

# Impunity in Indonesia: 50 years of injustice

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## 1 Introduction

Severe and massive human rights violations have occurred in Indonesia, with a peak in the years 1965-1966, but also in many years after that. Those responsible for the thousands of killings, torture, disappearances and forced labour have never been prosecuted or punished. This impunity in Indonesia is a continuing suffering for the victims and their relatives, and a threat to the rule of law, because it facilitates perpetrators to feel above the law and it may strengthen possible perpetrators in carrying out their abuses. This paper analyses the opportunities to break the cycle of impunity based on existing legal mechanisms – both Indonesian and international. It points to possibilities to realize the rights to the truth, to justice and rehabilitation, in the context of the initiative of the International People’s Tribunal 1965 (IPT)<sup>2</sup> which was started in 2014, in an effort to come to terms with the events of 1965 and the years after.

In 1965 an alleged<sup>3</sup> coup attempt took place in Indonesia and as a result in the following years many human rights violations have taken place. None of these violations have been prosecuted; on the contrary, victims and survivors have been subject to intimidation and discrimination until today. Perpetrators are being held in high esteem or are still considered heroes.

The internationally agreed concept of impunity offers opportunities to start a process to deal with the past. Still, the initiative has to come from within Indonesia. In 2014 and 2015 the documentary films “The Act of Killing” and “The Look of Silence” broke the taboo around the 1965 human rights violations. Legal instruments can now be used to try and cope with the accumulation of emotions and fears within Indonesian society. Therefore the analysis of legal and internationally agreed ways to approach the struggle against impunity is a tool to start a discussion about the violations, the victims and the perpetrators, the reasons for impunity and the consequences.

This paper tries to present an analysis of international and Indonesian legal mechanisms in support of the struggle against impunity, considers possible obstacles and ways to address these and draws conclusions that hopefully can contribute to the effort by the International People’s Tribunal 1965 in dealing with the past.

## 2 Definition of impunity

The United Nations define impunity as “...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.”<sup>4</sup>

In short: Impunity is the failure of the state to prosecute the perpetrators of human rights violations that are serious crimes under international law.

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<sup>2</sup> <http://1965tribunal.org/>

<sup>3</sup> In the night of 30 September 1965 and early morning of 1 October 1965 a group of army officers carried out a coup attempt. Six generals were kidnapped and murdered. Then General Suharto took over and started a counter-attack in which the communist party was banned and its members were massacred. Who was truly responsible for the coup attempt has never been determined satisfactorily.

<sup>4</sup> <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>

As used in the United Nations principles<sup>5</sup>, the phrase “serious crimes under international law” includes:

- grave breaches of the Geneva Conventions of 12 August 1949 and of Additional Protocol I thereto of 1977 and
- other violations of international humanitarian law that are
  - crimes under international law,
  - genocide,
  - crimes against humanity, and
  - other violations of internationally protected human rights that are crimes under international law and/or which international law requires States to penalize, such as
    - torture,
    - enforced disappearance,
    - extrajudicial execution, and
    - slavery.<sup>6</sup>

In 2005 the principles to fight impunity as an elaboration of the concept of impunity have been agreed by the General Assembly of the United Nations. They were drafted by the independent expert Professor Diana Orentlicher<sup>7</sup> and are officially called “The Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity”<sup>8</sup>. However, these definitions are not 100% clear and conclusive; the terms of “other violations”, “and/or” and “such as”, but also the use of “crimes against humanity” make these definitions open for interpretation.

With regard to this last term, in Indonesia very often used, the most elaborated definition of “crimes against humanity” is found in the Rome Statute on the International Criminal Court (in force since 2002, page 3-4):

For the purpose of the Rome Statute, a ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- a. murder;
- b. extermination;
- c. enslavement;
- d. deportation or forcible transfer of population;
- e. imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- f. torture;
- g. rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- h. persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

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<sup>5</sup> Ibidem, page 6

<sup>6</sup> As analysed below this listing is not conclusive and based on different criteria from different international agreements, but quoted here literally from the UN document.

<sup>7</sup> [http://ap.ohchr.org/documents/dpage\\_e.aspx?m=138](http://ap.ohchr.org/documents/dpage_e.aspx?m=138)

<sup>8</sup> E/CN.4/2005/102/Add.1; 8 February 2005, p. 6,

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>

- i. enforced disappearance of persons;
- j. the crime of apartheid;
- k. other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.<sup>9</sup>

Notwithstanding some of the above unclear, overlapping and contradictory terminology, the concept of impunity is an overarching concept that makes a holistic approach to the human rights violations in Indonesia in 1965 possible. The unclarity arises because crimes against humanity are defined as being 'systematic' and 'widespread' and directed against 'any civilian population'. Also the difference between murder and extermination, and the definitions of persecution and apartheid are not clear. Finally the open-ended provision under (k) does not allow for a strict legally worded assessment. Still the concept is a useful instrument to assess the punishability of the violations that have taken place in Indonesia in relation with the events on 1965. The international standards are not the only instruments. Nearly all crimes listed here are also included in the Indonesian Criminal Code. We will elaborate these two approaches below.

### 3 International law provisions

As mentioned above, the UN Set of Principles on Impunity (2005), as well as the Rome Statute on the International Criminal Court (ICC, 2002), are concrete references for considering transitional justice, including prosecution of the 1965 violations. However, the Set of Principles is of a declarational character and not binding; and the Rome Statute has not yet been signed or ratified by the Indonesian State. Consequently, investigation or prosecution by the ICC would only be possible on the basis of a decision of the UN Security Council. Additionally, it is open to interpretation whether human rights violations that took place before the ICC was established fall under its jurisdiction. This might only be possible in the case of enforced disappearances, as the consequences of enforced disappearances in other countries have been regarded as ongoing human rights violations for the relatives involved. More in-depth research is necessary in this regard.

The main International Covenants and conventions are important international guarantees and provide mechanisms for monitoring human rights violations and abuses. The crimes that are covered by the definition of impunity are mainly violations of the "integrity rights" (protecting the integrity of a person's body), that are laid down in the International Covenant on Civil and Political Rights (ICCPR), which also includes the right to freedom of expression, freedom of religion, etc. The other main covenant is called the International Covenant on Economic Social and Cultural Rights (ICESCR), which includes rights like the right to education, right to healthcare etc. Violations of these rights are not crimes under international law as mentioned in the UN Set of Principles.

#### 3.1 International Covenant on Civil and Political Rights - ICCPR

In 2013 the initial report by Indonesia on the realization of the rights included in the ICCPR was considered by the ICCPR Treaty Body, the Human Rights Committee (HRC).<sup>10</sup> The Concluding Observation No. 8 notes:

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<sup>9</sup> [http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf) (this link can be opened without using the keyword).

<sup>10</sup> [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/IDN/CO/1&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/IDN/CO/1&Lang=En)

The Committee regrets the failure by the State party to implement article 43 of Law 26 of 2000 in order to establish a court to investigate cases of enforced disappearance committed between 1997 and 1998 as also recommended by Komnas HAM and the Indonesian Parliament. The Committee particularly regrets the impasse between the Attorney General and Komnas HAM with regard to the threshold of evidence that should be satisfied by Komnas HAM before the Attorney General can take action. The Committee further regrets the prevailing climate of impunity and lack of redress for victims of past human rights violations, particularly those involving the military (art. 2).

And quite extraordinarily, in No. 32 it requests the Indonesian government:

In accordance with rule 71, paragraph 5, of the Committee's rules of procedure, the State party should provide, within one year, relevant information on its implementation of the Committee's recommendations made in paragraphs 8, 10, 12 and 25 above.

The information was not provided with the year, and the UN Human Rights Committee even sent its member, Professor Mr. C. Flinterman, to Jakarta to put some pressure on the authorities to fulfil this important obligation.<sup>11</sup> This procedure is still pending.

### **3.2 Convention Against Torture - CAT**

Another important international law instrument is the Convention Against Torture (CAT). In 2008 the Treaty Body, the Committee of the Convention Against Torture reported:

the Committee remains concerned that the Indonesian Criminal Code does not contain a definition of torture, and also that the crime of torture as defined in article 1, section 4, of Law No. 39/1999 on Human Rights and in article 9, paragraph (f) of Law No. 26/2000 on Human Rights Courts is limited so that it is only applicable to "gross violations of human rights". No perpetrators of acts of torture have been convicted under these laws. The Committee is also concerned about the absence of appropriate penalties applicable to acts of torture in the Penal Code, qualified as "maltreatment" in articles 351 to 358 of the Code (arts. 1 and 4).<sup>12</sup>

In relation to past human rights violations, the report of the CAT states:

The Committee is troubled that human rights courts, including ad hoc ones, which are designed to deal "specifically with gross violations of human rights", including torture, genocide and crimes against humanity, pursuant to Law No. 26/2000, were not able to secure the conviction of any of the alleged perpetrators of gross human rights violations in relation to the Tanjung Priok (1984), East Timor (1999) and Abepura (2000) cases, especially now that the Supreme Court has acquitted Enrico Guterres (arts. 2, 6 and 12)." Some of these violations date from before Indonesia ratified CAT. In the same line the 1965 violations should be reported to the committee in the next shadow-reporting procedure.

The report even mentions alleged perpetrators of torture:

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<sup>11</sup> Oral communication by Prof. Flinterman, 08-04-2015.

<sup>12</sup> [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/IDN/CO/2&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/IDN/CO/2&Lang=En)

The Committee is concerned with the State party's lack of international judicial cooperation in investigating, prosecuting or extraditing perpetrators of acts of gross human rights violations, especially with regard to acts perpetrated in East Timor in 1999. Furthermore, it is deeply troubled at evidence that alleged perpetrators of war crimes wanted by Interpol, such as Colonel Siagian Burhanuddin, for whom Interpol has issued a red notice, are currently serving in the Indonesian military forces. The Committee regrets the refusal of the State party to provide information on the result of its cooperation with United Nations and Timorese institutions, especially as full cooperation was recommended by the Committee in its previous concluding observations. The Committee is further concerned that the Commission on Truth and Friendship between Indonesia and Timor-Leste has a mandate to recommend amnesties, including for those involved in gross human rights violations (arts. 5, 6, 7, 8 and 9).

The international agreements ICCPR and CAT, have been ratified by the Republic of Indonesia in 2006 and 1998 respectively. By domestic laws the guarantees of these agreements have been declared valid in Indonesian law. However, there are some problems: for instance, the fact that ratification took place well beyond the 1965 violations. Moreover, Indonesian law does not contain a definition of torture that is in compliance with the international definition, and finally the individual complaints procedures in the ICCPR and CAT have not been accepted by the Republic of Indonesia.

### **3.3 Convention on the Prevention and Punishment of the Crime of Genocide - CPPCG**

It is also open to interpretation whether the human rights violations of 1965 and following years can be identified as a form of genocide, such as politicide<sup>13</sup>. This is an important issue, as, like torture and crimes against humanity, genocide can be prosecuted by foreign or international penal tribunals. In the case of agreement about the 1965 violations being politicide – which is still to be discussed – , the International Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG, in force since 1951) would be applicable. The Convention stipulates that:

[P]ersons committing genocide or the other acts listed above should be punished, whether they are constitutionally responsible rulers, public officials or private individuals. Through the Convention, the Contracting Parties pledge to undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in it. The Convention also requires that persons charged with genocide or any of the other acts enumerated in Convention be tried by a competent tribunal of the State in the territory of which the act was committed, or by an international penal tribunal. The Convention underscores that genocide and the other acts enumerated in the Convention cannot be considered as political crimes for the purpose of extradition and requires States, when requested, to grant extradition in accordance with their laws and treaties in force. Significantly, the Convention empowers any Contracting Party to call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in the Convention.”<sup>14</sup>

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<sup>13</sup> See also: <http://genocidewatch.org/testsite/wp-content/uploads/2013/04/Genocide-politicide.pdf>

<sup>14</sup> <http://www.ohchr.org/Documents/Issues/RuleOfLaw/ConceptNote21Jan2009.pdf>

The Republic of Indonesia has as yet not acceded to the Convention, nor has it signed it.<sup>15</sup> Further research into this possibility is warranted.

### 3.4 Convention on the Protection from Enforced Disappearances - CED

Another possible approach is the Convention for the Protection of all Persons from Enforced Disappearances (CED)<sup>16</sup>. This convention was agreed upon by the UN in 2006 and entered into force in 2010. The Treaty Body, the Committee on the Protection from Enforced Disappearances, started its work in 2011. Indonesia became a signatory in September 2010 but has not yet ratified the convention.<sup>17</sup> It would be useful to explore the opportunities of this instrument more in-depth.

## 4 Indonesian legal context

In Indonesia, prosecution of crimes<sup>18</sup> has been laid down in the Criminal Code (KUHP) and the Criminal Procedure Code (KUHP). In 2015, both are under discussion in the Indonesian Parliament, but the crimes listed above will certainly be retained in their new versions. The leading agency for the prosecution is the Attorney General's Office (AGO or *Kejaksaan Agung*). It is important to be aware that in Indonesia the position of Attorney General is a political one, at the level of a Minister. In October 2014, in the decision making on the new cabinet by incoming President Joko Widodo, the Attorney General was the last (and the most sensitive?) one to be appointed.

In addition to criminal prosecution legislation, since the reformation period starting in 1998, Indonesia has a body of human rights law: The Amendment to the Constitution (UUD45) in article 28, the Human Rights Law (UU 39/1999) and the Human Rights Tribunals Law (UU 26/2000). This law opens up the opportunity to establish Human Rights Tribunals on a structural basis as well as on an ad hoc basis. However, the Parliament that has to decide on the establishment of such tribunals is very reluctant to do so. And although this is an improvement compared to the earlier situation, the problem now is not so much the legislation but rather the law-enforcement. Since 1965 there has not been any prosecution under the KUHP with regard to the violations of 1965. Other human rights violations also have seldom been prosecuted by the human rights tribunals, and where there has been prosecution, sentences usually have been extremely light.<sup>19</sup>

Since 1993 Indonesia has a National Human Rights Commission (*Komnas HAM*) of which the members are appointed by the President on recommendation from different sides (former members, parliament, etc.)<sup>20</sup>. In 2012 *Komnas HAM* finalized a supposedly 900 page report on the 1965 violations, but the AGO has refused to accept the report for lack of formal investigation and the *Komnas HAM* has as yet only publicized a 15 page summary (see Ch.5).

Since 1965 several hundred people who were accused of involvement in the alleged coup attempt have been prosecuted by an Extra-ordinary Military Court (*Mahkamah Militer Luar Biasa, Mahmillub*). They were given severe sentences: life sentences and the death penalty. The legality and

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<sup>15</sup> [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-1&chapter=4&lang=e](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=e) (Indonesia is not listed.)

<sup>16</sup> <http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx>

<sup>17</sup> [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CED&Lang=en](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CED&Lang=en)

<sup>18</sup> The terms "crimes" and "human rights violations" can be overlapping. The difference is that in human rights violations there is an involvement of political factors between victim and perpetrator, and of governmental action, whereby governmental institutions allegedly are conducting or condoning (allowing) violations. Violations by non-state-actors (paramilitary, companies, etc.) are often called "abuses".

<sup>19</sup> See: [https://www.ictj.org/sites/default/files/ICTJ-Kontras-Indonesia-Derailed-Report-2011-English\\_0.pdf](https://www.ictj.org/sites/default/files/ICTJ-Kontras-Indonesia-Derailed-Report-2011-English_0.pdf)

<sup>20</sup> An analysis of the *Komnas HAM* can be found in Ken Setiawan's PhD thesis: <https://openaccess.leidenuniv.nl/handle/1887/22838>

fairness of these convictions is very doubtful, but the decisions of the *Mahmillub* have, as far as we know, never been retracted.

In 2005 a law on a Truth and Reconciliation Commission was enacted by the Indonesian Parliament. However, this law contained some irregularities. For instance, rehabilitation of the victim of a certain violation was only possible in cases where the perpetrator was identified and reconciled with the victim. The Constitutional Court (*Mahkamah Konstitusi*, MK) declared the law as formulated unconstitutional. The then President, former General Susilo Bambang Yudhoyono, son-in-law of one of the most important alleged anti-communist military leaders, General Sarwo Edhie, chose not to pursue the matter.

In 2015 the Indonesian Parliament began to discuss a new draft law on dealing with the past. The idea is that a Joint Committee (with representatives from victims, army, police, the ministries of Justice and Political Affairs, the Komnas HAM)<sup>21</sup> will assess which human rights violations should be prosecuted and which will be “reconciled”. The Committee is planned to have one year to work through all past violations, not only those related to 1965. Human rights organisations are critical of the new draft<sup>22</sup>.

## 5 The Komnas HAM report

From 30 September 1965 onwards until well into the 1980s many human rights violations have taken place. Some violations, such as discrimination and the consequences of disappearances, are continuing until today. Many books and reports with data on human rights violations have been published by Indonesian legal academics, human rights defenders and victims, as well as by foreign researchers and activists. Figures of the number of persons who were killed or disappeared, range from 500,000 to 2 million. Tens of thousands of people were detained for more than a decade. Discrimination and intimidation also included the relatives of those “guilty of involvement” into the third generation – grandchildren who were not even born in 1965 have felt the effects. But a complete overview is not available.

From 2008 till 2012 the Indonesian National Human Rights Commission, *Komnas HAM*, carried out an investigation into the human rights violations related to 1965. This resulted in a report of, supposedly, 900 pages, which describes violations in six regions. The full report is not publicly available; the *Komnas HAM* published only a 15 page summary.<sup>23</sup>

According to the 2012 *Komnas HAM* summary:

In conformity with reports from victims and their relatives, the events of 1965-1966 resulted in the occurrence of various forms of human rights violations, including murders, killings, slavery, enforced evictions or transportation of people, arbitrary detention and deprivation of other physical freedoms, torture, rape, maltreatment (persecution) and enforced disappearances. Additionally the victims and their relatives experienced mental

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<sup>21</sup> Kompas, 12-06-2015

<sup>22</sup> [http://kontras.org/index.php?hal=siaran\\_pers&id=2018](http://kontras.org/index.php?hal=siaran_pers&id=2018) ; <http://www.hukumonline.com/berita/baca/lt54ec660114603/ruu-kkr-diharapkan-penuhi-prinsip-ham-internasional>

<sup>23</sup> [http://www.komnasham.go.id/publikasi-komnas?id\\_kategori=All&kata\\_kunci=&penulis\\_pub=&page=4](http://www.komnasham.go.id/publikasi-komnas?id_kategori=All&kata_kunci=&penulis_pub=&page=4). See for an unofficial English translation of the summary by Martha Meijer: <http://www.stopimpunity.org/page134.php>.

(psychological) suffering for several generations, namely in the form of discriminatory measures in civil and political rights, as well as in economic, social and cultural rights.<sup>24</sup>

The summary has a number of flaws on substance, which make it less convincing. There is unclear terminology, which is partially due to unclear wording in the human rights laws of Indonesia. The different wordings for torture and killings and the criteria for what is a crime against humanity do not make the analysis any clearer. The paragraph under the heading “Buru” does not refer to the labour camps on that island where more than ten thousand prisoners were held in slavery.<sup>25</sup> This is a very unfortunate omission.

Moreover, the methodology of the investigation by the *Komnas HAM*, taking a random six places/regions and disregarding all other places, must for the victims be difficult to accept, considering the aim of implementing the right to the truth. Also for the aim of realizing the right to justice, this limitation is not justified. However, when the aim is just to prove the necessity of further judicial investigation by the AGO, and considering the extraordinarily wide and massive occurrence of the violations, the long period of time that has elapsed since and the earlier mentioned definition problems, the *Komnas HAM* report has contributed to breaking the taboo that was still covering the 1965 violations, and has drawn important conclusions:

There is sufficient primary proof to suspect that crimes against humanity have taken place in the form of serious human rights violations, as follows:

- a. Murder (article 7 sub b jo article 9 sub a of the Law no. 26 Year 2000 on the Human Rights Courts);
- b. Killing (article 7 sub b jo article 9 sub b of the Law no. 26 Year 2000 on the Human Rights Courts);
- c. Slavery (article 7 sub b jo article 9 sub c of the Law no. 26 Year 2000 on the Human Rights Courts);
- d. Enforced evictions and deportation (article 7 sub b jo article 9 sub d of the Law no. 26 Year 2000 on the Human Rights Courts);
- e. Arbitrary deprivation of liberty or other physical freedoms (article 7 sub b jo article 9 sub e of the Law no. 26 Year 2000 on the Human Rights Courts);
- f. Torture (article 7 sub b jo article 9 sub f of the Law no. 26 Year 2000 on the Human Rights Courts);
- g. Rape or similar forms of sexual violence (article 7 sub b jo article 9 sub g of the Law no. 26 Year 2000 on the Human Rights Courts);
- h. Maltreatment (persecution) (article 7 sub b jo article 9 sub h of the Law no. 26 Year 2000 on the Human Rights Courts);
- i. Enforced disappearances (article 7 sub b jo article 9 sub i of the Law no. 26 Year 2000 on the Human Rights Courts);

These acts form part of an attack that was directed at the civilian population: namely, a series of acts carried out against the civilian population as a consequence of the policies of the authorities. Because these acts were also carried out in a widespread and systematic way, these acts can be categorized as crimes against humanity.<sup>26</sup>

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<sup>24</sup> In the English translation page 1. <http://www.stopimpunity.org/page134.php>

<sup>25</sup> [file:///C:/Users/Acer/Downloads/EKSEKUTIF%20SUMMARY%20PERISTIWA%201965%20\(2\).pdf](file:///C:/Users/Acer/Downloads/EKSEKUTIF%20SUMMARY%20PERISTIWA%201965%20(2).pdf) , page 5-6.

<sup>26</sup> Ibid. page 14.

The recommendations of the *Komnas HAM* report are as follows:

Based on the above conclusions the Ad Hoc Team for the Investigation into the Events of 1965-1966 presents its recommendations as follows:

1. In conformity with the regulation of Article 1 sub 5 juncto Article 20 para (1) of the Law no. 26 Year 2000 on the Human Rights Courts, the General Prosecutor is requested to follow up on the results of this investigation with a legal inquiry,
2. In conformity with what is regulated in Article 47 para (1) and (2) of the Law no. 26 Year 2000 on the Human Rights Courts the results of this investigation can also be resolved by a non-judicial mechanism to fulfil the feeling [of the need] for justice of the victims and their relatives – a Truth and Reconciliation Commission (TRC).

Thus this declaration has been made as a form of accountability in the execution of the mandate that has been awarded to the *Komnas HAM* in order to carry out investigations into suspicions of human rights violations that have taken place in the events of 1965-1966.<sup>27</sup>

The *Komnas HAM* report has not been accepted by the Attorney General's Office<sup>28</sup>. One of the criticisms made by the AGO was that the *Komnas HAM* investigator was not under oath (which is in compliance with the (lack of) power the *Komnas HAM* has by law).<sup>29</sup> The report was returned to the *Komnas HAM* with the request to improve it. At the time of writing (July 2015) this impasse is still continuing.

One final remark about the two recommendations: many comments about the report take it that the two recommendations as quoted above are either/or recommendations. It should be noted that the *Komnas HAM* made two separate recommendations, and both should be considered.

## 6 How to proceed?

Considering the aims of the International People's Tribunal 1965, and the huge effort it will take to achieve an effective result, it is a good first step to break the task into more sizeable parts, and to consider what is feasible and what is not. On its website, the IPT states:

In the first place [the IPT] will give voice to the victims. Their stories must ring out clearly, breaking down the stigma they and their families still suffer. Secondly, the Tribunal will provide a public record of the crimes against humanity committed after October 1 1965. The 2012 report of the National Human Rights Commission has been the first public record of these crimes, but it has never received recognition by the state and no action has been undertaken so far. Thirdly, the Tribunal will help open up a space for public debate on the history of Indonesia, on its postcolonial ambitions, on its efforts to build social justice, on its attempts to establish the rule of law, on its endeavours to combine the centrifugal forces of socialism and Islam, and on its exertions to minimize its culture of violence.<sup>30</sup>

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<sup>27</sup> Ibid. page 15

<sup>28</sup> <http://www.beritasatu.com/politik/87978-kejaung-tolak-laporan-komnas-ham-kasus-petrus-dan-tragedi-1965.html>

<sup>29</sup> <http://www.komnasham.go.id/arsip-peraturan>, art. 5.

<sup>30</sup> <http://1965tribunal.org/about/concept-note-on-international-peoples-tribunal-on-crimes-against-humanity-in-indonesia-1965/>

In the UN Set of Principles Prof. Diana Orentlicher identifies four important aspects in combatting impunity:

- The right to the truth;
- The right to justice;
- The right to rehabilitation;
- The guarantee of non-recurrence.

The General Assembly of the United Nations has agreed that that these principles should guide all State parties. These four aspects are therefore also valid for any Indonesian approach to deal with the past. They provide a structure for setting up a process of dealing with the past. For each of these aspects I give here a few suggestions.

### 6.1 The right to the truth

The first phase for Indonesians – governmental, law-enforcement, and non-governmental institutions alike – is to establish the nature and extent of the crimes committed in 1965 and the years after. In Indonesia (contrary to East-Timor in 1999) there is a functioning law-enforcement system, and, clearly, the main road forward would be that the AGO initiates a judicial inquiry and/or a Truth and Reconciliation Commission, as recommended by the Komnas HAM. The East Timorese Acceptance, Truth and Reconciliation Commission (CAVR) could give a realistic example of how to gather the data.<sup>31</sup> Contrary to East Timor at the time, in Indonesia there is said to be a lack of political will to realise such a procedure; is it a lack of political will, or are descendants of the perpetrators, remnants of the “*Orde Baru*”, still too powerful? Or is it both?

This gathering of data would help fulfil the right of victims to the truth. It should be the aim to gather data from as many regions as possible. Open facilities could be set up at the level of district (*kabupaten*) and subdistrict (*kecamatan*), to facilitate the collection and aggregation of data. At the same time those gathering testimonies should ensure that the violations that are recorded fall within internationally agreed definitions of crimes against humanity. Also the data collected should be as accurate as possible, in order to facilitate procedures of prosecution: names and numbers of victims, names and numbers of perpetrators and details of circumstances should be all be recorded.; at the higher level of analysis the overall mechanisms and lines of command should become clear.

One important consideration is the understandable desire of witnesses to submit their testimonies in confidentiality. It has to be recognised that people who have been forced to keep silent and virtually live underground for such a long time will be hesitant to come forward with their testimonies. There will need to be a procedure designed that finds a balance between victims’ fear of retribution, and the right of perpetrators to a fair and public trial. Each witness should be guaranteed safety and protection, and psychological counselling should be available.

The implementation of the right to the truth could be supported by the activities if the International People’s Tribunal in different ways: data collection, moral support for victims, witness protection, intermediary and counselling.

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<sup>31</sup> <http://www.cavr-timorleste.org/en/index.htm>

## 6.2 The right to justice

Following investigation, there could be a judicial prosecution in accordance with Indonesian law (KUHAP and KUHP) and in accordance with the international conditions of a fair trial. The interest of “justice be done”, as additional to uncovering the truth, should not be considered an interest of the victims alone, but also serve a wider interest of enforcing the rule of law of the state and fulfilling the need for justice by others than the direct victims.

Here one notes the language differences between Indonesian, English and Dutch. Where the aim of “justice be done” in Bahasa Indonesia is a situation of “*keadilan*” as well as a process of punishing the perpetrator (“*pengadilan*”), the English terminology is implied in one word “justice”. The Dutch language is more similar to the Indonesian differentiation in the wording of “*gerechtigheid*” and “*berechting*”. “Justice” alone is not enough to implement the right to justice. These differences implicate also differences in approach to the perpetrators when considering prosecution.

Considering the time lapse of 50 years, to serve the wider interest of the rule of law of the state and fulfil the need for justice for victims, it is important to think about what to do about cases where perpetrators have died since the violation was committed. In some law systems a case is closed with the death of the assumed perpetrator. Whether this is the case in Indonesia should still be investigated. In these cases a truth and reconciliation process might better serve the right of victims to justice.

In earlier human rights court proceedings in Indonesia, judges have shown little courage in coming to strong sentences, even when legislation is in place. This is an obstacle to achieving real justice. In the discussion of trials of human rights violations committed by members of the Indonesian military in East Timor, deceased former President Abdurrahman Wahid proposed the establishment of hybrid courts, in which foreign judges sit next to national judges. Although there was some mixing in the Serious Crimes Panels in the District Court of Dili in East Timor<sup>32</sup>, this proposal was not elaborated. Still, the fear of many Indonesians that prosecution in ordinary courts serves only as window dressing is an issue that needs to be addressed.

Non-judicial procedures were recommended in the *Komnas HAM* report, in addition to judicial procedures. Most suggestions point in the direction of a Truth and Reconciliation Commission, TRC (*Komisi Kebenaran dan Rekonsiliasi*, KKR). In 2006 a law establishing such a commission was nullified by the Constitutional Court, on the grounds of the non-constitutional character of the law. A new draft of the TRC legislation is currently being considered, and time will tell whether a real truth-finding and reconciliation process can be established, considering the dominance of still existing “*Orde Baru*” remnants. In-depth research into the backgrounds of powerful politicians has never been carried out. The dynastic aspects of political power play are of course well-known. The former President Susilo Bambang Yudhoyono is the son-in-law of General Sarwo Edhie, a notorious communist fighter who boasted to have killed some thousands of them. Sarwo Edhie’s son is a former Chief-of-Staff of the Army. Yudhoyono’s son is currently a member of Parliament. These dynasties are well-known. But how many other politicians – who ultimately have to decide on a TRC legislation – have ties with perpetrators, nobody can tell. Research into this issue is necessary.

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<sup>32</sup> <http://www.utrechtlawreview.org/index.php/ulr/article/view/32/32>

Although the aim of “justice be done” is still very far away – considering the lack of political will and the remaining power pockets of the “*Orde Baru*” – it is important to consider these aspects because they have impact on kind of the truth finding that is needed.

### 6.3 The right to rehabilitation

The basis for rehabilitation has been laid down in another United Nations set of principles, those by Van Boven and Bassiouni (“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”, New York, 16 December 2005)<sup>33</sup>. The explanatory note says:

The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities entrusted in 1989, by its resolution 1989/13 of 31 August 1989, a Special Rapporteur with the task of undertaking a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms with a view to exploring the possibility of developing basic principles and guidelines on the issue. The study originated at a time of political change on various continents with prospects of a higher degree of human rights advancement. It was also a time of the creation of transitional justice mechanisms in a series of countries. Restoring justice implied an increased focus on the criminal responsibility of perpetrators of gross human rights abuses and their accomplices. It also opened up the exposure of many wrongs inflicted on the victims of these abuses with a view to rendering retributive justice and reparative justice. It was fitting in the search for transitional justice and it responded to a climate of improved human rights awareness that the Sub-Commission embarked, under the auspices of its parent body the United Nations Commission on Human Rights, on the undertaking of studies aimed respectively at combating impunity and strengthening victims’ rights to redress and reparation.

Victims of the 1965 human rights violations have often stated that they are not primarily concerned with financial compensation, but rather the acknowledgement of their suffering, the loss of lives, and the loss of freedom and opportunities. But rehabilitation should include material as well as immaterial reparation<sup>34</sup>.

Acknowledgement of the human rights violations that have been perpetrated is a first step. A public debate about rehabilitation would make it possible for Indonesian society to really become aware of the loss and suffering. Establishing a special fund, as has been done in other countries, can serve as an example. The CAVR in East Timor considered compensation in the sense of victims recovering their dignity; only in limited, urgent cases was there a financial aspect (US\$ 200)<sup>35</sup>. Currently – more than 70 years after the events – French victims of Nazi deportation, detention or other persecution during the World War II can apply for a pension or other compensation from a special fund. A similar

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<sup>33</sup> [http://legal.un.org/avl/ha/ga\\_60-147/ga\\_60-147.html](http://legal.un.org/avl/ha/ga_60-147/ga_60-147.html)

<sup>34</sup> See for instance: International Center for Transitional Justice: Neglected Duty: Providing comprehensive reparations to the Indonesian “1965 victims” of State Persecution, July 2006. <http://www.ictj.org/publication/neglected-duty-providing-comprehensive-reparations-indonesian-1965-victims-state>.

<sup>35</sup> <http://www.cavr-timorleste.org/cheqaFiles/finalReportEng/10-Acolhimento-and-Victim-Support.pdf>

claim is in process in a class action in the USA<sup>36</sup>. Some other examples include funds that are meant to prevent future genocides or other human rights violations.<sup>37</sup>

#### 6.4 The guarantee of non-recurrence

Finally, establishing the guarantee of non-recurrence is much more a nation-wide effort, and not so much individually focused. Victims will feel safe only when laws and regulations are in place. Indeed, new laws and regulations are necessary to prevent human rights violations taking place and to ensure that impunity does not occur in the future.

Apart from legislation and prosecution mechanisms, changes in the attitudes of society, for example, through education and media campaigns, will help guarantee non-recurrence of such crimes. The current debate on the death penalty is exemplary for such changing attitudes.

## 7 Conclusion

The effort to deal with the 1965 human rights violations will be confronted with many difficult and varied questions: political, psychological, legal, social and financial which are summarized below.

In general we conclude that one of the aims of the International People's Tribunal (IPT 1965), step-by-step breaking the cycle of impunity, is in compliance with the United Nations concepts to fight impunity. The rights involved in fighting impunity are the right to the truth, to justice, to rehabilitation and the guarantee of non-recurrence. Several international covenants and conventions, such as the Covenant on Civil and Political Rights, the Convention Against Torture, and possibly the Conventions regarding genocide and enforced disappearances, support this struggle. Giving a voice to the victims is essential, the first and foremost step as the implementation of their right to the truth. Many questions can only be addressed after the first step – the right to the truth – has been started. And wide discussion on the outcomes will be helpful in furthering the public debate in Indonesia, which is an absolute requirement for any progress at all.

Psychological difficulties may occur among the victims of those human rights violations with regard to their possible reluctance to speak out on what has happened after having been silent for 50 years, and mobilize activities against impunity. Notwithstanding the courage they have already shown during the recent past, an independent mechanism for witness protection and psychological support is needed.

With regard to the right to justice, the chances that the Attorney General's Office (AGO), which is the primary actor responsible for breaking the impunity, will take further steps to ensure justice and reparation are slim, even after the new president took office in October 2014. That should not, however, prevent the taking of action by groups and individuals to help the process along. Legal difficulties may arise because of the different terminologies that are being used internationally and within Indonesian law on the concept of crimes against humanity, politicide and other internationally agreed human rights violations. In the review of the Criminal Code (KUHP) and the Criminal Procedure Code (KUHP) the human rights aspects, such as an internationally sound definition of torture, should get utmost attention.

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<sup>36</sup> <http://edition.cnn.com/2014/12/05/world/europe/france-holocaust-payments/> and [http://holocaust-compensation-france.memorialdelashoah.org/en/index\\_engl.html](http://holocaust-compensation-france.memorialdelashoah.org/en/index_engl.html). see also: <http://rt.com/news/250897-holocaust-lawsuit-compensation-sncf/>.

<sup>37</sup> <http://www.ushmm.org/confront-genocide>

Social obstacles may arise when speaking of the right to rehabilitation. Acknowledgement of suffered loss of life and freedom and rehabilitation of innocence is the main aim of victims themselves. If a real reimbursement is considered for the many and frequent abuses, the decades' long suppression and exclusion may become a real financial issue.

Finally the guarantee of non-recurrence is a policy-oriented aim that needs the political will and the courage to change. Rewriting history and unveiling what has happened are still a threat for the position of the established politicians. Family relations with those responsible are still prevailing in the political decision making. Legislative development by the Parliament is slow to say the least. Moreover, law-enforcement needs to be strengthened, the judiciary should show integrity, a change in the political status of the office of the Attorney General, and clarity about the relation between the Attorney General's Office (AGO) and the National Human Rights Commission (*Komnas HAM*) are necessary. Considering the lack of political will among the established politicians the victims will put their hope in non-governmental interventions such as the International People's Tribunal.

## 8 Glossary

AGO	-	Attorney General's Office
CAT	-	Convention against Torture (United Nations)
CAVR	-	Commission for Acceptance, Truth and Reconciliation (East Timor)
CED	-	Convention for the Protection of all Persons from Enforced Disappearances
HRC	-	Human Rights Committee (Treaty Body of ICCPR, United Nations)
IPT	-	International People's Tribunal (IPT 1965)
ICC	-	International Criminal Court (United Nations)
ICCPR	-	International Covenant on Civil and Political Rights (United Nations)
ICESCR	-	International Covenant on Economic Social and Cultural Rights (UN)
KKR	-	Komisi Kebenaran dan Rekonsiliasi, Truth and Reconciliation Commission
Komnas HAM	-	Komisi Nasional Hak Azasi Manusia, National Human Rights Commission
KUHAP	-	Kitab Undang-undang Hukum Acara Pidana, Criminal Procedure Code
KUHP	-	Kitab Undang-undang Hukum Pidana, Criminal Code
MK	-	Mahkamah Konstitusi, Constitutional Court
Mahmillub	-	Mahkamah Militer Luarbiasa, Extra-ordinary Military Court
TRC	-	Truth and Reconciliation Commission

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