the law grants amnesty to perpetrators of gross human rights violations. Under international law, the

Abdul Hakim Garuda Nusantara, *Perlindungan HAM di Indonesia: Tantangan dan Prospeknya*, http://humanrights.go.id/index_HAM.asp?menu=pakar&id=31 (accessed on 24 December 2007).

Unofficial translation of articles 1(9), 27 and 44 of Law No. 27 of 2004 on Truth and Reconciliation Commission.

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Republic of Indonesia, Law No. 27 of 2004 on Truth and Reconciliation Commission, enacted on 6 October 2004.

Republic of Indonesia, Law No. 27 of 2004 on Truth and Reconciliation Commission, Arts. 3 – 4.

granting of amnesty to perpetrators of gross human rights violations is in no circumstances allowed and consequently, by granting amnesty to the perpetrators of such crimes will violate the international obligation of a State to try those perpetrators.³³¹

Second, in relation with Article 1(9), Article 27 stated that *compensation* and rehabilitation could only be rendered to the victims if a plea of amnesty is granted. International law protects the rights of victims to seek and receive reparation for their loss caused by gross human rights violations and it is the obligation of a State to ensure the respect and implementation of the victims' rights for reparation.³³² Drawing from the experience, South African TRC did not hamper the right of the victims to claim compensation whether an amnesty is granted or not to the perpetrator. Therefore, the right of victims to gain reparation is an inherent right and the obligation of a State to make reparation to victims of gross human rights violations is absolute and cannot be derogated by, among others, the granting of amnesty to or the non existence of trial against perpetrators of gross human rights violations.

Third, Article 44 of Law No. 27 of 2004 states that cases of gross human rights violations that have been handled and solved by the truth commission cannot proceed to the ad hoc human rights court, this provision is in contradiction with international law. The establishment of truth commission within the framework of transitional justice serves as one of the means of non-judicial approach that have to be taken together with judicial approach

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The prohibition of granting amnesty to perpetrator of gross human rights violation and State's obligation to try perpetrators of such crimes are embodied by customary international law reflected in various treaties, decisions and writings, such as: 1) The Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (Genocide Convention), article 4; 2) United Nations Human Rights Committee, General Comment to the ICCPR No. 20 (44), UN Doc. CCPR/C21/Rev. 1/Add 3 (1992), par. 15; 3) The Final Declaration and Programme of Action of the 1993 World conference on Human Rights, Part. II, UN Doc. A/Conf/57/24 (1993), par. 60; 4) The Convention on the Non-Applicability of Statutory Limitations to war Crimes and Crimes against Humanity of 1968, articles I – II; 5) the Statutes of both the ICTY and ICTR; and 6) The Four Geneva Conventions of 12 August 1949 and the Protocols Additional to the Geneva Conventions of 1977; and 7) *Prosecutor v. Furundzija*, ICTY Appeal Chamber, case No. IT-95-17/1-T (10 December 1998), para. 151 – 157.

The Guidelines on the Right to a Remedy and Reparation, *supra* note. 159, Principles XV and XVII.

and the two shall not impede the implementation of each other.³³³ Even though Law No. 27 of 2004 adopted the truth commission model from the South African TRC nevertheless one important difference between the post conflict situation in Indonesia and South Africa must be taken into account that is, Indonesia still has a 'working' judicial mechanism and apparatus, which South Africa has not.

The Indonesian Constitutional Court in rendering its decision of the case also shared the above view on the inconsistencies of the provisions in Law No. 24 of 2004 with international law. Furthermore, the Court also found that these provisions are in contradiction with the Indonesian Constitution, the Court stated that the provisions of Articles 1(9), 27 and 44 of Law No. 27 of 2004 are in contradiction with the acknowledgement and protection of human rights prescribed by the Indonesian Constitution and international law. The Indonesian Constitutional Court even went too far in its decision by stating that the provision under Article 27 is a core provision of Law No. 27 of 2004 and without it, the Law or the truth commission cannot function. Therefore, in its final decision of the case on 7 December of 2006, the Court decided that Law No. 27 of 2004 as null and void. The state of the case of 2006, the Court decided that Law No. 27 of 2004 as null and void.

The Indonesian Constitutional Court's decision in annulling Law No. 27 of 2004 invited strong reaction especially from the members of TJAT. This is because the TJAT judicial review petition to the Indonesian Constitutional Court aimed at to straighten the existing mechanism on truth and reconciliation commission so that it will put more emphasize on the victims' protection rather on the perpetrators and the commission operation will not

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³³⁵ *Ibid.*, pp. 124 – 131.

Eirin Mobekk, Transitional Justice and Security Sector Reform: Enabling Sustainable Peace, supra note. 186, pp. 11, 46 – 47.

Decision of the Indonesian Constitutional Court on the Invalidation of Law No. 27 of 2004 on Truth and Reconciliation Commission, No. 006/PUU-IV/2006, 7 December 2006, pp. 120 – 131. The Court stated that articles 1(9), 27 and 44 of Law No. 27 of 2004 are not in compliance with articles 28 (4 – 5), 28A, 28D(1), 28G(2) and 28I(1, 4 – 5) of the amended Indonesian Constitution, which contain the basic protection of human rights recognized by the international community of nations.

hamper judicial mechanism.³³⁶ ELSAM, one of TJAT members, argued that Articles 1(9), 27 and 44 are not the provisions that directly relate to the process of revelation of truth as one of the truth and reconciliations commission's mandates.³³⁷ In other words, if the decision of the Indonesian Constitutional Court only annulled Articles 1(9), 27 and 44 of Law No. 27 of 2004, the absence of those provisions will not affect the implementation of Law No. 27 of 2004 and the mandate of the future truth and reconciliation commission in revealing the truth about past gross human rights violations. ELSAM also argued that the Court has violated the principle of non-*ultra petita* principle, which provides that judges had a duty to abstain from deciding issues not included in the parties' submissions.³³⁸

Law No. 27 of 2004 is unarguably contained many deficiencies nevertheless, the enactment of this Law is a positive step to respect and uphold human rights in Indonesia and the decision of the Indonesian Constitutional Court has reflected a set back to this endeavor. The decision also crippled the operation of Law No. 26 of 2000 in which Article 47 of this Law states that the establishment of a truth commission serves as non-judicial alternative to address past gross human rights violations that took place before the enactment of Law No. 26 of 2000. In case of Aceh and Papua, the annulment of Law No. 27 of 2004 had created a big impact, which resulted into the complete absent of a venue to address past gross human rights violations in the respective territories.

Article 229(3) of Law No. 11 of 2006 clearly states that the future truth and reconciliation commission in Aceh will work in compliance with the corresponding national legislation on truth and reconciliation

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TJAT, Judicial Review Petition on Law No. 27 of 2004 on Truth and Reconciliation Commission, 25 April 2006.

Elsam, Ketika Prinsip Kepastian Hukum Menghakimi Konstitusionalitas Penyelesaian Pelanggaran HAM Masa Lalu: Pandangan Kritis atas Putusan MK dan Implikasinya bagi Penyelesaian Pelanggaran HAM di masa Lalu, Jakarta, 19 Desember 2006, pp. 6 – 7.

³³⁸ *Ibid.*, p. 13.

³³⁹ *Ibid.*, p. 19.

commission. 340 Furthermore, Article 260 of Law No. 11 of 2006 asserts that the truth and reconciliation commission in Aceh shall be established within a year after the coming into force of this Law. Due to the decision of the Indonesian Constitutional Court in annulling Law No. 27 of 2004, the establishment of truth and reconciliation commission in Aceh has not been realized until today. Notwithstanding the non-existence of legal foundation on the establishment of truth and reconciliation commission in Aceh, the newly elected regional government of Aceh is still determined to pursue the establishment of such commission. 341

Whilst in the case of Papua, Law No. 21 of 2001 on the Special Autonomy for the Papua Province is actually one of the legal bases to establish a truth commission in Indonesia prior to Law No. 27 of 2004. The mandate of Papuan truth and reconciliation commission is to clarify the history of Papua's integration to Indonesia and to formulate and determine reconciliation approaches that include revealing of truth, acknowledging the crimes, stating apology, etc. ³⁴² Unlike Law No. 11 of 2006 on the Regional Government of Aceh, Law No. 21 of 2001 does not prescribed that the establishment of a truth and reconciliation commission in Papua should depend on a specific national legislation on truth and reconciliation commission nor should it wait for the enactment of such legislation. ³⁴³

Based on the legal provisions provided by Law No. 21 of 2001, the establishment of Papuan truth and reconciliation commission is actually possible and independent from other supporting legislation. There should

Republic of Indonesia, Law No. 11 of 2006 on the Regional Government of Aceh, Art. 229(3) and *see* the Official Commentary attached to the Law on Art. 229(3).

³⁴¹ Adi Warsidi, *Aceh tetap Bentuk Komisi Kebenaran dan Rekonsiliasi*, Tempointeraktif, 24 January 2007, http://www.tempointeraktif.com/hg/nasional/2007/01/24/brk,20070124-91855,id.html (accessed on 26 December 2007).

⁽accessed on 26 December 2007).

Republic of Indonesia, Law No. 21 of 2001 on the Special Autonomy for the Papua Province, Art. 46 and *see also* the general comment on Art. 46 attached to the Law.

Republic of Indonesia, Law No. 21 of 2001 on the Special Autonomy for the Papua Province, Arts. 45(2) and 46. Nothing in these two articles or in the general comment of Law No. 21 of 2001 mention about the Law on Truth and Reconciliation Commission as a legal foundation to the establishment of a truth and reconciliation commission in Papua.

have been no impediment whatsoever, based on the Law, to establish the Papuan truth and reconciliation commission. However, until this moment Papua has not had a truth and reconciliation commission as promised by the GoI and it has been more than six year since the enactment of Law No. 21 of 2001 and yet justice has not been served for the Papuans, either by means of an *ad hoc* human rights court or a truth and reconciliation commission.

Aceh and Papua really need a prompt and effective implementation of transitional justice mechanisms, and the establishment of truth and reconciliation commission in these territories is imperative. Especially with the enactment of Law No. 21 of 2001 and Law No. 11 of 2006, which give a wide discretion to the respective regional government to establish their own laws and policies, a comprehensive and consolidated truth about their history and past gross human rights violations will give them a fresh start and, to some extent, to prevent the repetition of the gruesome history of violence that have taken place there.

An example of the negative implication of the absence of either *ad hoc* human rights court or a truth and reconciliation commission is the repetition of violence in Papua that took place in Wasior (2001) and Wamena (2003 and 2006) committed by the Indonesian military and police force, where hundreds of civilians were also victimized. When it comes to regulations and policies, the regional governments of Aceh and Papua and the GoI still produce regulations and policies that do not put past experiences of gross human rights violations into consideration, which of course resulted, again, in the repetition of violence and these regulations and policies were reflected, as an example, in the Presidential Decision No. 28 of 2003 on the Declaration of a State of Emergency with the Status of Martial Law in Nangroe Aceh Darussalam Province that imposed a second DOM period in Aceh.

Truth and reconciliation commission should be established in Aceh and Papua as prompt as possible and the regional governments of both provinces must take an active role in this issue. The process of straightening the past is important as a foundation of those regional governments in establishing new regulations and policies that reflect the respect and the upholding of human rights to prevent future violence. Concurrently, the GoI also has many promises to fulfill soon, the establishment of truth and reconciliation commission has become an annual promise of the GoI towards its people, this promise is prescribed in the Government Work Plan (RKP) since 2005 344 and in the GoI National Action Plan on Human Rights of 2004 – 2009. Furthermore, since the decision of the Indonesian Constitutional Court in annulling Law No. 27 of 2004 on truth and reconciliation commission is final and binding, the GoI needs to amend the controversial provisions in Law No. 27 of 2004 that accommodated impunity and enacts new law on truth and reconciliation commission that can balance the accommodation of the needs of the victims and perpetrators.

4.3 The Implementation of Other Transitional Justice Approaches in Aceh and Papua

As has been mentioned in previous chapter, there is no established standard of transitional justice approaches, especially the non-judicial approaches; it will always develop depending on a particular post conflict situation faced by a country. This notion also applies in the case of Aceh and Papua, since basically the conflicts in Aceh and Papua are strongly related to their struggle for independency from Indonesia and self-determination. The discussion concerning other transitional justice approaches taken to address the situations in Aceh and Papua shall be discussed further bellow.

Republic of Indonesia, Presidential Regulation No. 39 of 2005 on Government Work Plan of 2006; and Republic of Indonesia, Presidential Decision No. 19 of 2006 on Government Work Plan of 2007.

³⁴⁵ Republic of Indonesia, Presidential Decision No. 40 of 2004 on National Action Plan on Human Rights, attachment, p. 57.

4.3.1 Enactment of National Legislations on Special Autonomy

Since the conflicts in Aceh and Papua were filled with thick air of disintegration from Indonesia, GoI viewed the option of giving special autonomy to the respective province as the most favorable option for both Indonesia and those provinces. The GoI effort to give special autonomy status to Aceh dated back in 1999, 346 while for Papua, Law No. 21 of 2001 marked the first GoI endeavor to address special autonomy issue in Papua. Theoretically, the promulgation of Law No. 21 of 2001 on the Special Autonomy of the Papua Province and Law No. 11 of 2006 on the Regional Government of Aceh should benefit the people in the respective province, since, aside from the wide discretion of authority bestowed by these laws to the regional government, generally these laws prescribed that the GoI has the obligation to consult every matter that relate to the people of Aceh and Papua.

Law No. 21 of 2001 on the Special Autonomy for the Papua Province gives a wide discretion to the regional government of Papua and its apparatus to govern Papua, according to the Law the authority of the regional government includes, among others: 1) the establishment of the MRP that consists of Papuan indigenous peoples' representatives;³⁴⁷ 2) the independent authority of the regional government to exercise its governance power in all sectors, except matters that relate to foreign policies, national defense and security, national monetary and fiscal policies, religions and national judiciary;³⁴⁸ and 3) the people of Papua are given the discretion to form their own local political parties.³⁴⁹ In the case of Aceh, Law No. 11 of 2006 on the Regional Government of Aceh, gives more or less the same

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³⁴⁶ Republic of Indonesia, Law No. 44 of 1999 on the Enforcement of the Special Status of Special Territory of Aceh Province.

Republic of Indonesia, Law No. 21 of 2001 on the Special Autonomy for the Papua Province, Art. 19.

³⁴⁸ *Ibid.*, Art. 4(1).

³⁴⁹ *Ibid.*, Art. 28.

discretion to the regional government of Aceh to govern its territory.³⁵⁰ Additionally, Law No. 11 of 2006 establishes special autonomy for Aceh to implement Islamic Sharia law and have their own Sharia Court³⁵¹ and most importantly, the regional government of Aceh can establish international cooperation when it comes to culture, sport, investment and trade.³⁵² Both laws have also set out the possibility to implement other transitional justice approaches and international humanitarian cooperation.

The enactment of Law No. 11 of 2006 has played an important role in the improvement of post conflict condition in Aceh. Moreover, the coming into force of Law No. 32 of 2004 on Regional Governance that enables a direct election of head of regional government in every province in Indonesia³⁵³ has brought positive impact to the implementation of Law No. 11 of 2006 where in the end of 2006 Aceh finally conducted its first direct provincial election. The election in Aceh was even viewed as the most successful provincial election so far in Indonesia and it was also the first election that allowed independent (non-party affiliated) candidates.³⁵⁴ The candidate supported by GAM, Irwandi Yusuf, won the election.

However, the situation differs greatly in Papua, one obvious example is the non-existence of local political parties in Papua until now. Furthermore, the establishment of MRP only took place four years after the coming into force of Law No. 21 of 2001 unlike Aceh that already had its supporting governance bodies promptly after the enactment of Law No. 11 of 2006. The implementation of Law No. 21 of 2001 runs rather too slow compared to the implementation of Law No. 11 of 2006 in Aceh, there are still many agendas in Law No. 21 of 2001 that should be implemented. Even so, the GoI in the end of 2006 stated that it would do a revision on Law No. 21 of

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³⁵⁰ Republic of Indonesia, Law No. 11 of 2006 on the Regional Government of Aceh, Art. 7 (on the authority of the regional government) and Art. 75 (on the establishment of local political party).

³⁵¹ *Ibid.*, Art. 128.

³⁵² *Ibid.*, Arts. 9 and 165.

³⁵³ Republic of Indonesia, Law No. 32 of 2004 on Regional Governance.

International Crisis Group, *Indonesia: How GAM Won in Aceh*, Crisis Group Asia Briefing, No. 61, 22 March 2007, pp. 1 – 2.

2001 notwithstanding the fact that the Law has not been fully implemented and the fact that Law No. 21 of 2001 has already provided comprehensive steps to address post conflict situation in Papua.³⁵⁵ The GoI in this case must really first implement Law No. 21 of 2001 consistently until it can evaluate the effectiveness of this Law and only by then it can decide whether to revise it or not.

4.3.2 Reparation for Victims of Gross Human Rights Violations

The forms of reparation under Indonesian legislation are not as wide as those under international law standard. Law No. 26 of 2000 provides that victims of gross human rights violations be entitled to have reparation. These rights are confirmed by Government Regulation No. 3 of 2002 on Compensation, Restitution and Rehabilitation to the Victims of Gross Human Rights Violations. The modalities of reparation provided are compensation, restitution and rehabilitation; reparation under Indonesian legislation does not cover satisfaction and guarantee of non-repetition. Moreover, the forms of reparation in Indonesia also do not come under hierarchical order as it does under international law.

Under Indonesian legislation, the sole body that can order a reparation measure for victims of gross human rights violations is the human rights court through its decision.³⁵⁷ Government Regulation No. 3 of 2002 further stipulates GoI responsibility to make reparation for victims of gross human rights violations.³⁵⁸ However, the provision that stated that victims of gross human rights violations could only gain reparation if it is so ordered in the

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³⁵⁵ Kontras, *Laporan Hak Asasi Manusia Tahun 2006: HAM belum Jadi Etika Politik*, *supra* note. 296, p. 193.

Republic of Indonesia, Law No. 26 of 2000 on the Establishment Human Rights Court, Art. 35(1).

Republic of Indonesia, Law No. 26 of 2000 on the Establishment Human Rights Court,, Art. 35(2); and Republic of Indonesia, Government Regulation No. 3 of 2002 on Compensation, Restitution and Rehabilitation to the Victims of Gross Human Rights Violations, Art. 3(1).

³⁵⁸ Government Regulation No. 3 of 2002 on Compensation, Restitution and Rehabilitation to the Victims of Gross Human Rights Violations, Arts. 2 and 3.

decision of the human rights court is not a victim-oriented provision. In this sense, the victims can only have reparation when a final and binding decision has been declared, in other words, when all level of remedies has been exhausted. This implies that the decision to render reparation for victims of gross human rights violations cannot be promptly executed and it means the prolongation of the fulfillment of the rights of the victims. This provision is contradictory to the very principle in Government Regulation No. 3 of 2002 that states that the granting of reparation must be conducted as precise, prompt and adequate as possible.³⁵⁹

Another drawback of this reparation mechanism is that it does not comply with international law. It is an international obligation of a State to give reparation to victims of gross human rights violations, especially if the violations are the result of wrongful acts of the State. The element of attribution to a State wrongful act, among others, is indicated if the act was committed by:

an organ of a State or of a person or entity empowered to exercise elements of governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions. ³⁶⁰

According to Law No. 26 of 2000, the Indonesian human rights court has the competency to examine and to render decision upon cases of gross human rights violations. In the provisions concerning penal law provisions, Law No. 26 of 2000 uses the term 'every person', which indicates the person responsible in committing such crimes. These two groups of provisions under Law No. 26 of 2000 are the bases to conclude that the human rights court competency is to try individual perpetrator of gross human rights violations. The fulfillment of the right to gain reparation for victims of gross human rights violations depends on the decision of the

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³⁵⁹ Government Regulation No. 3 of 2002 on Compensation, Restitution and Rehabilitation to the Victims of Gross Human Rights Violations, Art. 2(2).

³⁶⁰ ILC Articles on State Responsibility, Art. 7

Republic of Indonesia, Law No. 26 of 2000 on the Establishment of Human Rights Court, Art. 4.

³⁶² *Ibid.*, Chapter VII, arts, 35 – 42.

court in deciding whether a perpetrator is guilty or not over the crimes charge upon him or her. If the court did not find the perpetrator guilty of the charge, then the victims will not gain their right of reparation.

This fact is reflected in the Indonesian ad hoc human rights court decision in Tanjung Priok case where in its consideration, the court stated, "since the defendants have been found guilty of all charges therefore, automatically the victims are entitled for compensation, restitution and rehabilitation."³⁶³ The Judges perceived that a decision to render reparation to the victims of gross human rights violations depends on their finding of an individual conviction and not of State's responsibility to the occurrence of gross human rights violations. This attitude was further confirmed by the human rights court statement in rejecting a class action claim made by the victims of gross human rights violations in Abepura. In this case, the victims of gross human rights violations in Abepura filed a separate case to the human rights court based on the occurrences of gross human rights violations in Abepura in 2000 by State's officials and demand for reparation from the State. 364 The court rejected the claim by stating that the existing national legislations do not provide a clear mechanism on how to claim reparation in cases of gross human rights violations and the court stated that the victims should include their claim in the Attorney General's indictment to be heard by the court. 365

Clearly, there is a great misconception of the victims' right to reparation and State's obligation to give reparation for gross human rights violations in the practice of the Indonesian human rights court. This means that the right of victims to gain reparation depends on conviction of individuals and not based on the responsibility of the State to give reparation due to the occurrences of gross human rights violations caused by its organs or persons exercising governmental authority. In this way the State, Indonesia, can

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³⁶³ Indonesian Human Rights Court Decision on the case of Tanjung Priok riot cited in Wahyu Wagiman and Zainal Abidin, *Praktik Kompensasi dan Restitutsi di Indonesia:* Sebuah Kajian Awal, Seri Position Paper Perlindungan Saksi dan Korban, Indonesian Corruption Watch, Jakarta, 31 March 2007, p. 17.

³⁶⁴ *Ibid.*, p. 19.

³⁶⁵ *Ibid.*, p. 20.

avoid its responsibility to give reparation by hiding behind the notion of individual criminal responsibility. Meanwhile, under international law practice, each State shall have an adequate reparation mechanism in its legal system for victims of gross human rights violations arising from the State wrongful act. ³⁶⁶ Thus, it implies that a court decision is necessary to determine whether or not there is an existence of a gross human rights violation and whether or not the State is responsible to the occurrence of such crime and based on those finding the court can produce a decision whether to grant reparation to the victims.

In the cases of past gross human rights violations in Aceh and Papua, there is not much to say in relation with reparation mechanism to the victims. First, this condition is due to the absence of *ad hoc* human rights court to try crimes that took place prior to the enactment of Law No. 26 of 2000 in Aceh and Papua that creates a status quo on the question of accountability for past gross human rights violations. Second, up until now there is no proceeding in front of the human rights courts concerning gross human rights violations, aside from the Abepura proceeding, in Aceh and Papua after the enactment of Law No. 26 of 2000. Third, in the proceeding of Abepura, which is the only trial on past gross human rights violation in Papua, the court acquitted the two defendants on the basis that there was no occurrence of gross human rights violation during the incident in Abepura and dismissed automatically the victims' claim for reparation.

Indeed the practice so far in the Indonesian human rights court is not fair to the victims and their interests. There are still many challenges to fix within the system and the implementing apparatus. The practice of the human rights court obviously shows the lack of knowledge of the judges in international law so as to bend Indonesia's international obligation to give reparation to its people. To address this shortcoming, it is important for the

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^{366 1)} UDHR, Art. 8; 2) ICCPR, Arts. 2 and 9(5); 3) ICERD, Art. 6; 4) Convention against Torture, Art. 14; 5) CRC, Art. 39; 6) Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), Art. 3; 7) Additional Protocol I, Art. 91; and 8) ICC Statute, Arts. 68 and 75.

GoI to enhance the knowledge of its judges and Attorney Generals in international law. It is also important to implement other measure of reparation other than through court decision since according to States practice, the granting of reparation does not always by means of court decision, it can be done, for example, by enacting specific reparation law that gives reparation to victims of past gross human rights violations.³⁶⁷

4.3.3 Legal and Institutional Reform

Legal and institutional reform efforts in Indonesia, including Aceh and Papua, only started to show significant development after the downfall of the New Order regime in 1998. The most important reform is the amendment of the Indonesian Constitution with the first amendment concluded in 1999 and continued until the fourth amendment in 2002. The amendments of Indonesian Constitution are conducted, among others, in order to facilitate a wider human rights protection and to address disintegration issues that have been faced by Indonesia for many years, which come in the form of special autonomy and distribution of power between the GoI and the regional governments.

Reform also took place within the Indonesian military force. In 2000, the MPR enacted two decrees concerning the separation of the Indonesian police force from the military and their respective role in the security and defense sector. This development has received positive reaction from the people from Aceh and Papua that have been put under martial law for more than 30 years where the situation stigmatized the Indonesian military force as the source of violence. This positive response was indicated by the changes and promotion of 'community policing' by the Papuan Regional

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³⁶⁷ Example of enactment of specific law that gives reparation to victims of gross human rights violations can be seen from the practice in Germany in enacting Compensation Laws and Agreements (1948) and the Final Federal Compensation Law in 1965. See Kurt Schwerin, German Compensation for Victim of Nazi Persecution, supra note. 169.

Republic of Indonesia, MPR Decree No. VI/MPR/2000 on the Separation of Indonesian Military Force and the Indonesian Police Force; and MPR Decree No. VII/MPR/2000 on the Role of the Indonesian Military Force and the Role of the Indonesian Police Force.

Police, it has started to recruit more Papuan into the regional police force in order overcome the imbalance of the number of Papuans in the police force in previous years. However, many adjustments need to be done in connection with this separation of the police force from the Indonesian military force. One of the problems faced is the military's adamant resistance towards any reform, which impedes the implementation of regional security since the special autonomy law relinquishes the power of the military in Aceh and Papua and gives it to the hand of the regional police forces. This has become the source of competition between the two institutions and which in the long term caused security instability in the regions. ³⁷⁰

The third legal and institutional reform that takes place in Aceh and Papua comes under the GoI effort to eradicate corruption in the public service sectors. In 2004, President SBY enacted Presidential Instruction No. 5 of 2004 on the Acceleration of Corruption Eradication that instructed the Head of National Development Planning Agency (Bappenas) to formulate a National Action Plan on Corruption Eradication 2004 – 2009 (RAN-PK). This action plan aims at the eradication of corruption in various sectors of public service including, among others, tax office, police force, investment, judiciary and others (depending to the need of a particular region). There are three major steps to be taken under RAN-PK to eradicate corruption, which are prevention, enforcement, and monitoring and evaluation. RAN-PK document is meant to be a *living document*, which means that it will always be renewed with comprehensive measures to eradicate corruption based on the evaluation and findings from the implementation of previous plans, so it will go beyond 2009.

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³⁶⁹ Hilmar Farid and Rikardo Simarmatra, *The Struggle for Truth and Justice: a Survey of Transitional Justice Initiatives Throughout Indonesia*, *supra* note. 38, p. 108

 $^{^{370}}$ Ibid.

Republic of Indonesia, Presidential Instruction No. 5 of 2004 on the Acceleration of Corruption Eradication, dictum 11(3).

³⁷² RAN-PK Document, Narration, pp. 22 – 26.

³⁷³ *Ibid*. P. 27.

The RAN-PK document acts as an umbrella provisions for State institutions and regional governments to establish their own action plan to eradicate corruption. RAN-PK requires every State institution at the central level to formulate its own institution action plan to eradicate corruption and furthermore mandate their corresponding institution at the regional level to do the same in compliance with the respective region's action plan on corruption eradication. Public campaign and consultations have been conducted in Aceh and Papua to introduce RAN-PK in 2006 by Bappenas in cooperation with the respective regional government and it resulted into the firs effort to draft the Regional Action Plan on Corruption Eradication (RAD-PK) in Aceh and Papua.

The focus of Aceh's RAD-PK, for the time being, relies heavily on corruption eradication within public procurement of goods and services, land and police force and the regional government of Aceh agreed to include its RAD-PK draft into its governance policy for 2007 – 2009.³⁷⁴ In Papua, the focus of its RAD-PK is almost the same with the focus of Aceh RAD-PK draft, which are public procurement of goods and services, land issue, and tax.³⁷⁵ The regional government of Papua already has a consolidated draft on RAD-PK and committed to implement the draft in 2007.³⁷⁶

The fourth legal and institutional reform that strongly related to the enhancement of human rights protection is the enactment of Presidential Decision No. 40 of 2004 on the National Action Plan on Human Rights (RAN-HAM) 2004 – 2009. The main programs of RAN-HAM are: 1) to accelerate the ratification of international human rights instrument; 2) enhancing the work of the national human rights institutions; 3) harmonize national legislations with international human rights standards; and 4)

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³⁷⁶ *Ibid*.

Bappenas, Report on the Implementation of RAN-PK Public Campaign and Consultation and FGD on the Drafting of Aceh Province RAD-PK, Jakarta, September 2006, p. 19.

Bappenas, Report on the Implementation of RAN-PK Public Campaign and Consultation and FGD on the Drafting of Papua Province RAD-PK, Jakarta, October 2006, http://www.bappenas.go.id/index.php?module=ContentExpress&func=display&ceid=26 87 (accessed on 3 January 2008).

disseminate human rights education.³⁷⁷ Similar to RAN-PK, RAN-HAM also aimed at the formulation of regional human rights policies that are in accordance with national and international standard.³⁷⁸ The most important point listed in RAN-HAM is settlement of past gross human rights violations in post conflict territories through the enhancement of human rights court performance and establishment of truth and reconciliation commission.³⁷⁹ However, the realization of this plan in RAN-HAM has not yet come into form even though 2009 is already around the corner.

Legal and institutional reforms that take place in Indonesia post New Order Regime do not include the implementation of lustration or vetting laws, even though it is important to be implemented in order to uproot the source of impunity. Although the regime in Indonesia has changed nevertheless, the individuals that exercised government authority are mostly consisted of individuals that also hold power during the New Order Regime. Especially in the military, the individuals that hold prominent position are the very individuals that hold the same positions during the New Order Regime when repressions took place in many places in Indonesia.

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Republic of Indonesia, Presidential Decision No. 40 of 2004 on National Action Plan on Human Rights (RAN-HAM) 2004 – 2009, Annex I, pp. 12 – 15.

³⁷⁸ *Ibid.*, p. 12.

³⁷⁹ *Ibid.*, p. 57.

5 Conclusions and Recommendations

5.1 Conclusions

Conflicts always caused great sufferings to civilians and not to the real conflicting parties. In this part, it is important to reiterate the statement of the victims of Nanking massacre incident in 1937, "conflict is a tragedy to history and disgrace to humanity." The wisdom behind this warning is that it invokes the consciousness of the international community to prevent the occurrence of conflicts and to address their repercussions in order to establish a sustainable peace and provide a guarantee of non-repetition. Indeed to serve this very cause, the concept of transitional justice was born and developed.

Transitional justice in its very nature aims to give justice to those who have been wronged during a conflict, to restore their dignity and to establish a solid ground for them to start over without having to live under the shadow of past atrocities, in short, accountability in any forms. Both retributive and restorative justice play important role, which embodied in the major transitional justice approaches, judicial and non-judicial approaches, and the aim, is not only to 'get even' but also to restore completely from traces of atrocities shadowing the victims. Both judicial and non-judicial approaches utilize a wide range of implementation alternatives, starting from national to hybrid court mechanism (judicial approach) until the establishment of truth commissions and enactment of reparation and lustration laws (non-judicial approach). However, one must underline that the modalities in applying these approaches are not exhaustible, depending on the necessities of a particular post conflict situation, and the nature of these approaches is interrelated where one cannot work comprehensively without the other. Therefore, both judicial and non-judicial approaches should be implemented

³⁸⁰ The Massacre of Nanking, *supra* note 3.

holistically to address post conflict situations in order to achieve reconciliation and sustainable peace.

Meanwhile, in relation with international law framework, transitional justice exists to address violations of international human rights and humanitarian law stemming from the demand of the international community for accountability on past atrocities. The scope of transitional justice implementation to address past gross violations of international law is wider than the scope of international criminal law since it utilizes international criminal law as a form of criminal justice implementation along side with other extra judicial measures that covers restorative aspect of post conflict situation not only from legal perspective but also from political, social and economic perspectives. Therefore, the relation between transitional justice and international law, particularly, international human rights law, international humanitarian law and international criminal law is indivisible.

However, even though the implementation of transitional justice derives its justification from the demand of international community for States to fulfil their international obligation to seek accountability from perpetrators of past gross international law violations. State practice shows that the implementation of transitional justice in post conflict situation is still distorted by political settlement. The rendering of amnesties to perpetrators of gross international law violations is a common practice in States that has just undergone a conflict but still faced with political disturbances due to the fact that those perpetrators still retain power, especially in the military force. This practice is clearly in contradiction with international law and an indication of impunity, which eventually will jeopardize the peace process. So far, the practice of bartering away justice for political settlement for the sake of political stability and peace, or most likely to be addressed a realpolitik, has not yet proven to be effective at all. In fact, it stimulates a renewed conflict stemming from the old one and this statement is supported by the conflict development, among others, in Sierra Leone and Chile. One crucial fact that States should also remember is that the implementation of *realpolitik* at the cost of justice cannot suppress society's demand for accountability.

Moreover, this practice of *realpolitik* stained transitional justice mechanism with a somewhat fallacious dichotomy of justice and peace, where the attainment of either justice or peace should sacrifice the attainment of the other. The notion that stated that harmonization of justice and peace in the implementation of transitional justice is indeed misleading since, it imperative that both justice and peace should be achieved in post conflict situation. Justice and peace are not separated initiatives to address a post conflict situation on the contrary their implementation constitutes a causal link where the attainment of peace as the main goal of transitional justice can only be achieved if justice has already been served.

Justice can be postponed for the sake of gaining political stability however; it cannot and should not be waived. This stand is in line with international law, which requires no derogation can be made when it comes to seeking accountability for gross human rights violations and base on the causal link between peace and justice and the international law stance in seeking accountability, it is without a doubt that the harmonization of peace and justice in the implementation of transitional justice is feasible and an absolute requirement for a success implementation of transitional justice.

It is important to point out that in the implementation of judicial approach in the form of criminal justice, which requires the prosecution of perpetrators of gross human rights violations is of an imperative character under the framework of transitional justice. This has been confirmed through the establishment of various criminal tribunals, either nationally or internationally or a combination thereof, which applies diverse mechanisms in prosecuting individuals that committed international crimes. However, one must also bear in mind that transitional justice is not always about judicial approach, it also utilizes other approaches that are of non-judicial character. After the end of the Cold War, many States implemented the

establishment of truth commission as one prominent tool of non-judicial approach to address victims' grievances and sufferings due to a conflict. The aim of truth commission is to uncover the truth about past violations and to make a comprehensive overall picture of certain violations that took place in the course of a conflict.³⁸¹ Truth commissions put emphasis on recovering the truth to serve the grievances of victims and generally implement reparation policies to victims and, in some case, amnesty to perpetrators in order to acquire detailed information on a violation and acknowledgment on the crimes that have been committed. In many cases Governments tend to use this institution to legalize political settlements in post conflict situations by authorizing the utilization of amnesty through truth commissions.

The South African TRC is a clear example on this practice, where the establishment of the TRC did not open the door for the prosecution of apartheid perpetrators. Even though the South African Government claimed this mechanism to be effective in addressing past gross human rights violations in South Africa in addition to the incapability of the judicial mechanism at that time nevertheless, it failed to attend to the core of the victims' demand, judicial accountability. The practice of granting amnesty through truth commissions that waived the obligation to prosecute indeed has proven that it does not guarantee the prevention of a renewed conflict and in addition it will surely rekindle the victims' sense of being treated unjust, which eventually will lead to an artificial peace and stability since the root of conflict still linger in the society.

The creation of truth commissions to address victims' grievances due to past gross violations of human rights in post conflict situation is undeniably a progressive tool to achieve stability and peace however, referring to the main goal of transitional justice, which is to gain accountability, the establishment of truth commissions cannot be used as the ultimate tool of transitional justice and this apply to all post conflict situations without any

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³⁸¹ Patricia Hayner, Fifteen Truth Commissions – 1974 to 1994: A Comparative Study, supra note 21, p. 604.

exception. The creation of truth commissions must go hand in hand with the implementation of judicial approach, *vis-à-vis* prosecution of perpetrators. Only in this sense, justice in a transitional era can be served since it covers both the victims' demand for criminal justice and at the same time the healing process of the society toward reconciliation and sustainable peace in post conflict situation. By the same token, the practice of truth commission that complements prosecution process of past gross human rights violations perpetrators reflects a holistic implementation of justice and it reaffirms the stance that justice cannot be bartered away with political settlement.

Theoretically, the concept of transitional justice provides a comprehensive and unrestricted approach to be implemented in post conflict situations in order to gain accountability for past gross human rights violations, serve justice and achieve reconciliation. However, in reality, States always prefer to alter the approaches of transitional justice to make it more lenient and put more room for political settlement in addressing their post conflict situations by arguing that the concerned lenient transitional justice approaches that they are taking is necessary under the particular situation in the respective post conflict situation.

The handling of post conflict situations in Indonesia is a clear-cut example of State's inconsistencies with the main goals of transitional justice. Conflicts in various parts in Indonesia generally caused by discrimination policies applied on a region or on a particular ethnic group and the long-standing conflicts in Aceh and Papua are among of these conflicts. The conflicts in Aceh and Papua have already taken place since the early phase of Indonesia's independence from the Dutch colonial power, both provinces, claimed to be voiced by GAM and OPM, demand for self-determination and disintegration from Indonesia due to the GoI discriminative policies, especially during the New Order Regime. The use of excessive military force was a common measure implemented to suppress the separatist

³⁸² UNSG Report on the Rule of Law and Transitional Justice, *supra* note. 14, p. 4.

movement, which mostly causing great civilian casualties compared to the members of the separatist movements.

The fall of the New Order regime and the enactment of various laws on ratifications of human rights treaties, special autonomy, human rights and the establishment of human rights court in Indonesia by the new GoI administrations have flickered people's optimism for a better and peaceful future. The enactment of Law No. 39 of 1999 on human rights is considered as the starting ground for the GoI awareness of human rights. The Law defines GoI obligations to respect and implement human rights in accordance with international standards that have been endorsed by the GoI, 383 and it established Komnas HAM as an independent commission at national level that bear the duty to observe and make recommendation on the implementation and protection of human rights in Indonesia.³⁸⁴ Most importantly, Law No. 39 of 1999 gave a legal basis to establish human rights court within Indonesian judiciary system to try and to prove its commitment in addressing human rights violations, the GoI promptly enacted Law No. 26 of 2000 on the Establishment of Human Rights Court. Soon after that, ratifications of international instruments on human rights protection were realized, including the ratifications of ICCPR and ICESCR in 2005 to guide and support the implementation of Laws No. 39 of 1999 and No. 26 of 2000.³⁸⁵

As a matter of fact, the combined implementation of Law No. 39 of 1999, Law No. 26 of 2000 and international human rights law instruments that Indonesia has ratified is supposed to be sufficient enough for the Indonesian judiciary to commence judicial approach to address the past gross human rights violations in Aceh and Papua. However, in practice, neither the GoI nor the Indonesian judiciary put their full effort to implement these laws,

³⁸³ Republic of Indonesia, Law No. 39 of 1999 on Human Rights, Consideration, par. d; and Art. 71.

³⁸⁴ Ibid.

Republic of Indonesia, Law No. 11 of 2005 on the Enactment of International Covenant on Economic, Social and Cultural Rights; and Republic of Indonesia, Law No. 12 of 2005 on the Enactment of International Covenant on Civil and Political Rights.

which resulted into the failure of the judiciary to prosecute and punish perpetrators of past gross human rights violations, especially in Aceh and Papua.

Generally, this failure to prosecute was mostly due to the inconsistencies of both the GoI and Indonesian judiciary in applying the national human rights instruments. This situation is only exacerbated by the reluctance of the DPR and Kejagung to take prompt measure on the reports on the human rights condition in Aceh and Papua submitted by Komnas HAM, and this condition is indicated by the non-existence of either an *ad hoc* human rights court within the Indonesian judiciary dealing with past gross human rights violations taking place in Aceh and Papua before the enactment of Law No. 26 of 2000 nor the filing of a single case concerning the second DOM period in Aceh. Indeed, when it comes to the implementation of judicial approach to address the grievances of victims in post conflict situations in Indonesia, especially in Aceh and Papua, one can actually find it depressing since the implementation mechanism is already there and yet nothing had been done.

Furthermore, concerning the non-judicial approach of transitional justice in Aceh and Papua, the implementations were also not so much of a different with the implementation of judicial approach. It is understandable that the GoI concentrates mostly to the enhancement of its regional special autonomy policies since most cases of conflicts in Indonesia was due to self-determination and disintegration issues. Indeed the granting of special autonomy law on Aceh and Papua has a great positive impact to the regional social and economic development of the respective province however, even though the GoI has enacted Law No. 21 of 2001 on Special Autonomy for Papua Province and Law No. 11 of 2006 on the Regional Government of Aceh, still these Laws have not been fully implemented to address past gross human rights violations.

A clear example of this ignorance is the non-existence a truth and reconciliation commission in Aceh and Papua as mandated under the special autonomy laws and Article 47 of Law No. 26 of 2000. An attempt to carry on with this mandate has been taken by the GoI to establish a national truth and reconciliation commission through the enactment of Law No. 27 of 2004 adopting the model of the South African TRC. Nevertheless, this attempt failed since the provisions regarding the establishment of Indonesian truth and reconciliation commission contain many deficiencies, which contradict the Indonesian Constitution and international law, and therefore the Indonesian Constitutional Court nullified Law No. 27 of 2004 in December 2006. Once again, transitional justice effort in Aceh and Papua has bumped into another dead end.

The establishment of truth and reconciliation commission in Aceh and Papua has bee put into an indefinite halt. Notwithstanding the fact that the nullification of Law No. 24 of 2004 does not have any impact to the establishment of truth and reconciliation commission in Papua since the mandate in Law No. 21 of 2001 on the Special Autonomy for the Papua Province precede the enactment of Law No. 24 of 2004.

As for reparation mechanism for victims of gross human rights violations in Aceh and Papua, not much can be said; clearly, the Indonesian judiciary still has a great number of improvements to be made especially concerning the judges lack of knowledge in the notion of State responsibility and rendering reparation for victims of gross human rights violations under international law. Lastly, in connection with legal and institutional reform as part of non-judicial approach, the GoI has shown its good intention to address various side factors that hindered the transitional period in post conflict situations. Various efforts have commenced starting from the amendments of the Constitution, military reform until the enactment of national action plans on corruption eradication and human rights. These legal instruments on institutional and legal reform actually have set up an adequate overall reform framework for the GoI to work with; the only shortcoming is the

tardiness of the implementation and satisfactory results have not yet been shown so far. Therefore, the GoI still has a great deal of homework to be done in addressing the transitional period in Aceh and Papua.

5.2 Recommendations

Obviously, it is not an easy task to address transitional period in post conflict situations and this condition also apply to Indonesia in addressing the situations in Aceh and Papua. So far, there are already efforts commenced by the GoI to smoothen the transitional period in Aceh and Papua and yet, generally, they are not enough. As has been contemplated in the previous chapter, the Indonesian national law has provided a good framework, even though it is not perfect, of transitional justice for post conflict situations like Aceh and Papua nevertheless, the problem lies with the apparatuses that are reluctant to implement this framework. Therefore, the GoI may need to concentrate its efforts on the comprehensive implementation of the already existing transitional justice approaches framework.

First, legal and institutional reform in Indonesia plays an important role in supporting the implementation of transitional justice process in post conflict situations. Corruption eradication and the enhancement of human rights awareness and knowledge within the judiciary system need to be conducted in a holistic and intertwine manner since the culture of corruption and the lack of human rights awareness and knowledge within the judiciary are among the main causes of failure in the implementation of the judicial approach. To address this issue, enactment of lustration law and a comprehensive human rights law education according to international standard can be one of the options to be considered in order to make sure that the judiciary is free from those individuals that still hold relation with people from the New Order Regime and the judiciary is filled with individuals that are qualified in running the judicial system. In this way, hopefully, the Indonesian judiciary can work on gross human rights

violations cases that took place in post conflict situations in an impartial and just manner.

Second, the role of Komnas HAM in conducting investigations in post conflict situations should be expanded and greater support from the GoI, especially from the DPR and Kejagung, should be given. In particular, when it comes to the issue of establishment of *ad hoc* human rights court to try perpetrators of gross human rights violations prior to the enactment of Law No. 26 of 2000, so far Komnas HAM reports on Aceh and Papua have not been followed up either by DPR and Kejagung. One of the alternatives to enhance the follow up of Komnas HAM reports is by cutting the long bureaucratic line to establish an *ad hoc* human rights court, in other word, to exclude the role of the DPR to interpret and decide whether there is human rights violations in a particular time and place prior to the enactment of Law No. 26 of 2000 based on Komnas HAM report. In this fashion, it will reduce political interference to the judiciary, since the DPR is a political body of the State and not all of its members are familiar with legal issues, and most importantly, it will nurture the independency of the judiciary.

Third, prompt measures should be taken with regards to Indonesia's obligation to establish a truth and reconciliation commission as prescribed under its national laws and the Helsinki MoU. Indeed the annulment of Law No. 27 of 2004 on National Truth and Reconciliation Commission by the Indonesian Constitutional Court has put the establishment of national truth and reconciliation commission in Indonesia into an indefinite halt however; there are still some measures that can be taken for the time being. One of these measures is the establishment of a regional truth and reconciliation commission in Papua as mandated by Law No. 21 of 2001 that precede Law No. 27 of 2004. Meanwhile, in the case of Aceh, a speedy process should be conducted on the amendment of the provisions of Law No. 27 of 2004, an active role from the Komnas HAM in giving inputs to the DPR in amending this law shall be required in order to produce truth and reconciliation commission mechanism that will be in compliance with international

standard. Most importantly is that the establishment of truth and reconciliation commission in Indonesia shall not impede the implementation of the judicial approach and the right of victims to receive reparation.

Fourth, concerning Indonesian reparation mechanism for victims of past gross human rights violations, the GoI should consider establishing another venue for the victims to seek for reparation. Indeed the human rights court can be one of the venues to seek reparation but should not be the only one, especially with the fact reflected in the Abepura and Tanjung Priok cases that there is a big misconception of State obligation to provide reparation to its citizens due to State's wrongful acts. As one of the examples, Indonesia could enact a special reparation law for the victims of pass gross human rights violations in Aceh and Papua and point out a certain body can be the Komnas HAM or the future truth and reconciliation commission, to administer reparation for these victims. Thus, the victims can seek reparation from various venues and hopefully with a speedy process.

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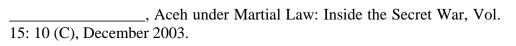
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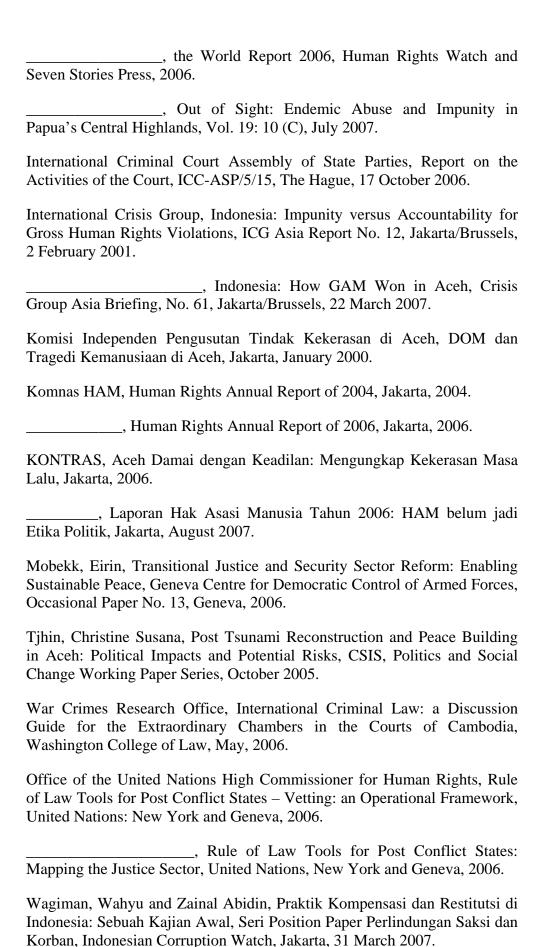
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