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**NEGLECTED DUTY:
Providing Comprehensive
Reparations to the
Indonesian “1965 Victims”
of State Persecution**

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for the *International Center
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July 2006

NEGLECTED DUTY:

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Identification card for an ex-political detainee held at Buru Island forced detention camp. The identification number at the top of card bears the discriminatory “ET” code (see sections III(A) & (F) of report).



Postcard sent from a political detainee from Buru Island forced detention in 1974. The stamp demonstrates that the contents of the postcard had been censored.



Forced labor camp in a paddy field, 1979 (see section III(D)).



Badge given to political detainees held on Buru Island, with distinctive stamp stigmatizing the person as from Buru, the most notorious detention camp (see sections III(B), (E), VI(A)).

All images courtesy of People’s Empowerment Consortium (PEC), Jakarta, Indonesia.

About the ICTJ

The International Center for Transitional Justice (ICTJ) assists countries pursuing accountability for past mass atrocity or human rights abuse. The Center works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuses remain unresolved.

In order to promote justice, peace, and reconciliation, government officials and nongovernmental advocates are likely to consider a variety of transitional justice approaches including both judicial and nonjudicial responses to human rights crimes. The ICTJ assists in the development of integrated, comprehensive, and localized approaches to transitional justice comprising five key elements: prosecuting perpetrators, documenting and acknowledging violations through nonjudicial means such as truth commissions, reforming abusive institutions, providing reparations to victims, and facilitating reconciliation processes.

The Center is committed to building local capacity and generally strengthening the emerging field of transitional justice, and works closely with organizations and experts around the world to do so. By working in the field through local languages, the ICTJ provides comparative information, legal and policy analysis, documentation, and strategic research to justice and truth-seeking institutions, nongovernmental organizations, governments and others.

Background on Indonesia

Indonesia continues to grapple with a legacy of abuse and authoritarianism characterized by state-organized violence and conflict over natural resources and self-determination. Some of the central transitional justice issues in Indonesia involve serious crimes committed during the occupation of East Timor. The clarification of violations committed under the Soeharto regime is also important, in particular the massive persecution of dissidents in the early days of the "New Order." In addition, the conduct of regional conflicts confronting the state and separatist insurgencies, as in the cases of Aceh and Papua, is a central issue.

After 33 years of widespread human rights abuses committed by the armed forces and other groups under the "New Order" regime led by General Soeharto, in 1998 Indonesia began a political transition. Amid a deepening financial, economic, and social crisis, Soeharto stepped down in May 1998 in favor of his vice president, B.J. Habibie. Abdurrahman Wahid, a moderate Islamic cleric and long-time opposition leader, who won the 1999 presidential election, succeeded Habibie as president. Both Habibie and Wahid made some progress in the areas of democratization and human rights, including taking the decision to give East Timor the choice to decide on its status, sponsoring broad constitutional reforms, and setting up a Human Rights Court. Despite these advances, officially addressing Indonesia's legacy of abuse continues to be a daunting task.

In July 2001, Megawati Sukarnoputri, who had served as Wahid's vice president, assumed the presidency after the legislature removed Wahid from power. Under her watch, the Human Rights Court prosecuted persons allegedly responsible for crimes in East Timor, but these trials have resulted in the acquittal of a majority of the accused and have been severely criticized as biased and ineffective. Further, she did not take effective steps to restore the honor and status of victims of persecution during the Soeharto regime.

The successive government of President S.B. Yudhoyono has seen the successful conclusion of a peace agreement in Aceh to end a 30-year old conflict in that region of Northern Sumatra. However, the accountability provisions included in the agreement between the government and the former insurgency of the Free Aceh Movement are still ambiguous. President Yudhoyono has not yet acted on the establishment of a Truth and Reconciliation Commission for which legislation has existed since 2004. The Constitutional Court of Indonesia is examining that legislation due to demands that it contradicts constitutional rights and international human rights standards applicable to Indonesia.

The ICTJ's Work in Indonesia

In August 2003, the ICTJ released "Intended to Fail," an analysis of the trials before the Ad Hoc Human Rights Court in Jakarta. The report suggests that Indonesia never intended to fulfill its promise of holding perpetrators accountable for the violence surrounding the East Timorese vote for independence in 1999.

ICTJ Senior Associate and head of the Center's Indonesia program, Eduardo Gonzalez, worked with Timorese, Indonesian, and international NGOs to request that the United Nations develop an appropriate response to this failure. The ICTJ favored the creation of an independent Commission of Experts (COE) to advise the UN on how to proceed in the face of impunity. After the work of the COE was finished, the ICTJ advocated at the UN for the implementation of its recommendations, which were finally endorsed by the Secretary General in July 2006.

The Center also monitored parliamentary efforts to establish a Truth and Reconciliation Commission (TRC) and coordinated with local partners to try to ensure that the proposed body would respect victims' rights and promote accountability. In December 2004, the ICTJ released a comprehensive study of the truth commission legislation, and in February 2005, together with local partners, co-sponsored a conference in Jakarta for civil society leaders and activists to develop a strategy for achieving accountability and justice in the face of deep flaws in the legislation establishing a TRC. In September 2005, the Center participated in a seminar organized by ELSAM, the Institute for Policy Research and Advocacy, to explore ways to remedy the weaknesses of the TRC mandate and helped human rights organizations who challenged the legislation before the Constitutional Court of Indonesia. The ICTJ submitted expert testimony before the Court in July and August of 2006.

Any effective intervention in the field of transitional justice requires a comprehensive analysis of the capacity of local civil society and the recommendation of specific methods to strengthen that capacity. In January 2004, the ICTJ released "The Struggle for Truth and Justice," a report that maps nearly 200 transitional justice initiatives undertaken by Indonesian civil society organizations. The report revealed a robust level of activity, and the interest shown in transitional justice led to the hiring of Jakarta-based consultants to help monitor local efforts. The Center has published a monthly newsletter in Bahasa Indonesia to disseminate transitional justice information throughout the region. The ICTJ also held a workshop for university professors to help incorporate transitional justice issues into their curricula and expects to continue cooperation in this respect, since it is essential that Indonesian practitioners develop their own understanding and conceptualization of the transitional justice framework.

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NEGLECTED DUTY
Providing Comprehensive Reparations to the Indonesian
“1965 Victims” of State Persecution¹

July 2006

I. INTRODUCTION

Indonesia is eight years into its transition to democracy after over three decades of gross human rights violations under General Soeharto. Those human rights violations had their symbolic and practical genesis in the events of September 30, 1965, an alleged Communist putsch the successful repression of which led to the emergence of an authoritarian right-wing regime led by General Soeharto.

General Soeharto, leader of the Indonesian Army, mounted a comprehensive campaign accusing members of the Indonesia Communist Party (PKI) of mounting an unsuccessful coup on September 30, 1965 against President Soekarno. Eventually, Soeharto's ascent to power displaced President Soekarno himself, who was removed from power on March 21, 1967. Soeharto's persecution, discrimination, and stigmatization of the PKI and anyone arbitrarily deemed connected to it, enabled him to wrest and maintain political power in Indonesia.

The “1965 victims,” as they are known in Indonesia, are all those people who disappeared, were killed, detained, or discriminated against allegedly on the basis of their involvement in the September 30, 1965 events or their affiliation with the PKI. Those events were frequently used by Soeharto to persecute anyone opposed to him, and to generally maintain an authoritarian state. The vast majority of gross violations of human rights committed against the 1965 victims were perpetrated between October 1965 and March 1966 when hundreds of thousands of Indonesians were killed and as many as 1.7 million people were detained without trial. Those 1965 victims who survived received no official restitution. On the contrary, they were stigmatized in their communities and forced to organize their lives according to myriad of regulations that prohibited them from engaging in a vast array of normal civic activities. For decades, the 1965 victims were prohibited from voting or working in such professions as education or the law.

Under international law, victims of gross human rights violations, such as the 1965 victims, have the right to reparation. The corresponding State duty to provide reparations includes restitution of the victims' enjoyment of rights, family life, and citizenship, place of residence, employment, and property.² It also includes a duty to apologize, provide compensation, and revoke mechanisms which continue to violate human rights. These duties are not affected by the fact that the violations were committed under a previous government. Reparations are of vital importance because they provide victims with official recognition, thus signifying that all citizens are considered equal before the law. Reparations promote justice by redressing violations of human rights and aim to restore the trust of citizens in State institutions. Moreover, reparations are broader than merely returning stolen property or restoring a victim's “political reputation.”

¹ This report was written by Teresa Birks, ICTJ consultant from Nov. 2003 to Apr. 2005 and currently at the School of Oriental and African Studies, University of London. It was edited by Andrew Hudson, ICTJ Fellow in 2006, and contributed to by Taufik Basari and Leonardo Filippini, ICTJ fellows in 2005. The report was supervised by Eduardo Gonzalez, senior associate at the ICTJ.

² See *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*, G.A. Res. 60/147, U.N. Doc. A/Res/60/147 (Dec. 16, 2005).

Ironically, while there are currently calls to forgive or pardon an ill Soeharto,³ who was ousted in 1998 amidst allegations of corruption and economic mismanagement, the 1965 victims remain stigmatized and discriminated against. Explicitly discriminatory legislation and practices remain in force. The transition to democracy in Indonesia has at least allowed victims' organizations to form and they have recently spearheaded the campaign to provide *rehabilitasi* to the 1965 victims. *Rehabilitasi* is an Indonesian concept akin to political restitution, which centers on restoring the good name and reputation of the individual.

This report first outlines Indonesia's international law obligations to provide remedies to the 1965 victims. Second, it traces the history of persecution against the 1965 victims and provides an overview of current discriminatory laws and practices. Third, it summarizes efforts by victims' groups to fight the effects of discriminatory practices. Fourth, it demonstrates that successive Indonesian administrations have failed to adequately address the problem. This report builds on domestic calls for *rehabilitasi*. However, it also demonstrates how the current Indonesian government should implement a comprehensive reparations framework broader than just *rehabilitasi*. Such a reparations program should be located within a coherent strategy of transitional justice including genuine truth-seeking, prosecution, and comprehensive institutional reform.

In this report, the victims of persecution (be it death, detention, loss of job or property) will be referred to as the "1965 victims." The activities which caused the persecution will be referred to as the "1965 events." Those 1965 victims who were detained will be referred to as "political detainees" or "ex-political detainees."⁴ The category of 1965 victims is therefore very broad. Soeharto used the term with considerable elasticity to discriminate against a wide range of people. As such, in providing remedies to the 1965 victims, the definition of that group should be commensurately broad.

Finally, this report focuses on the 1965 victims as a case study of one set of victims under the Soeharto regime. Yet, there were numerous other groups of victims whose rights were violated by Soeharto and who were unrelated to the 1965 victims. The reason this report focuses on just the 1965 victims is that they are unique being the first victims under Soeharto. They are seen symbolically as the "seminal" or "foundation" victims under the Soeharto era. It was on the basis of the persecution of the 1965 victims that Soeharto obtained and consolidated power, thereby enabling further discrimination. Nevertheless, the vast majority of this report's analysis and recommendations in relation to the 1965 victims are equally applicable to all victims of discrimination and gross violations of human rights under Soeharto. In devising transitional justice mechanisms for the 1965 victims, victims of other human rights abuses must also receive similar treatment.

³ See, e.g., 'Let Us Invent Human Rights', *Jakarta Post*, June 27, 2006 ("the general sentiment among politicians is to 'forgive Soeharto'"); 'Law Enforcement not Yet a Priority in Indonesia', *Jakarta Post*, June 22, 2006.

⁴ For a further explanation of these and other terms, see the glossary in chapter 7 of this report.

II. INTERNATIONAL AND INDONESIAN LAW ON REPARATIONS

A. General

States must provide victims of gross violations of human rights with an effective remedy. A victim's right to an effective remedy includes access to justice, reparation for harm suffered, and access to the relevant information concerning the violation.⁵ Restitution, the focus of this report, is one element of the victim's right to reparation. The broader right to an effective remedy is enshrined in international⁶ and regional⁷ human rights instruments, as well as international humanitarian law⁸ and international criminal law.⁹ Within this context, Indonesia has international legal obligations to provide victims of gross human rights violations with effective remedies including comprehensive reparations.

B. Indonesian Human Rights Laws

Indonesian law, in addition to international law, is clear in stating that victims of violations of human rights must be provided with comprehensive reparations.

1. Law Number 39 of 1999 Concerning Human Rights

This law, passed by the DPR (House of People's Representatives) is a comprehensive statutory bill of rights. It supplements the Constitutional Bill of Rights. Law No. 39 includes a range of rights which are relevant to reparation, such as: right to life (art. 9); right to justice (art. 17); right to security (art. 29); freedom from torture and cruel, inhuman, or degrading treatment (art. 32); arbitrary arrest (art. 34). Moreover, article 7 states:

“(1) Everyone has the right to use all effective national legal means and international forums against all violations of human rights guaranteed under Indonesian law, and under international law concerning human rights which has been ratified by Indonesia. (2) Provisions set forth in

⁵ Basic Principles and Guidelines, supra note 2, art. 12.

⁶ Universal Declaration of Human Rights (art. 8), International Covenant on Civil and Political Rights (arts. 2.3, 9.5, and 14.6), International Convention on the Elimination of all forms of Racial Discrimination (art. 6), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 14), Convention on the Rights of the Child (art. 39), UN Declaration on the Protection of All Persons from Enforced Disappearances (art. 5), UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (art. 19), Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Principles 34, 36).

⁷ European Convention on Human Rights (art. 5.5), American Convention on Human Rights (arts. 25, 68, 63.1), African Charter on Human and Peoples' Rights (art. 21.2).

⁸ Hague Convention Regarding the Laws and Customs of Land Warfare (art. 3), Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (arts. 50, 51), Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (arts. 51, 52), Convention (III) relative to the Treatment of Prisoners of War (arts. 130, 131), Convention (IV) relative to the Protection of Civilian Persons in Time of War (arts. 147, 148), Protocol Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (art. 91).

⁹ The Rome Statute of the International Criminal Court requires the provision of reparations to victims, “including restitution, compensation and rehabilitation” (art. 75). It also requires the Assembly of States Parties to establish a trust fund for the benefit of victims of crimes within the jurisdiction of the Court (art. 79). It further mandates the Court “to protect the safety, physical and psychological well-being, dignity and privacy of victims” and to permit the participation of victims at all “stages of the proceedings” (art. 68).

international law concerning human rights ratified by the Republic of Indonesia, are recognized as legally binding in Indonesia.”

Article 7 is complemented by article 71 which states that “the government shall respect, protect, uphold, and promote human rights as laid down in this Act, other legislation, and international law concerning human rights ratified by the Republic of Indonesia.” Together articles 7 and 71 oblige the government to protect and promote the human rights contained in the Law and in international law. Such protection and promotion includes positive measures such as investigating, prosecuting, and providing reparations when rights contained in the Law are breached. Moreover, the Law clearly recognizes that treaties ratified by Indonesia (see section II(C) below) are binding in domestic law.

2. Law Number 26 of 2000 Establishing Ad Hoc Human Rights Court

Article 35 of this law unequivocally provides for the right to reparation under Indonesian law for victims of violations of human rights: “every victim of a violation of human rights and or his/her beneficiaries shall receive compensation, restitution, and rehabilitation.”

C. Treaties Ratified by Indonesia

The right of victims of gross human rights violations to comprehensive remedies is clearly stated in the main international human rights instruments.¹⁰ Indonesia has recently acceded to the International Covenant on Civil and Political Rights (ICCPR) and its provisions are now binding on Indonesia under international law.¹¹ Moreover, the ICCPR’s provisions have been directly incorporated into Indonesian domestic law.¹² Therefore, the rights contained in the ICCPR are justiciable and enforceable in the Indonesian legal system. ICCPR obliges Indonesia to ensure that any person whose rights have been violated has:

- “an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”;¹³
- a right to an effective remedy “determined by a competent judicial, administrative or legislative authorit[y]”;¹⁴ and
- their remedies enforced.¹⁵

The Human Rights Committee, which provides authoritative interpretations of the obligations contained in the ICCPR, has stated that the right to an effective remedy encompasses a duty to investigate breaches of the ICCPR, prosecute those responsible, and pay compensation.¹⁶

¹⁰ See supra note 6.

¹¹ Dec. 16, 1966, 999 U.N.T.S. 171. The ICCPR entered into force for Indonesia on May 23, 2006.

¹² Law No 12 of 2005. Art. 1(2) states that, “the copy of the original document of the ICCPR ... and its translation in Bahasa Indonesia as attached is an inseparable part of this law.” Art. 2 states: “this law enters into force since the date of the issue.” A copy of the ICCPR is annexed to the law ensuring all of its provisions are part of Indonesian law.

¹³ ICCPR, art. 2(3)(a).

¹⁴ ICCPR, art. 2(3)(b).

¹⁵ ICCPR, art. 2(3)(c).

¹⁶ See e.g., Human Rights Committee, *Concluding Observations on El Salvador*, UN. Doc. A/58/40 Vol. I (2003) 61, para. 84(6); Human Rights Committee, *Concluding Observations on Peru*, UN. Doc. A/51/40 Vol. I (1996) 48, paras. 347, 358.

The ICCPR also provides that anyone who was, “the victim of unlawful arrest or detention shall have an enforceable right to compensation.”¹⁷ Moreover, an individual whose prior criminal conviction is overturned where there has been a miscarriage of justice is entitled to compensation.¹⁸ The Human Rights Committee has also stated that upholding the right to life in article 6(1) or the prohibition on torture or cruel or inhuman treatment (article 7) entails the provision of reparations for their breach.¹⁹ Article 28A of the Indonesian Constitution protects the right to life, while article 28I recognizes the right to be free from torture. Given the Constitutional Court’s previous inclination to interpret Constitutional protections in light of international law,²⁰ article 28A and 28I should be regarded as imposing an obligation to investigate and provide reparations in relation to torture or unlawful killings.

Indonesia has also acceded to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).²¹ In relation to racial discrimination, it provides that Indonesia must ensure that victims can seek, from a competent national tribunal, “adequate reparation or satisfaction for any damage suffered.”²²

The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) has also been ratified by Indonesia.²³ Its provisions have also been incorporated into Indonesian law and are therefore binding under both international and Indonesian law.²⁴ In relation to victims of torture or cruel, inhuman, or degrading treatment, CAT obliges Indonesia to ensure that victims obtain redress. Specifically, it requires that they have “an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.”²⁵ In relation to this obligation, the CAT committee has stated that a State must “conduct a proper investigation into the facts that occurred, prosecute and punish the persons responsible for those acts, and provide the complainants with redress, including fair and adequate compensation.”²⁶

Finally, the Convention on the Rights of the Child (CRC) is also binding on Indonesia.²⁷ In relation to children who are the victims of human rights violations, Indonesia must “take all appropriate measures to promote [the] physical and psychological recovery and social reintegration of [the] child victim.”²⁸

These treaties, which are binding on Indonesia both under international and Indonesian law, establish a common understanding for addressing the rights of victims of human rights violations.

¹⁷ ICCPR, art. 9(5).

¹⁸ ICCPR, art. 14(6).

¹⁹ See e.g., Human Rights Committee, General Comment No. 20, (Oct. 3, 1992) para. 15; *Baboeram v Suriname*, Comm. No 146/1983, para. 13.2.

²⁰ See *infra* note 31 and associated text.

²¹ International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 1995. Indonesia acceded on July 25, 1999.

²² CERD, art. 6.

²³ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85. It entered into force for Indonesia on Nov. 27, 1997.

²⁴ Law No 5 of 1998. It contains the same provisions as Law No 12 of 2005 in relation to the ICCPR, *supra* note 12.

²⁵ *Id.*, art. 14(1).

²⁶ See e.g., *Hajrizi Dzemajl et al. v. Serbia and Montenegro* (161/2000), CAT, A/58/44 (Nov. 21, 2002) 85 (CAT/C/29/D/161/2000) at para. 11.

²⁷ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, ratified by Indonesia on Oct. 5, 1990

²⁸ *Id.*, art. 39.

It should be noted that some of these treaty law obligations apply to violations of human rights before Indonesia acceded to the treaties such as the ICCPR in 2006 or CAT in 1997. Those treaties clearly state that a victim has a procedural right to have the incident investigated and reparations paid. The fact that the incident has not been investigated is in itself a violation of the treaty and ensures that a right is being violated in an ongoing manner. A breach has therefore occurred subsequent to the ratification of CAT and ICCPR.²⁹ Moreover, in relation to enforced disappearances, it is well recognized that there is an ongoing crime until proof of the victim's death has been established.³⁰ Therefore, in relation to enforced disappearances where no proof of death has been established the violation of the ICCPR or CAT is ongoing and has occurred subsequent to ratification. Finally, the Constitutional Court of Indonesia has correctly recognized that the provisions of treaties such as the ICCPR or the Universal Declaration of Human Rights, even when not ratified by Indonesia, are relevant in interpreting the Indonesian Constitution.³¹ In relation to such violations, the treaty norms therefore function as strong presumptive guidelines in the application of international law to domestic law.

D. Other Relevant International Law Guidelines and Documents

In 2005, the UN General Assembly adopted the 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 (Basic Principles and Guidelines).³² The Basic Principles and Guidelines are the culmination of over a decade of work on the subject by the Commission on Human Rights.³³ In that time, the Commission has formed a coherent framework regarding the provision of reparations.

The Basic Principles and Guidelines do not entail new international or domestic legal concepts, as the Preamble to the instrument emphasizes. They identify mechanisms, modalities, procedures, and methods for the implementation of existing legal obligations under international human rights law

²⁹ See, e.g., Inter-American Commission on Human Rights, *Maria da Penha v. Brazil*, Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704 (2000), para. 27 ("Despite the fact that the original assault occurred [before entry into force of treaty] the State allegedly tolerated a situation of impunity and defenselessness, the effects of which were felt even after the date on which [the State] acceded").

³⁰ See e.g., Draft International Convention for the Protection of All Persons from Enforced Disappearance; *Velásquez Rodríguez v. Honduras*, IACtHR July 29, 1988, Ser. C No.4 (1988) para. 155 ("forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that State Parties are obligated to respect and guarantee"); *Miguel Rodríguez case*, Chilean Supreme Court case striking down amnesty law (Nov. 17, 2004); *Villegas Namuche case*, Peruvian Constitutional Court, (file 2488-2002-HC/TC, March 18, 2004); *Eduardo Bleier v. Uruguay*, Communication no. R. 7/30, May 23, 1978. See also *Petra Dijkstra et al., Enforced Disappearances As Continuing Violations* (May 7, 2002), <http://www1.jur.uva.nl/ailc/Enforced%20disappearances%20as%20continuing%20violations.pdf>

³¹ Constitutional Court Decision, Case No. 011-017/PUU-I/2003, Feb. 24, 2004, available at: <http://www.mahkamahkonstitusi.go.id/>.

³² Basic Principles and Guidelines, *supra* note 2.

³³ Final Report submitted by Mr. Theo van Boven, Special Rapporteur: Study Concerning The Right To Restitution, Compensation And Rehabilitation For Victims Of Gross Violations Of Human Rights And Fundamental Freedoms, UN. Doc. E/CN.4/Sub.2/1993/8); 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 (E/CN.4/Sub.2/1997/20); Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in Accordance with Commission Resolution 1999/33: The Right To Restitution, Compensation And Rehabilitation For Victims Of Gross Violations Of Human Rights And Fundamental Freedoms, U.N. Doc. E/CN.4/2000/62; Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher, Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity U.N. Doc. E/CN.4/2005/102/Add.1; C.H.R. Res. 2005/35, U.N. Doc. E/CN.4/2005/L.10/Add.11 (19 Apr. 2005).

and international humanitarian law. Their central tenets such as restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition appear in a number of previous international, regional, and municipal instruments and jurisprudence.³⁴

Several regional conventions also provide a right to a remedy for victims of violations of international human rights.³⁵ The Inter-American Commission and Court of Human Rights, together with the European Court of Human Rights, have extensive jurisprudence regarding the right to reparations and the scope and appropriate form of such remedies.³⁶ Both of these courts have frequently ordered states to provide reparations to victims.

In addition, several truth commissions, similar bodies or legislation have contained reparations schemes, such as South Africa,³⁷ Haiti,³⁸ El Salvador,³⁹ Ghana,⁴⁰ Malawi,⁴¹ Guatemala,⁴² Panama,⁴³ Peru,⁴⁴ South Korea,⁴⁵ Argentina,⁴⁶ Brazil,⁴⁷ Chile,⁴⁸ Sierra Leone,⁴⁹ and Timor Leste.^{50,51}

³⁴ See, e.g., Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Annex, 40 U.N. GAOR Supp. (No. 53) at 214, U.N. Doc. A/40/53 (Nov. 29, 1985), which includes far-reaching rights of restitution and compensation for victims. *Donnelly and Others v United Kingdom*, 4 ECHR Dec & Rep 4 (1975); Human Rights Committee, General Comment 21: Concerning Humane Treatment Of Persons Deprived Of Liberty (Art. 10) (Oct. 4, 1992), para. 7.

³⁵ See, e.g., African Charter on Human and Peoples' Rights (art. 7); American Convention on Human Rights, (art. 25), European Convention for the Protection of Human Rights and Fundamental Freedoms (art. 13); and the Inter-American Convention to Prevent and Punish Torture (art. 9)

³⁶ See, e.g., *Velazquez Rodríguez*, Ser. C, No. 7 (July 20, 1989), para. 25. *Godinez Cruz*, Ser. C, No. 8, (July 20, 1989) para. 23; *Aloboetoe et al.*, Ser. C, No. 15, (Sept. 10, 1993) para. 43; *Soering v. United Kingdom*, ECHR App. No. 14038/88, (July 7, 1989); *Aksoy v. Turkey*, ECHR App. No. 21987/93, (Dec. 18, 1996).

³⁷ Christopher Colvin, "Overview of the Reparations Program in South Africa" in *Handbook of Reparations* (Pablo de Greiff, Ed., Oxford University Press, 2006) 176.

³⁸ Alexander Segovia, "The Reparations Proposals of the Truth Commissions in El Salvador and Haiti: A History of Noncompliance" in de Greiff, *supra* note 37, at 154.

³⁹ *Id.*

⁴⁰ National Reconciliation Commission, *Ghana National Reconciliation Commission Report* (Apr. 22, 2005).

⁴¹ Dianna Cummack, "Reparations in Malawi," in de Greiff, *supra* note 37, 215.

⁴² Commission for Historical Clarification, *Guatemala: Memory of Silence, Report of the Commission for Historical Clarification* (Feb. 25, 1999).

⁴³ Comisión de la Verdad de Panama, *Informe Final Comision de la Verdad* (Apr. 18, 2002).

⁴⁴ Comisión de la Verdad y Reconciliación, *Hatun Willakuy: Informe Final de la Comision de la Verdad y Reconciliación* (Feb. 2004).

⁴⁵ Presidential Truth Commission on Suspicious Deaths of the Republic of Korea, *A Hard Journey to Justice: First Term Report* (Apr. 2004).

⁴⁶ See María José Gueembe, "Economic Reparations for Grave Human Rights Violations: The Argentinean Experience" in de Greiff, *supra* note 37, at 21; Christina Marie Wilson, "Argentina's Reparation Bonds: An Analysis Of Continuing Obligations," 28 *Fordham International Law Journal* 786 (2005).

⁴⁷ See Ignacio Cano, and Patricia Ferreira. "The Reparations Program in Brazil" in de Greiff, *supra* note 37 at 102.

⁴⁸ See Elizabeth Lira, "The Reparations Policy for Human Rights Violations in Chile" in de Greiff, *supra* note 37 at 55.

⁴⁹ Truth and Reconciliation Commission, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission* (2004).

⁵⁰ Commission for Reception, Truth, and Reconciliation in East Timor, *Enough! Final Report of CAVR* (Oct. 31, 2005).

⁵¹ See also Japan, which is showing "an increasing willingness to accept the arguments of victims on a number of issues, frequently relying upon concepts such as justice, fairness and equity": Shin Hae Bong, "Compensation For Victims Of Wartime Atrocities, Recent Developments in Japan's Case Law", 3 *Journal of International Criminal Justice* 187 (2005) at 205.

Moreover, many of these commissions such as, Ghana, Sierra Leone, Timor-Leste, and Peru, cited international law as the foundation for their reparations recommendations.

Some commentators have argued that the right to provide reparations is a norm of international customary law.⁵² Certainly, as the Permanent Court of International Justice has stated, “it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.”⁵³

E. Nature of Victims’ Right to Remedy and Forms of Reparation

The *Basic Principles and Guidelines* enshrine victims’ right to the following remedies, “(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.”⁵⁴

The *Basic Principles and Guidelines* provide a comprehensive five-part definition of what constitutes “adequate, effective, and prompt reparation”:

1. **Restitution:** The aim of restitution is to “restore the victim to the original situation” before the violation. It includes “restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.”⁵⁵

This report focuses mainly on the restitutive aspects of reparation. In this respect, the Basic Principles and Guidelines clearly state that restitution involves ensuring that victims can exercise all of their human rights.

2. **Compensation:** Comprehensive compensation should be “provided for any economically assessable damage” and should be “proportional to the gravity of the violation.”⁵⁶
3. **Rehabilitation:** The use of the term rehabilitation in the *Basic Guidelines and Principles* should not be confused with its use in Indonesia where it refers to political restitution. The *Basic Guidelines and Principles* define it in its therapeutic sense as including “medical and psychological care as well as legal and social services.”⁵⁷
4. **Satisfaction:** Satisfaction includes a broad range of measures including:
“(a) Effective measures aimed at the cessation of continuing violations”;
“(b) Verification of the facts and full and public disclosure of the truth”;
“(c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification, and reburial of the bodies”;

⁵² Katharine Shirey, “The Duty To Compensate Victims Of Torture Under Customary International Law,” 14 *International Legal Perspectives*. 30 (2004) at 40. (“A survey of 33 countries ... revealed that all have some mechanism for granting compensation to victims of torture. In Bangladesh, Japan, South Korea, Uganda, and Venezuela, [for example], the victim's right to compensation is part of the country's constitution. ... The survey of domestic law indicates that the awarding of compensation to victims of torture is almost universal.”) See also the website of Redress which contains laws and jurisprudence regarding reparations: <http://www.redress.org>.

⁵³ *Factory at Chorzów*, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17.

⁵⁴ *Basic Principles and Guidelines*, supra note 2, art. 11.

⁵⁵ *Id.*, art. 19.

⁵⁶ *Id.*, art. 20.

⁵⁷ *Id.*, art. 21.

“(d) An official declaration ... restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim”;

(e) Public apology;

“(f) Judicial and administrative sanctions against persons liable for the violations”;

“(g) Commemorations and tributes to the victims”;

“(h) Inclusion of an accurate account of the violations that occurred ... in educational material at all levels.”⁵⁸

5. Guarantees of non-repetition: The Basic Principles and Guidelines list a number of measures which should be implemented by member states to prevent future violations. They include effective civilian control of the military; independence of the judiciary and reforming laws which contribute to gross violations of human rights.⁵⁹

F. When Reparations should be Provided

Reparations, as detailed above, should be provided by the State when gross violations can be attributed to it.⁶⁰ “States should endeavor to establish national programs for reparation and other assistance to victims in the event that the party liable for the harm suffered is unable or unwilling to meet their obligations.”⁶¹ Moreover, States shall enforce domestic and foreign judgments against individuals or entities liable for the harm suffered.⁶²

G. Summary

Under international law, Indonesia is required to provide effective remedies to the 1965 victims who suffered gross violations of human rights. This report focuses on one type of remedy it should provide to those victims, namely reparations. However, it also elaborates on the broader transitional justice mechanisms Indonesia should adopt.

III. THE CONTEXT OF GROSS HUMAN RIGHTS VIOLATIONS COMMITTED IN INDONESIA

A. The Events of September 30, 1965

The government of the Republic of Indonesia’s founder, Sukarno, came to an end as the result of a sequence of events, the exact account of which is still uncertain. On September 30, 1965, a group of military officers led by Lieutenant Colonel Untung kidnapped and executed six Indonesian generals and two middle ranking officers. Many versions of the events abound. According to the official version, the kidnap and murder of the high-ranking officers was part of an attempted coup by Indonesia’s Communist Party (PKI). Initially referred to as “the September 30 Movement” (G.30-S), Soeharto’s New Order came to popularize the term, “the September 30 Communist Party Movement (G.30-S/PKI), linking the communists to the coup as part of its campaign to destroy the PKI and claim political legitimacy.

⁵⁸ *Id.*, art. 22.

⁵⁹ *Id.*, art. 23.

⁶⁰ *Id.*, art. 15.

⁶¹ *Id.*, art. 16.

⁶² *Id.*, art. 17.

The repression of the presumed rebels was led by Major General Soeharto, whose actions resulted in the exponential growth of his personal political power rapidly overshadowing that of President Sukarno. After the repression of the so-called G.30-S, Soeharto effectively assumed sweeping powers and personally decreed the PKI to be unlawful. He claimed that President Sukarno had authorized him to act as he saw fit. The events of September 30, 1965 and their aftermath have been analyzed as a coup and counter-coup in which elements of the military "...crushed Untung's action and established dominance of anticommunist military officers under Soeharto's leadership."⁶³

B. Gross Violations of Human Rights: Massacres and Mass Detentions

After the events of September 30, 1965, Soeharto initiated significant violence throughout much of the archipelago that lasted until March of 1966. The targets of the killings and detentions were those accused of being PKI members, or of having some indirect involvement through filial ties or membership in associated organizations. The massacres took place largely due to the absolute power and authority vested in Soeharto to 'take any steps necessary' to eliminate the PKI. Soeharto ordered all newspapers to shut down October 2–10, 1965, with the exception of two owned by the Army. Moreover, Law No. 11/1966 on Press Regulations outlawed the publication of communist or Marxist-Leninist materials. Thus, the dissemination of any other version of the September 30, 1965 events and their aftermath was seriously obstructed. Many of those killed, arrested and detained, had little or nothing to do with the PKI. In many areas, particularly in Central and East Java and Bali, members of the Indonesian armed forces under Soeharto's overall command perpetrated these episodes of violence. Moreover, these armed forces mobilized civilian militias and other civilian groups such as youth, student, or Muslim-based organizations.⁶⁴

According to the testimony of ex-political prisoner Suparno, on November 4, 1965, the situation in Juana Sub-district, Central Java remained calm until the arrival of the elite Red Beret paratroopers. (The Red Beret Paratroopers were the precursors to Indonesia's notorious Army Special Forces, Kopassus). Upon their arrival, the paratroopers set up two youth organizations that were mobilized to arrest and detain those identified as members of the PKI. (The two youth organizations were The Association of Indonesian Youth and Pupils for Action (KAPPI) and the Association of Indonesian Students for Action (KAMI)). (Source: Hasworo, *supra* note 64, at 29).

Around the country, massacres and detentions followed the arrival of the Red Beret Paratroopers.⁶⁵ The Red Beret Paratroopers Commander, stated, "We decided to encourage anti-communist civilian groups to assist us in this work... We trained them for two or three days, and then sent them to kill the Communists."⁶⁶ Telegrams sent by the US Embassy to Washington also confirm

⁶³ Geoffrey Robinson, *The Dark Side of Paradise: Political Violence in Bali* (Cornell University Press, 1995).

⁶⁴ Rinto Tri Hasworo, 'Penangkapan dan Pembunuhan di Jawa Tengah Setelah G-30-S' in *Tahun yang Tak Pernah Berakhir: Memahami Pengalaman Korban 65*, (John Roosa, Ayu Ratih, and Hilmar Farid, eds., 2004) at 29.

⁶⁵ In relation to Bali, see, Geoffrey Robinson, 'Post-Coup Massacre in Bali,' in, *Making Indonesia: Essays on Modern Indonesia in Honor of George McT Kahin* (Daniel Lev and Ruth McVey, eds., 1996) at 129–38, as quoted by Hasworo, *supra* note 64, at 28.

⁶⁶ Colonel Sarwo Edhie Wibowo. Hughes, *Indonesian Upheaval* (Fawcett, 1967) at 132, as quoted by Hasworo, *supra* note 64, at 32.

the military's provocation and mobilization of civilian groups to perpetrate acts of violence against so-called communists.⁶⁷

The authorities committed murder and torture and detained those labeled as communists. The majority of deaths and detentions occurred between September 1965 and March 1966. The number of people killed and disappeared during this period is heavily contested. Official figures vary from 78,000⁶⁸ to the 'boasts' of General Sarwo Edhie, for example, who famously claimed that up to 3 million had been killed.⁶⁹ Many victims' organizations and NGOs, both in Indonesia and abroad, quote figures as high as 1 million deaths.⁷⁰ More 'conservative' estimates put the figure in the hundreds of thousands.⁷¹ The divergence in estimates and their highly contested nature is in part an indication of the polarization of interests between the State and victims. It also demonstrates the lack of an official and comprehensive analysis of the 1965 events. Such an analysis is needed for the State to meaningfully acknowledge its historical responsibilities and duties and to provide Indonesia with a clearer understanding of what happened.

As the massacres slowed down, arbitrary arrests and detention without trial increased. The estimates of those "communist sympathizers" arrested and detained without charge or trial are uncertain, but could be as high as 1.7 million.⁷² According to Amnesty International, "... more than one million were detained and hundreds of thousands were held without charge or trial for up to 14 years."⁷³ The arbitrary arrests and detentions were accompanied by torture, rape, and disappearances. Most of those who survived arrest were held without being formally charged, and were invariably moved around from one place of detention to another. They were either finally released or detained in makeshift detention camps for many years without trial.

⁶⁷ Robinson, *supra* note 65, at 127, as quoted by Ritno Tri Hasworo, at 34.

⁶⁸ Findings of an official fact-finding mission under Major General Sumarmo in 1965: Harold Crouch, *The Army and Politics in Indonesia* (Cornell University Press, 1988) at 155. A survey carried out in 1966 by the Operational Command for the Restoration of Security and Order, Kopkamtib, put the number of dead at one million, see Robert Cribb, "Introduction: Problems in the Historiography of the Killings in Indonesia" in *The Indonesian Killings: 1965–1966*, (Robert Cribb ed., Monash University, 1990) at 8.

⁶⁹ Manai Sophian, *Kehormatan Bagi Yang Berhak: Bung Karno Tidak Terlibat G30S/PKI* (Yayasan Mencerdaskan Kehidupan Bangsa, 1994) cited in Saskia Wieringa, *Sexual Politics in Indonesia* (MacMillan, 2002) at 344.

⁷⁰ See, e.g., Human Rights Watch, *Academic Freedom in Indonesia: Dismantling Soeharto-Era Barriers* (Aug. 1, 1998) Chapter III.

⁷¹ Amnesty International in *Power and Impunity: Human Rights Under the New Order* (1994 – ASA 21/17/94) quote a figure of between 500,000 to one million deaths. The US Department of State Background Notes: Indonesia (Bureau of East Asian Affairs, 1997) estimates between 160,000–500,000 deaths. In 1965–1966 Massacre to be Investigated (Tapol Bulletin 169–170, Feb. 2003) Tapol put the figure at between half a million and 3 million.

⁷² See, e.g., Carmel Budiardjo, "Forty Years On, Justice And Comprehensive Rehabilitation For The 1965 Victims," TAPOL Bulletin 180 (Sept. 26, 2005).

⁷³ Amnesty International, *Power and Impunity*, *supra* note 71.

Yahya, a card-carrying Indonesian Nationalist Party (PNI) activist was arrested for being a member of the PKI. A barber from Semarang in Central Java, Yahya was taken to a prison in Ambarawa and detained for a year before he was called up for interrogation. Yahya was relatively lucky for he was finally able to prove his membership of the PNI and was released. Nevertheless, he was still required to report to the village head in order to travel and his identity card was marked with the ex-political detainee stamp (ET) (see image on front cover) (Source: Hasworo, *supra* note 64, at 42. By the time Yahya was released, his wife and baby had died. Yahya suspects his wife committed suicide.)

Many individuals were arrested upon presenting themselves voluntarily to local police stations, confident in their innocence. Others chose not to take the risk and went into hiding. In such cases, the military sometimes resorted to kidnapping family members in order to secure the individual.

Lasmini was a mother of five children from Purwodadi, Central Java whose husband, Kusdi, was being sought by the military. In late 1965, soldiers came to their home looking for Kusdi. Angry that Lasmini could not tell them the whereabouts of her husband, the soldiers destroyed the house and took her to Gundi police station where she was detained. "I was held for a week. Then my husband came to take my place. He came in and I left, just like that ..." Some time later, Kusdi was moved to Purwodadi Detention Center where he disappeared. Lasmini still has no knowledge of the fate or whereabouts of her husband. (Source: Hasworo, *supra* note 64, at 45-7)

There were no legal rights afforded to those accused of being directly or indirectly involved in the PKI and/or the events of September 30, 1965. Only 767 people were actually convicted of a crime.⁷⁴ From 1968 to 1969, thousands of political detainees were transferred to Buru Island in the Moluccas for 're-education,' 'political rehabilitation' and forced labor (see front cover). There, many died of malnutrition, malaria and other diseases. Eventually their families were also shipped off to the island. Many thousands of others continued to be held in different detention centers, such as the Plantungan 'rehabilitation' center for women in Central Java.⁷⁵

⁷⁴ Kopkamtib Chief of Staff, Admiral Sudomo, *Press Statement: The Return of a Number of G.30-S Category 'B' Detainees to Society* (Dec. 1, 1975).

⁷⁵ Budiardjo, *supra* note 72.

C. Soeharto's Rise to Power and the Institutionalization of Persecution

Even prior to his inauguration as President of the Republic of Indonesia on March 27, 1968, Soeharto's control of power enabled him to pass a number of crucial decrees. These measures both legitimized his rise to power and facilitated persecution of the PKI and those accused of being sympathizers.

At the time of the events of September 30, 1965, Soeharto was Commander of the Army Strategic Reserve Command (Kostrad). The position effectively put him in direct command of all the Army's troops and in control of communications. By October 2, 1965, President Sukarno was pressured into handing the responsibility for restoring security and order to Soeharto.⁷⁶ On October 10, Soeharto institutionalized his authority by establishing the Operational Command for Restoration of Security and Order (Kopkamtib) and appointed himself as Commander in Chief.⁷⁷ In his position as Commander in Chief, Soeharto proceeded to issue edicts calling for the "cleansing" of all PKI members, their families, and their associates.⁷⁸ It was accompanied by a large number of dismissals from the police force and other agencies. The Instruction also allowed for monitoring and 'political rehabilitation' of those who were related to political detainees or suspected of being sympathizers. Soeharto also ordered the deployment of the Red Beret Paratroopers to oversee the persecution. Under Soeharto, the Kopkamtib, "...quickly expanded beyond its original purpose of tracking down PKI supporters. The Kopkamtib became the government's main instrument of political control."⁷⁹

On March 11, 1966, President Sukarno issued an Instruction that vested in Soeharto the power to, "take all steps thought necessary to guarantee security, law and order and stability...and maintain the integrity of the Indonesian nation-state..."⁸⁰ The next day, Soeharto exercised this power to issue Presidential Decree 1/3/1966 outlawing the PKI.⁸¹ On July 5, 1966, in response to Soeharto's wishes, the Provisional People's Consultative Assembly (MPRS) issued MPRS Resolution No. XXV/1966 outlawing the PKI and Marxist-Leninist ideology, thus providing some legal cover for the persecutions. On March 21, 1967, MPRS Resolution No. XXXIII/1967 was passed removing Sukarno from the Presidency and replacing him with Soeharto as caretaker. On March 27, 1968, MPRS Resolution No. XLIV/1968 confirmed Soeharto as President of the Republic of Indonesia.

⁷⁶ "Speech by Army Commander Soeharto to Central and Regional Leaders of the National Front (Oct. 15)" in *Selected Documents Taken From the 30th September Movement and its Epilogue* (Cornell South East Asia Program, 1966) at 174.

⁷⁷ Crouch, *supra* note 68, at 137

⁷⁸ Instruction No. KEP-028/KOPKAM/10/1968 Policies Pertaining to the Control/Purging/Treatment of State/Government Personnel (Oct. 18, 1968).

⁷⁹ *Id.*, at 223

⁸⁰ Himpunan Peraturan Bersih Diri dan Bersih Lingkungan Dari G.30-S/PKI (English Trans., Dharma Bhakti, 1988) at 161. This instruction is highly controversial as the original does not exist; only Soeharto-sanctioned copies exist.

⁸¹ On March 13, Sukarno issued a correction to the instruction, which was ignored by Soeharto. Jakarta Legal Aid Foundation, Class Action No. 238/SK/LBH/III/2005, Outline of Facts, (1966), at 8.

D. Loss of Jobs and Land, Forced Labor and Stigmatization

During the persecution, schools, businesses, and plantations allegedly controlled by PKI organizations or sympathizers were shut down and the buildings seized by the military. Much of this property now represents part of the Indonesia army's (TNI) controversial business portfolio. Numerous detainees were then used as forced labor to work on land which had been stolen from them (see front cover).⁸² Some were rewarded with nominal wages, others received nothing at all. The detainees were often used for infrastructure projects such as the building of roads, bridges, dams, and canals.

Ngatim from South Lampung in Southern Sumatra describes how upon his arrest in November 1967 he spent one and a half years in a camp next to the Bulung River digging for sand. He and his fellow detainees were paid nothing, and sometimes they were not even fed. Ngatim recalls that on some occasions they would not receive anything from the government for three months, relying on the goodwill of local people. (Source: Razif, *supra* note 82, at 141).

In addition to the massacres, torture, forced labor, arbitrary arrests, and detentions, the 1965 victims lost their jobs, their homes, their land, their possessions, and their businesses. For example, on November 8, 1965, Narhomi's husband, a teacher, was summonsed to Juwana police station in Central Java and detained for belonging to the Republic of Indonesia Teacher's Association. Upon his detention, Narhomi, also a teacher, was dismissed. With two small children and the loss of income they had suffered, she struggled. Eventually her young son died since she could not afford medical treatment. Narhomi's husband was moved to a different detention center in March 1966 and his fate and whereabouts remain unknown. Narhomi could not rely on family support, as most of her family had suffered the same fate as her husband.⁸³

For the family members of many political detainees their stigmatization was also dramatic. For example, Menik, from Ambarawa, Central Java, describes how upon her husband's arrest other villagers treated her with contempt and her family was alienated from day to day activities. The stigmatization remained after her husband's release in 1971. It even continued on to the next generation with their son being dismissed from the police academy after they learnt of his father's detention.⁸⁴

The labeling and stigmatization of the 1965 victims was perpetuated in popular culture through mediums such as shadow puppet plays and a film, "Treachery of the G.30-S/PKI." This film was shown annually on television and incorporated into the school curriculum. There are also ceremonies and monuments, such as the "*Lubang Buaya*" monument in Jakarta, which serve to 'remind' the nation of the alleged barbarity of the communists. These practices demonized the 1965 victims and maintained a veil of silence over their persecution.

⁸² See Razif, "Romusha dan Pembangunan: Sumbangan Tahan Politik untuk Rezim Soeharto," in *Tahun yang Tak Pernah Berakhir: Memahami Pengalaman Korban 65* (John Roosa, Ayu Ratih and Hilmar Farid, eds., 2004) at 141-2.

⁸³ Yayan Wiludiharto, "Penantian Panjang di Jalan Batas: Kisah Keluarga Korban" in *Tahun yang Tak Pernah Berakhir: Memahami Pengalaman Korban 65*, (John Roosa, Ayu Ratih and Hilmar Farid, eds., 2004) at 66-67 and 70-72.

⁸⁴ *Id.*, at 82-83.

E. Classification of Political Prisoners, Detainees, and Suspects

Soeharto introduced a classification system for the 1965 victims. They were classified into one of the following categories before being sent off to various detention camps:

- Category A: Those who were alleged to have been directly involved in the events of September 30, 1965.
- Category B: PKI members and members of organizations associated with the PKI.
- Category C: Those alleged to have been indirectly involved in the events of September 30, 1965, including ordinary members of outlawed organizations, those sympathetic to the PKI, those with friends and relatives belonging to the PKI or having a 'relationship' with the PKI.⁸⁵

Category C, in particular, was so broad that many people were detained with no real affiliation to the PKI. For example, Nani Nurani was classified as category C, and imprisoned for seven years without trial in December 1968 because she had been invited to perform a traditional dance at an alleged PKI event.⁸⁶ Even children were detained because their parents had been arrested, detained, or killed on suspicion of being PKI. Efforts to systematize the classification system and set parameters for its application were attempts by the regime to create a sense of order to its policies of repression in order to gain some legitimacy. Inevitably, however, this classification system was applied arbitrarily and in violation of the most basic legal and human rights norms.

On November 23, 1965, ten-year-old Wajikan from Purworejo, Central Java was arrested and taken to the district level military command post. He was accused of "digging a hole to bury the generals [killed on September 30, 1965]" In reality, he was apparently in the process of digging a new well. Wajikan was held for over a year before his case was investigated. He was classified as category B and eventually sent off to Buru Island where he was held for over ten years. (Source: Hasworo, *supra* note 64, at 43–44).

Documents pertaining to the classification system and its implementation, specifically those relating to categories A and B are difficult to obtain.⁸⁷ Much more documentary evidence exists in relation to the category C classification system. On June 25, 1975, Soeharto issued Presidential Decree No. 28/1975 on the treatment of those classified as category C.⁸⁸ Article 1 (b-e) of the Decree gives a detailed breakdown of subcategories:

⁸⁵ Nugroho Notosusanto and Ismail Saleh, *Tragedi Nasional Percobaan Kup G 30 S/PKI di Indonesia*, (Intermassa, 1989) Appendix 9, at 190–200; See also ICTJ communication with Taufik Basari from the Jakarta Legal Aid Foundation (LBH Jakarta).

⁸⁶ Nani Nurani issued proceedings against Indonesian officials in the State Administrative Court (PTUN) in Jakarta. She claimed that in refusing to issue her with an identity card for life, she was discriminated against in a way which breached article 25(1) of Law No. 39/1999 (ensuring citizenship rights shall be upheld without discrimination) and article 28I(2) of the Constitution. The Court upheld her claim and ordered the authorities to issue her with an identity card for life: Jakarta State Administrative Court, Decision re Case No. 60/G.TUB/2003/PTUN.JKT, *Nona Nani Nurani v. Koja Sub-District Head, North Jakarta*, July 17, 2003.

⁸⁷ But, see, Kopkamtib Chief of Staff, Admiral Sudomo, *The Classification of Those Believed to Have Been Directly or Indirectly Involved in the G.30-S*, (JUKLAK 02/KOPKAM/II/1974, Feb. 21, 1974); Kopkamtib Chief of Staff, Admiral Sudomo, *The Surveillance of Ex-Political Prisoners and Detainees Who are Being Returned to Society*, (JUKLAK 04/KOPKAM/II/1974, Feb. 21, 1974)

⁸⁸ *The Treatment of Those Involved in G.30-S Category C*, (Keppres No. 28/1975, June 25, 1975).

- Category C: Those indirectly involved or suspected of being indirectly involved in the events of the September 30, 1965;
- Category C-1: Those involved in the Madiun Affair⁸⁹ and who in the aftermath of the events of the September 30, 1965 aided the PKI and who have not explicitly condemned the PKI;
- Category C-2: Members of outlawed organizations with the same principles as the PKI;
- Category C-3: Those sympathetic to the PKI but whose physical involvement in the events of the September 30, 1965 is unclear.

Given the failure of subsequent laws or decrees to revoke Presidential Decree No. 28/1975, it remains in force.⁹⁰ It represents one of a number of laws and regulations that continue to specifically discriminate against the 1965 victims.

F. Purges, Ideological Screening, Vetting and Disenfranchisement

Shortly after Presidential Decree No. 28/1975, the Civil Service Administration Body issued guidelines for its implementation.⁹¹ These guidelines contain detailed instructions on the treatment of civil servants, government employees, and staff of state-owned companies classified as category C. Such treatment included political rehabilitation, declaration of oaths of loyalty and allegiance to the Republic of Indonesia and the state ideology (Pancasila). Moreover, the guidelines stated that category C-2 and C-3 civil servants that have been honorably discharged retain their right to pensions, as do C-2 and C-3 civil servants who were dismissed prior to the Presidential Decree. This has not however proven to be the case. In December 2000, 57 former employees of the state owned oil company, Pertamina, called on the government to reinstate their pension rights. All 57 were dismissed by Pertamina in 1974, accused of being active members of an outlawed organization, the Oil Workers Union. In fact, the company had automatically docked Union membership dues from their wages.⁹² The government has so far not responded to their requests. Former Caltex employees in Riau were denied pensions in similar circumstances.

In the 1970s, a range of new regulations and procedures were issued so that anyone aspiring to work in the civil service was required to provide a certificate of non-involvement in the events of the September 30, 1965.⁹³ These regulations have not specifically been repealed and therefore remain in effect. Details as to the circumstances under which the certificate of non-involvement is required and to whom it applies, is specified in a Kopkamtib Instruction.⁹⁴ Kopkamtib Chief of Staff also established an ideological screening task force.⁹⁵ Moreover, other guidelines ensured that

⁸⁹ The Madiun Affair of Sept. 18, 1948 was a PKI uprising in support of peasant farmers in Madiun, East Java.

⁹⁰ Jakarta Legal Aid Foundation Class Action No. 238/SK/LBH/III/2005, section II c-8. Official Indonesian Government literature still refers to the murder of the Generals as G.30-S/PKI, directly linking the PKI to the events of Sept. 30.

⁹¹ Guidelines for the Administration of Civil Servants/Staff/Employees of State Owned Companies/Government Employees Involved in the G.30-S/PKI Revolt Category C, (BAKN Circular Letter No. 13/SE/1975, Oct. 22, 1975).

⁹² Pertamina Tuntut Gelar Perkara (Bernas Dec. 7, 2000).

⁹³ Pangkopkamtib Instructions No. KEP-020/KOPKAM/4/1970 and No. KEP-27/KOPKAM/XI/1973 in respect of: The Procedure for Issuing a Certificate of Non-Involvement in the G.30-S/PKI; BAKN Circular Letter 02/SE/1974; BAKN Circular Letter No. 02/SE/1975.

⁹⁴ Kopkamtib Instruction No. KEP-06/KOPKAM/XI/1975 in respect of: Improvements to the Procedure for Issuing a Certificate of Non-Involvement in the G.30-S/PKI.

⁹⁵ Kopkamtib Instruction No. KEP 07/KOPKAM/XII/1975 in respect of: The Establishment of the Ideological Screening Task Force (Dec. 17, 1975).

anyone categorized as A, B, or C could not join the military⁹⁶ and, if they remained in the civil service, could not earn promotion.⁹⁷ The ideological screening of civil servants and background checks of candidate's family members continued into the 1990s.⁹⁸

In addition, the 1965 victims were prevented from voting or standing for any legislative positions, including local, regional and national elections.⁹⁹ In 1996, the then Director General for Social and Political Affairs, Soetoyo, stated that in the 1971 General Elections, around 1.7 million "ex-communists" had been prohibited from voting. Laws No. 4/1975 and 1/1985 allowed some 1965 victims to vote but only with government approval.¹⁰⁰ The process for obtaining government approval was formalized in Instruction No. 32/1981, which established a government body to allow ex-political detainees to vote based on satisfaction of the following criteria:

1. Demonstrated loyalty towards the nation and government;
2. Lack of dissemination of communist teachings;
3. Lack of participation in activities that threaten security and stability;
4. Observance of government regulations concerning security, stability, and law and order;
5. Observance of all laws and regulations.¹⁰¹

According to Soetoyo, the number of those prohibited from voting had fallen to 45,000 in the 1982 elections; 41,000 in the 1987 elections; 36,000 in the 1992 elections and 20,700 in the 1997 elections.¹⁰² In February 1999, Legislation No. 3/1999 in respect of General Elections was passed which returned the right to vote to ex political detainees. However, until the recent Constitutional Court decision, ex political detainees and their relatives were prohibited from standing as candidates (see section V).

G. Release of Political Prisoners and Detainees—Surveillance, 'Political Rehabilitation' and Continued Persecution

In the early 1970s, with the release of thousands of political detainees, Soeharto required new practices to maintain his strategy of demonizing the PKI in order to legitimize repressive practices at all administrative levels. All these policies were based upon Instruction No. 32/1981,¹⁰³ which

⁹⁶ PP No. 6/1976

⁹⁷ BAKN Circular Letter No. 01/SE/1976 *with reference to Non-Involvement Certificate Requirement for the Promotion of Civil Servants*.

⁹⁸ See, Kopkamtib Implementation Instruction No. JUKLAK-15/KOPKAM/V/1982 (May 27, 1982); Coordinating Minister for Politics and Security, *Ideological Screening of Civil Servants, Civil Service Candidates and Others* (Sept. 8, 1988); Presidential Decree No. 16/1990 that provided for the notorious *Badan Penelitian Khusus* or *Litsus* to investigate and monitor civil service candidates parliamentarians and solicitors.

⁹⁹ See, e.g., Law No. 15/1969 on the Election of Members of the People's Constitutional Assembly Body, (*Badan Permusyawaratan Perwakilan Rakyat*).

¹⁰⁰ "The Controversy of an Activists Right to Vote", *Gatra*, May 4, 1996,

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *The Rehabilitation and Surveillance of Former G.30-S/PKI Political Detainees and Prisoners* (Instruction No. 32/1981). It also incorporated *The Surveillance and Restoration of Former G.30-S/PKI Prisoners and Detainees Released into the Community and Increased Vigilance*, (Kopkamtib Instruction No. JUKLAK-04/KOPKAM/II/1974); and *The Strategy for the Protection of the Pancasila Way of Life from the Latent Threat of Communism* (Kopkamtib Instruction JUKLAK-02/KOPKAM/VI/1980).

continues to be used now to legitimize discriminatory practices, particularly at the local level and which states:¹⁰⁴

Following the release of G.30-S/PKI detainees, in order to encourage national stability (conserve law and order)...the surveillance and restoration of former G.30-S/PKI political prisoners...must be implemented immediately.

The guide implementing Instruction No. 32/1981 calls upon provincial governors and local administrative officials to “carry out surveillance and reconstruction in all aspects of life, such as attitude, behavior, and all socio-political, socio-cultural, and socio-economic activities,” in coordination with the security forces.¹⁰⁵ It also states that, “each and every...activity...that may [indicate] the return of the communist/PKI must be obstructed and annihilated.”¹⁰⁶

The discriminatory practices defined by the implementation guide included:

1. *The “restoration” or “rehabilitation” program known as Santiaji Santikrama which also severely curtailed mobility.* It was held at least once a month at both district and village levels in order to ‘restore’ religious, ideological and socio-cultural norms to the ex political detainees.¹⁰⁷ The *Santiaji* continued until 2002. One aspect of the *Santiaji* was that ex political detainees were required to seek permission to move residence or travel outside of their village, including participating in religious pilgrimages. All activities including work, social interaction, cultural activities, and ‘mental ideology’ were monitored.¹⁰⁸
2. *The placement of special codes on identity cards designating the holder as an ex political detainee (ET) or member of an outlawed organization (OT).* The ET code was included on the identity card of former political prisoners and detainees, ‘without exception.’¹⁰⁹ (See example on front cover of this report). The stigmatization of 1965 victims was further extended under Instruction No. 24/1991, which prohibits ex political detainees over the age of 60 from being issued with an identity card for life. Normally, once an Indonesian citizen attains the age of 60 they are issued with an identity card for life. In contrast, 1965 victims must report periodically to authorities to have their identity card renewed.
3. *Prohibition on employment in certain sectors.* Former political prisoners and detainees were banned from the following positions: “teacher/lecturer, priest, shadow-puppet master, legal aid practitioner, journalist etc.” The implementation guide states that these positions may be misused in order to “influence others directly or indirectly in the interests of reviving communism.”¹¹⁰ It also limits a business from employing a workforce where the majority of the employees are ex political detainees.¹¹¹ From the late 1980s to the 1990s, further specific judicial positions were prohibited including Judge on the Supreme, State,

¹⁰⁴ Instruction No. 32/1991 may have been superseded by Instruction No. 10/1997. However, this instruction retains the prohibition on issuing an ID card to former political prisoners. Human rights activists and victims’ organizations are still calling for the repeal of Instruction 32/1981. Local governments still refer to the instruction. LBH Jakarta refers to its currency in the recent ‘Five Presidents’ case.

¹⁰⁵ Implementation Guide No. 188.52-3609, Chapter IV, Part 1 d.

¹⁰⁶ *Id.* Chapter IV, Part 1 a.

¹⁰⁷ *Id.* Chapter V, Part 1 c.

¹⁰⁸ *Id.* Chapter V, Part 2 a.

¹⁰⁹ *Id.* Chapter V, Part 2 d. (2) b)

¹¹⁰ *Id.* Chapter V, Part 2(6)(a).

¹¹¹ *Id.* Chapter V, Part 2(6)(b).

State Administrative, or Religious Courts¹¹² and the Public Prosecutors Office.¹¹³ The vast majority of these discriminatory mechanisms remain current.

Soeharto persecuted the 1965 victims in an effort to obtain and maintain power. Anti-subversive rhetoric was used in order to ensure military involvement in almost all aspects of public life. Such military ubiquity provided both Soeharto and the military with the means to eliminate any form of opposition, including 'separatists,' 'subversives,' and 'deviants.' Thus the labeling, stigmatization and alienation of so-called communist sympathizers was an important element of Soeharto's strategy to wrest and maintain control of power.

IV. REFORMASI AND THE TRANSITION TO DEMOCRACY: FAILURE TO REMEDY THE PERSECUTION

A. Soeharto's Act of Clemency

By 1995 and amidst growing domestic pressure led by the National Commission of Human Rights, Soeharto used his Presidential prerogative under Article 14(1) of the 1945 Constitution to grant clemency to three high-profile ex political detainees. They were former Deputy Prime Minister Subandrio, former Minister/Air Force Commander Air Marshal Oemar Dhani and former head of the Central Intelligence Body, Police Brigadier General Sutarto. He also announced that the ET code on identity cards would no longer be required.¹¹⁴

B. The B.J. Habibie Administration

In 1998, new President Habibie ordered the release of a number of political prisoners, including the labor activist Muchtar Pakpahan and dissident politician Sri Bintang Pamungkas. However, many 1965 victims including those identified with organizations such as the People's Democratic Party remained imprisoned. In February 1999, Legislation No. 3/1999 in respect of General Elections was passed which returned the right to vote to ex political detainees, though they were still prevented from standing as candidates in legislative elections. As such, the Habibie administration failed to dismantle the state persecution of the 1965 victims.

In addition, in May 1999, Legislation No. 27/1999 in respect of Changes to the Criminal Code in Connection with Crimes Against State Security added a number of clauses that specifically outlawed the spread and dissemination of Communist/Marxist-Leninist teachings 'in any shape or form', 'orally or in writing and via any media' with a range of sanctions ranging from 12 to 20 years' imprisonment.¹¹⁵

¹¹² See, respectively, Article 7 (2a) of Law No. 14/1985; Article 14 (1d) of Law No. 2/1986; Law No. 5/1986; Article 13 (1e) of Law No 7/1989. Article 8 (d) of Law No. 17/1997 also applied the prohibitions to the Tax Dispute Resolution Body.

¹¹³ Article 9 (d) of Law No. 5/1991.

¹¹⁴ See Tempo March 2-8, 2004, After 38 Years in Shackles and Asmara Nababan as quoted in Kompas 15.3.00, Aturan-Aturan Tentang "Bersih Lingkungan" Harus Dicabut.

¹¹⁵ Articles 107a, 107c, 107d, and 107e from UU 27/1999, Perubahan Kitab Undang-Undang Hukum Pidana Yang Berkaitan dengan Kejahatan Terhadap Keamanan Negara, May 19, 1999.

C. The Administration of Abdurrahman Wahid “Gus Dur”

The subsequent President, Abdurrahman Wahid, was the former leader of the influential Islamic organization, Nahdatul Ulama (NU), many of whose members had been 1965 victims.¹¹⁶ Gus Dur’s administration gave hope to the 1965 victims, especially because he urged NU members to seek reconciliation with them.¹¹⁷ In 2000, Gus Dur issued two Presidential Decrees disbanding the infamous National Security Agency and Special Investigations Unit.¹¹⁸ The dissolution of the latter was symbolically and practically important for former political prisoners, detainees, and their families. It also heralded the start of a long process of removing the stigma and discrimination directed towards 1965 victims.

The motivations officially stated for disbanding the Special Investigations Unit were an implicit condemnation of the Soeharto era. The Presidential Decree stated:

1. “That Indonesia is a State based on the rule of law, and therefore all Indonesians are of equal standing before the law and government, including all activities concerning the appointment and supervision of civil servants;”
2. “...that the task of the Special Investigations Unit was to seek information concerning the involvement of a civil service candidate or member of staff in the G.30-S/PKI or other outlawed organization;”
3. “That the activities of the Special Investigations Unit as referred to under point b. are not in accordance with the principles of a State founded on the rule of law, and thus it must be annulled.”¹¹⁹

On March 14, 2000, on national television, Gus Dur apologized on behalf of the government for the persecution of the 1965 victims and the atrocities perpetrated against them by the state.¹²⁰ He even suggested the repeal of MPRS Resolution No. XXV/1966 (which officially outlawed the PKI and Marxist-Leninist ideology). However, Gus Dur was unable to convince the MPR (People’s Consultative Assembly) to repeal the Resolution, which can only be revoked by the MPR itself. Repeal of the Resolution is thus a political rather than legal decision, which realistically requires the support of the political elite in the DPR (House of People’s Representatives) and MPR as well as the military.

Gus Dur’s administration also began drafting legislation for the Truth and Reconciliation Commission (TRC) in relation to crimes under the Soeharto era. The legislation was eventually enacted in 2004. However, the law is undermined by critical flaws that affect its usefulness as an instrument to provide truth, reconciliation, or reparations to the 1965 victims.¹²¹ Gus Dur enacted

¹¹⁶ See e.g., Agus Sunyoto et al., *Banser Berjihad Menumpas PKI* (Pesulukan Thoriqoh Agung, 1996) at 155; Fathurrahman Zakaria, *Geger Gerakan* Sept. 30, 1965, *Rakyat NTB Melawan Bahaya Merah* (Sumurmas, 1997) at 110-1.

¹¹⁷ For an excellent discussion on Gus Dur’s attempts to encourage reconciliation between NU membership and those identified as PKI, see Budiawan, *Breaking the Immortalized Past: Anti-Communist Discourse and Reconciliatory Politics in Post-Soeharto Indonesia*, (National University of Singapore, 2003 and Elsam, 2004).

¹¹⁸ Keppres No. 38/2000 disbanding Bakorstanas; Keppres No. 39/2000 disbanding Litsus.

¹¹⁹ Keppres No. 39/2000 disbanding Litsus.

¹²⁰ “Gus Dur: Sejak Dulu Sudah Minta Maaf”, *Kompas*, March 15, 2000. In his position as former chair of the NU, Gus Dur also apologized for the actions of the NU and admitted that, “... in fact many of the killings were perpetrated by NU members.”

¹²¹ For a detailed discussion of the TRC legislation see, ICTJ, *Comment by the International Center for Transitional Justice on the Bill Establishing a Truth and Reconciliation Commission in Indonesia*, (June 3, 2005): <http://www.ictj.org/static/Asia/Indonesia/050603.ICTJ.IndoTRCComment.eng.pdf>

some measures of clemency toward political detainees. For example, in 2000, he invoked his constitutional prerogatives in response to parliamentary and/or Supreme Court decisions, and issued Presidential Decrees granting pardons and restoring the reputation of some political prisoners.¹²² However, the administration's initial interest in addressing past wrongs failed to comprehensively address the persecution of the 1965 victims.

D. The Administration of Megawati Sukarnoputri

The administration of Megawati Sukarnoputri also failed to adequately respond to the state obligations to provide remedies to the 1965 victims. In 2003, the MPR held a special session to review all its resolutions from 1960 to 2002. However, in the face of strong opposition the MPR refused to annul either MPRS Resolution No. XXV/1966 (outlawing Marxist-Leninist and communist ideology) or MPRS Resolution No. XXXIII/1967 used to install Soeharto as President. Upon completing its deliberations, the MPR issued a resolution which stated that MPRS Resolution XXV/1966 was one of only three resolutions that were to remain unconditionally current.¹²³ According to this decision, Resolution XXV/1966 is not subject to legislative amendment by a new administration. The effect of upholding Resolution XXV/1966 was to continue to forbid ex-political detainees from standing as local, national, or presidential candidates, which was formalized in the Law on General Elections of 2003.¹²⁴

On June 12, 2003, partly in response to these developments and partly in response to requests from 1965 victims, the Supreme Court sent a communication to the President.¹²⁵ The communication called on the regime to institute rehabilitasi. Rehabilitasi is an Indonesian concept which is similar to, but narrower than, the notion of restitution under international law. In this context, it means the restitution of the 1965 victims' political reputation. The legal framework in relation to rehabilitasi defines it as "... the restoration of original status, for example honor, good name, position, or other rights."¹²⁶ The Supreme Court called upon the President to use the authority vested in her under Article 14(1) of the Constitution to provide restitution for the 1965 victims. Article 14(1) of the Constitution states that, "The President may grant clemency and restoration of rights and shall in so doing have regard to the opinion of the Supreme Court." In the Communication, the Supreme Court stated that pursuant to Article 14(1) "... the power to grant rehabilitasi rests not with the Supreme Court but is the prerogative of the President."¹²⁷

On July 25, 2003, the deputy head of the DPR sent a Communication to the President in response to two 1965 victims' organizations demands for rehabilitasi.¹²⁸ The Communication described rehabilitasi as a "necessary element of reform that government has yet to implement" and also

¹²² Keppres No. 92/2000 in respect of a pardon for Father Sandyawan Sumardi and Benny Sumardi; Keppres No. 93/2000 in respect of the restitution and pardon of R Sarwito Kartowibowo, and Keppres No. 142/2000 in respect of the restitution of Nurdin A.R.

¹²³ Review of Material and Legal Status of Provisional People's Consultative Assembly and People's Consultative Assembly Decisions from 1960–2002 (Resolution No. I/2003).

¹²⁴ Law No. 12/2003, art. 60(g); Law No. 23/3003, art. 6(s).

¹²⁵ Communication No. KMA/403/VI/2003 (June 12, 2003).

¹²⁶ Government Regulation No. 3/2002 in respect of Compensation, Restitution, and Rehabilitation for Victims of Gross Human Rights Violations, art. 1(6). This regulation refers specifically to the implementation of Article 35 (3) of Law No. 26/2000 on Human Rights Tribunals, but nevertheless provides a legal definition of rehabilitation, compensation, and restitution.

¹²⁷ Communication No. KMA/403/VI/2003 (June 12, 2003), per Communication No. KMA/403/VI/2003 (June 12, 2003), per Justice Bagir Manan.

¹²⁸ Communication No. KS.02/3947/DPR-RI/2003. The victims' organizations were Forum Koordinasi Tim Advokasi and the Lembaga Perjuangan Rehabilitasi Korban 1965's (LPR-KROB).

urged the President to use her prerogative power to act in favor of the 1965 victims. On August 25, the Indonesian Human Rights Commission sent a similar communication to the President in response to the rehabilitasi demands of another 1965 victims' organization.¹²⁹ In addition, the MPR passed a resolution empowering the President to engage in rehabilitasi in relation to Sukarno and others.¹³⁰ Unfortunately, Megawati did not use these opportunities to engage in rehabilitasi in relation to the 1965 victims.

V. RELIANCE ON THE CONSTITUTIONAL COURT FOR REHABILITASI: TESTING THE CONSTITUTIONALITY OF THE LAW ON GENERAL ELECTIONS

A. The Arguments

Shortly after its establishment in 2003, the Constitutional Court received two submissions concerning Law 12/2003 on General Elections (Electoral Law).¹³¹ Both submissions challenged the constitutionality of article 60(g) forbidding 1965 victims from taking part in the elections as local or national legislative candidates.

Both submissions¹³² argued that article 60(g) was in violation of a citizen's right to be treated equally before the law, as provided under the Second Amendment to the 1945 Constitution,¹³³ and international instruments.¹³⁴ They argued that membership of an outlawed organization was not sufficient justification for withholding an individual's civil and political rights, something that could only be done by a decision in relation to a particular individual. The second submission also argued that national reconciliation would only be possible as and when discriminatory legislation and practices were eliminated. They referred to other discriminatory practices such as the prohibition of an identity card for life for ex political detainees.¹³⁵

The government defended the electoral law based on a constitutional formulation limiting the exercise of rights and in the continuing force of MPRS Resolution XXV of 1966 prohibiting communism and Marxism-Leninism.¹³⁶ It argued that article 28(J)(2) of the Constitution allowed for rights to be restricted according to law and that Resolution XXV of 1966 therefore ensured the validity of the electoral law.¹³⁷

¹²⁹ Communication No. 147/TUA/VIII/2003. The victims' organization was Paguyuban Korban Orde Baru's (PAKORBA).

¹³⁰ Resolution No. V/2003, Appendix No. 2(1).

¹³¹ Constitutional Court case No. 011-017/PUU-I/2003 (Dec. 30, 2003).

¹³² Group I was represented by LBH Jakarta and the Indonesian Legal Aid and Human Rights Association, Perhimpunan Bantuan Hukum dan HAM Indonesia (PBHI).

¹³³ The Second Amendment enshrines a Bill of Rights in the Indonesian Constitution. The submission specifically argued that article 60(g) breached arts. 27; 28(C)(1); (D)(1); (D)(3); (I)(2) which provide for equality before the law and freedom from discrimination.

¹³⁴ Universal Declaration of Human Rights, art. 21; ICCPR, art. 25 (providing every citizen with the right to be elected at elections to form a representative government).

¹³⁵ *Id.*

¹³⁶ Representing the government at the Court hearing held on Jan. 13, 2004 was Home Affairs Minister Hari Sabarno.

¹³⁷ Minister Sabarno stated that "MRPS Resolution No. XXV 1966 was the key to the drafting of Article 60(g)": "Judicial Review UU Pemilu: Pemerintah Diskriminasikan Eks PKI", *Kompas*, (Jan. 15, 2004).

B. The Decision

On February 24, 2004, the Constitutional Court delivered a landmark decision. It accepted, with one dissenting opinion, the arguments that article 60(g) of electoral law was discriminatory and in violation of the 1945 Constitution.

In reaching its decision, the court held that the bill of rights prohibited all forms of discrimination. The court concurred that article 60(g) of the Electoral Law prohibited a specific group of Indonesian citizens from exercising their right to stand as candidates and to be elected. It held that article 60(g) was "...a negation of citizenship rights or in other words discrimination based on political beliefs and is thereby in violation of rights as guaranteed under Articles 27, 28 D (1) and (3), and 28 I (2) of the 1945 Constitution."¹³⁸

The Court acknowledged that article 28 J (2) of the Constitution provides for the limitation of individual rights and freedoms, establishing that limitations were only permissible with the aim of "...guaranteeing the...respect of the rights and freedoms of others and in order to fulfill just demands in accordance with moral, religious, security and law and order considerations within a democratic society." However, the Court found that in the context of an election, an individual could only be prohibited from taking part based on considerations such as illness, age, or if the right had been revoked by a court decision that was individual rather than collective in nature. The Court found that, "as a State based on the rule of law, each prohibition that has a direct relationship with rights and freedoms must be based on a court decision that has permanent legal standing."¹³⁹

In addition, the Court found that the inclusion of article 60(g) in the electoral law pursued political objectives and represented "political punishment" meted out to a specific group of people. The Court rejected the argument that article 60(g) was justified by the relevant MPR Resolutions.¹⁴⁰ It stated that although the MPR Resolutions were still current they did not have the legal jurisdiction to abolish or limit the right to be elected. The Court was also of the opinion that "Article 60 (g) was no longer relevant to the efforts towards national reconciliation that the Indonesian people have already committed themselves to."¹⁴¹

The Court's decision was reached with reference not only to the Constitution, but also to international instruments such as the ICCPR, which at the time had not been ratified by the Indonesian government.¹⁴² The decision was therefore a positive sign that Indonesia's judiciary accepts the value of international law.

¹³⁸ Constitutional Court Decision Case No. 011-017/PUU-I/2003, Constitutional Court Gazette, 2003–2004.

¹³⁹ *Id.*

¹⁴⁰ TAP MPRS No. XXV/1966 and TAP MPR No. I/2003

¹⁴¹ Constitutional Court Decision Case No. 011-017/PUU-I/2003, Constitutional Court Gazette, 2003–2004.

¹⁴² *Universal Declaration of Human Rights, supra* note 134.

C. Wider Implications of the Decision

The Court's decision was welcomed by victims groups and two of Indonesia's most influential Muslim organizations, the NU and Muhammadiyah.¹⁴³ Unfortunately, although article 60(g) was repealed with immediate effect, the decision was not implemented before the 2004 general elections. The first scheduled election that ex political detainees can stand for will be in 2009. By then many of them will be experiencing advanced age and could face challenges on the basis of poor health.¹⁴⁴

Nevertheless, the decision is important for its psychological boost to the 1965 victims and its precedential value.¹⁴⁵ Armed with a legal decision explicitly asserting that they are equal before the law, 1965 victims will be encouraged to claim their rights.¹⁴⁶ Moreover, the ruling should also be used to seek review of other legislation and regulations which similarly discriminate against 1965 victims.¹⁴⁷ For example, the electoral laws in relation to Presidential and Vice-Presidential Elections still prohibit 1965 victims from standing as candidates.¹⁴⁸ The Constitutional Court decision had the important effect of sparking calls for an end to all discrimination against 1965 victims.¹⁴⁹ The Chair of the Indonesian Human Rights Commission recognized the decision's catalytic utility by stating, "the decision...can serve as a stepping stone to re-examine all legislation that discriminates, either socially, politically, culturally, or in terms of economic status."¹⁵⁰

A major obstacle in the road to comprehensive restitution of rights for the victims of persecution is still the MPRS Resolution No. XXV/1966 strengthened by the MPR Resolution of 2003.¹⁵¹ Some Indonesian commentators have argued that the Constitutional Court decision requires the revocation of all legal instruments that discriminate against the 1965 victims.¹⁵² Certainly, the decision increases civil society's leverage in calling for their revocation. Moreover, according to Article 2 of MPR resolution of 2003, MPRS XXV/1966 must be "...implemented in a just manner and respecting the law, democratic principles, and human rights." Such a formulation calls for robust constitutional scrutiny and appears to allow a process that could end in the revocation of the disputed Resolution.

¹⁴³ See "Putusan Mahkamah Konstitusi soal Eks PKI: Terobosan buat Bangsa," *Kompas* (March 26, 2004) (quoting Head of the NU, KH Hasyim Muzadi: "All Indonesian citizens, without discrimination, should have the right to vote and to stand. This is a good thing."); "Eks Tapol Boleh Jadi Caleg: Putusan MK Dewasakan Proses Demokrasi", *Sinar Harapan*, (Feb. 26, 2004) (citing Head of the Muhammadiyah, Syafii Maarif)

¹⁴⁴ See, e.g., Gus Dur was prevented from standing in the 2004 presidential elections for health reasons, such as his poor eyesight.

¹⁴⁵ "Bitter Victory", *Tempo* (March 2-8, 2004) (Referring to comments by The Foundation for the Research of the 1965 Massacre, *Yayasan Penelitian Korban Pembunuhan 1965* (YPKP))

¹⁴⁶ Further challenges to Indonesia's discriminatory legislation include the 'Five Presidents Case' and 'The Case of Nani Nurani'. See also the *Request for General Rehabilitation for the Victims of 30.G-S 1965* submitted to President Susilo Bambang Yudhoyono by LPR-KROB on Dec. 17, 2004.

¹⁴⁷ See *Tempo*, *supra* note 145 ("the DPR and the government [should] immediately improve all laws containing the same failing. Pending any improvement, discriminatory articles should be suspended and no longer implemented.")

¹⁴⁸ Law 23/2003. Article 6 (s)

¹⁴⁹ See, e.g., Asvi Warman Adam of the Indonesian Institute for Social Sciences (LIPI), "It is high time for us to eliminate all forms of discrimination against former members of the PKI and their family members." ("Government Told to Change Policy on Ex-PKI," *Jakarta Post*, (Feb. 26, 2004)).

¹⁵⁰ *Tempo supra* note 145.

¹⁵¹ MPR 1/2003. Concerning the Review of Material and Legal Status of Decisions Made by the Provisional People's Consultative Assembly and the People's Consultative Assembly from 1960 to 2002

¹⁵² "Setelah Eks-PKI Boleh Dipilih sebagai Calon Anggota DPR, DPRD dan DPD," *Jawa Pos*, (March 2, 2004) (quoting constitutional expert, Ismail Sunny, from the University of Indonesia).

VI. THE PRESENT SITUATION

The Constitutional Court opened the path to judicial restitution of the rights of the 1965 victims. However, restitution of some political rights is only a fraction of what still needs to be done to fulfill the duties of the Indonesian State to provide reparations to the 1965 victims. After the limited progress achieved in this area in the years since the demise of Soeharto, President Susilo Bambang Yudhoyono has a unique opportunity to comprehensively address the needs of the 1965 victims. He must start by repealing discriminatory low-level ministerial and district regulations and pervasive discriminatory practices. Such regulations and practices are incompatible with a society based on the rule of law and democracy.

A. Persistence of Discriminatory Practices

Legislation

The exact number of laws and regulations that discriminate against the 1965 victims is difficult to identify. The list reviewed in this report cannot be considered exhaustive. However, the main discriminatory laws and regulations can be identified, principally MPRS Resolution XXV of 1966 from which many others are derived.

The practice of ignoring the principle of legislative hierarchy has made it possible for subordinate norms to remain in force depending on the discretion of low-level officials. This has been compounded by a lack of legal rationalization which would harmonize all laws so that they are consistent with the Constitutional Court decision or other recent laws which have removed discrimination against 1965 victims in some areas.¹⁵³ Indonesian laws, decrees, or regulations remain in force unless specifically overturned by a subsequent instrument.¹⁵⁴ For example, Government Regulation, PP No. 6/1976 that bans the 1965 victims from civilian and military service is still effective.¹⁵⁵ Other laws regulating Veterans' pension entitlements, and appointments to the Tax and Religious Courts also still contain articles which discriminate against the 1965 victims.¹⁵⁶ The 'Five Presidents' class action case calling for *rehabilitasi* of the 1965 victims identifies the damaging effects of several decrees that continue to affect the victims' enjoyment of equal rights.¹⁵⁷

Nevertheless, MPR Decree No. 3/2000 clearly states the hierarchy of Indonesian laws.¹⁵⁸ At the top of the hierarchy is the Indonesian Constitution, followed by Statutes, then Regulations, and Presidential Regulations. Provincial Regulations and Laws are at the bottom. The Decree also states that legal instruments of a lower hierarchy cannot contradict with those of a higher level.¹⁵⁹

¹⁵³ See, e.g., Law No.3/1999 which returned the right to vote in general elections to the 1965 victims.

¹⁵⁴ In this scenario the Latin maxim applies, *lex posterior derogate lex priori* (the later law prevails over the prior one).

¹⁵⁵ *Jakarta Post*, *supra* note 149.

¹⁵⁶ "Pasca Putusan MK Soal Eks-PKI: MK Jangan Tunggu DPR", *Kompas* (June 12, 2004) (quoting Benny K Harman, Head of the Center for the Study of the Constitution and Democracy).

¹⁵⁷ Jakarta Legal Aid Foundation Class Action No. 238/SK/LBH/III/2005 (March 9, 2005). It identifies the following Decrees: Civil Service Administration Body (BAKN) Circular Letter No. 02/SE/1975 concerning Certificate of Non-Involvement in G.30-S for Civil Service Candidates; Presidential Decree, Keppres No. 28/1975 with reference to the Treatment of Those Involved in G.30-S, Category C; BAKN Circular Letter No. 01/SE/1976 concerning Certification of Non-Involvement in G.30-S for Promotion/Transfer of Civil Servants; Home Affairs Ministerial Instruction, No. 32/1981 and No. 24/1991.

¹⁵⁸ MPR Decree No. 3/2000, articles 2 & 3.

¹⁵⁹ *Id.*, article 4(1).

Given the clear non-discrimination human rights provisions contained in the Constitution and Statutes,¹⁶⁰ other regulations and provincial laws which discriminate against the 1965 victims are of no legal effect and could not be implemented.

Instruction No. 32/1981 was one of the key instruments used to persecute the 1965 victims (see sections III(E)(G)). Although some argue that it was replaced in 1997,¹⁶¹ other legislation promulgated since 1997 refers to it as their legal basis. For example, Badung District Regulation No. 5/2001 on Resident Registration cites Instruction No. 32/1981 as the legal principle in its promulgation. In addition, the Surabaya Municipal Development Plan to 2010 makes references to the need to “monitor/anticipate political upheaval” and the “supervision and surveillance of [1965 victims] at village and sub-district level” (as is stipulated under Instruction No. 32/1981).¹⁶²

Continued Political Stigmatization

The continued interest in maintaining the ‘specter of communism’ is often demonstrated with pronouncements warning against alleged communist activity, blamed on politicians or activists with views differing from the military establishment, at certain critical political junctures.

For example, in the run up to the 2004 General Elections, a Lieutenant Colonel in North Sumatra stated that:

If we find that there are still former PKI living in [our] territorial jurisdiction...then we must know exactly where they live...Finding complete data on former PKI is a serious job that cannot be negotiated...If you find that former PKI have already passed away, then we must have complete data about the whereabouts of their graves. If they are still alive, we must know where they reside.¹⁶³

As recently as June 2006, the Head of the State Intelligence Body (BIN) warned parliament of the “hidden and camouflaged activities of communists” and that, “... we must be vigilant because these activities are on the increase.” He informed parliament that BIN had monitored meetings in Bandung, Bogor, Blitar, and Cipanas, and that they had succeeded in breaking up a meeting of 1965 detainees and members of Gerwani in Bandung: “we found out about it and asked the police to break up the meeting.”¹⁶⁴ A meeting of this description was broken up in Bandung on May 20, 2006, not by the police but by around 100 members of two militia organizations with alleged links to the military.¹⁶⁵ The military cite Resolution No. XXV/1966 and Legislation No. 27/1999 as the legal basis for the need to take action.¹⁶⁶

Also in June 2006, the military warned that the House of Representatives had been infiltrated by sympathizers of the PKI and that it was “suspicious of” and “concerned about” the alleged re-

¹⁶⁰ See supra sections V(A), (B).

¹⁶¹ The defense submissions in the Nani Nurani case refer to Instruction No. 32/1981 as having been replaced by Instruction No. 10/1997.

¹⁶² See Surabaya Local Government website, www.surabaya.go.id, development plan point h. 3

¹⁶³ Marwan Saragih, Commander of 0207/Simalungun Territorial Command in North Sumatra, “Sinar Indonesia Baru,” Medan (Jan. 17, 2004) as quoted by A. Umar Said in, Eks Anggota PKI Harus Didaftar? <http://kontak.club.fr/Eks%20anggota%20PKI%20harus%20didaftar.htm>

¹⁶⁴ Syamsul Siregar, Head of the State Intelligence Body (BIN) as quoted in “Kegiatan Kaum Komunis Mengingkat” Detikcom, (June 12, 2006)

¹⁶⁵ Asian Human Rights Commission Urgent Action-185-2006 (June 9, 2006). The two militia organisations are Laskar Siliwangi and the Pemuda Panca Marga.

¹⁶⁶ Jakarta Military Commander Major General Agustadi Sasongko Purnomo as quoted in “Pangdam Jaya: Sudah ada 3 Indikasi PKI akan Bangkit” Detikcom (June 12, 2006).

emergence of the PKI.¹⁶⁷ These accusations seem intended to target those members of parliament that have or are said to have filial links with ex 1965 political detainees based on the argument that “you can’t guarantee that a child has broken away from the ideology of his/her parents” and that “at the very least they have a historical grudge.”¹⁶⁸ Similar hostility and stigmatization applies often to members of the labor movement.¹⁶⁹

Labeling

Overt expressions of anti-communist feelings are still in evidence, sometimes contained in banners and posters sanctioned by local government. For example, in Central Java and around Yogyakarta, there are still banners warning local residents to “beware the latent threat of communism,” and that “communists are anti-religious.”¹⁷⁰ There have also been anti-communist demonstrations by organizations such as the Indonesian Anti-Communist Forum. The background to such organizations is unclear and many believe that the military or military-backed interests sponsor them. The rhetoric that equates communism with atheism is also used to mobilize discriminatory sentiment, particularly among religious organizations.¹⁷¹

Moreover, the prohibition of an identity card for life for ex political detainees over the age of 60 is still enforced. The effect of this policy is to brand and stigmatize the 1965 victims. Despite the repeal of the law in relation to stamping identity cards with an ET code, the coding of 1965 victims remains in practice in some areas. For example, ex political detainee, Payung Salenda who spent 10 years on Buru Island, states that his identity card still bears the ET code and that the local officials refuse to issue him with a replacement.¹⁷²

B. Claims to Pensions, Appropriated Land, Buildings, and Businesses

There have been a number of claims submitted to the courts, particularly in Central and Eastern Java, by victim’s organizations and individuals seeking restitution of a different sort. Namely, the return of land, homes, or other property seized. For example, in June 2003, the District Court of Kendal in Central Java found that the military had acted unlawfully when it seized a plantation belonging to local shareholders.¹⁷³ In 1966, the military had ordered the seizure of these lands, property, and assets because they claimed the shareholders had been involved in the events of September 30, 1965. No compensation was paid. According to the Court, the seizure had been unlawful because “... the President is the only official who has the authority to revoke the right to assets in the national interest,” adding that in such an event, “... compensation must be awarded.”¹⁷⁴ The Court also found that none of the shareholders had been in any way involved in the events of September 30. Therefore, it ordered the defendants, military officials, to return the

¹⁶⁷ Comments by Major General Agustadi. See M Taufiqurrahman, “House, Army End Row over Communist Fray” *The Jakarta Post* (June 14, 2006); Army Chief of Staff General Djoko Santoso, “TNI Punya Data Kader Komunis di DPR” *MetroTVnews.com* (June 6, 2006); Rizal Maslan, “Watch Out! The PKI Could Rise Again” *Detik.com* (March 7, 2006).

¹⁶⁸ Arkurat Djaswadi of Surabaya State University, as quoted in “Silaturahmi Mencurigai Komunis” *Gatra* No 32 (June 22, 2006).

¹⁶⁹ Defence Minister Juwono Sudarsono as quoted in “Geger Penyusupan PKI di DPR” *Suara Merdeka* (June 15, 2006)

¹⁷⁰ As witnessed by the author in 2005.

¹⁷¹ Legislation No. 27/1999 for example explicitly states that Communist/Marxist-Leninist teaching is in conflict or incompatible with religion.

¹⁷² *Jakarta Post*, *supra* note 149.

¹⁷³ “Tergugat Langsung Banding, Sekjer Menangi Kebun Sumurpitu” *Suara Merdeka* (June 18, 2003) (Kendal case).

¹⁷⁴ *Id* per Chief Judge Magdalena Sidabutar.

land and all its assets back to its rightful owners. The court did not however order any compensation be paid to the plaintiffs for losses incurred over the last four decades. This case is an illustration of the many clear-cut cases where the military authorities acted unlawfully, yet the stigma of being branded a communist was sufficient to silence the community.

Other claims have sought the reinstatement of veterans' or civil servants' pensions and compensation for unpaid amounts. In Central Java, for example, the Advocacy for Community Transformation group has been assisting 1965 victims in obtaining documents from the Regional Employment Agency to pursue claims for their pensions.¹⁷⁵ However, as the above case demonstrates, these claims have often been less successful than property restitution claims. There is, therefore, a need for the government to take the initiative and begin a national dialog on long due compensation.

C. Further Calls for *Rehabilitasi* from within Indonesia

Rehabilitasi or the restitution of political reputation has been the goal of many of the 1965 victim's organizations. More recently, appeals have been made directly to President Susilo Bambang Yudhoyono to issue a Presidential decree calling for rehabilitasi. For example, the Organization for the Rehabilitation of the Victims of the New Order (LPR-KROB), wrote to President Yudhoyono on behalf of all of the 1965 victims outlining their claim for rehabilitasi based on Article 27 of the 1945 Constitution.¹⁷⁶ LPR-KROB called upon the President to use his Presidential prerogative under Article 14(1) of the Constitution (see section IV(D)) and issue a Presidential Decree covering the following demands:

1. Repeal and annul all legislation that discriminates against the 1965 victims. Such laws typically contain the following language, "those who are not former members of the PKI, including its mass organizations, or not involved directly or indirectly in the G.30-S/PKI or other organizations."
2. Repeal and annul the stigma of special codes on identity cards and other documents belonging to the 1965 victims.
3. Declare that the 1965 victims are not guilty of the crimes that were imputed to them and recognize their status as victims of human rights violations.
4. Acknowledge that there were Indonesian citizens sacrificed by the 1965 persecution.
5. Declare the "General Rehabilitation" of the 1965 victims, restoring and returning their dignity, status, and honor as citizens of Indonesia.¹⁷⁷

For example, in addition to the demands above, another organization called for the President to:

1. "Instruct all government and private institutions to make an inventory [of items seized from 1965 victims] and then return and pay compensation."
2. "Write an objective history of the events of 1965, by taking into consideration living witnesses and literature. Then publish the results and include them in the national education curricula."

¹⁷⁵ Hilmar Farid and Rikardo Simarmatra, *The Struggle for Truth and Justice: A Survey of Transitional Justice Initiatives Throughout Indonesia*, (ICTJ Occasional Paper Series, New York, Jan. 2004) at 65.

¹⁷⁶ LPR-KROB Communication No. 147/Sek/DPP.P/XII/2004 sent to the President's office on Dec. 17, 2004 in respect of General Rehabilitation. Article 27 of the Constitution enshrines the right of every citizen to "equal status before the law and government" and "to work and live in human dignity."

¹⁷⁷ *Id.*

3. “Apologize to the Indonesian people, particularly the victims by acknowledging that there was intention and neglect on the part of state officials in 1965.”¹⁷⁸

Another organization that has written and circulated detailed analysis and demands for rehabilitasi points to the importance of truth seeking and the dissemination of alternative histories in the interest of national reconciliation.¹⁷⁹ They also call for other reparatory measures such as the repeal and annulment of discriminatory legislation (they cite Instruction No. 32/1981) and monetary compensation.

The Jakarta Legal Aid Foundation initiated in 2005 a class action against former Presidents (“the Five Presidents class action suit”).¹⁸⁰ In addition to the claims above, the class action contained demands for rehabilitasi in the form of:

- A declaration that the defendants have acted unlawfully;
- An order that the defendants provide financial compensation to the plaintiffs;
- An order that President Yudhoyono set up a team for the calculation of the losses sustained by the plaintiffs;
- An order that the defendants make a written apology;
- An order that President Yudhoyono erect monuments to the 1965 victims and include the history of the persecution in the national curriculum;

Although the claim was rejected by the Central Jakarta Court in September 2005 stating lack of authority to hear it, the Jakarta Legal Aid Foundation said they would appeal against the decision.¹⁸¹

D. President Yudhoyono’s Options

As detailed in Chapter 1 of this report, the international legal obligations of the Indonesian State towards the 1965 victims encompass a wide range of measures which include comprehensive reparations. Given its importance to victim groups, Indonesia should implement rehabilitasi. However, it should also adopt a transitional justice framework to include a comprehensive policy of reparations and a holistic approach to other transitional justice mechanisms (as identified in the next chapter).

Since his inauguration in October 2004, President Susilo Bambang Yudhoyono has frequently stated his commitment to national reconciliation. The President has shown a particular interest to “try and find a way to restitute and compensate the Buru Island political detainees.”¹⁸² As stated in section IV(D), President Yudhoyono has the sole prerogative under article 14(1) of the Constitution to issue a Presidential Decree calling for rehabilitasi.¹⁸³ There are no legal obstacles to such action given that, as previously noted, the Supreme Court has recommended it.¹⁸⁴ The Parliament and

¹⁷⁸ Points 2, 3, and 4 respectively of the Open Letter to the President of the Republic of Indonesia in respect of: Returning the Economic, Social and Cultural Rights of the Victims Accused of Being Involved in the G30S and Accused of Being PKI, Nov. 24, 2004, Jakarta.

¹⁷⁹ Coordination of Advocacy Teams and Organizations Calling for the Rehabilitation of Victims of the 1965 Affair, Rehabilitation of the Victims of the 1965 Affair in the Perspective of Reconciliation and the National Interest.

¹⁸⁰ Jakarta Legal Aid Foundation Class Action No. 238/SK/LBH/III/2005 (March 9, 2005).

¹⁸¹ Tempo Interaktif Sept. 30, 2005.

¹⁸² “Presiden Ingin Rehabilitasi dan Beri Kompensasi Tapol” Kompas (March 17, 2005).

¹⁸³ Constitution of the Republic of Indonesia, Art. 14 (1)

¹⁸⁴ Communication No. KMA/403/VI/2003. See 3.4 above.

Human Rights Commission have also requested that the President endorse *rehabilitasi*.¹⁸⁵ By exercising his Presidential prerogative to reconstitute rights, President Yudhoyono can give substantive meaning to his policy of reconciliation. He can also begin to pursue a comprehensive strategy of reparations and other transitional justice mechanisms, outlined in the next chapter of this report, which would fulfill Indonesia's legal obligations to the 1965 victims.

However, the President must overcome two significant problems. The first is implementation.¹⁸⁶ In order to deal with the problems of legal implementation and administrative policy, the President should be prepared to issue a Presidential decree instructing all implementing authorities and policy-makers to revoke, repeal or annul all discriminatory regulations that are in contravention of the Constitution or human rights laws.¹⁸⁷ Such a move would have the advantage of providing explicit guidelines as well as avoiding legal challenges to lower regulations.

The second major problem the President faces is political reluctance to alter the *status quo* and take on the power of the military. The construction of a wide political consensus will need to be achieved over a considerable period of time in order to revoke the main piece of discriminatory legislation: MPRS Resolution XXV/1966. The MPR only needs to convene itself once every five years. This means that a sizable political majority needs to be mobilized, which can only be achieved by the continuous activity of a vocal civil society. An Indonesian State which operates under the rule of law and institutes a comprehensive transitional justice strategy will maximize civil society's ability to achieve such a political consensus.

E. Truth-Seeking: Setting the Record Straight

The adequate recovery of historical memory and the public acknowledgement of the truth about the violations committed are vital components of what the Indonesian State owes the 1965 victims according to international law. Moreover, such memorialization and acknowledgment is a prerequisite to the effective implementation of other reparation mechanisms. Reparations which are provided without a public acknowledgment of past violations or which are accompanied by an amnesty are likely to be ineffective in addressing victims' grievances. As such, the adequate recovery of historical memory is an essential part of the demands made by the Indonesian human rights community on behalf of the victims. President Yudhoyono has indicated that the Truth and Reconciliation Commission (TRC) established in August 2004 would be an appropriate vehicle for providing restitution to the 1965 victims.¹⁸⁸ However, the President's unequivocal commitment to the TRC is misplaced given the fundamentally flawed nature of the TRC.¹⁸⁹ The ICTJ report on the TRC demonstrates its problems such as a narrow focus limited to case-by-case investigation precluding an analysis of the violence's historical context or its widespread and systematic nature. Moreover, the proposed TRC has the power to grant amnesties for gross violations of human rights and may only provide reparations where an amnesty is granted. Both of these provisions clearly violate Indonesian and international law (see sections II(B), (C)). Therefore, the TRC as currently envisaged is not the most appropriate mechanism for the fulfillment of the duties of the Indonesian

¹⁸⁵ Communication KS. 02/3947/DPR-RI/2003, July 25, 2003. Communication 147/TUA/VIII/2003, Aug. 25, 2003. See section IV(D) above.

¹⁸⁶ Taufik Basari. Jakarta Legal Aid Foundation. Electronic communication Apr. 2005.

¹⁸⁷ Articles 27, 28, and 28 A-J in the Second Amendment to the 1945 Constitution. Human Rights Law No. 39/1999, including Article 1 (3) on discrimination, Article 18 (1) on the right to a fair trial and Articles 71 and 72 on government responsibility.

¹⁸⁸ *Kompas*, *supra* note 182. (In relation to the Buru Island detainees only.)

¹⁸⁹ For a detailed discussion of law 27/2004 establishing the TRC, see ICTJ, *supra* note 121.

State towards the 1965 victims. The TRC should genuinely investigate the events of 1965 and allow victim participation to create a historical narrative based on objective truth.

VII. RECOMMENDATIONS

The heinous past and present treatment of the 1965 victims is unacceptable and must be remedied. The ongoing human rights violations against the 1965 victims are a burden on Indonesia's nascent democracy that hinders its international commitments to respect and protect human rights. Responsibility to rectify those violations rests primarily with the Indonesian State. Furthermore, although this report has focused on the 1965 victims, there were a myriad of other human rights' infringements perpetrated during the Soeharto era. Such abuses must also be addressed. Tackling the 1965 violations in isolation would be ineffective and improper.

Given the ICTJ's considerable experience observing and providing technical advice with respect to reparations and other transitional justice mechanisms in different contexts around the world, it hopes that the different stakeholders in Indonesia will carefully consider the following recommendation.

1. Indonesia must adopt a holistic and comprehensive transitional justice strategy in relation to all gross violations of human rights committed by the Soeharto administration. These measures should not just apply to the 1965 victims but to all victims of gross violations of human rights. Such strategies must recover the true history of the era and should include an integral approach to issues such as reconciliation,¹⁹⁰ prosecutions,¹⁹¹ reparations¹⁹² and other transitional justice mechanisms.¹⁹³

Specifically, in relation to the 1965 victims, the ICTJ has the following recommendations:

2. Victims and civil society must be principally involved in the development, implementation, and evaluation of any transitional justice framework used to remedy their situation. They must participate in the decision making process to determine which policies are prioritized, since mechanisms imposed without consultation are likely to be ineffective.
3. In providing remedies to the 1965 victims, the class of victims should not be defined narrowly in terms of proven former political affiliation. Given that the term "1965 victims" encompasses a wide range of victims persecuted for broadly defined political reasons, it should be applied similarly expansively in providing reparation.
4. Based on Supreme Court, DPR, and MPR authority, the President of the Republic should exercise his Prerogative Powers under article 14(1) of the Constitution and issue a Presidential Decree which officially:
 - recognizes that the 1965 victims suffered gross violations of their human rights;

¹⁹⁰ For ICTJ report on reconciliation see: ICTJ, *Crying without Tears: In Pursuit of Justice and Reconciliation in Timor-Leste: Community Perspectives and Expectations* (Aug. 2003) available at: <http://www.ictj.org/images/content/0/9/096.pdf>.

¹⁹¹ For ICTJ reports on prosecutions see: ICTJ, *Intended to Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta* (Aug. 2003) available at: <http://www.ictj.org/images/content/0/9/098.pdf>; ICTJ, *Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor* (June 2005) available at: <http://www.ictj.org/images/content/1/2/121.pdf>.

¹⁹² On reparations see: Pablo de Greiff (ed.), *The Handbook of Reparations* (2006).

¹⁹³ Such as vetting and recovery of memory: see generally www.ictj.org.

- declares that those 1965 victims unfairly stigmatized were not guilty of the crimes alleged against them;
 - apologizes on behalf of the State for the deliberate infliction of gross violations by the State upon the 1965 victims; and
 - restores the dignity, reputation, and rights of the 1965 victims.
5. The Indonesian government should remove, discontinue, or redesign monuments or commemorations that stigmatize the 1965 victims. It should also erect new tributes to the 1965 victims which remember and recognize the violations perpetrated against them.
 6. In order to cease continuing violations and discrimination towards the 1965 victims, the following action is necessary:
 - The MPR should revoke Resolution XXV/1966 which has been used as a continuing justification for discriminatory policy and action towards the 1965 victims.
 - All laws should be reviewed to identify those which discriminate against the 1965 victims. All discriminatory laws and regulations should be explicitly revoked including: Presidential Decree No 28/1975 regarding the classification system (see sections III(E), (F)); Instruction 32/1981 and its implementing guide regarding discrimination in employment, identity cards, and surveillance (see section III(G)); and Law 23/2003 which prohibits the 1965 victims from standing as Presidential or Vice-Presidential candidates.
 - The President and the Parliament should officially declare that they will not enact any new discriminatory regulations infringing on freedoms of expression and association.
 - The Government should promote MPR Decree No. 3/2000 which states that the Constitution and Statutes are at the apex of the legal framework and that other lower level regulations cannot contradict them. In particular, it should promote the non-discrimination clauses in the Constitution and Human Rights laws (see note 187).
 - The President should issue a decree stating that any discriminatory regulations are not to be implemented by local officials, stating explicitly that such regulations contravene the Constitution and human rights legislation (see note 187).
 - The Government should promulgate policies to ensure that public officials do not institute any further policies or practices which discriminate against the 1965 victims, including appropriate sanctions against any public official who continues to discriminate against the 1965 victims.
 - The government should counter the legacy of cultural repression created by the Soeharto regime by promoting a tolerant society which does not stigmatize the 1965 victims. In particular, posters, ceremonies, films, or plays stigmatizing the 1965 victims should be the object of critical analysis. Hate speech against the 1965 victims should not be acceptable in public affairs.
 7. A dialog with victims must begin which establishes the true nature of the events of 1965 and which contains a public disclosure of the true facts:
 - The government must officially recognize that the historical narrative in relation to the events of the 1965 was politically instrumentalized in the past and that the historical narrative must be rectified based on the objective truth of what happened rather than political interests.
 - Following consultation with victims, a TRC should be considered which can effectively verify the truth and encourage reconciliation. The current legislation on a

TRC is fundamentally flawed and it should be remedied in order to serve the purpose of historical clarification.¹⁹⁴

- The national education curriculum should be revised to include the objective historical narrative in relation to the 1965 victims and fostering a culture of tolerance and understanding.
 - In addition to obtaining an accurate historical narrative, any genuine mechanism for official truth-seeking must allow for victim participation, providing opportunities for victims to publicly recount their experiences and to restore their dignity through public hearings and commemorations.
8. Those bearing the most responsibility for committing gross violations of human rights against the 1965 victims should be brought to justice. Sanctions should be in the form of judicial prosecution or, if appropriate, administrative measures.
 9. The government should establish a mechanism to identify all property illegally seized from the 1965 victims. Once identified all assets, including property, land, buildings, and plantations which remain State owned should be returned to the 1965 victims.¹⁹⁵ Such a scheme should make allowances for individuals who may not be able to prove they had formal title to property.
 10. The government should implement genuine efforts to restore employment or provide appropriate compensation to those 1965 victims arbitrarily dismissed from State employment and who seek reinstatement.¹⁹⁶ Restitution of wages should be based on a neutral and uniform benchmark rather than perpetuating wage differentials.
 11. In addition to the above, the 1965 victims must be able to freely exercise all of their human rights, especially in relation to identity, family life, and freedom of expression, association, and political participation.
 12. Both the State and those guilty of gross violations should be required to pay compensation to the 1965 victims. Either a TRC or a separate mechanism should be established to address the losses sustained by the 1965 victims, in particular loss of employment and pensions as well as harm suffered and other damage.¹⁹⁷ Victims must participate in the development of a compensation scheme to ensure its legitimacy and effectiveness.
 13. In addition to affirming the rights of the 1965 victims, State institutions must be reformed in order to guarantee that the rights of the Indonesian citizens are not infringed in the future through stigmatization and persecution.
 14. Personnel in State institutions at all levels and, in particular, the security forces, should be trained against discriminatory practices. Any ideological indoctrination of such personnel must be discontinued immediately and replaced by respect to the rule of law and democratic freedoms.

¹⁹⁴ ICTJ, *supra* note 121.

¹⁹⁵ On this topic, see further, ICTJ, *The Contemporary Right to Property Restitution in the Context of Transitional Justice* (forthcoming).

¹⁹⁶ See, e.g., the Brazilian, Argentinean and Chilean reparations programs which reinstated all state employees dismissed for political motives. On Brazil see, Ignacio Cano and Patricia Ferreira *supra* note 47. On Argentina see María José Guembe *supra* note 46. On Chile see Elizabeth Lira *supra* note 48.

¹⁹⁷ See e.g., Chilean reparations program which included a pension scheme. See Elizabeth Lira *supra* note 48.

15. Measures which have already advanced *rehabilitasi*, such as the Constitutional Court decision on the general elections, should be officially disseminated, taught, and actively promoted by Indonesian authorities. Future measures of reparations and other measures which assist victims should be actively publicized by State institutions.
16. The above measures should be available to all 1965 victims irrespective of their residence or citizenship or refugee status. The government should undertake a comprehensive study of the situation of refugees or persons otherwise in exile due to the events of 1965.¹⁹⁸ Specific measures should be implemented to encourage those in exile to return to Indonesia if they desire.
17. The above measures should pay particular attention to the gendered nature of some violations, by consulting with female victim groups and designing reparations programs which recognize women's particular victimization.
18. The international community should engage in activities which support and strengthen victim organizations in Indonesia. Such endeavors should increase the capacity and resources of civil society in Indonesia to enable them to advocate for reparations for the 1965 victims and in favor of democratization efforts more broadly.

The ICTJ urges all Indonesian stakeholders to respect the human rights of victims and support their right to reparations. The government of Indonesia must provide such reparations in the context of a comprehensive transitional justice strategy that is fully consistent with international law.

¹⁹⁸ See e.g., Argentine Law of 2004 specifically provided reparations for exiled people (see María José Guembe *supra* note 46). A Chilean law in 1994 established a national office for returning exiles and provided benefits to encourage their return (see Elizabeth Lira *supra* note 48). Malawi and Brazil had similar programs (see Dianna Cummack, *supra* note 41; Ignacio Cano and Patricia Ferreira *supra* note 47).

VIII. GLOSSARY

1965 Victims: All those people who were discriminated against or who suffered gross violations of human rights as a result of being categorized under Soeharto's classification system (see section III(E)).

BIN: State Intelligence Body

DPR: House of People's Representatives.

ET: The code placed on identity cards of ex-political detainees, signifying Ex-Tapol.

Events of 1965: All of the actions and omissions which caused harm to the 1965 victims.

Events of September 30, 1965: The executions of the Indonesian generals on September 30, 1965 and its immediate aftermath into October 1, 1965.

Ex-political detainees: All those 1965 victims who were detained for their alleged Communist Party involvement.

PKI: Indonesian Communist Party

G.30-S: The Soeharto acronym for the "September 30 Movement" denoting people alleged to have been involved, even indirectly, in the alleged attempted coup of September 30, 1965.

G.30-S/PKI: The Soeharto acronym for the "September 30 Communist Party Movement" denoting those members of the Communist Party alleged to have been directly involved in the alleged attempted coup of September 30, 1965.

Inmendgari: Instruction.

Keppres: Presidential Decree.

Kostrad: Army Strategic Reserve Command. Soeharto was Commander during the events of September 30, 1965.

Kopkamtib: Operational Command for the Restoration of Security and Order. Soeharto appointed himself Commander in Chief (*Pangkopkamtib*) after the events of September 30, 1965.

LPR-KROB: Organization for the Rehabilitation of the Victims of the New Order. Leading victim's organization seeking justice for the 1965 victims.

MPR: People's Consultative Assembly.

MPRS: Provisional People's Consultative Assembly. The former MPR.

NU: Influential Islamic organization, *Nahdatul Ulama*. It was led by former President Abdurrahman Wahid.

OT: The special codes placed on the identity cards of those alleged to be a member of an outlawed organization.

Red Beret Paratroopers: Elite members of the Indonesian army established by Soeharto and which perpetrated serious violations against the 1965 victims. They were the precursors to Indonesia's notorious Army Special Forces, (*Kopassus*).

Rehabilitasi: The Indonesian concept similar to restitution, but which merely calls for the restoration of the reputation and honor of an individual. Recently a campaign has developed for *rehabilitasi* specifically in relation to the 1965 victims.

Resolution XXV/1966: The Resolution passed by the MPRS in 1966 which banned the Communist Party and communist ideology.

Tapol: A contraction of the Indonesian words *tahanan politik*, meaning political prisoner. The term was used to refer to 1965 victims who were imprisoned without trial or charge.

TNI: Indonesian Army.

TRC: Truth and Reconciliation Commission.



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