Amnesty International's Comments on the Law on Human Rights Courts (Law No.26/2000)

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In June 2000, Amnesty International published the report Indonesia: Comments on the draft law on Human Rights Tribunals (ASA 21/25/00) in which it provided detailed analysis of the draft legislation. The organization is encouraged that a number of the recommendations contained in this report were incorporated into the final version of the legislation, Law No.26/2000 concerning Human Rights Courts, which was adopted by the Peoples Representative Assembly (DPR) on 6 November 2000.

While acknowledging that important amendments were made to the legislation, Amnesty International considers that there is still a need to revise the legislation further so that it is fully consistent with international law and standards. Amnesty International fears that, without further amendment, the process of bringing to trial perpetrators of gross human rights violations will be jeopardised.

It is recognized that there is considerable pressure on the Indonesian government to establish an *ad hoc* Human Rights Court in order that the first cases relating to crimes committed in East Timor during 1999 can be heard. Amnesty International also hopes that those responsible for crimes committed in East Timor, as well as in Aceh, Papua and elsewhere in Indonesia, can be brought to justice promptly in fair trials without the possibility of the death penalty. However, the organization is concerned that, if a Human Rights Court is established for these or any other cases before the legislation is amended, proceedings are likely to fall short of international standards for fair trial.

The following comments reflect Amnesty International's concerns with the current legislation. The comments are made on the basis of an unofficial translation. It may be possible that some of our concerns relate to inaccuracies in the translation rather than with the legislation itself.

Jurisdiction

Article 5 of Law No.26/2000 provides that a Human Rights Court has the authority to hear and rule on cases of gross violations of human rights perpetrated by an Indonesian citizen outside the territorial boundaries of the Republic of Indonesia. Amnesty International is concerned that the limitation of territorial jurisdiction is inconsistent with international law since it does not provide for the exercise of universal jurisdiction over persons suspected of crimes under international law who are found in Indonesian territory, or for suspects in such cases to be extradited to another state which is able and willing to prosecute alleged perpetrators. As a state party to the Geneva Conventions of 1949 and to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Indonesia is obliged to exercise universal jurisdiction.

Amnesty International also notes the absence of clarification in Law No.26/2000 that would make it explicit that the law covers all individuals considered, under national law, to be Indonesian citizens. This would ensure that there is no ambiguity that the jurisdiction would apply to all individuals suspected of involvement in the commission of gross human rights violations committed in East Timor both during 1999 and in the preceding years when East Timor was under Indonesian occupation.

In relation to the crimes over which the Human Rights Courts have jurisdiction, which according to Law No.26/2000 are genocide and crimes against humanity (Article 7), Amnesty International recommends that the Human Rights Courts are also given jurisdiction over war crimes.

Definitions of crimes

Amnesty International welcomes the improvements made to the definitions of the crimes over which the Human Rights Courts have jurisdiction.

Article 7, Chapter 1 in the section entitled "General Provisions" states that the definitions of the crime of genocide and crimes against humanity in Law No.26/2000 are in accordance with the Rome Statute of the International Criminal Court (Rome Statute) Article 6 and 7. The use of the Rome Statute as the basis for the definitions is welcome since, together with other international instruments and treaties, it provides definitive standards for the investigation and prosecution of gross violations of human rights. Amnesty International therefore urges the Indonesian Government to ensure that all provisions in the Law on Human Rights Courts, including those relating to the definitions of crimes, fully comply with these standards.

This approach will also help facilitate the ratification by Indonesia of the Rome Statute, which has been signed by 139 countries, 27 per cent of which had ratified it as of 28 January 2000. Among those countries which have signed the Rome Statute are Cambodia, Bangladesh, Thailand, the Philippines, the Republic of Korea, Mongolia, Kazakstan and Uzbekistan and Tajikistan.

By ensuring that the definitions of genocide, crimes against humanity and war crimes are the same as in the Rome Statute, the task of the legislature will be eased. It would also be helpful to lawyers, prosecutors and judges, in the light of difficulties in translation, if Law No.26/2000 were to state that Articles 8 and 9 are to be interpreted in accordance with Articles 6 and 7 of the Rome Statute, with due regard to the Elements of Crimes.

With reference to Law No.26/2000 attention is drawn to the following articles where Amnesty International remains concerned by inconsistencies with definitions provided in international law:

- *Article 8 on genocide* - While Article 8 is consistent with the definition of genocide in Article II of the Convention for the Prevention and Punishment of the Crime of Genocide (Genocide Convention), which is reproduced in Article 6 of the Rome Statute, it fails to include the ancillary crimes of genocide contained in Article III of the Genocide Convention. These ancillary crimes are: Conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; and complicity in genocide. Amnesty International considers that it is essential to include these ancillary crimes to

permit investigation and prosecution at the earliest possible moment to help prevent genocide from occurring.

- *Article 9 on crimes against humanity* - The list of crimes included in the definition of crimes against humanity are mainly consistent with crimes against humanity recognized by international law. However, Amnesty International is concerned that a number of the elaborated definitions of these crimes contained in the General Provisions of Law No.26/2000 are inconsistent with definitions of such crimes under international law, in international conventions or other international instruments including Article 7 of the Rome Statute, in ways which could lead to impunity. In particular:

- *Paragraph (b) on extermination* - The notes contained under the General Provisions to Law No.26/2000 defines extermination as encompassing "*deliberate action taken to cause suffering, including action to obstruct the supply of food and medicines that causes the extermination of a part of the population*". This narrow reading of extermination was expressly rejected during the drafting of the Rome Statute which provides that extermination "*includes the intentional infliction of conditions of life, inter alia the deprivation of access to food , calculated to bring about the destruction of part of the population*".

- *Paragraph (c) on enslavement* - Under the General Provisions of Law No.26/2000, enslavement is said to "*include trade in humans, particularly the trading of women and children*". Amnesty International is concerned that this does not fully reflect the definition of enslavement under international law concerning contemporary forms of slavery which is broader, containing provisions for the exercise of any or all powers attaching to the right of ownership over a person, *including* trafficking in persons.[1]

- *Paragraph (f) on torture* - Under the General Provisions torture is defined as "*deliberately and illegally causing gross pain or suffering, physical or mental, of a detainee or a person under surveillance*". Amnesty International is concerned that this definition is too narrow and should be amended to reflect the definition in the Rome Statute which states that torture "*means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused...*". The use of the word "illegally" in Paragraph (f) should also be clarified to ensure that it means contrary to international law and not just national law.

In addition, for crimes against humanity listed in Article 7 of the Rome Statute there is provision for "[*o*]*ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health*" (Rome Statue, Article 7(1)(k)). Including this crime against humanity will help to ensure that the law will be able to prevent impunity for forms of evil conduct which human ingenuity is able to devise in the future.[2]

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[1] Relevant international law can be found in the 1926 Slavery Convention; the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery; and in Article 7 (1)(c) and (2)(c) of the 1998 Rome Statue.

[2] In its Commentary on Common Article 3 of the Geneva Conventions the International Committee of the Red Cross (ICRC) noted that "*... it is always dangerous to try to go into too much detail... . However much care were taken in establishing a list of all the various forms of infliction, one would never be able to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be the more restrictive it becomes*."

Judicial procedure

According to Article 10 of Law No.26/2000, unless otherwise stipulated, the judicial procedure for cases of gross violations of human rights will be conducted in accordance with provisions in the existing Code of Criminal Procedure (KUHAP).

However, Law No.26/2000 does include specific provisions for the arrest and detention of suspects which differ from those under KUHAP. Under Article 11(1) the Attorney General is given power of arrest, "*for the purpose of investigation, any person who, on the basis of sufficient preliminary evidences, is strongly suspected of perpetrating a gross violation of human rights*". The Attorney General is also authorised, "*as investigator and public prosecutor..., to undertake the detention or extend the detention of a suspect for the purposes of investigation and prosecution*".

According to international standards, arrest and detention of suspects should be only be carried out by people authorized for that purpose and the use of these powers must be subject to supervision by a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.[3] In view of the Attorney General's position as a State Minister and political official, Amnesty International is concerned that the decision whether or not to arrest or detain a suspect risks being influenced by political considerations. It is therefore strongly recommended that the additional safeguards of judicial supervision of arrest and detention is added in order to protect against such a possibility.

Provisions relating to preventative detention have also been included in Law No.26/2000 (Articles 12-17). Under these provisions a suspect may be held in pre-trial detention for up to 310 days. Each extension of detention is authorised by the Chief Justice of a Human Rights Court. However, there appears to be no explicit requirement to present the individual before a prosecutor or judge during this period. Amnesty International is concerned that the length of permissible delay before presenting the accused before a prosecutor or judge is in violation of the right enshrined in Article 9(3) of the International Covenant of Civil and Political Rights (ICCPR), of a detainee to be brought promptly before a judge or other officer authorized by law to exercise judicial power. Amnesty International urges that the relevant provisions of the Law on Human Rights Courts be modified accordingly.

With reference to KUHAP itself, Amnesty International reiterates the recommendation from its original document: Indonesia: Comments on the draft law on Human Rights Tribunals, that the government urgently reviews this legislation to ensure that it fully conforms with international standards on fair trial. Although on many points the protection offered by KUHAP for detainees and defendants is satisfactory, there are still provisions which fall short of international standards and which are also not covered by provisions on procedure in Law No.26/2000. Among the issues which should be addressed is the absence of any provision which prohibits any statement established to have been made as a result of torture from being invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

[3] See Principle 4 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: "*Any form of detention or imprisonment and all measures effecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority*".

In addition, there is a need to ensure that provisions intended to protect the rights of suspects and detainees which are contained in KUHAP are routinely and uniformly applied. In its report of 12 August 1999, the Working Group on Arbitrary Detention (WGAD) noted that there were deficiencies among "*the authorities and judicial officers who must apply the law, be they police officers, prosecutors, judges or even lawyers. Such deficiencies may relate to routine matters (lack of notification of prolongation of detention) or to serious breaches of professional ethics or of the duty of impartiality (for example, corruption*)." WGAD highlighted the importance of education in this area and the necessity for exemplary and severe sanctions, which should be administered in all proven cases.[4]

Independence of the prosecution

Amnesty International continues to be concerned that the independence of the prosecution could be undermined by certain provisions contained in Law No.26/2000.

Under Article 18, the National Commission on Human Rights (Komnas HAM) remains the sole body empowered to initiate and carry out the preliminary inquiry into alleged cases of gross human rights violations. Amnesty International considers that Komnas HAM's role should not limit the ability of prosecutors to conduct such inquiries and that any such restriction could be inconsistent with their independence and contrary to the United Nations (UN) Guidelines on the Role of Prosecutors.

Following the initial inquiry by Komnas HAM, the decision whether or not to proceed with an investigation and prosecution rests with the Attorney General (Articles 21(1) and 23(1)) who is also empowered to appoint an *ad hoc* investigator and an *ad hoc* public prosecutor (Articles 21(3) and 23(2) respectively). Amnesty International is concerned that, because the Attorney General is a State Minister and a political official, there is a risk that the decision to open an investigation and to prosecute could be perceived as being politically motivated. Amnesty International believes it would be more consistent with the appearance of impartiality if such decisions were made by the relevant prosecutor, subject to review by the Attorney General under strictly objective, legal criteria.

Regarding the appointment of the public prosecutor, Amnesty International remains concerned that such appointments could be, or could be perceived to be, politically motivated if made by a State Minister, who is a political official. The organization therefore recommends that the selection of prosecutors should be made by a neutral body applying criteria which would safeguard against appointments based on partiality or prejudice. In general, the method for selecting the prosecutor should be as open as possible and involve the broadest possible public consultation with, for example, relevant non-governmental organizations (NGOs) and other experts.

Independence of the judiciary

Amnesty International is concerned that a number of provisions in the legislation have the potential to undermine the independence and impartiality of the judiciary serving in Human Rights Courts or in related appeals courts. *Ad hoc* judges are appointed to the Human Rights Courts and,

[4] Report of the Working Group on Arbitrary Detention on its visit to Indonesia (31 January - 12 February 1999), E/CN.4/2000/4/Add.2, 12 August 1999.

in the case of an appeal, to the High Court by the President on the recommendation of the Supreme Court (Articles 28(1) and 32 (5) respecitively). In the case of an appeal to the Supreme Court, *ad hoc* judges are to be appointed by the President on the recommendation of the Peoples Representative Assembly (DPR) (Article 33(4)).

In order to guarantee the independence of the judiciary, Amnesty International considers that appointees should be screened by an independent, non-political body and appointments made on the basis of neutral criteria to ensure selection is primarily based on merit. As with the selection of prosecutors, the selection procedure for judges should be as open as possible and involve public consultation.

In addition, Amnesty International believes it to be essential that judges have a relatively long term of office which is non-renewable in order to help protect their independence and impartiality from political pressures. Such security of tenure is absent from Law No.26/2000 which provides for *ad hoc* judges to be appointed for an initial period of five years which is renewable by a further five years. Amnesty International recommends that this provision is amended so that it is consistent with the right of all persons to be tried by an independent, impartial and competent tribunal as recognized in Article 14 of the ICCPR and in the UN Basic Principles on the Independence of the Judiciary. The Rome Statute provides for lengthy, non-renewable terms to ensure that the judges are independent.

Time limits on investigations, prosecutions and trial hearings

While recognizing that time limits for investigations and prosecution have been increased in the final legislation, Amnesty International considers that the permitted period of time for investigation and prosecution as well as for trial and appeal hearings are still too short and rigid.

The cases which will come before the Human Rights Court are likely to be both complex and sensitive. They will raise complicated factual questions, for example where chains of command must be established, and possible difficulties in locating and protecting witnesses. In order to ensure that investigation and prosecution is carried out thoroughly and according to due process it may be necessary to extend the time limits provided for in Law No.26/2000 to avoid the danger that cases could be hastily and inadequately proposed or dismissed, leading to impunity. Moreover it is necessary to ensure that time limits do not have a negative impact on the right of defendants to have adequate time to prepare a defence. In practice, trials of this complexity can take some time as illustrated by cases which have come before the International Criminal Tribunals for former Yugoslavia (ICTY) and Rwanda (ICTR) which have sometimes taken more than one year.

The designated period of 30 days in which the investigator can complete the preliminary inquiry (Article 20(3)) and the limit of a total of 240 days permitted for the investigation itself (Article 22 (paragraphs 1, 2 & 3)) create unnecessary limitations. Amnesty International therefore recommends that these time limits should be made more flexible. Similarly, and notwithstanding the right of anyone charged with a criminal act to be tried without undue delay, the 70-day time limit for the prosecution should be subject to extension for good cause (Article 24).

The time limit of 180 days for cases of gross human rights violations to be heard and ruled on by a Human Rights Court (Article 31) and for appeals in both the High Court or Supreme Court to be heard and ruled on within a period of 90 days (Articles 32(1) and 33(1)), is also

considered to be too rigid. Such time limits are useful as benchmarks, but they should not be mandatory.

Reparations

Amnesty International urges the Indonesian Government to consider amending Article 35 of Law No.26/2000 which relates to compensation, restitution and rehabilitation so that it reflects the broader scope of the right to reparations of a victim. Every victim or his/her beneficiaries has the right to reparations which should include compensation, restitution and rehabilitation. Guidance on the scope of these types of actions are provided in both the Joinet Principles and the Van Boven-Bassiouni Principles.[5]

According to Paragraph 15 of the Van Boven-Bassiouni Principles, "[*a*]*dequate, effective and prompt reparation shall be intended to promote justice by redressing violations of international human rights or humanitarian law. Reparations should be proportional to the gravity of the violations and the harm suffered*". The Principles make provision for three types of action:

- Restitution with a view to seeking to restore victims to their previous situation before the violation occurred, including restoration of liberty, legal rights, social status, family life and citizenship, return to one's place of residence, and restoration of employment and return of property (Paragraph 22);

- Compensation for any economically assessable damage including for physical or mental injury, lost opportunities including education, material damages and loss of earnings, including loss of earning potential, harm to reputation or dignity and legal aid costs (Paragraph 23);

- Rehabilitation, which should include medical and psychological and psychiatric treatment (Paragraph 24).

The Joinet Principles also refer to symbolic measures which provide collective moral reparation, such as formal public recognition by the State of its official responsibility for violations of international human rights or humanitarian law.

Penal Provisions

[5] Question of the impunity of perpetrators of human rights violations (civil and political), Final Report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, Annex II: Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Joinet Principles), Principles 36 to 50, U.N. Doc. E/CN.4/Sub.2/1997/20 (1997); UN Commission on Human Rights Independent Expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of International Human Rights and Humanitarian Law (Final Draft), 18 January 2000 (Van Boven-Bassiouni Principles), U.N. Doc. E/CN.4/2000/62/Rev.1 (2000).

Amnesty International is seriously concerned that provision for a maximum penalty of death for a number of crimes was reintroduced into the final legislation having been removed from earlier drafts.[6] Amnesty International regards the death penalty as a violation of the fundamental right to life and as the ultimate cruel, inhuman and degrading punishment. As such, the death penalty contravenes inalienable rights enshrined in the Universal Declaration of Human Rights (UDHR) and other international standards and conventions.

Provision for the death penalty in the Law on Human Rights Courts is at odds with the purpose of the legislation, which is designed to strengthen the legal and judicial framework to *protect* human rights by bringing to justice individuals who perpetrate human rights violations. While the acts being tried under this legislation are among the most atrocious of crimes, the use of the death penalty as a punishment undermines the fundamental role of a Human Rights Court in upholding human rights.

International human rights standards encourage the abolition of the death penalty[7] and the international community has adopted treaties specifically aiming at the abolition of the death penalty.[8] Moreover, in establishing the International Criminal Courts for former Yugoslavia and for Rwanda, the UN Security Council excluded the death penalty from the punishments which these courts are authorized to impose. Similarly, the Rome Statute does not permit the International Criminal Court to impose the death penalty. Amnesty International regards the introduction of the death penalty by the Human Rights Courts as a permissible punishment to run contrary to international efforts to abolish the death penalty. Among the countries to have abolished the death penalty in Asia are Cambodia, Nepal, New Zealand, Australia and, most recently, East Timor. Amnesty International urges the Indonesian government to repeal the provisions for the death penalty contained both in the Law on Human Rights Courts and in the regular Criminal Code (KUHP).

With regard to custodial sentences provided for in Law No.26/2000, Amnesty International remains concerned that the grounds for distinguishing between maximum and minimum sentences are not clear. The organization would also encourage states to guarantee that prison conditions for those sentenced be fully consistent with international standards.

Command responsibility and due obedience

Amnesty International welcomes the amendment made to the provision on command responsibility (Article 42) so that command responsibility now also expressly applies to civilians as well as to the military and police.

The credibility of the Human Rights Courts will rest, in a large part, on whether they are effective in bringing to justice *all* individuals responsible for gross human rights violations, including senior military, police or other state officials who are found to be responsible, either directly or by virtue of command responsibility, for such violations. By ensuring that nobody, however senior, is exempt from criminal prosecution and therefore above the law, the Human Rights Courts will have an important effect in ending impunity in Indonesia and will also contribute to rebuilding confidence in the criminal justice system generally.

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[6] Crimes which carry the maximum penalty of death are: genocide; killing; extermination; enforced eviction or movement of citizens; imprisonment or other severe deprivation of physical liberty and apartheid.

[7] See: Article 6(6) of the ICCPR and Article 27(2) of the American Convention on Human Rights.

[8] The Second Optional Protocol to the ICCPR; the Protocol to the American Convention on Human Rights to Abolish the Death Penalty and Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms prohibit executions and require the abolition of the death penalty in peacetime.

In addition to ordering, committing, tolerating or failing to act to prevent crimes against humanity or war crimes from being committed, criminal responsibility of military commanders and civilian superiors also extends to crimes committed by paramilitary groups and/or other armed groups not organized into official military structures, operating under their control, whether or not they act under specific and express instructions from the official force.[9] Amnesty International recommends that explicit reference to this principle is made in Law No.26/2000.

It is also a principle of international law that neither orders from a superior or from a government nor the principle of due obedience can be invoked to escape criminal responsibility. Any subordinate who participates in the commission of crimes against humanity, in compliance with superior orders, is also criminally responsible for these crimes.[10]

Witness and Victim Protection

Provision is made under Article 34 of Law No.26/2000 for the law enforcement and security apparatus to provide protection for witnesses and victims. As Amnesty International stated in Indonesia: Comments on the draft law on Human Rights Tribunals, the provision for effective protection of witnesses and victims is an essential requirement if the Human Rights Courts - or any other court investigating human rights violations - is to succeed. If such a protection and support program is not developed, witnesses may not come forward or their lives may be put at risk putting the trials and justice in jeopardy.

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*". Amnesty International believes that if those responsible for genocide, crimes against humanity and other serious crimes under international law, including cases of rape and sexual assault**,** are to be bought to justice, effective programs to protect witnesses will have to be developed in cooperation with a variety of agencies.

While it is common for the civilian police to take a leading role in witness/victim protection programs it should be recognized that members of the civilian police force are likely to be implicated in the crimes which come before the Human Rights Courts. Any witness protection unit should therefore be established separately from, and be able to operate fully independently from, any police and security forces that may be involved in the crimes. Amnesty International recommends that the government seeks professional expertise from countries that run an effective witness protection program and that inter-governmental and non-governmental organizations be consulted and asked for their active support.

Amnesty International also recommends that clear divisions be created with separate personnel to work with witnesses for the prosecution, on the one

[9] ICTY, *Prosecutor v. Tadic*, judgement of 15 July 1999.

[10] The principle of criminal responsibility of the subordinate is explicitly recognized in international instruments including the Rome Statute (Article 33), the UN Convention against Torture (Article2(3)), the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 19), UN Code of Conduct for Law Enforcement Officials (Article 5); and the UN Declaration on the Protection of All Persons from Enforced Disappearance (Article 6(1)).

hand, and witnesses for the defence on the other. These and other steps are necessary to avoid inadvertent disclosure of information that might expose victims and witnesses to danger for providing information.

It may also be necessary to consider providing technical facilities in the Human Rights Courts that would permit witnesses to testify by closed circuit television and by means which permits witnesses' testimony to be heard and seen in court, but not seen by the general public. In highly sensitive cases, where witnesses are unavailable to attend the court because their safety cannot be guaranteed in Indonesia, it may be necessary to create facilities that enable such witnesses to testify outside Indonesia, provided the necessary legal guarantees are in place. Such an arrangement could be considered in the case of East Timor.

Adequate resources are a prerequisite for an effective witness/victim protection program which encompasses protection before, during and after the trial until the security threat ends. It will therefore be necessary to ensure that adequate funding for the program is available.

Retrospectivity

Article 43 makes provision for gross violations of human rights which occured prior to the enactment of the legislation to be heard in an *ad hoc* Human Rights Court. Amnesty International welcomes the efforts of the Indonesian Government to investigate and bring to justice perpetrators of past human rights violations. The organization believes that such initiatives, if successful, could substantially contribute to the process of strengthening legal and institutional protections for human rights and serve to deter the commission of human rights violations in the future.

The recent amendment to the Constitution which, under Article 28.i, protects individuals from being prosecuted on the basis of a retroactive law has led to debate in Indonesia as to whether or not the new legislation on Human Rights Courts can indeed be applied to past cases.[11] Amnesty International considers the principle of *non-retroactivity* - that is, of protecting individuals from being prosecuted for acts which did not constitute a criminal offence, under national or international law, at the time of commission - to be a fundamental one.

However, international law does not prohibit *retrospective* criminal legislation which merely provides a procedure to investigate, prosecute and punish conduct which, at the time it was committed, was criminal according to the general principles of law recognized by the community of nations. Article 11(2) of the UDHR provides that "[*n*]*o one shall be held guilty of any penal*

[11] This amendment to the Constitution was adopted at the annual session of the People's Consultative Assembly (MPR) in August 2000.

offence on account of any act or commission which did not constitute a penal offence, under national or international law, at the time when it was committed". This principle is also reflected in other international instruments such as the ICCPR. Article 15 of the ICCPR prohibits retroactive criminal punishment, but provides nothing which "*shall prejudice the trial and punishment of any person for any act or commission, which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations*".

Crimes against humanity, including genocide, have been recognized as crimes under both customary international law and conventional international law for more than half a century. The state is therefore obliged to protect against the commission of such acts and to bring to justice those responsible. The fact that international law on crimes against humanity and war crimes is not, or was not, incorporated into national law at the time the crimes were committed does not excuse the state from its international responsibility to pursue judicial investigations. Moreover, crimes against humanity, which includes genocide, and war crimes are unaffected by statutes of limitation. Thus the passing of time does not diminish the responsibility of the state to indict, try and sentence those responsible for such crimes.[12]

With regard to the establishment of *ad hoc* Human Rights Courts to try past cases of gross human rights violations, Amnesty International remains concerned by the provision that they shall be formed by Presidential Decree on the recommendation of the DPR. The organization reiterates its view that the role of the Head of State and other political officials in deciding whether or not to establish a Court is inappropriate because there would exist a risk that the public might perceive that political considerations could influence their decision. Such a risk is likely to undermine the integrity of the judicial system and could raise doubts about the impartiality and independence of any *ad hoc* Court which is established.

Amnesty International therefore recommends that responsibility for establishing *ad hoc* Human Rights Courts to try past cases rests with a neutral, independent and non-political body, which should apply neutral criteria for assessing whether or not an *ad hoc* Human Rights Court should be established on a particular case. If established, every effort should be made to ensure that the proceedings in the court are consistent with the right to fair trial.

Truth and Reconciliation

Provision for legislation to be developed on the establishment of a Truth and Reconciliation Commission is made under Article 47 of Law No.26/2000. Truth and Reconciliation processes can achieve a number of important objectives including: establishing the historical truth about human rights violations; providing victims with a voice; promoting healing and reconciliation; recommending reparations for victims and their families and recommending legal and institutional measures to prevent future human rights violations from occurring. Truth and Reconciliation processes can also play a powerful role in providing information to support prosecutions of perpetrators of human rights violations.

Amnesty International is concerned by the provision under the Law No.26/2000 that the "*resolution of gross human rights violations which occurred prior to the adoption of this Act may*

[12] This principle is contained in several treaties: the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, adopted by the UN General Assembly, UN GA Res. 2391 (XXII) of 1968; the Council of Europe's treaty: Non-applicability of Statutory Limitations to Crimes against Humanity and War Crimes; E.T.S. No. 82, adopted on 25 January 1974, and Article 29 of the Rome Statute.

be undertaken by the Truth and Reconciliation Commission" has not been amended (Article 47(1)). In its original document, Indonesia: Comments on the draft law on Human Rights Tribunals, Amnesty International noted that Truth and Reconciliation Commissions should be regarded as an addition and not an alternative to justice and that, while such processes provide an important contribution towards providing a full account of past violations, there are certain crimes, including crimes against humanity and war crimes, which are considered so serious that international law requires the crimes be investigated, and that where there is sufficient admissible evidence, prosecuted.

The Government of Indonesia is urged to amend the provision in Article 47(1) of Law No.26/2000 in order to clarify that *all* perpetrators of gross violations of human rights must be brought to justice. Amnesty International also urges the government to ensure that provisions in the draft legislation on the establishment a Truth and Reconciliation Commission relating to amnesties do not deny the victims their rights to effective remedy, truth and reparation or exonerate the state of its obligation to prosecute, try and punish those responsible for human rights violations. To include the possibility of an amnesty for perpetrators of human rights violations would be to run the risk of enshrining impunity in law.