Faculty of Law

Dissertation

"Indonesia's Truth and Reconciliation Commission as a Mechanism for Dealing with Gross Violations of Human Rights"

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Master of Law in Human Rights

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DECLARATION

I declared that this dissertation represents my own work, except where due acknowledgment is made, and that it has not been previously in a theses, dissertation or report submitted to this university or to any other institutions for a degree, diploma or other qualifications.

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ABSTRACT

Following the step down of President Soeharto in 1998, Indonesia has to take necessary measures to settle gross violation of human rights. Pressure on the promotion of human rights through legal regulation concerning human rights has shown a rewarding result. This is a positive impact on the spirit to respect and promote human rights.

One of the results is the enactment of Law No. 26/2000 concerning Human Rights Court which mandate to establish the Truth Commission. This mandate clearly stipulate in Article 47 (1). Four years later, the House of Representative issued Law No.27/2004 concerning Truth and Reconciliation Commission which dealing with gross human rights violation in the past. In this context, the settlement of human rights violation in the past not only focused on accountability through the court but also through a non-legal mechanism (reconciliation!).

In other hand, the enactment of this law produces a serious debate among various groups whether inside or outside parliament. Outside parliament, there are two camps in civil society when they dealt with this issue. First camps said Indonesia would be better to strengthen the role of human rights court than using the instrument of truth commission. They believe that justice can be only achieved by bringing the perpetrator to justice. Second camps think that the establishment of truth commission will provide an opportunity for victims to tell about their past experiences, and this way is believed to be able to promote the process of reconciliation. In short, the existence of the commission is to supplement human rights court in Indonesia.

Indonesia's commitment to settle some gross human rights violation cannot be separated from some claims by some groups of community. They are the victims of human rights violations in Aceh, Papua, 1965 Communist Coup and other victims who claim for a justice. There are two things containing in the laws in Indonesia concerning

this matter. Firstly, justice shall be implemented through court mechanism, and secondly through reconciliation mechanism.

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CHAPTER I

INTRODUCTION

A. Background

Indonesia has undergone a significant political system change in the mid of 1998 following the downfall of President Soeharto who had been in power for more than 30 years. At that time, Indonesia also experienced a succession from an authoritarian regime to a democratic one.[1]

This new step toward a democratic regime has at least produced a positive impact on the spirit to respect and promote human rights. In 1998, the People's Consultative Assembly (hereinafter MPR) issued Decree No. XVII/MPR/1998 concerning Human Rights.[2] Then, President Habibie launched a National Action Plan on Human Rights ("RANHAM")[3] for the period of 1998-2003 which among others confirming the government's obligation to ratify some human rights instruments. On the basis of the mandate granted by the MPR, in 1999, the government together with the House of Representative (hereinafter Parliament) enacted Law No. 39 Year 1999 concerning Human Rights (hereinafter Law No.39/1999)[4]. Then in 2000, the MPR again called on the significance of human rights appreciation and enforcement, especially when dealing with human rights abuses through establishment of Truth and Reconciliation Commission

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[1] *See* Satya Arinanto, *Hak Asasi Manusia dalam Transisi Politik di Indonesia* [Human Rights in Indonesia's Political Transition] (Jakarta: Pusat Studi Hukum Tata Negara Fakultas Hukum Universitas Indonesia, 2005): p.97-105. In his doctoral dissertation, Satya Arinanto says that the downfall of Soeharto regime is not only attributed to the democratization waves which hit some parts of the globe, but also to the economic and monetary crisis which has a major role in the step-down of authoritarian Soeharto regime.

[2] People's Consultative Assembly of the Republic of Indonesia, *Decree of the People's Consultative Assembly of the Republic of Indonesia No. XVII Year 1998 concerning Human Rights* (Majelis Permusyawaratan Rakyat Republik Indonesia, Ketetapan Majelis Permusyawaratan Rakyat Republik Indonesia No.XVII Tahun 1998 tentang Hak Asasi Manusia), at http://www.unsrat.ac.id/ hukum/uu/mpr_17_98.htm site visited 25 November 2005. In essence, the said decree instructs the State Institutions and all Government Apparatus to respect, enforce, and disseminate understanding about human rights to the public. In addition, the decree also instructs the President and House of Representative to ratify some instruments of the United Nations concerning Human Rights, as far as it is not in contrary with Pancasila State Ideology and Constitution 1945.

[3] Indonesia, *Presidential Decree concerning the National Action Plan on Human Rights*, Presidential Decree No. 129 Year 1998 (Keputusan Presiden tentang Rencana Aksi Nasional Hak Asasi Manusia, Keputusan Presiden No. 129 Tahun 1998). In Indonesia, this Presidential Decree is known as "RANHAM". It specifies four (4) major pillars in the promotion of human rights in Indonesia, they are: (1) preparation for the ratification of the international instruments on human rights; (2) dissemination and education of human rights; (3) the priority of the enforcement of human rights; and (4) implementation of the contents or provisions set out in the international instruments on human rights which have been ratified by Indonesia.

[4] Indonesia, *Law concerning Human Rights* (Undang-Undang tentang Hak Asasi Manusia), Law No.39, State Gazette No.165 Year 1999, Supplement State Gazette No.3886. The last paragraph of the article on 'General Explanation' of the Law functions as a basis of all legislation on Human Rights, any direct or indirect violations to human rights is subject to imprisonment, penalty, and/or administration sanction in accordance with the provisions set out in applicable laws.

(hereinafter TRC), by issuing Decree No.V/MPR/2000[5] concerning The Stabilization of National Unity and Integrity.

In the same year, Law No.26 Year 2000 concerning Human Rights Court (hereinafter Law No.26/2000)[6] was also enacted. The efforts at settlement of the violations of human rights are not only focused on accountability through the court but also through a non-legal reconciliation mechanism. It is clearly stipulated in Law No. 26/2000, Article 47[1] stating that "The settlement of the gross violations of human rights occurring prior to the coming into force of this act may be undertaken by a Truth and Reconciliation Commission."[7] This law is aimed at sending the perpetrators of human rights violations to the court; however, it also raises the possibility of a settlement out of court through reconciliation mechanism.

Implementing the provisions set out in this article, in October 2004, Law No. 27 Year 2004 concerning Truth and Reconciliation Commission was enacted.[8] The enactment of this law produces a serious debate among various groups such as parliament and civil society. Different points of views among the parliament members arose when the public hearing was conducted over the period of 2003 to 2004. The debate itself does not only take place at the Parliament, but also among civil society.[9]

The establishment of the truth commission will provide an opportunity for victims to tell about their past experiences, and this way is believed to be able to promote the process of reconciliation. The existence of the commission is to supplement the human

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[5] People's Consultative Assembly of the Republic of Indonesia, Decree of the People's Consultative Assembly of the Republic of Indonesia *No. V Year 2000 concerning The Stabilization of National Unity and Integrity* (Majelis Permusyawaratan Rakyat Republik Indonesia, Ketetapan Majelis Permusyawaratan Rakyat Republik Indonesia No.V Tahun 2000 tentang Pemantapan Pesatuan dan Kesatuan Nasional), in Article 1 Chapter I B (Aim and Objectives) states that "True awareness and understanding to consolidate national unity should be realized in concrete measures among others through the formation of a Commission for Truth and National Reconciliation and the formulation of national ethics and vision of the future Indonesia."

[6] Indonesia, *Law concerning Human Rights Courts* (Undang-Undang tentang Pengadilan Hak Asasi Manusia), Law No. 26, State Gazette No. 208 Year 2000, Supplement State Gazette No. 4026.

[7] Ibid. above n.6, Article 47 (1) [unofficial translation by the Indonesia National Commission on Human Rights] (hereinafter Law No.39/1999)TPF (hereinafter Law No.39/1999)TPF

[8] Indonesia, *Law concerning Truth and Reconciliation Commission* (Undang-Undang tentang Komisi Kebenaran dan Rekonsiliasi), Law No.27, State Gazette No.114 Year 2004, Supplement State Gazette No.4425.

[9] *See* Priyambudi Sulistiyanto, "Reconciliation and Forgiveness in the post-Suharto Indonesia" a paper submitted to *International Conference on Truth and Reconciliation Commission in Indonesia* a conference organized by Elsam, European Union, Friedrich Ebert Stiftung, NZAID, and The Jakarta Post, held in Hotel Santika Jakarta 12-14 September 2005, p.8. Detail of the debates among them will be discussed in Chapter III

rights tribunals in Indonesia.[10] This argument seems to reflect the writing of David A. Crocker:

> "Many societies seeking a just transition from authoritarian regimes or civil wars to democracy have employed official truth commission to investigate systematic violations of internationally recognized human rights… Truth commissions can contribute to achieving many important goals in societies during the transition to democracy… they must be supplemented by other measures and institutions, such as trial and judicial punishment."[11]

Reconciliation mechanism as set out in Law No.27 Year 2004 has a juridical consequence on the compensation to be provided to the victims such as compensation, restitution and rehabilitation, as stated in this law that "the uncover of truth is also for the interest of victims and/or their families who are beneficiaries for compensation, restitution, and/or rehabilitation."[12]

Then, how is the process of searching the truth as meant by the said law? Law No.27 Year 2004 does not enumerate in details how the mechanism of uncovering the truth as a major mandate of the said commission.[13] The law only outlines the authorities and the functions of Commission.

The method to be employed to uncover the truth is fully the authority of this commission. It is on its discretion whether to use a methodology solely derived from their 'pure thought' or partially or wholly adopts the methodology which has applied in South Africa. As a comparison, in South Africa, those are willing to ask for an amnesty shall submit an application to the commission.[14] If the application is accepted, the said person is obliged to make a testimony in order to uncover the facts and truths she/he has experienced and/or committed. The perpetrator shall bear a testimony before the commission's plenary session and then the commission will decide whether or not the

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[10] Ibid. above n.9, p.9

[11] *See* David A. Crocker, "Truth Commissions, Transitional Justice, and Civil Society," in Robert I. Rotberg and Dennis Thompson [ed.], *Truth v. Justice, the Morality of Truth Commission*, (Princeton and Oxford: Princeton University Press, 2000): p.99.

[12] Ibid., above n.8., in *Preamble* ("*Consideration B*")

[13] Compare with South Africa 1995 Act concerning 'Promotion of National Unity and Reconciliation' which thoroughly provides for the working mechanism, timeframe, authorities in uncovering the truth in connection with the gross human rights violations during the Apartheid regime.

[14] More comprehensive reading about how amnesty will be granted to applicant from legal perspective, see Andreas O'Shea, *Amnesty for Crime in International Law and Practice*, (The Haque/London/New York: Kluwer Law International, 2002): 42-55.

said perpetrator deserves for the grant of an amnesty, depending on the panel which has conducted a hearing.[15]

Then, upon being granted an amnesty, what the rights and obligations which shall be conducted by the perpetrators of gross violations of human rights and victims are. What obligations which shall be conducted by related country in relation to the decision of granting an amnesty to the perpetrator. It also relates to the process of granting an effective remedy, what are the stand of the country and the implication of the said stand. It also includes the good faith of the country to fight the 'impunity'. The victims shall not be marginalized in what process is selected. The victims often act as a complement to all process taken. The rights of the victims shall be promoted in accordance with the applicable legal instruments whether cultural law, national law or international norms.

B. Research Question

On the basis of the description illustrated in the background and problem identification above, the research questions of this dissertation on Indonesia's Truth and Reconciliation Commission as a mechanism for dealing with gross violations of human rights are as follows:

1. Are the 'truth' and 'justice' effective remedies for gross violation of human rights?
2. What obligations arise for Indonesia in relation to the right to an effective remedy?
3. How to reconcile the Indonesia TRC with efforts to fight impunity?

C. Structure of Paper

This dissertation is divided into six chapters. **Chapter I** begins with an illustration of the legislature background after Soeharto step-down. Then, will explain the mandate from Law No.26/2000 concerning Human Rights Court to establish the TRC to resolve gross violation of human rights in the past. The debate among Indonesian before the establishment of TRC will be provided but not much detail. Detail of the debate among them will discuss in Chapter III.

Chapter II will illustrate the conceptual framework. The conceptual framework will introduce the generally applied concepts at the international level. However, Indonesia has its own unique concepts. This chapter will describe and examine its enforceability and

[15] See Ronald C. Slye, "Amnesty, Truth, and Reconciliation, Reflection on the South African Amnesty Process," in Robert I. Rotberg and Dennis Thompson [ed.], *Truth v. Justice, the Morality of Truth Commission,* (Princeton and Oxford: Princeton University Press, 2000): p.171-177.

effectiveness, and its compatibility to the international concepts and instruments. In other words, this research tries to identify how effective the remedies both in the perspective of the international and Indonesian national law.

Chapter III will discuss the mandate of the TRC based on Law No. 27 Year 2004. Historically, it will illustrate the process of the enactment of the law amidst various polemics and debates among the government, House of Representatives (DPR), civil society, and NGO's. In addition, the chapter will discuss about the weakness of this law, including its mandate, time frame, and structure of the commission.

Chapter IV will illustrate what is being done or to be done in relation to various human rights violations, whether to enforce the justice or seeking 'peace agreement' in such cases as the Tanjung Priok incident, Aceh, Papua, or victims of Communist Rebellion ("G-30-S/PKI"). Will reconciliation be introduced in the mechanism of the settlement of the said human rights violations, or even having been done or not at all or even not willing to do it? What they want to, "Justice, Peace Agreement or Reconciliation"?

Chapter V will illustrate and analyze the process of the settlement of human rights violations by the TRC. Including new legal problems arise, for example the problems of subpoena mechanism and conflict with Penal Code Procedure. This chapter will analyze the traditional concept, how they work. It will also describe the expected performance of the TRC in effort to fight impunity. Finally, **Chapter VI** presents the conclusions of the research.

CHAPTER II

THEORETICAL FRAMEWORK

A. Introduction

During the transitional period from the authoritarian regime to a democratic regime, Indonesia has encountered some problems on how to deal with the past, particularly the violations of human rights. Some instruments -- international, regional, and domestic, are required to enable the State to handle the said problems. These instruments set forth among others to provide compensation, restitution and rehabilitation. At domestic level, in addition to the positive law (written law), the country also acknowledges the existence of religious and cultural laws.

Such domestic references as 'Musyawarah', 'Pela-gandong/Bakubae' and 'Ishlah' are of essence to the people in handling the problems arising during the transitional period. However, the references which derive from the Western scholars shall be deemed as an integral part of the efforts to overcome the problems.

This chapter will analyze how these instruments work.

B. What is a remedy?

The international human rights lawyer, Dinah Shelton, states that the term 'remedies' contains of two separate concepts. "*In the first sense, remedies are the processes by which arguable claims of human rights violation are heard and decided, whether by courts, administrative agencies, or other competent bodies. The second notion of remedies refers to the outcome of the proceedings, the relief afforded the successful claimant*."[16]

In the context of human rights violation, the word of 'remedy' could be meant as efforts or actions of the state responsibility form to provide maximum and effective efforts especially to the victims of human rights violation, of which the form is like the reparation. The reparation toward victims of human rights violation according to Dinah Shelton could be restitution, compensation, satisfaction, and guarantees non-repetition.[17] Meanwhile, the Black's Law mentions the remedies are 'the field of law dealing with the

[16] Dinah Shelton, *Remedies in International Human Rights Law*, 2nd Edition (Great Britain: Oxford University Press, 2005): p.7.

[17] *Ibid*. above n.16, p.7-8 *See also* UN Commission on Human Rights Resolution: 2004/34, 55th meeting, 19 April 2004 [adopted without a vote] in the Preamble, it is stated that the victims of human rights violation have the rights to obtain restitution, compensation and rehabilitation.

means of enforcing rights and redressing wrong.[18] Beside that, the remedy also gives '*guarantees a procedural and a substantive claim.*'[19]

The right to a remedy when rights are violated is guaranteed by international human rights instrument. The Universal Declaration of Human Rights [UDHR] stated that "[E]*veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law*."[20] Beside stated in the UDHR, other international instrument which also stipulates the issue of this remedy is among others the International Convention on Civil and Political Rights [ICCPR],[21] the Convention on the Elimination of Racial Discrimination [CERD],[22] the Convention against Torture [CAT],[23] European Convention on Human Rights,[24] the American Convention on Human Rights ("Pact of San Jose, Costa Rica"),[25] and the African Charter on Human and People's Rights.[26]

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[18] Bryan A. Garner, *Black's Law Dictionary*, 8th Edition (USA: Thompson West, 2004): 1320.

[19] See Manfred Nowak, *Introduction to the International Human Rights Regime* (Leiden/Boston: Martinus Nijhoff Publishers, 2003): 63.

[20] *Universal Declaration of Human Rights* [1948], Art.8.

[21] Article 2[3]: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted. "*International Convention on Civil and Political Rights* [ICCPR], Art.2 [3]. Adopted and opened for signature, ratification, and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966. *Entry into force* 23 March 1976, in accordance with Article 49.

[22] Article 6: "States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedom contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damages suffered as a result of such discrimination." *Convention on the Elimination of All Forms of Racial Discrimination*, Art.6. Adopted and opened for signature and ratification by General Assembly resolution 2106(XX) of 21 December 1965. *Entry into force* 4 January 1969, in accordance with Article 19.

[23] Article 14: "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture his dependants shall be entitled to compensation." *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment*, Art.14. Adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46 of 10 December 1984. *Entry into force* 26 June 1987, in accordance with Article 27[1].

[24] Article 13: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by person acting in an official capacity." *European Convention on Human Rights*, Art.13. This convention signed by States Members of the Council of Europe, at Rome, on 4 November 1950, and *enter into force* on 3 September 1953. For more information on this convention such as amendment by Protocol No. 11, see on footnote Göran Melander *et all* [ed.], *The Raoul Wallenberg Institute, Compilation of Human Rights Instrument*, 2nd Revised Edition (Leiden/Boston: Martinus Nijhoff Publishers, 2004): 61.

[25] Article 25[2]: "The States Parties undertake: (a) To ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; (b) To developed the possibilities of judicial remedy; and (c) To ensure that the competent authorities shall

Human Right Resolution 2005/35[27] and 2004/34[28] also provides right to an effective remedy. This instrument comprise obligation to ensure and respect for implementation international human rights law.

How is it like at the domestic level, then? In fact, the issue of remedy has already been stipulated in the Indonesian law. However, whether the meaning of the remedy according to the Indonesian law is the same with what is meant in several international instruments, we could see it in some articles which are in the law below.

Article 1365 Indonesia Civil Code (Kitab Undang-Undang Hukum Perdata) stated that somebody, who is guilty for the behavior of law violation has to give a compensation to the party who is harmed.[29]

In the Indonesia Penal Code Procedure (*Kitab Undang-Undang Hukum Acara Pidana*-- *KUHAP*) –which is very important to be regarded as mechanism being use in criminal process to dealing with compensation-- Article 95(1)"The suspect, the accused or the convict has the right to demand compensation for being captured, detained, sued and tried or for other actions, without reasons based on the law, or for the mistakes over the person or the law to be implemented.[30] In the Article 97 (1) "Somebody has the right to get rehabilitation when the court sets him free or release him from any law suit whose verdict has already had the final force of law."[31]

In Chapter VI of the Law No. 26/2000– about Compensation, Restitution, and Rehabilitation—Article 35 Par. (1) stated "Every victim of a violation of human rights

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enforce such remedies when granted. *American Convention on Human Rights*, Art. 25[2]. Signed by States Members of the Organization of American States, at San José, Costa Rica, on 22 November 1969. This convention *enter into force* on 18 July 1978.

[26] Article 26: "States Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter." *African Charter on Human and People's Rights*, Art.26. Adopted by the Assembly of Heads of State and Government of the Organization of African Unity, at Nairobi, on 27 June 1981. The Charter *enter into force* on 21 October 1986.

[27] UN Doc E/CN.4/2005/L.10/Add.11, Human Rights Resolution 2005/35, "Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law." 56th meeting [19 April 2005] Adopted by a recorded vote of 40 votes to none. One of the mandates of this law is State duty to ensure and implement an effective remedy to victims, including reparation.

[28] UN Doc E/CN.4/2004/127, Human Rights Resolution 2004/34, "The right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms." 55th meeting [19 April 2004]. Adopted without a vote.

[29] Article 1365: "Every deed which is violating the law and brings harm to other people, requires the person, who made the loss because of his mistake, to compensate that loss." *See* Indonesia, *Indonesia Civil Code* (*Kitab Undang-Undang Hukum Perdata - Burgerlijk Wetboek*), Staatsblad 1847-23. Article 1365.

[30] Indonesia, *Penal Code Procedure* (*Undang-Undang Tentang Hukum Acara Pidana*), Law No. 8, State Gazette No. 76 Year 1981, Supplement State Gazette No. 3209, Article 95(1).

[31] Ibid., above n.30., Article 97(1)

violations and/or his/her beneficiaries shall receive compensation, restitution, and rehabilitation."[32]

As the follow ups of the mechanism of giving Compensation, Restitution and Rehabilitation for the victims of gross human rights violation, Indonesian Government has issued the Government Regulation No.3 Year 2002 (hereafter GR No.3/2002).[33] This regulation stipulates the procedure and mechanism of giving compensation. This regulation was made as the application of Article 35 Par. (3) Law No. 26/2000.

The issue of remedy is clearer in the Preamble Law No. 27/2004 concerning Truth and Reconciliation Commission "*that disclosure of the truth is also for the sake of the victims and/or the family of the victims who is their heirs to get the compensation, restitution, and/or rehabilitation.*" This law clearly stipulates the procedure of giving and refusing the compensation requests, although the detail is not stipulated.[34]

In this matter, the instrument which provides for remedy is not a new thing in Indonesia, although it is not as specific and detailed as that contained in regional and international instruments. Some provisions of the laws set out the grant of compensation, restitution and rehabilitation.

C. What is Justice?

The matter of justice becomes very crucial in the settlement of various problems arising during transitional period. The justice shall be achieved through such methods as the judicial process or the grant of compensation, restitution and rehabilitation or through other ways which are considered as an actualization of an effort to promote the sense of justice. However, what is justice, it will be discussed based on two paradigm, the 'Western' and 'Islam'.[35]

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[32] According to 'Explanation' on this article, the meaning of "compensation" is compensation provided by the state because the perpetrator is unable to provide compensation in full as is his or her responsibility. The meaning of "restitution" is compensation provided a victim or a victim's family by the perpetrator or a third party. Restitution may constitute: (a) returning property, (b) paying compensation for loss or suffering; or (c) covering the cost of a particular action. The meaning of "rehabilitation" is restoration of the previous position, for example of honour, good name, office, or other right.
Ibid., above n.6., Article 35 para. 1 ["Explanation"].

[33] Indonesia, Government Regulation on Compensation, Restitution, and Rehabilitation for the Victims of the Gross Human Rights Violation *(Peraturan Pemerintah tentang Kompensasi, Restitusi, dan Rehabilitasi Terhadap Korban Pelanggaran Hak Asasi Manusia Yang Berat*), PP No.3 Year 2002, State Gazette No.7 Year 2002, Supplement State Gazette No.4172.

[34] Ibid. above n.8., *Preamble*.

[35] The separation of these two paradigms is solely for a convenience in understanding the justice in the context of 'Islam' and the 'West'. It does not mean to confront between the civilized and uncivilized groups. Even this separation does not want to judge that the one is better than the other.

1. Western Concept

In Black's Law, justice means owed by a community to its members, including the fair allocation of common advantages and sharing of common burdens.[36] Immanuel Kant said, as quoted by Jonathan Westphal, "*every action is just [right] that in itself or in its maxim is such that the freedom of the will of each can coexist together with the freedom of everyone in accordance with a universal law*."[37]

The concept of justice for gross violations of human rights according to the United Nations[38] is: "justice means an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interest of victims and for the well-being of society at large." In other words, justice has to be applied in balance between the rights of the suspects and the interests of the victims. Justice may not be heavy-sided. Prioritizing only the interest of the victims could not be called justice, but also the interest or the rights of the suspects must in the other hands be prioritized.

Justice according to Luc Huyse has many sides. In his opinion, Western, justice is often focused on the idea that perpetrators could not go without being punished. This means that they have to pay what they have done in the past, or what they have done was contradicted with the justice in the society. With that understanding, he divides justice into two categories, those are retributive justice and restorative justice.[39]

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[36] Ibid., above n.28., p.881.

[37] Jonathan Westphal, *Justice* (Indianapolis/Cambridge: Hackett Publishing Company Inc, 1996): p.151.

[38] UN Doc S/2004/616 "The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General" [23 August 2004], *para*.7.

[39] The understanding of 'retributive justice' is ideally that perpetrators should not go without unpunished. Meanwhile 'restorative justice' is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future. In the language of Lode Walgrave, restorative justice defined as '*every action that is primarily oriented towards doing justice by restoring the harm that has been caused by a crime*'. Restorative justice is thus characterized by its aim of doing justice by repairing the harm, which includes material damage, psychological and other forms of suffering inflicted on the victim and his proximate environment, but also social unrest and indignation in the community, uncertainty about legal order and the authorities' capacity for assuring public safety. It also encompasses social damage which the offender accused to himself by his offence. Restorative justice therefore not limited to resolving a tort according to civil law, but deals with crimes, which are also public events traditionally dealt with by criminal law. *See* Luc Huyse, "Justice" in IDEA, *Reconciliation after Violent Conflict: a Handbook* (Stockholm, 2003), p.97-111; *See also* Antony Duff, "Restoration and Retribution" in Andrew Von Hirsch (eds.), *Restorative Justice and Criminal Justice, Compeling or Reconcilable Paradigm?* (Oxford and Portland, Oregon: Hart Publishing, 2003): p.44; *See also* Lode Walgrave, "Imposing Restoration Instead of Inflicting Pain: Reflections on the Judicial Reaction to Crime" in Andrew Von Hirsch (eds.), *Restorative Justice and Criminal Justice, Compelling or Reconcilable Paradigm?* (Oxford and Portland, Oregon: Hart Publishing, 2003): p.61.

2. Moslem Concept[40]

The meaning of justice (‘*adl*) in Moslem[41], “*means placing something in its rightful place; it also means according equal treatment to others or reaching a state of equilibrium in transaction with them* (*al-taswiyah fi’l-mu’amalah*).”[42]

In Islam, the issue of justice has its own place and it is considered important. Islam does not only demand justice toward oneself or family, but also toward the society or other people. By sending down (the law) of Islam, it is expected that the society will get certainty and justice in legal cases. At least those are stated in several verses in Quran such as Al *Hadid* [25] and *An Nisa* [105].[43]

The concept of Shariah

There are three categories of crimes according to Islam, those are (1) *Hadd or Hudud* (most serious crimes); (2) *Tazir* (less serious crimes); (3) *Qesas* or *Qisas* (revenge crimes with restitution).[44] Islamic law[45] or *Shariah*[46] has an additional category of crimes

[40] In this context, the understandings of the Islamic concept are more based on the general concepts as contained in the Holy Koran. The author does not want to be trapped in a bias on what perspective to be used whether Sunni or Shiite or School of Thought in Islam. In this part, the author intentionally does not discuss about these factions due to the words limitation which shall be met.

[41] The discussion on the meaning of justice according to Islam (Moslem), beside to elaborate the meaning of justice itself, it is also because the majority of Indonesians are Islam. Therefore the discussion is considered relevant by the writer.

[42] In Quran [*Al Nahl*, 16:90], according to Kamali, that God commands justice (‘*al-adl*’) and fair dealing. And also important message coming from God to His Messenger (Prophet Muhammad) to maintain justice in the world: “*We sent Our Messenger with clear signs and sent down with them the Book and the Measure in order to established justice among the people*.[57:25]” Mohammad Hashim Kamali, *Freedom, Equality and Justice in Islam* (Cambridge, UK: The Islamic Texts Society, 2002): 103-108

[43] Islam, as also other religions, brings certain messages to its people, mainly related to the issue of justice and to upright the justice. It is even itemizing in detail. If the stipulation is not in the Quran, it will indeed be described in the next stipulations, such as Hadith, Ijma also Qiyas-as part of contextual interpretation toward Quran. *See* Ade Maman Suherman, *Pengantar Perbandingan Sistem Hukum Civil Law, Common Law, Hukum Islam* (Jakarta: RajaGrafindo Persada, 2004):155-174.

[44] *See* Denis J Wiechman, Jerry D Kendall and Mohammad K Azarian, “Islamic Law: Myths and Realities” http://muslim-canada.org/Islam_myths.htm site visited 3 February 2006.

[45] The Islamic law is derived from four main sources: *the Quran*, Islam’s holy book, considered the literal word of God; the *Hadith* or record of the actions and sayings of the Prophet Muhammad, whose life is to be emulated; *Ijma* is the consensus of Islamic scholars; and *Qiyas* as kind of reasoning that uses analogies to apply precedents established by the holy texts to problems not covered by them, for example, a ban on narcotics based on the Quranic injunction against wine-drinking. *See* Sharon Otterman [Associate Director of Council on Foreign Relations], “Background Q&A, Islam: Governing Under Sharia,” www.cfr.org/publication/8034/islam.html site visited 8 December 2005; And this law may be defined as the body of rules of conduct revealed by God to his Prophet (Peace upon by him) whereby the people are directed to lead their life in this world, *See also*, Erika Fairchild, *Comparative Criminal Justice Systems* (Belmont, California: Wadsworth Publishing Company, 1993): p.40.

[46] Islamic law is known as Shariah Law, and Shariah means the path to follow God’s law. Shariah law is holistic or eclectic in its approach to guide the individual in most daily matters. Shariah law controls, rules and regulates all public and private behavior. *See* above n.44.

that common law nations do not have.[47] If someone commits a crime which is included in *Qisas*, the law allows the victim to sue or ask for retribution and retaliation. It is not any punishment could be demanded retaliation, everything is stipulated in Quran. When someone is murdered, the family of the victim could demand *Qisas*. According to Denis J Wiechman et al who quoted Erika S Fairchild in her book of *Comparative Criminal Justice System* stated, "*Punishment is prescribed in the Quran and is often harsh with the emphasis on corporal and capital punishment. Theft is punished by imprisonment or amputation of hands or feet, depend on the number of times it is committed…*" Wiechman, furthermore explained that punishment could be done in various forms, including paying *Diya*.[48]

In this context, notion of remedy indeed has already been known in the Shariah law, although it is not as complete as the remedy in the Western concept. As a comparison, in the Western system there is no retaliation system against the criminals, because in principle in any criminality when the criminal is punished the system of 'retaliation' has been given to the actor. It is not the same with Shariah law, the victim or the family of the victim could demand 'retaliation' such as, "an eye for an eye". In the context of modernity, it is then opposed by the Islam reformers, because it does not show the values of Islam which appraise humanity.[49]

The nuance of reconciliation has been already known in Islam when the victim later forgives the actor of the crime.[50] At the same time, there is often *Diya* payment as a form of regret of the actor to the victim or to the family of the victim. Although it is often considered naive, but Islam conveyed that to forgive each other is considered honorable in the eyes of God.[51]

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[47] *See* above n.44.

[48] *Diya* is paid to the victim's family as part of punishment. *Diya* is an ancient from of restitution for the victim or his family. The family also may seek to have a public execution of the offender or the family may seek to pardon the offender. *See* above n.44.

[49] In the language of Denis J Wiechman et al, "…torture and extended pain is contrary to Islamic teachings and Shariah law." *See* above n.44.

[50] According to M Imam Aziz, one of the Islam Youth thinkers in Indonesia who study theology of reconciliation, stated that *Qisas* is adat law of pra-Islam which is adopted by Quran with the possibility to give forgiveness to the actor. This concept is considered to have "goodness" which has more values than to demand revenge. He also added that in the Quran also be mentioned a verse that is stated although forgiveness is given, the actor of the crime should follow with al-*ma'ruf* or it could be meant as giving compensation or it is a good deed to be willing to live side by side peacefully in the society. *See* M. Imam Azis, "Teologi Rekonsiliasi: Mengungkap Kebenaran, Menegakkan Keadilan," (Theology of Reconciliation: Reveal the Truth, Up Right the Justice) in *Afkar Tashwirul, Jurnal Refleksi Pemikiran Keagaman & Kebudayaan (Jurnal of Reflection of Culture and Religion Thought)*, 2003; No.15, p:7.

[51] Quran [Al Baqarah 2:22] stated "they shall forgive and have broaded-heart". In this context, from Quran it could be seen that to ask for an apology is considered a good deed. According to the young thinker of Islam Indonesians, according to Abd Moqsith Ghazali, asking for an apology is not an easy thing to do. It

Ishlah

One of the principles which is also important in developing Islam is the principle of Ishlah ('to have peace'). M Imam Aziz quoted Quran [Al-Hujurat:9] "*ishlah bi al-adl wa al-qitsth*" that is reconciliation after going through a process of revealing the truth (*tabayyun*), there is a guarantee that the human criminality would not be repeated in the future by making regulation and policy which is not discriminative (*taubat*), rehabilitation of rights and giving compensation (*ittiba bi al ma'ruf*).[52]

The revelation of the truth is tried to reveal not only who is the guilty, but also what is wrong with the policies, either written (the Law, regulation, decision) or not written (direct instruction, or attitude to let criminality happen) of the doer who is in the capacity of the policy maker at that time, and no merely individual.

D. The Meaning of Truth and Reconciliation

According to Daan Bronkhorst, in the transitional context, the word 'truth' is chosen because a country has to explain and be responsible for its actions in the past, either done by the present government or more often done by the previous regime.[53] Alex Boraine mentioned that as 'forensic truth' or 'hard truth', that is information about whose moral and legal rights were violated, by whom, how, when, and where. Given the moral significance of individual accountability, the identity of individual perpetrators, on the one hand, and of moral heroes who sacrificed personal safety to prevent violations, on the other, should be brought to light.[54]

In this matter, the justice is not only as a response to 'truth' but also demands for accountability. The response to the past shall at least require the settlement of 'justice' and 'truth'.[55]

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needs a big heart to openly admit the sins that have been done in the past. Besides asking for an apology, which is often done by the doer, Quran also instructed the victims to give apology. According to Ghazali, without apologizing one to another, the reconciliation may not be carried out honestly and fairly, so if there is reconciliation without apologizing each other, it will be like a meaningless empty jar. *See* Abd Moqsith Ghazali, "Membicang Fikih Rekonsiliasi, Bertolak dari Kasus Tragedi Kemanusiaan 1965/1966" (Talking about Fikih Reconciliation, Starting from the Humanity Tragedy Case 1965/1966) in *Afkar Tashwirul, Jurnal Refleksi Pemikiran Keagaman & Kebudayaan*, 2003; No.15, p:29-31.

[52] *See* above n.50. p: 7.

[53] Satya Arinanto, "Komisi Kebenaran dan Rekonsiliasi: Permasalahan dan Prospek Pembentukannya di Indonesia" (Commission of the Truth and Reconciliation: the Problems and the Prospect to establish in Indonesia), a paper presented to *Seminar on the Law Development VII*, Denpasar 14-18 July 2003, p.14 at http://www.lfip.org/english/pdf/bali-seminar/KomisiKebenarandanRekonsiliasi- satya%20arinanto.pdf site visited 20 November 2005.

[54] As quoted by David A. Crocker, "Reckoning with Past Wrongs: A Normative Framework," in *Ethics & International Affairs*; Vol.13, 1999: p.3.

[55] Martha Minow, *Between Vengeance and Forgiveness* (Beacon Press, 1998): p.9.

In Indonesia what the truth is, as stipulate in Law No.27/2004, "the truth is an event that could be expressed related to the gross human rights violation, either about the victim, place or time"[56] Therefore what is meant by the truth in this research is the truth according to TRC, nothing more.

Another term should be clear is that reconciliation. Reconciliation is the word mostly used in a country which experienced transition period from authoritarian regime to democratic regime. However, in fact there have not yet been the same views or opinions about what is exactly 'reconciliation'.[57] James L Gibson mentioned "reconciliation is often discussed as a relationship, as for instance between victims and perpetrators, or between beneficiaries and the exploited."[58]

Difficulty to determine what is reconciliation is because it contains two meaning, those are a goal –something to achieve-- and process – a means to achieve that goal. According to David Bloomfield reconciliation is an over-arching process which includes the search for truth, justice, forgiveness, healing and so on.[59]

In Indonesia, Law No.27/2004 stated 'reconciliation' as the result of a process of revealing truth, confessions and amnesty, through TRC in the framework of settling the gross violation of human rights in order to create peace and unity of the nation.[60]

E. Indonesia: The Realities

1. Introduction

In Indonesia, there are several law systems which live and grow in its society. The Positive law or the national law or secular law –inherited from the Dutch colonial—sits in the highest rank in the capacity of the effectiveness. It contains of stipulation and sanction which has a tied strength. Beside that, there are *Islamic law* and *adat* (traditional customary law)[61] which is not absolute in the effectiveness.

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[56] Ibid., above n.8 Article 1(1).

[57] At least it is revealed by James L Gibson who compared the opinions of some experts in defining exactly what 'reconciliation' is. *See* James L Gibson, "Overcoming Apartheid: Can Truth Reconcile a Divided Nation?" in *The Annals of the American Academy of Political and Social Science* Vol.603, #1 (January), 2006: p.85-89; *See also* David Bloomfield, "Reconciliation: an Introduction," in IDEA, *Reconciliation after Violent Conflict: A Handbook 2003* (Stockholm, 2003): p.12.

[58] James L. Gibson., above n.57., p.86.

[59] David Bloomfield.., above n.57.

[60] Ibid, above n.8. Article 1(2)

[61] The concept of *adat Law* contains a number of regulations and norms that have sanctions. It means that there are rules and if they are violated people could be sued. Later if one is proved guilty, he will get punished. However, because *adat law* is not codifying, or it is not written, so it does not have a binding law of force as it is the written law. Often the characteristics of the punishment are occult, mystical or supernatural. *See* Soekanto, *Meninjau Hukum Adat Indonesia, Suatu Pengantar Untuk Mempelajari*

2. *Adat* Law

This law originate from customs, which in hereditary is respected and obeyed by the society as a tradition of the Indonesians.[62]

The source of Adat Law in Indonesia based on the view of the Adat Law experts are habits and customs related to the people tradition,[63] or the norms of daily life which directly emerge as a cultural statement of Indonesian origin, the justice which live in the heart of people or traditional culture of the Indonesians.[64]

In the context of Maluku as a region having conflict since 1999, possess the principle of Pela-Gadong and Bakubae as a tool to settle the conflict. This adat mechanism in fact has been existed far before the conflict. However, it becomes a question for many groups of people whether that mechanism is able to answer and resolve the present conflict.

Bakubae is indigenous idiom that reflects spirit of peaceful, commonly used in children's games to restore friendship after child's quarrel.[65] *Bakubae* is slang in Ambon Malay for "saling (bersikap) baik" or "good to another".[66] Often interpret as 'reconciliation movement'.[67]

'Pela' is a village alliance system unique to the Central Moluccas tying Moslem and Christian villages together and ultimately playing a pivotal role in traditional social

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Hukum Adat (Over-see Indonesian Adat Law, an Introduction to Study Adat Law) (Jakarta: CV Rajawali, 1981): p.1-3. *See also* Timothy Lindsey, "From Rule of Law to Law of the Rulers – to Reformation?" Timothy Lindsey (ed.), *Indonesia Law and Society* (Sidney: The Federation Press, 1999): p.12.

[62] The prevailing of Adat Law in Indonesia is admitted implicitly by the 1945 Constitution through the general explanation. There, it is stated that "1945 Constitution is a written basic law, while beside the 1945 Constitution there is also a basic law which is not written, that is basic regulations which is emerged and kept in the practice of the state organization, although it is not written." *See* "The Indonesia 1945 Constitution".

[63] Adat Law as a law that hereditary comes down from the ancestors to the next generation has universal values, those among others are (1) principle of working together; (2) social function and the right of property in the social life; (3) principle of agreement as the basic of the state power; and (4) principle of representation and discussion in the government system. *See* Ilham Bisri, *Sistem Hukum Indonesia, Prinsip-Prinsip & Implementasi Hukum di Indonesia* (Indonesian Law System, the Principles & Law Implementation in Indonesia) (Jakarta: PT RajaGrafindo Persada, 2004): p.122.

[64] *See* Ilham Bisri. above n.63. p.112-113.

[65] Ichsan Malik and Hamdi Muluk, *"The Baku Bae" Peace Movement as Alternative Strategy to Conflict Resolution and Reconciliation in Indonesia* http://www.conferences.unimelb.edu.au/flagship /Abstracts/Muluk.pdf site visited 18 November 2005.

[66] Jan Goss, "Understanding the Maluku Wars: An Overview of the Sources of Communal Conflict and Prospect for Peace" in *Cakalele* [University of Hawaii] Vol.11-12, 2004. http://jongoss.info/papers/ malukuwars.htm site visited 9 December 2005.

[67] ICG Asia Report No.31, "Indonesia: The Search for Peace in Maluku" 8 February 2002, p.27 http://www.crisisgroup.org/library/documents/report_archive/A400544_08022002.pdf site visited 14 March 2006.

relationships and experience of cultural identity.[68] Meanwhile, 'Gandong' literally means 'from the same womb'.[69] With that statement they believe that they have the same ancestors. '*Para tetua adat*' (the old and wise figure) conveyed that the culture of Pela was a statement of kinship or absolute brotherhood.[70]

Across the region, Indonesia has a notion of *Musyawarah* as a part of the conflict settlement mechanism in the society, beside to get a place in its own society, it is also to get recognition in the basic State of Indonesia. This notion is emphasized in Pancasila as philosophy of the Republic of Indonesia.[71] *Musyawarah* as a mechanism of conflict

[68] "Pela" at http://www.nunusaku.com/05_adat/02_pela/index.html site visited 13 March 2006; *See also* ISAI-IMS, "The Role of Media in Supporting Peace-building and Reconciliation Efforts in Central Sulawesi, Muluku and North Maluku" (Final Draft Report Version 30 July 2004) at http://www.i-m-s.dk/media/pdf/ISAI-IMS%20Media%20Assessment%20Report%20(30%20July%2004).pdf site visited 13 March 2006, at note no.78 in these report 'Pela' or 'Pela-Gandong' is a kind of reconciliation ceremony used by both Moslem and Christian communities in Ambon. The ceremony itself reportedly derives from the story between Desa Paso (Paso village) under the Ternate Sultanate. The story states that a long time ago, when a delegation of Desa Paso was on their sea journey to pay tribute to Ternate Sultanate (North Maluku), their boat capsized and they were washed ashore on an island called Tanjung Pela (sacred cape). There they declared brotherhood by turning over a rock. Since then it has been traditional to declare brotherhood or Pela-Gandong.; *Also see* Yohanes Sulaiman, "Between Discourse and Violence: An Analysis of Ethno-Religious Conflict in Indonesia" A Thesis at the Ohio State University (2002) p.62 at http://psweb.sbs.ohio-state.edu/grads/ysulaimn/My_files/works/2002psthesis.pdf site visited 14 March 2006; *See also* Nicola Frost, "Adat in Maluku: New Value or Old Exclusions?" in *Antropologi Indonesia* Special Volume 2004; p.3.

[69] Dieter Bartels, "Pela Failure (Bahasa Indonesia) Bag. II" (27 July 2000) at http://www.munindo.brd.de/artikel/artikel_03/art03_bartels_maluku_2.html site visited 14 March 2006.

[70] It is a saying that has the binding power to form a unity between those who have Pela, with the sanction if the prohibitions (taboo) are broken, the effect would fatal for the one who breaks the prohibitions. In short, Pela-Gadong is a affirmation of brotherhood and moral binding that Moslem and Christian are blood-brothers. As blood-brothers there may not be hatred let alone hostility among them. *See* "Bagian Pertama Idul Fitri Berdarah di Ambon 19 Januari 1999/1 Syawal 1419 H, Bab 102 Kondisi dan Realitas Budaya yang Kurang Menguntungkan" (*First Part of Bloody Idul Fitri in Ambon 19 Januari 1999/1 Syawal 1419 H, Chapter 102 Culture Condition and Reality which is not Beneficial*) at www.geocities.com/r_kastor/102-Bab.html site visited 13 March 2006

[71] Pancasila or 5 principles ("the Five Principles") consists of two Sanskrit words, "Panca" meaning five, and "sila" meaning principle. It comprises five principles held to be inseparable and interrelated. Pancasila is a view of life, nation ideology and the 'source of any sources of law'. It means Pancasila is a view of life, awareness and moral dreams which cover the psychological situation and characteristics of the people of the country, and it is the place to step or lean for every law issue which is existed in or which appears in Indonesia. This is the place to test the validity either philosophical or juridical. Moreover, the fourth principle in Pancasila stated "Democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives" (*Kerakyatan yang dipimpin oleh hikmat kebijaksanaan dalam permusyawaratan perwakilan*)." This Principle has a meaning that is every conflict or disputes have to prioritize discussion to get the settlement. In other words, the culture of peace has more meaning in the Indonesian society. Besides that, Pancasila democracy calls for decision-making through deliberations (*musyawarah*) to reach a consensus (*mufakat*). It is democracy that lives up to the principles of Pancasila. This implies that democratic right must always be exercised with a deep sense of responsibility to God according to one's own conviction and religious belief, with respect for humanitarian values of man's dignity and integrity, and with a view to preserving and strengthening national unity and the pursuit of social justice.

settlement is not owned by one ethnic only. In several places, people recognize *musyawarah* mechanism to get a peace solution although in different names.[72]

F. Summary

The concept of remedy is not only to have the strong legal base, either from international instrument, regional or national. This concept could be seen starting from UDHR, ICCPR, ICESCR, CAT, and CERD to an instrument that stipulates in detail like in resolutions from the treaty bodies.

In Indonesia, the term of 'reconciliation' actually is not a new thing. The local culture has already known that term as a tool for resolving conflict. The word of 'musyawarah' has already been a general language and had the meaning of searching discussion for settling the conflicts, either in small scale or big scale. In several regions often heard the term that is similar in each local language.

Besides using adat approach which so far is used by several regions in Indonesia, approach that use religion framework is also known in several regions especially with Islam as the majority in Indonesia. Indonesia basically has variety in cultures which show tolerance between those instruments. Adat instrument such as discussion which is up headed in the past has to be able to be the strong foundation in uniting the differences.

[72] In the tradition of the tribes in Papua, there is a custom that stipulate how to resolve the conflict among them. This custom is still held tightly by the tribes of Asmat, Baliem, Beoga and Ilaga, in settling the internal conflict between them. Beside that, adat could also be used as the symbolic vehicle in the reconciliation process among them. *See* J Budi Hernawan, "Mengisi Gagasan Pembentukan Komisi Kebenaran Dan Rekonsiliasi Konteks Papua" (Fill in the Idea of Establishing Commission of the Truth and Reconciliation in Papuan Context) a paper for workshop "Menggagas Masa Depan Penegakan HAM"(To Plan the Future of Human Rights Uprighting) held by Kontras Papua, Jayapura 10-14 June 2002. www.hampapua.org/skp/skp03/op-16i.rtf site visited 9 December 2005.

CHAPTER III

THE MANDATE OF THE TRUTH AND RECONCILIATION COMMISSION BASED ON LAW NO.27/2004

A. Introduction

The establishment of the Truth and Reconciliation Commission (TRC)[73] in Indonesia is one of the consequences of the enactment of various regulations concerning human rights particularly after the year 1998. Pursuant to the mandate laid down in the Decree of the People's Consultative Assembly No. V/MPR/2000[74] and Law No.26/2000 concerning Human Rights Court,[75] the Government of Indonesia and the House of Representative followed up with a discussion to pass the law on the establishment of the TRC. During the discussion of the said draft bill of law, different opinions arise both from the parliament and the public.

Four years later, on October 6, 2004, the President Megawati passed the said bill into Law No. 27/2004 concerning the TRC. Again, many controversies and opposition arise in relation to the enactment of this law. Many activists of NGOs oppose this law, saying that it does not address the interests of victims and even tends to grant impunity to the perpetrators. Meanwhile, other parties think that the law is at least considered as a breakthrough to overcome the deadlock in the settlement of violations of human rights in the past.

This chapter will further describe and analyze some issues concerning the establishment of the TRC and its mandates.

B. The Need to Establish the TRC

The idea to established TRC was introduced following the fall down of Soeharto regime. Some human rights organizations proposed to President Habibie in 1998 the need to establish TRC to response the previous regime with its various violations of human rights. The idea did not at once receive a positive response. In addition, some people had strongly opposed the idea to establish TRC. For example General Wiranto agreed that the

[73] "Truth Commission" refers to official, temporary, non-judicial fact finding bodies that investigate a pattern of abuses of human rights or humanitarian law, usually committed over a number of years. *See* UN Doc E/CN.4/2005/102/Add.1.

[74] Ibid. above n.5

[75] Ibid. above n.6

establishment of TRC will see the military become a major object of investigations into gross violations of human rights.[76]

This opposition did not, however, lessen the determination of certain human rights activists in Indonesia about the need for the establishment of a TRC. They considered a TRC as a vital and competent institution to uncover the actual facts on the violations of the human rights in the past. The findings of the TRC, they argued, would at least reveal the motive of the violations of the human rights and who are the perpetrators. The information will also let the victims know about the actual facts about the said human rights violations.

The idea to establish the TRC was firstly stated formally by President Abdurahman Wahid (the Fourth President of the Republic of Indonesia) in 1999.[77]

Elsam, a non-governmental organization which focuses on the reconciliation issues, together with the Indonesia National Commission on Human Rights (hereinafter Komnas HAM) and other human rights organizations proposed the draft bill concerning the TRC during this period.[78] Elsam in its 'position paper' states that the need to establish the TRC arose due to the fact that it was very difficult for the transitional government to enforce the law in respect of the violations of human rights committed by the previous regime. It was primarily caused by the existing strong influence of the elements of the previous regime during the transition period such as the military and bureaucracy. The presence of TRC would, the organization agreed, serve as a complementary mechanism for State in conducting its obligation to enforce the law against violations of human rights in the past.[79]

On the other hand, government had also proposed a draft bill on the TRC to Parliament. The government in its introductory note highlighted the importance of the enactment of the law on the basis of six (6) basic considerations. Firstly, gross violations of human rights occurred before the enactment of Law No. 26/2000 should be reinvestigated to uncover the truth and to enforce justice. Secondly, establishment of TRC was one of realizations of the effort. Thirdly, it should provide a legal basis for uncovering the violations of human rights that had occurred before the enactment of Law

[76] *See* Priyambudi Sulistiyanto, above n.9, p.4.

[77] *See*, AHRC-Indonesia Site, "The Indonesian Bill on the Truth and Reconciliation and the NGO/Victims Communities in Jakarta," at http://indonesia.ahrchk.net/news/mainfile_php/truth/5 site visited 16 March 2006.

[78] *Ibid.*

[79] *See*, ELSAM, "Kertas Posisi atas RUU KKR", (Position Paper on the Draft on the Truth and Reconciliation Commission) at http://www.elsam.or.id site visited 16 March 2006.

No. 26/2000. Fourthly, violations of human rights occurred before the enactment of the said law had not been completely settled and accounted for, thereby the victims and the families of the victims (heirs) have yet to receive a permanent legal opinion and justice on the background of the said violations of human rights. Fifthly, ignorance about violations of human rights had produced a cynicism and apathy against legal institutions as State was considered to have granted impunity to the perpetrators of human rights violations. Sixthly, through this TRC, it was expected that the perpetrators and victims of the human rights violations told the truth on their bad experience on the gross violations of the human rights, thereby the true fact can be disclosed. According to the government, these considerations were very important to create and maintain the national unity.[80]

C. Debate the Parliament and Voices of Civil Society

The draft bill provoked a lively debate in Parliament. The debate was not only in connection with the consequence and importance of the establishment of TRC to disclose the violations of human rights in the past, but also with designation of the law itself.

The debate particularly on the designation of the law could be seen as a substantial representation of the group's interest at Parliament. It could be also said that there was still a strong political foothold of the former regime at Parliament which did not support the process of the fact-finding of human rights violations in the past. It was reflected in decision of the Military-Police Faction which opposed the use of the word 'truth' with a reason that the reconciliation spirit should be prioritized and not to rejuvenate the 'old wound' concerning the violations of human rights.[81] The proposal of this faction reflected personal perception of the faction members which tended to waive the process of the discovering of the truth itself, and preferred reconciliation on the name of the 'State unity' to the fact-finding. So, this faction emphasized that the 'State unity' should be put

[80] *See* "Sejarah dan Dinamika RUU Komisi Kebenaran dan Rekonsiliasi: Perbaikan Sejarah Yang Penuh Kebohongan," (History and Process of the Draft on the Truth and Reconciliation Commission: a Correction to the Deceitful History) at http://www.parlement.net/ site visited 17 march 2006. *See also* Budiman Tanuredjo, "Penyelesaian Pelanggaran HAM Era Orde Baru Mau ke KKR atau Pengadilan HAM Ad Hoc?" (Settlement of Violations of Human Rights committed by the New Order regime to be held at the Truth and Reconciliation Commission or Ad Hoc Human Rights Tribunal? (Kompas daily, 14 July 2003) at http://www.indonesia-house.org/PoliticHR/impunity/071403Penyelesaian_ham. htm site visited 16 March 2006.

[81] *See* "Pembahasan RUU Komisi Kebenaran dan Rekonsiliasi: Elsam Menolak Usulan dari Faksi TNI/Polri" (Discussion of the Draft Bill on the Establishment of the Truth and Reconciliation Commission: Elsam declined the Proposal of the Military-Police Faction) at <http://www.kompas.com/kompas-cetak /0405/24/Politikhukum/1039111.htm> site visited 24 November 2005.

above any other things.[82] Meanwhile, the Crescent and Star Party Faction insisted on the use of the word 'truth', but added the word "national" to "reconciliation". The Reform Faction preferred the word "accountability" instead of "truth".[83]

Parliament also discussed other more substantial problems as compensation, rehabilitation and amnesty. The disagreement at Parliament on these three issues could already be seen in the preliminary process of the List of Inputs (DIM)[84] which reflected a taking side to the perpetrators instead of the victims. Take for example, the controversial clause which sets out that compensation will be only provided if the amnesty is granted.[85] This clause was agreed by almost all factions at the parliament, except the Crescent and Star Party Faction which proposed that the compensation to the victims shall not be related to the grant of the amnesty request.[86]

Other debates also grew outside the building of the parliament, that was, the civil society. Priyambudi Sulistiyanto highlighted the said disagreement and classified them into two camps: between the prosecution and punishment camp and the truth commission camp. The first camp (which included Kontras, The Indonesian Legal Aid Foundation or YLBHI and Imparsial) argued that Indonesia should strengthen the role of a human rights court instead of a truth commission.[87] They believed that the perpetrators must be brought to court for their past crimes and be treated accordingly, and argued that justice can only be achieved if the perpetrators were punished. The second camp, represented by Elsam and Komnas HAM, argued that a truth commission would provide the opportunity to victims to come forward and tell their stories about the past which would enhance the

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[82] *See* Reny Rawasita Pasaribu, "Sikap TNI/Polri dalam Daftar Inventaris Masalah RUU KKR, Laporan Pemantauan RUU Komisi Kebenaran dan Rekonsiliasi April 2004 Minggu Kedua," (Stance of the Military-Police in the List of Inputs on the Draft Bill on the Establishment of the Truth and Reconciliation Commission, Monitoring Report of the Draft Bill on Establishment of the Truth and Reconciliation Commission, April 2002, 2nd week) at http://www.parlemen.net site visited 8 April 2006.

[83] Priyambudi Sulistiyanto, above.n.9, p.8.

[84] List of Inputs ('Daftar Isian Masalah') is a detailed collection of the all inputs furnished by each faction at the Parliament on the draft bill of the law being discussed and to be discussed. The inputs will be used later as a reference in a discussion of the draft. The list usually reflects the stance and opinion of a faction against a draft bill of law being or to be discussed.

[85] Ibid. above n.8, Article 27

[86] *See*, Reny Rawasita Pasaribu, "Mencermati Daftar Inventaris Masalah Hasil Pansus KKR, Laporan Pemantauan RUU Komisi Kebenaran dan Rekonsiliasi Maret 2004 Minggu Kedua," (Analysis on the List of Inputs at the Special Committee on the Draft Bill of Law on the establishment of the Truth and Reconciliation Committee, March 2004, 2nd Week" at http://www.parlemen.net site visited 8 April 2006.

[87] Those who take the "no peace without justice' approach are motivated by the belief that only legal proceedings against the perpetrators of war crimes and human rights abuses can (1) provide the truth and punishment necessary to satisfy the victims; (2) prevent individual retaliation for past injustices; and (3) prevent history from repeating itself. Victims and human rights NGOs typically adopt this position. *See* Ivan Simonovic, "Attitudes and Types of Reaction toward Past Crimes and Human Rights Abuses," in *HeinOnline* –29 Yale J. Int'l L.343 2004: p.347.

reconciliation process. Accordingly, a TRC could complement human rights court which was already established in Indonesia.[88]

Kontras in its response to the Draft Bill of the Law on the Establishment of the TRC which was being discussed at Parliament said that the state assumed international legal and moral obligations to bring the perpetrators of gross violations of human rights to court. In addition, Kontras assumed that in current socio-political context and the construction of the said draft bill of law, it was not proper for Indonesia to choose the model of TRC in settling the past crimes as there were many perpetrators of the said past crimes were as a part of current government system. It would therefore create more possibility of the grant of impunity.[89]

Meanwhile, Komnas HAM in its inputs furnished to the Special Committee of Parliament on the Draft Bill of the Law on the establishment of the TRC stated that the process of settlement of gross violations of human rights in the past should be conducted in consideration to the achievement of justice, especially to the victims and/or their families and/or their heirs as it is they who have mostly suffered from the tragedy and received any denial of justice. The settlement of the gross violations of the human rights through the TRC should not seen as a revenge, but a process of justice achievement, especially the fulfillment of the justice for the victims.[90]

Meanwhile, although ELSAM supported the establishment of the TRC, it highlighted, in a hearing with the Special Committee that it was important to conform to the internationally accepted principles concerning the removal of impunity. It added that the establishment of TRC should be based on the perspective of the rights of the victims which had been universally recognized, comprising the rights to know, rights to justice and rights to rehabilitation.[91]

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[88] Priyambudi Sulistiyanto, above n.9, p.9

[89] *See*, Kontras, "Pembentukan KKR: Jalan Pintas Hindari Keadilan dan Kejujuran Sejarah," (Establishment of the Truth and Reconciliation Commission: a Short Cut to Avoid Justice and Historical Transparency) [18 September 2003] at http://www.parlemen.net site visited 16 March 2006. This document is the response of the Kontras to the Draft bill of Law on the TRC being discussed at the Parliament.

[90] *See*, "Brief Report of the Special Committee on the Draft Bill of Law on the establishment of the TRC, Meeting Year 2003-2004, 1st Session Period, 5th Meeting, Type of 2nd Meeting RDPU, Wednesday, 17 September 2003; Agenda: Suggestions and Inputs from the Indonesian National Commission on Human Rights (KOMNAS HAM) to the Draft Bill of Law on the TRC," at http://www.parlemen.net site visited 16 march 2006. The Special Committee on the Draft Bill of Law on the TRC in its resolution stated that the responses, inputs and suggestions of the Indonesian National Commission on Human Rights (KOMNAS HAM) form part of the inputs of the Special Committee in discussing and formulating the List of Inputs (DIM).

[91] *See*, "Brief Report of the Special Committee on the Draft Bill of Law on the establishment of the TRC, Meeting Year 2003-2004, 1st Session Period, 6th Meeting, Type of 3rd Meeting RDPU, Thursday, 18 September 2003; Agenda: Suggestions and Inputs from ELSAM, KONTRAS, and LPHSN to the Draft Bill

D. Various Responses to the Law on the Establishment of the TRC

There were various comments from the public on the enactment of the Law on the Establishment of TRC – some supported and some opposed the law. Kontras classified these people into four (4) groups. Firstly, those who felt optimistic and contented with the enactment of the law. Secondly, those who felt pessimistic, but could accept the enactment of the law. Thirdly, those who totally opposed the enactment of the law. Fourthly, those who had no concerns and underestimated the role of the TRC.[92]

The first group comprised those who were directly involved from the beginning phase of the establishment of TRC at Parliament, for example the Chairman of the Special Committee on the Draft Bill of Law on the Establishment of the TRC, Mr. Sidharto Danusubroto,[93] who said that following the enactment of the Law on the Establishment of the TRC, it meant that Indonesia was no longer left behind in the appreciation of human rights. The second group includes those who could generally accept the Law, but had some criticism on some provisions or articles of the law. They consisted of Elsam, Komnas HAM and some other NGOs. The third group included Kontras and victims of such human rights violations as 1965 communist coup d'etat victims (hereinafter G-30-S-PKI), Tanjung Priok Incident, Semanggi Tragedy of 1998. They chose to totally refuse the use of the reconciliation mechanism and favored the ad-hoc tribunal mechanism as an effort to 'find and disclose the truth'. The stance of the third group is reflected in the personal values of Sumarsih Arief.[94] To her, reconciliation

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of Law on the TRC," at http://www.parlemen.net site visited 16 march 2006. The Special Committee on the Draft Bill of Law on the TRC in its resolution stated that the responses, inputs and suggestions of ELSAM, KONTRAS, and LPHSN form part of the inputs of the Special Committee in discussing and formulating the List of Inputs (DIM).

[92] Kontras, "Pembentukan Komisi Kebenaran dan Rekonsiliasi," (Establishment of the TRC) [Email to Author, Thursday, 16 March 2006]. This paper is an appendix to the list of questions asked by the Author to Mr. Usman Hamid, the executive director of Kontras.

[93] The Draft Bill of Law on the Establishment of the TRC was sent by the President Megawati Soekarnoputri to the House of Representative on 26 May 2003 and its discussion was firstly conducted after 14 August 2003. The number of the members of the Special Committee on the Draft Bill of Law on the Establishment of the TRC is 50 persons, chaired by Sidarto Danusubroto from Indonesian Struggling Democratic Party Faction. *See* "Pansus RUU KKR Terbentuk" (Special Committee on the Draft Bill of Law on the TRC established) (Kompas daily, 20 July 2003) at http://www.kompas.com/kompas-cetak/0307/10/ nasional/ 420986.htm site visited 19 October 2005.

[94] Sumarsih Arief is a housewife, the winner of the *Yap Thiam Hien Award*, an Indonesia's prestigious appreciation to the dedicated human rights activists. She is the mother of BR Norma Irmawan (Wawan), a student of Atmajaya University Jakarta who was shot dead by the security when demonstrated at the Semanggi Junction Area on 13 November 1998 (Semanggi I Tragedy). The Semanggi Tragedy is known as a consequence of the fall down of President Soeharto on 21 May 1998. Students from various universities flocked together and went on strike at Semanggi Junction Area, Jakarta as a consequence of the political tense especially in the military.

requires an agreement of apology made between the perpetrators and the victims. It is very hard for her to accept the apology from the perpetrators without a tribunal process.[95]

The fourth group, according to Kontras, was reflected in the stance of the Chairman of the Golkar Party and the incumbent Vice President Jusuf Kalla who stated that "*Human rights shall be future-oriented, instead of the past. The past shall be forgiven. The TRC is only for a reconciliation, thought it is not clear between who. The TRC is an idea arising in 2000 on an emotional basis and consideration that the past is full of the violations and conflicts.*"[96]

E. Some Weaknesses of Law No. 27/2004

1. Mandate

The major mandate of the TRC as laid down in Law No. UU 27/2004 is (1) to find the truth; (2) to provide compensation, restitution, and/or rehabilitation to the victims or families of the victims who are legal heirs; and (3) to consider the grant of amnesty; all of which are expected to pave way to achieve a reconciliation and national unity.[97]

This law is substantially different from that of human rights tribunal as the law on TRC does not provide for legal prosecution process. It solely sets forth non-judicial process emphasizing on the process of uncovering the truth rather than judicial prosecution process. The law does not, however, set forth detailed mechanism of the truth uncovering itself.

The law does not specify a mandate on important recommendations regarding administrative and legal actions required to assure the same violations not reoccur in the future. This mandate is vital as the investigation of the past violation of human rights is aimed at identifying the system and organization of previous regime in committing gross violations of human rights, thereby involving such apparatus of the regime as the governmental institutions, legal system or the cultural and ideological system.

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[95] M Fadjroel Rahman, *"Kebenaran, Jalan Menuju Rekonsiliasi: Refleksi untuk Komisi Kebenaran dan Rekonsiliasi,"* (Truth, a Road leading to a Reconciliation: Reflection for the TRC), [Email to Author Saturday, 18 March 2006]. M Fadjroel Rahman is one of 42 participants who pass the final selection phase of the members of the TRC. Pursuant to the Law on the TRC, the President will choose 21 persons out of the said 42 participants to be appointed as the members of the TRC. When this dissertation is written, the President has yet to decide the appointment of the 21 members of the TRC.

[96] Ibid. above n.92

[97] Ibid. above n.8 'Chapter: Explanation'.

2. Time Frame

The time frame is a serious matter for TRC. TRC Law No.27/2004 does not specify the time frame of investigation or uncovering of the truth. It just states in its 'preamble' that "gross violations of human rights committed before the enactment of Law No.26/2000 concerning the Human Rights Court shall be reinvestigated to uncover the truth, achieve a justice, and promote a culture on the appreciation of human rights, thereby a reconciliation and national unity can be realized."

There is no fixed time frame specified in the said law, despite at the beginning phase of the discussion of the Draft Bill appeared a time frame of investigation which was started from the proclamation of Indonesian Independence in 1945 until 2000, when the Law No.26/2000 was enacted.[98]

There is an uncertainty in defining the time frame. Some people 'offered' a period of investigation from 1945 to 2000,[99] some stated that the time frame of investigation should be started from 1965 as they considered the slaughterers of supporters of the G-30-S-PKI as the point of departure of human rights violations in Indonesia.[100] The case of 5 July 1959 was also said as starting point of the authoritarian regime and should be the point of departure of investigation.[101]

The definite time frame in this law is so important as the basic spirit of TRC is to uncover the truth. Retroactive time frame in uncovering of the truth is to expressly identify the cut off period between the former and the incumbent administration. The determination of the time frame will confirm the mandate and scope of responsibilities of TRC -- which work temporarily -- and help them to avoid any failure in carrying its mandate due to indefinite time frame of the investigation. Above all, the time frame is necessary to avoid any uncertainty about the authorities of the TRC and to prevent any polemic or opposition from the public which might disgrace the credibility of TRC.

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[98] *See* Asvi Warman Adam, "Realisasi Komisi Kebenaran dan Rekonsiliasi: Periodisasi dan Kriteria Kasus," (Realization of the TRC : Time Frame and Case Criteria), a paper submitted to *International Conference on Truth and Reconciliation Commission in Indonesia* a conference organized by Elsam, European Union, Friedrich Ebert Stiftung, NZAID, and The Jakarta Post, held in Hotel Santika Jakarta 12-14 September 2005, p.1.

[99] Ibid. above n.92

[100] Ibid. above n.98

[101] Ibid. above n.95, p.8

3. Compensation and Rehabilitation

In addition to the time frame of investigation of human rights violation, other problem which may arise was compensation. It is stated that compensation and rehabilitation will be provided if amnesty application is accepted.[102] It can be seen that the law takes sides to the perpetrators rather than victims. It will be a problem whether or not the amnesty is granted, will the victims remain to receive a compensation or restitution? The law does not provide a definite answer to this question. In other words, it may mean that without giving an amnesty to the perpetrators, and then the victims would not receive any compensation and rehabilitation. The provision of compensation, restitution and rehabilitation shall not be linked to the amnesty as these are absolute rights of the victims in any circumstances.

4. Amnesty

The tendency to take side to the perpetrators is also implied in Article 44 which states that gross violations of human rights which have been investigated by TRC cannot be referred to the Ad-Hoc Human Rights Court.[103] As a matter of fact, this law should have been a complimentary to judicial process. As a non-judicial and complementary mechanism, the TRC shall also take sides to the victims in investigating the case and uncovering the truth. It is in line with the rights of the victims (*right to know*) the real truth.

Then, there is a problem relating to what extent or what criteria that an amnesty shall be granted. The said law expressly sets forth that the TRC will only recommend an amnesty and the grant of amnesty shall be fully dependant on discretion of the President in consideration of the ideas furnished by the Parliament.[104] There is no clear limitation and criteria which is attributed to a transparency and accountability concerning the award of amnesty. Meanwhile, the said criteria and limitation are required to avoid the grant of impunity to the perpetrators.

F. Summary

[102] Ibid. above n.8, Article 27
[103] Ibid. above n.8, Article 44
[104] Ibid. above n.8, Article 25 and 28 (1)

The process of the enactment of the law did not run smoothly. There was a conflict of interests among factions in discussing the draft bill of the law at Parliament. Some factions opposed the use of the word ‘truth’ and put the ‘state unity’ above all. Outside the parliament building, the ideas of civil society were varied on the establishment of TRC. Some opposed the establishment without any conditions, some wanted to give an opportunity to TRC to work first. Some pro-cons opinions and responses arising during the discussion of the draft bill and after the enactment of the law are because a lot of people have different expectations on the implementation of the law and the operation of the TRC.

The Law itself, basically, justifies impunity as stated in Articles 28 and 29 that the perpetrators can be granted a full amnesty for their past crime if they have asked for an apology. The function of the TRC as a complementary mechanism to the human rights court cannot be implemented as it is hindered by the provisions set out in Article 44. In other words, the case which has been investigated and settled by TRC cannot be referred to the Ad-hoc Human Rights Court. ***

CHAPTER IV:
CASES EXAMINATION [1]

A. Introduction

Justice becomes a major concern when the victims are confronted with the perpetrators. It is often interpreted that the perpetrators shall be brought before the court for a trial. In addition to the judicial process, there are some mechanisms at which the victims and the perpetrators may attempt to achieve reconciliation. One of these mechanisms is through the peaceful settlement.

In some serious cases such as the human rights violations in Tanjung Priok in 1984, the victims choose the settlement of the case through a reconciliation mechanism. In this case, the term *Ishlah* is more commonly used than that "reconciliation".

There have been also some violations of the human rights in Aceh and Papua. At other side, the victims of the G-30-S-PKI case demand that the justice shall be achieved. By using reconciliation mechanism, how will these cases be settled?

This chapter will analyze how these cases are settled through the reconciliation mechanism.

B. Tanjung Priok Case

In Tanjung Priok case,[105] some of the family members of the victims or the victims themselves[106] choose to use the *ishlah* or a peaceful settlement with the military who has

[105] Tanjung Priok case erupted in September 1984. This case was originated from the detention of four persons, namely Achmad Sahi, Syafwan Sulaeman, Syarifuddin Rambe and M. Nur, who were alleged to have set a motorcycle owned by the local military officer to fire. They were arrested by the North Jakarta Police Resort and then detained at the North Jakarta Military District Command. On September 12, 1984, a local religious public figure, Amir Biki, held a massive religious meeting (*tabligh)* on Sindang Street. Amir Biki in his religious lecture demanded the military to let the four worshippers of the As Sa'adah Mosque free. When he found that the four persons had yet to be released on 11.00 P.M. on September 12, 1984, Amir Biki mobilized his people to go to the Office of the North Jakarta Military District Command and Koja Sector Police Office. These demonstrators who were on their way to the Military Office were ambushed in front of the North Jakarta Police Office by a group of the Airforce Defense Fleet (Arhanud) led by Second Sergeant Sutrisno Mascung under the command of Captain Sriyanto, the II Operation Section Chief of the North Jakarta Military District Command. The situation changed rapidly and 79 persons were shot, 55 persons were injured and 24 died. This incident was actually the peak of the protest of the local Tanjung Priok people against the militarism of the New Era Administration under the regime of Soeharto which insisted on the application of the Pancasila State Ideology as the state's single principle. Local people believe that Islamic ideology is the ideology which can grow in Indonesia which is based on Pancasila State Ideology; nevertheless, Pancasila shall not be made as the single, only principle. So, Islamic ideology can go side by side with Pancasila. See *Komnas HAM, "Ringkasan Eksekutif Laporan Tim Tindak Lanjut Hasil Komisi Penyelidik dan Pemeriksaan Pelanggaran Hak Asasi Manusia di Tanjung Priok (KP3T),*" (The National Commission on Human Rights: Executive Summary of the Report of the Follow-up Team of the Tanjung Priok Human Rights Violations Investigating and Examination Commission), Jakarta October 11, 2000. *See also* A.M. Fatwa, *"Pengadilan HAM Ad Hoc Tanjung Priok, Pengungkapan Kebenaran untuk Rekonsiliasi Nasional"* (Tanjung Priok Ad Hoc Human Rights Court, Discovering the Truth for a National Reconciliation) (Jakarta: Dharmapena Publishing, 2005): p.21.

committed human rights violations.[107] Then, should the *ishlah* cease or annul the legal process which are being undertaken or to be taken?[108] No. *Ishlah* is used in conjunction with application of religious law (Islamic law), instead of referring to the applicable positive law. Therefore, the *ishlah* should be merely interpreted as a moral accountability,[109] rather than a legal accountability.

The term *ishlah* or peaceful settlement has often confused and affected the mindset of law enforcers -- judges, prosecutors and police – in making a decision. They assume that when *ishlah* is achieved, the case has been considered closed as affected parties have agreed to undertake a peaceful settlement. The *ishlah* is directed to the philosophical and theological basis.[110] *Ishlah* is intended to rehabilitate dignity and status of parties (victims and perpetrators), replacing the conflict atmosphere with a peace, substitute a blasphemy for a forgiveness, stop any legal sue and accusation. The affected parties want a clarification through a peaceful settlement and amicable negotiation, instead of through court proceedings.

The *ishlah* mechanism chosen by some of the victims in settling the 'dispute' with the perpetrators is not identified in the criminal law system in Indonesia. So, the *ishlah* itself has no legal consequence.

AM Fatwa, one of Tanjung Priok victim's states that pursuant to the international law and positive law applicable in Indonesia, violation of human rights is not a civil case which can be settled between affected parties through an amicable negotiation, but it shall

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[106] The majority of the victims of the human rights violations in Tanjung Priok are Moslems. Therefore, the application of the Islamic methods is expected to be able to cease the on-going legal process and endeavors for a peaceful settlement (*Ishlah*). This solution is considered acceptable by some victims as one of the actualization of their compliance to the Islamic Law. See, BK/ISL, "Rempah-Rempah, Ishlah," (Peaceful Settlement Recipes), *Berita Kontras* No.13/Th ke-2/III/2001 in <www.kontras.org/buletin/mar-2001.pdf> site visited October 10, 2005.

[107] Some of the victims, comprising seven persons, who are the members of the Bunga Bangsa Foundation have agreed to undertake a peaceful settlement with the perpetrators (General *Ret.* Try Sutrisno et al) and signed a "Peace Accord'. Those who agreed to enter into a peaceful agreement or settlement as stated in the deed of the agreement are: Syarifuddin Sulaiman, Ahmad Sahi, Syafwan Sulaiman, Nasrun HS, Asep Saprudin, Sudarso, and Siti Chotimah. Full text of 'Ishlah Accord' can be reach at http://hukumonline.com/briefcase/917200391743PM723.doc site visited 10 October 2005.

[108] President Abdurahman Wahid on April 23, 2001 issued the Presidential Decree No.53/2001 concerning *the Establishment of the Ad Hoc Human Rights Court at Central Jakarta Court* (Keputusan Presiden No.53/2001 tentang Pembentukan Pengadilan HAM Ad Hoc Pada Pengadilan Negeri Jakarta Pusat). The issuance of this law was to response the recommendation submitted by the National Commission on Human Rights and the House of Representative which declares that the Tanjung Priok incident is categorized as a gross violations of the human rights.

[109] See, Siti Masriah, "Try Sutrisno Mengaku Bertanggung Jawab Secara Moral," (Try Sutrisno admits to be liable morally) *Tempo Interaktif*, January 12, 2004, <http://www.tempo.co.id/hg/nasional/2004/01/12/brk,20040112-14,id.html> site visited October 7, 2005.

[110] Elsam, "Progress Report # 3, Monitoring Pengadilan HAM Ad Hoc Tanjung Priok." (Monitoring of the Ad Hoc Human Rights Court for Tanjung Priok Case) (Jakarta: ELSAM): p.2.

be settled through criminal judicial process. He adds that the settlement of gross violation of human rights in the past by bringing its perpetrators to the court shall not be seen as a political nor personal revenge, but as an effort to achieve a sense of justice for the victims, and especially to discover a truth in the said incident.[111] This idea is also supported by Hendardi, the Chairman of the Indonesian Legal Aid Association, who states that the peaceful settlement or *ishlah* shall not hinder nor halt the ongoing judicial process at the court.[112] Also supporting this idea is the former Indonesian President Abdurahman Wahid who asserts that the *ishlah* process shall not mean that the legal process to bring the perpetrators should be ceased. Both process shall go hand in hand and complement one another.[113]

In this matter, it can be said that non-judicial process through a reconciliation or *ishlah* is an integrated part of reconciliation process, rather than a separate process. This mechanism shall not be confronted with the judicial process, but as a complementary.

C. Aceh Conflict

The history of the conflict in Aceh began in the pre-colonial era, during which the Acehnese struggled to fight the Dutch for more than three centuries. The conflict has continued for the last three decades between Indonesian central government and the GAM (Free Aceh Movement)…. Dialogue between GAM and the central government took place in 1999, but ended failure in 2003, and the central government launched an integrated military operation…"[114]

The "Memorandum of Understanding" between the Government of Indonesia and Representative of the Aceh Freedom Movement (hereinafter GAM) was signed in Helsinski, Finland[115] on August 15, 2005, some months after the Tsunami disaster hit Aceh.

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[111] Ibid. above n.105, p.ixiii-ixiv

[112] Ibid. above n.1, p.377

[113] Ibid. above n.1, p.380

[114] Supriyanto Basuki, "Reconciliation is the Best Solution for Conflict in Aceh," a master thesis at Naval Postgraduate School, California; p: abstract. available at http://www.ccc.nps.navy.mil/research/theses/Basuki03.pdf site visited 24 April 2006

[115] In signing the MoU, the Government of Indonesia is represented by Hamid Awaluddin (Minister of Law and Human Rights) and the GAM is represented by Malik Mahmud. This meeting was facilitated by Martii Ahtisaari, former President of Finland who acts for the Crisis Management Initiative. The combination of Kalla's (former ministry during President Megawati Soekarnoputri administration and now vice-president of Republic Indonesia) initiative, the impact of military operations on GAM, and the changed dynamics brought about by the tsunami led directly to the Helsinki talks. Five rounds -- 27-29 January, 21-23 February, 12-16 April, 26-31 May, and 12-17 July 2005 -- produced a memorandum of understanding (MOU) covering governance, political participation, economy, rule of law, human rights, amnesty and

Paragraph 2.3. of the MoU sets forth that "A Commission for Truth and Reconciliation will be established for Aceh by the Indonesian Commission of Truth and Reconciliation with the task of formulating and determining reconciliation measures."[116]

What does "the content" of this Peace Accord mean and what are their legal implications? Firstly, the judicial and non-judicial settlement processes after the conflict will be done through the TRC, of which is expected to be able to pave a way for a process of discovering the truth. The truth shall be discovered to determine who shall be considered as the perpetrators and who the victims are. After the truth is found and identified, then it shall be followed by reconciliation between victims and perpetrators.

Secondly, the mandate to establish the TRC in Aceh is given to the Indonesian TRC. When this study is written, the said Indonesian TRC is yet to be established. Meanwhile, the settlement of conflict in Aceh shall be done immediately.

At one side, Aceh is a 'special province' which applies the Shariah law.[117] What is the reconciliation process required for this area? Whether to apply the TRC mechanism – as specified in the MoU—or to apply the Shariah principles to settle the conflict?

In Shariah principle, there are three types of crimes with the levels ranging from the most serious crimes, less serious crimes to crimes with restitution. Basically, Shariah principle requires a just punishment. In the crimes with restitution, the perpetrators who are proven to be guilty are obliged to provide compensation to the victims or their family.

At the other side, as set out in the 'Peace Agreement' Paragraph 2.2. "A Human Right Court will be established for Aceh." It can be interpreted that in addition to using the TRC mechanism, the province requires the existence of the Human Right Court to trial the perpetrators of the human rights violations. In other words, the reconciliation process shall be led to the horizontal level, viz. among the Acehnese people who were involved in the past conflict. There is a wide demand to bring the perpetrators of the human rights violations before the court of law in Aceh. The alleged perpetrators

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reintegration, security arrangements, monitoring, and dispute resolution. *See* ICG, "Aceh: A New Chance for Peace," in *Crisis Group Asia Briefing* No.40, 15 August 2005 available at http://www.icg.org site visited 20 January 2006.

[116] "Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement" for full text document can be reach at http://www.thejakartapost.com/ RI_GAM_MOU.pdf site visited 24 April 2006.

[117] In August 2001, President Megawati signed Law No.18 Year 2001 concerning Special Autonomous to Aceh. One of the provisions of this law is allowing partially implementation of Islamic Law in Aceh.

comprise the military and civil officials, namely military and police personnel as well as civil bureaucrats who were involved in the conflict.[118]

In Aceh context, the reconciliation is more focused on the political argumentation and approaches rather than legal approach. The latter will be conducted in the framework of the political compromise between GAM and Government of Indonesia.

D. Papua

Papua[119] is a specific problem for the Government of Indonesia. The province which contains abundant natural resources is considered by human rights observers as an area which is prone to the human rights violations.[120] The human rights violations which were committed after the enactment of Law No.26/2000 is clearly the jurisdiction of the human rights court. However, human rights violations which were committed before the enactment of Law No.26/2000 it shall be jurisdiction of an Ad-hoc human rights court. In the context of the settlement of human rights violation in the past, there are two mechanisms available, they are the Ad-hoc Human Rights court and TRC.

In Papua, the demand for establishment of TRC receives a wide public support in line with the enactment of the Law No. 21/2001 concerning Special Autonomy for Papua Province (hereinafter Law No.21/2001),[121] three years before the enactment of Law No.

[118] The Indonesia's Democratic Party of Struggle Faction (FPDIP) at the House of Representative in a Specific Meeting with an agenda of a discussion of the Draft Bill of Law concerning the Acehnese Administration states that the reconciliation process shall not be seen partially, but wholly. In other words, the reconciliation shall not be addressed to local people, but also between local community and military/police or between Aceh Freedom Movement (GAM) and government/military/police. This idea is based on the grant of the amnesty to the members of the Aceh Freedom Movement as set out in the 'Peace Agreement'. According to this faction, the military/police who were involved in the violations of the human rights deserve the rights for the similar treatment. *See* "RUU Pemerintahan Aceh, Keberadaan Pengadilan HAM dan KKR Disepakati" (Draft Bill of Law concerning Acehnese Administration, the Existence of the Human Rights Court and the TCR is Agreed) [Kompas Daily, Thursday 18 May 2006] at http://www.kompas.com/kompas-cetak/0605/18/Politikhukum/2661017.htm site visited 18 May 2006.

[119] The name, Papua, was officially given to refer to the area and local people by the fourth President of the Republic of Indonesia Abdurahman Wahid as an appreciation and it indicates that the evidence for the identity and existence of Papua is acknowledged. Formerly, this area was known as West Papua, after the hand-over of this area from the Netherlands to the Government of Indonesia, the said name was changed to be 'Irian Jaya'.

[120] Neles Tebay, *West Papua, The struggle for peace with justice* (London: CIIR, 2005): p.3-27; Lucia Withers, "To end impunity," in *Inside Indonesia* Jul-Sep2001 available at http://www.insideindonesia. org/edit67/lucia1.htm site visited 27 January 2006; John Rumbiak, "From the ashes to empire," in *Inside Indonesia* Jul-Sep2001 available at http://www.insideindonesia.org/edit67/johnrumbiak2.htm site visited 27 January 2006; Johanes Budi Hernawan, "The Church and Human Rights in West Papua," available at http://www.acmica.org/pub_westpapua.html site visited 9 December 2005.

[121] Indonesia, *Law concerning Special Autonomy for Papua Province* (Undang-Undang Otonomi Khusus bagi Provinsi Papua), Law No.21, State Gazette No.135 Year 2001, Supplement State Gazette No.4151.

27/2004. The Law No. 21/2001 provides an opportunity for the Papuan people to establish a TRC.[122]

The discourse as contained in the Law No. 21/2001 does not receive a due consideration from Papuan people. Some violations of human rights which keep occurring have made problem more complicated, let alone the disappointment, anger, revenge, dissatisfaction of the local people to the state apparatus.[123]

One interesting thing which needs to be considered is contained in Article 46, namely the phrase "in conjunction with the strengthening of the national unity …" This phrase shall mean that whatever target is determined, what vehicles to use, the most important and major one is that the final output shall not deviate from the basic principle of the national unity. This article is interesting as the establishment of the TRC is directed to the achievement of a single target, viz. the national unity. In this case, the political matters are more dominant.

The inclusion of the said article cannot be separated from the political factor in Papua, that is, to avoid any separatist movement or at least to eliminate it, and lead it for the national integration and unity. To the government, the enactment of this law is of very beneficial in relation to the settlement of human rights violation in the past which cannot be settled through a judicial process.

At other side, the possibility for reconciliation by using a cultural mechanism in this context will be hindered by the fact of the variety of the races and tribes in Papua. Due to this fact, it will be difficult to establish a conducive atmosphere for the application of reconciliation mechanism as a whole. Moreover, the conflict which has resulted in the violations of human rights in Papua is classified as a vertical conflict, that is, a conflict between the government or state apparatus and local people. It is therefore assumed that the application of local mechanism is unable to achieve an effective reconciliation as a

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[122] Article 46 paragraph (1) states that in order to strengthen the national unity in Papua Province, the Truth and Reconciliation Commission will be established; (2) The duties of the Truth and Reconciliation Commission as stated in paragraph (1) herein (1) are:

a. To make a clarification on the history of Papua for the strengthening of the National Unity within the Republic of Indonesia; and
b. To formulate and enact the reconciliation measures.

See, Indonesia, *Law concerning Special Autonomous For Papua Province* (Undang-Undang tentang Otonomi Khusus Bagi Provinsi Papua), Law No. 21, State Gazette No.135 Year 2001, Supplement State Gazette No.4151, Article 46 (1) and (2).

[123] Johanes Budi Hernawan, "Mengisi Gagasan Pembentukan Komisi Kebenaran dan Rekonsiliasi Konteks Papua," (Fill in the idea of establishing Commission of Truth and Reconciliation in Papua context) a paper for workshop "Menggagas Masa Depan Penegakan HAM" (To Plan the Future of Human Right Uprighting) held by Kontras Papua, Jayapura 10-14 June 2002, http://www.hampapua.org/skp/skp03/op-16i.rtf site visited 9 December 2005.

whole. So, the use of the instrument of Law No. 27/2004 is believed to be more effective in the conflict settlement.

E. G-30-S-PKI Case[124]

This case is one of the agenda which shall be settled by the TRC. A serious settlement of gross violations of human rights occurred in 1965 and thereafter shall be done with a view to uncover the truth. The real story on the massacre in the said era is still obscure. Some parties are attempting to identify the political motive behind the case and to know what had actually occurred in this period.

Apart from the above stated political problems, uncovering the truth in this context will be a great job for TRC. This commission will encounter a serious problem in settling the said human rights violations which was massive in nature. After the truth is disclosed, the commission will also encounter a difficulty in relation to rehabilitation, restitution and compensation. This law grants an authority to the commission to provide its legal considerations to the government in providing rehabilitation, restitution and compensation to the victims and/or their family and/or their heirs.

This difficulty is attributed to the State's capabilities to provide the said compensation. As there are so many victims and/or their families who suffer from the annulment of the political and economical rights during the New Order regime, it will be difficult for the government to compensate all economic costs incurred by the said case. The alternative solution is the grant of rehabilitation to the victims and declaration of the

[124] Millions of the members and sympathizers of the Indonesian Communist Party (PKI) were killed after the failure of the September 30, 1965 Rebellion Movement (G-30-S-PKI). The military was asked to detain all members and sympathizers of the Rebellion Movement. The massive massacre was not only committed by the military under the command of Major General Soeharto, but also by people from Islamic groups. During the New Era regime under the control of President Soeharto, the members, sympathizers and family members of the Indonesian Communist Party had received discriminative treatments by the state and received negative stigma in the public. In addition, the State has systematically annulled their political rights, for example, they were not permitted to be hired as the civil servants, they have no voting rights and are not permitted to be admitted as the military and police. During this period, they had to submit to their fate. When the reform era replaced the authoritarian Soeharto Regime, they demand that their political rights shall be recovered. The Law on the Political Parties has recovered their political rights. Later, some people call on the government to grant rehabilitation and provide compensation to the family members of this massive massacre. *See* Olle Törnquist, *Dilemmas of Third World Communism: the destruction of the PKI in Indonesia* (London: Zed Books, 1984); Ruth Thomas McVey, *The rise of Indonesian Communism* (Ithaca, N.Y.: Cornell University Press, 1965); Rob Goodfellow, *Api Dalam Sekam : the New Order and the Ideology of Anti-Communism* (Clayton, Victoria: Monash Asia Institute, 1995); Benedict R. O'G. Anderson (ed.) *Violence and the state in Suharto's Indonesia* (Ithaca, N.Y.: Cornell University, 2001); AHRC, "A Statement by the Asian Human Rights Commission (AHRC): Rehabilitation and redress for massacre victims essential for true commemoration," at http://indonesia.ahrchk.net/news/mainfile.php/stbahasa/26/?alt=english site visited 16 March 2006.

apology as a good faith of the government when they dealt with human rights violation in the past.

In this context, the use of TRC instrument as a tool to settle and discover the past truth will not provide a satisfactory remedy to the victims and/or their family members. However, the above stated solution will at least show the good faith of the government to settle the past case peacefully.

Then, a question arises, will the use of the TRC instrument provide an effective remedy? The answer is that it depends on two things. Firstly, the TRC shall deal with the roots problem and uncover the truth of what had occurred at that time. Secondly, in the event that the government policy at that time is found to be incorrect, there shall be an open statement from the government about it and expression of apology to the victims and/or their family members as an evidence of the official state apology. If these two things can be realized by the commission, the economic burden to the state budget can be eliminated as the compensation is given in the form of rehabilitation.

F. Summary

The settlement of the gross violations of the human rights in Indonesia has not yet been conducted optimally by the State. This matter is not only due to the lack of legal instruments, but also lack of the government's good faith to settle the case completely.

The settlement as mention in the case above requires a political commitment from the government and hard work from the state apparatus to settle the cases as a whole. Lack of the government's political commitment to settle the case is believed to have hindered the operation to be conducted and recommendation to issued by the TRC.

The comprehensive settlement of gross violations of human rights which include in the jurisdiction of the TRC shall be immediately commenced as the community dissatisfaction and political tenses shall not be maintained without any certain settlement. Here, the function of the TCR is to mediate the existing problems through non-judicial mechanism and political settlement. ***

CHAPTER V :
AN EXAMINATION [2]

A. Introduction

The experiences show that the settlement of gross violations of human rights in Indonesia is always hindered by the some legal problems and their implementation. The regulations are occasionally so inadequate that the said settlement is far from the expectation; the regulations have been clearly specified but their implementation is not in the right tract.

This chapter will analyze the problems in relation to the settlement of gross violations of human rights, particularly in conjunction with uncovering of the truth as specified in Law No.27/2004.

B. Effective Remedy

The effective remedy is a right of any individual who suffers from any violations of human rights. As discussed in previous chapter how international instruments warrant an effective remedy for the victims of human rights violations.

The *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law* (hereinafter Basic Principles and Guidelines) asserts and warrants the victims of violations of human rights for reparation, namely restitution, compensation, rehabilitation, satisfaction and non-recurrence, and prevention.[125] Here, it can be identified that the concept of the grant of rights to the victims of human rights violation has been acknowledged by international laws. Indonesia has also appreciated the said rights of the victims as stated in the Government Regulation Number 3/2002 concerning the "Compensation, Restitution, and Rehabilitation for the Victims of the Gross Violations of the Human Rights."[126]

Then, there exists a problem in Indonesia whether the grant of remedy to the victims of human rights violations can be implemented effectively. It attributes to the domestic instruments which provide for the grants of an effective remedy are not so complete as the international instruments.

In this regard, the State has an obligation to provide an effective remedy. The State through its government shall carry out its function with a view to abide by the mandate as

[125] Ibid. above n.27 [Annex]
[126] Ibid. above n.33

specified by law and comply with the internationally applicable legal norms.[127] In other words, if the domestic instruments are considered inadequate, the State shall take necessary initiatives to complement them.

C. Relationship

The next question will be, is there any correlation between the TRC and Human Rights Court[128] or Komnas HAM? The establishment of TRC is a mandate granted by Law No.26/2000.[129] The jurisdiction of the Law concerning TRC and Law concerning the Human Rights Court is the same – the gross violations of the human rights occurred before the enactment of the Law Number 26/2000. The said gross violations of human rights include the 'crimes against humanity' and 'genocide'.[130]

However, there is a substantial difference between the Law concerning the TRC and the Law concerning the Human Rights Court. The TRC in this matter does not handle the process of legal prosecution, as done by Human Rights Court. Meanwhile the TRC deals with process of uncovering the truth, the grant of compensation, restitution and/or rehabilitation to the victims or their families and to consider giving amnesty.[131]

Here, it can be identified a division of function and authority between two institutions. The Law concerning TRC states that if any gross violations of human rights has been processed and decided by TRC, then the Ad-Hoc Human Rights Court will have no authority to try the case and vice versa.

Meanwhile, there are no regulations which expressly set forth the relationship between TRC and Komnas HAM. The Komnas HAM has a role in relation to the process of settlement of human rights violations as mandated by Law No. 39/1999 and Law No. 26/2000 – which grant an authority to Komnas HAM as the only investigator in cases of gross violations of human rights. Nevertheless, both institutions have the same jurisdiction over the crimes against humanity and genocide.

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[127] Principle 31 "Rights and duties arising out of the obligation to make reparation" of the UN Doc E/CN.4/2005/102/Add.1 [8 February 2005] states: "Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying on the part of the State to make reparation and the possibility for the victims to seek redress from the perpetrators."

[128] Law Number 26/2000 provides for two types of the court scheme. Pursuant to Article 43, if the gross violations of the human rights occurred before the enactment of the Law Number 26/2000, it shall include in the jurisdiction of the Ad-Hoc Human Rights Court. However, if the said violations of the human rights occurred after the enactment of the said law, it becomes the jurisdiction of the Human Rights Court'.

[129] Ibid. above n.6, Article 47

[130] Ibid. above n.6, Article 7

[131] Ibid. above n.8, 'General Explanation'

D. Legal Problems

1. Subpoena

Some legal problems will be likely encountered by TRC in the future. One of these problems relates to Law No. 26/2000 which has some weaknesses in the implementation of subpoena. The subpoena problem has been proved to be the one of weaknesses of Law No. 26/2000, so when Komnas HAM uses this function to investigate gross violations of human rights occurred during massive riot of May 1998, it was unable to undertake an investigation to some high-rank military or police officials for their testimony or witnesses.

In this case, there is a different interpretation between the Head of the District Court of Central Jakarta[132] and Komnas HAM in the matter of subpoena. The provision which provides a legal legitimization for Komnas HAM to issued subpoena is contained in Article 95 of Law Number 39/1999.[133] On the basis of the said regulation, Komnas HAM asserts that the Commission has a legal basis to do a subpoena. Meanwhile, the District Court of Central Jakarta states that the legal basis used by Komnas HAM to do a subpoena is inappropriate as the said article provides an authority to Komnas HAM in conjunction with the monitoring of the human rights violations (pursuant to the Law No. 39/1999) and instead of *pro-justicia* investigation which shall be based on Law No. 26/2000.[134]

By using the same legal instrument, Komnas HAM has summoned some high-rank military and police officers for the investigation of *Wasior Incident 2001* and *Wamena Incident 2003*.[135] The summoning process run smoothly and these high-rank military and

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[132] The Ad-Hoc Human Rights Court is under the jurisdiction of the district Court of Central Jakarta, so when the Komnas HAM as the investigator wishes to do a subpoena any one for his/her testimony, then the Komnas HAM shall have the Chairman of the District Court of Central Jakarta issue a letter of subpoena.

[133] Article 95 states: "Should a person called on fail to appear or refuse to give a statement, the National Commission on Human Rights may seek the assistance of the Head of Court to enforce its request, in accordance with prevailing law."

[134] A letter issued by the Chairman of the District Court of Central Jakarta, Ref. No.W7.DC.HN.5438/VII/2003/01/PNJKTPST (dated, July 28, 2003) addressed to the Chairman of the Komnas HAM stating an objection to the request submitted by the National Commission on Human Rights to the District Court of Central Jakarta to do a subpoena some high-rank military and police officers for an investigation to be conducted by the Komnas HAM in conjunction with their alleged involvement in the Massive Riot of May 1998. (file on the Author)

[135] Komnas HAM, "Ringkasan Eksekutif Hasil Penyelidikan Tim Ad Hoc Penyelidikan Pelanggaran Ham Yang Berat di Papua" (Executive Summary of the Results of the Investigation conducted by the Ad Hoc Team of the Investigation of the Gross Violations of the Human Rights in Papua), [31 July 2004] available at http://www.komnasham.go.id/ site visited 18 May 2006; *See Also* "Kasus Wasior dan Wamena Segera Dilimpahkan ke Kejagung," (Wasior and Wamena cases Immediately Referred to the Attorney

police officers were voluntarily willing to fulfill the invitation for a testimony extended by the investigators of Komnas HAM.

This phenomena indicates that political factor in fulfilling summon for an investigation process for the alleged violations of human rights is more dominant. As a matter of fact, the legal process should have not been based on the political factor or preference, but on the legal awareness of each citizen. In addition, the legal regulation shall be clearly and expressly specified in order to prevent any multi-interpretation.

Then, a problem will arise when the TRC has the Court issue a verdict for the subpoena and the Court rejects the said request.[136] The TRC will encounter the same hindrance for the subpoena when Komnas HAM failed to obtain an approval from the Court to do a subpoena in relation to the investigation on May 1998 Massive Riot.

If this practice occurs again in implementation of law in Indonesia, it can be said that legal process is not in line with the provisions as set out in some international human rights principles.[137]

2. Role of the Parliament

The role of Parliament in deciding whether or not any crime is categorized as a gross violation of human rights is one of the obstacles in investigation process. Legally, the Parliament has legitimacy as contained in Article 43 (2) of Law No. 26/2000. When Komnas HAM was investigating the Trisakti/Semanggi Tragedy, the Parliament declares that "there is no gross violation of human rights" in the said incidents, the said statement has automatically toppled the said investigation.[138]

Office), [Sinar Harapan, Friday, 3 September 2004] available at http://www.sinarharapan.co.id/berita/0409/03/nas12.html site visited 2 April 2006.

[136] Article 7 paragraph 3 basically sets forth that the court is obliged to issue a verdict no later than seven (7) days after the receipt of the request for the said verdict. The article does not state whether the court is obliged to accept and approve any requests. It depends on the District Court to evaluate whether the received request will be fulfilled or rejected.

[137] Principle 8 (a) of the *Promotion and Protection of Human Rights* (UN Doc E/CN.4/2005/102/Add.1 [8 February 2005] stated that "The commission's terms of reference may reaffirm its right: to seek the assistance of law enforcement authorities, if required, including for the purpose, subject to the terms of Principle 10 (a), of calling for testimonies; to inspect any places concerned in its investigations; and/or to call for the delivery of relevant documents. Principle 10(a) states: "Victims and witnesses testifying on their behalf may be called upon to testify before the commission only on a strictly voluntary basis.

[138] Both Tanjung Priok and East Timor Cases were investigated upon the declaration of the political stance of the Parliament. Meanwhile Trisakti Case and Semanggi I-II cases could not be investigated as the House of Representative decided that the cases are not categorized as the gross violation of human rights. *See* Budiman Tanuredjo, "Penyelesaian Pelanggaran HAM Era Orde Baru Mau ke KKR atau Pengadilan HAM Ad Hoc" (Settlement of the Human Rights Violations during the New Era to be Brought to the TRC

The intervention of the legislative in judicial affair will continue if the above-stated article is not amended. This concern is reasonable as the function of TRC is to investigate gross violations of human rights in the past.

A problem will arise when the Parliament declares that there is no gross violation of the human rights in "X" incident, for example. Then, the jurisdiction of the TRC will be diminished as the TRC will have to carry out its function only for a reconciliation of gross violations of human rights.[139] Here, the intervention of Parliament as laid down in Law No. 26/2000 is inappropriate and is one of the legislative interventions in judicial affairs.

E. How does traditional concept work?

It is important for Indonesia which has a diversity of cultures and races to try to introduce 'cultural approach' for the conflict settlement. Three approaches in this research are offered as a mechanism of conflict settlement.

The three examples of traditional concept examined in the previous chapters comprising *Pela-Gandong/Bakubae* in Maluku, *Ishlah* (peaceful settlement) and *Musyawarah* (amicable negotiation) have a significant role in facilitating the reconciliation process. This has proven that indigenous reconciliation processes have long existed in Indonesia. Reconciliation is not a new thing for people in Indonesia. They had applied the traditional concept with different term for the reconciliation.

Pela-Gandong and Bakubae is a mechanism of conflict settlement developed hereditarily by cultural people in Maluku Province. The concept is applied to settle any horizontal conflicts among the tribes or community groups in the province. The conflict which occurred at the end of 20th century has applied this mechanism as a tool to reconcile both conflicting groups. Although it is not the most effective way to recover from the conflict, cultural people at this area believe that this mechanism has a significant role in ceasing the conflict.

Meanwhile, some Moslems apply the *ishlah* to settle the conflict. This concept has at least been used in the peaceful agreement between victims and perpetrators in Tanjung Priok case. The victims of the incident are civilians and the perpetrators are military. This concept applies the Islamic argumentation which states that the grant of forgiveness is a noble deed before the God. This mechanism is primarily based on the religious values.

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or Ad Hoc Human Rights Court) (Kompas 14 Juli 2003) at http://www.indonesia-house.org/PoliticHR /impunity/071403Penyelesaian_ham.htm site visited 16 March 2006.

[139] Gross violations of human rights as described in Article 7 Law No.26/2000 are Crimes against Humanity and Genocide.

Different from the above stated concepts, *musyawarah* (amicable negotiation) is a generally acceptable concept by the people in Indonesia. It is not a specific characteristic of certain ethnical group or religion, but it has been widely accepted as a mechanism in settlement of both vertical and horizontal conflicts. In addition, the concept has been included in the State's constitution as one of the country's morality basis.[140]

F. Expectation of the TRC Performance in effort to fight impunity.

The Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (hereinafter Set of Principles) sets forth some measures to combat the impunity. One of the principles to combat impunity in the State context which establishes the truth commission is by positioning the commission as a complementary instrument to the judicial process.[141] The TRC must not be used to substitute role of courts of law.

In Indonesia, TRC should go hand in hand with the court, not only to discover the truth, but also to bring a sense of justice to the victims. The complementary spirit in Law No. 27/2004, however, is not in line with the principle to combat the impunity as contained in the *Set of Principles*.[142]

The substance of Law No. 27/2004 tends to support the grant of impunity. It is evidenced by some provisions which state that if the perpetrators have agreed to apologize and the victims have been willing to forgive, an amnesty may be granted to the perpetrators.[143] The perpetrators will 'only' be brought before ad-hoc human rights court if they are unwilling to appreciate the truth and do not regret their wrongdoing.[144]

In this context, the spirit of the Law concerning TRC in Indonesia has not only denied the senses of justice and universal principles of human rights, but also the legal principles applicable in Indonesia that any crime is subject to a punishment. Therefore, the performance of Law No.27/2004 to combat impunity has been reduced as the substance of the said law even tends to offer impunity.

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[140] *See* above n.71

[141] Principle 5 "Guarantees to give effect to the right to know" of the UN Doc E/CN.4/2005/102/Add.1 [8 February 2005].

[142] "Impunity" means the impossibility, de jure or de facto, of bringing the perpetrators of violations to account –whether in criminal, civil, administrative or disciplinary proceedings—since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims. *See* Definition "impunity" from UN Doc E/CN.4/2005/102/Add.1 [8 February 2005]; *See also* UN Doc E/CN.4/Sub.2/1997/20/Rev.1 [2 October 1997]; UN Doc E/CN.4/2005/102 [18 February 2005].

[143] Ibid. above n.8, Article 28

[144] Ibid. above n.8, Article 29(3)

G. Witness and Victim Protection System

The legal basis which provides for the witness protection in Indonesia is not in form of Law, but government regulation.[145] Inadequate instruments of the witness protection have become a hindrance to the witnesses and victims in giving their testimonies before the court.

For example, in the ad hoc court trials of gross violations of human rights in East Timor and Tanjung Priok, the safety of the witnesses and victims are not adequately secured as they are not free from intimidation or terror. As a consequence, they are unwilling to present their testimonies before the ad hoc court.

Indonesia shall immediately adopt such witness protection system as applied at the International Criminal Tribunal Former for Yugoslavia (ICTY) in The Hague. It is very significant to assure the safety of the witnesses and quality of their testimonies as stated in Principle 6 (d) of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power states that judicial processes should take *"measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation."*[146]

The absence of the witness protection law will obviously hinder the function of the commission. The witness protection is believed to provide a firm legal basis to reveal the truth by which those whose testimonies are required do not necessarily feel that they will be intimidated and retaliated. In more sensitive and massive gross violations of human rights cases, witness protection is an absolute instrument. Otherwise, the mastermind of gross violations of human rights will remain untouchable and the process of revealing the truth will be a scenario of making a scapegoat.

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[145] Indonesia, Government Regulation of the Republic of Indonesia concerning the Procedure of Protection of the Victims and Witnesses in the Gross Violations of the Human Rights (Peraturan Pemerintah Republik Indonesia Tentang Tata Cara Perlindungan Terhadap Korban Dan Saksi Dalam Pelanggaran Hak Asasi Manusia Yang Berat), Government Regulation Number 2/ 2002, State Gazette Number 6/2002, Supplement to State Gazette Number 4171.

[146] Principle 6 (d) of the "UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power." U.N. Doc. A/40/53 (1985). Adopted by General Assembly Resolution 40/34 of 29 November 1985.

H. Summary

The effort of uncovering the truth in Indonesia is not so simple. In addition to the hindrance attributed to the obscure and multi-interpretative legislation, the existing legislation is not adequate to cover all problems arising in the country.

In Indonesia, legal and political issues are interconnected. Both issues have the same dominance and even being in conflict one another. It is an undeniable fact as the country has just been free from the authoritarian regime and now is seeking its appropriate political and legal format.

At other side, although there are many local instruments which can be applied in the settlement of the conflict, these instruments have not received due considerations. The legal certainty of the said instruments is not adequate as well.

Some problems are believed to arise in the judicial process for uncovering of the truth such as *subpoena*, the intervention of Parliament, witness protection system and the implementation of the law. It can be identified that the State's good faith to combat the impunity is still low, as evidenced by the spirit of the Law No. 27/2004 which tends to promote a peaceful agreement through an impunity.***

CHAPTER VI - CONCLUSION

In Indonesia context, the discussion about the TRC is more often based on the assumptions rather than real facts. Firstly, it is partly caused by the fact that the said commission has yet to be established. Secondly, the law which provides for the functions of this commission has yet received effective supports from other regulations. The operation of this commission shall be at least supported by three regulations which specifically set forth the witness protection, procedure of the grant of restitution, rehabilitation and compensation, as well as the amnesty.[147] Thirdly, dedicated supports are required from the state apparatus (legislative, executive, and judicative) in handling and settling the past cases. Despite many other requirements which shall be met, these three requirements are at least very important in promoting credibility of the commission in its operation in the future.

In addition, the commission will likely encounter many other problems, one of which relates to the period of the uncovering of gross violations of human rights. The law does not expressly specify the said period of investigation. It is therefore deemed necessary to find out a solution to this problem immediately. In case there is no specified period of investigation, a controversy will arise in the future and of which will in turn reduce the credibility of the commission.

At one side, the commission in carrying out its duties will be faced to some important questions. First, is "truth" or "justice" an effective remedy for gross violation of human rights? Second, what obligations arise for Indonesia in relation to the right to an effective remedy? Third, how to reconcile Indonesia's TRC with efforts to fight impunity?

Firstly, the grant of an effective remedy for gross violations of human rights cannot be correlated to two alternatives 'truth' or 'justice'. These two important components shall be fully met in granting an effective remedy. '*Basic Principles and Guidelines*' states that an effective remedy for the victims pursuant to the international law shall at least include three components, they are (a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; and (c) access to relevant information concerning violations and reparation mechanisms.[148]

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[147] Article 25 Law Number 27/2004 sets out that the grant of amnesty is an exclusive authority of the President in consideration of the opinions of the Parliament.

[148] "*Basic principles and guidelines on the right to a remedy and reparation for victims of gross violation of international human rights law and serious violations of international humanitarian law*," Human Rights Resolution 2005/35 [Annex]. First, access to justice means that victims shall have equal

'Truth' and 'justice' are the rights of any victims of gross violations of human rights. In the victim's perspective, these two components are inseparable. The victim may not receive either the 'truth' or 'justice' only. In this context, rights for the 'truth' and 'justice' shall be simultaneously accompanied by three components as mandated by '*Basic Principles and* Guidelines.' They shall form an integral part of mechanism to grant an effective remedy. When one of these components is met, then the said remedy is no longer considered effective.

Secondly, obligation of State to grant an effective remedy is an essential component in the international human rights law and domestic law. When the State or its apparatus commits a violation to the specified law, then it is an obligation of the State to grant a remedy to the victims.

In this regard, it is also an obligation of the State to break the cycle of impunity. This matter is expressly specified in the *Set of Principles* that national and international measures must be taken for that purpose with a view to securing jointly, in the interests of the victims of violations, observance of the right to know and, by implication, right to the truth, right to justice and right to reparation, without which there can be no effective remedy against the pernicious effects of impunity.[149]

The principles for the grant of an effective remedy have been expressly set forth in various human rights instruments – international, regional and national/domestic.[150] One of the key elements to be done by the State in relation to the performance of its obligation in granting of an effective remedy is the issuance of the official declaration stating that the State has admitted for the occurrence of the past crimes. On this regard, the State shall strengthen its position to the principle that it will not do the same crime in the future and will support any legal process to the past crime.

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access to an effective remedy as provided for under international law, these include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Second, an adequate, effective and prompt reparation for harm suffered should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies. Effective reparation includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Third, access to relevant information means that State should develop necessary means to victims to access all available legal, medical, psychological, social, administrative and all other services to which victims may have a right to access.

[149] UN Doc E/CN.4/2005/102/Add.1.: *Preamble*

[150] General Comment No. 9 CESCR, UN Doc. E/C.12/1998/24 [3 December 1998] "The domestic application of the Covenant," para.3, states that States should modify the domestic legal order as necessary in order to give effect to their treaty obligations. *See also* the "*Basic principles and guidelines on the right to a remedy and reparation for victims of gross violation of international human rights law and serious violations of international humanitarian law*," Human Rights Resolution 2005/35 [Annex, Part I: "Obligation to respect, ensure respect for and implement international human rights law and international humanitarian law"]

The legislative shall have a political will to support the function of the commission by passing the laws which will support the operation of the commission. It is based on the immediate need for some regulations such as the law concerning the witness protection and the law concerning the grant of the rehabilitation, restitution and compensation. These two things are so far set forth in the Government Regulation.

Besides, Indonesia has just ratified two important human rights instruments – the ICCPR[151] and ICESCR.[152] As the State which has decided to ratify these two Covenants, it shall abide by all provisions set out in the said covenants. In other words, following the ratification of these two human rights instruments, Indonesia should issue any regulations on the promotion of human rights in the same direction and spirit as contained in the said covenants and implemented them.

Thirdly, the matter about the impunity is one of the weaknesses of Law No. 27/2004. It is found in an article which states that when the perpetrators have been willing to ask for an apology and the victims have agreed to give their forgiveness, the commission can provide a recommendation of amnesty. The law which tends to take sides to the perpetrators is believed to cause difficulties to TRC in its effort to combat impunity. It is in contrary to the provisions set out in the *'Basic Principles and Guidelines'* which states that settlement of gross violations of human rights shall be oriented to the victims.

The fact that non-judicial process through TRC as an effort to pave a way for impunity is undeniable. It is also because the process of settlement of gross violations of human rights is not merely related to legal matters, but also political issues.

Finally, national reconciliation depends on many diversified factors and is riddled with challenges. No single model is applicable. What works in one case does not necessarily work in another. In each experience, the dynamics is different, but studies show that successfully reconciled societies usually undergo an extensive process of truth, justice, reparations, and the re-establishment of identities.[153]

In Indonesia context, the challenge is to facilitate the reintegration of offenders and at the same time bring a sense of justice to the victims, breaking the cycle of impunity and

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[151] Indonesia, *Law concerning Ratification on International Covenant on Civil and Political Rights* (Undang-Undang tentang Pengesahan Kovenan Internasional tentang Hak-Hak Sipil dan Politik), Law No.12, State Gazette No.119 Year 2005, Supplement State Gazette 4558.

[152] Indonesia, *Law concerning Ratification on International Covenant on Economic, Social and Cultural Rights* (Undang-Undang tentang Ratifikasi Kovenan International tentang Hak-Hak Ekonomi, Sosial dan Budaya), Law No.11, State gazette No. 118 Year 2005, Supplement State Gazette No.4557.

[153] "Open debate on Post-conflict national reconciliation: role of the United Nations," Statetement by Ambassador Ronaldo Mota Sardenberg, Permanent Representative of Brazil to the UN [New York, 26 January 2004] available at http://www.un.int/brazil/speech/ site visited 19 May 2006.

of defending the rule of law, without provoking a destabilizing backlash, where political stability remains precarious.

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