



Comment
by the International Center for Transitional Justice
on the Bill
Establishing a Truth and Reconciliation Commission in Indonesia¹

Introduction

The People's Representative Assembly of Indonesia (*Dewan Perwakilan Rakyat - DPR*) passed on September 7, 2004, a bill creating a "Truth and Reconciliation Commission" (TRC), which is charged with clarifying abuses committed before 2000 and determining whether to award individualized amnesties for perpetrators and reparations for victims.

The law consists of 46 articles detailing the objectives, competence, functions, structure and composition of the commission, and has an official parliamentary comment attached with the purpose of clarifying the sense of some passages. President Megawati reportedly signed the draft into law 27/2004 during her last days in office.²

The International Center for Transitional Justice believes that the bill shows serious conceptual and operational weaknesses that would severely compromise the ability of a truth commission to operate in a credible, independent, and effective way.

Specifically, the ICTJ is concerned with the following features of the bill:

- A narrow definition of the research to be conducted, which is limited to a case-by-case investigation, thus precluding the analysis of the context and patterns of the several waves of violence experienced in Indonesian history.
- The reduction of reconciliation to a mechanism of individualized out-of-court settlements, in which amnesties are exchanged for reparations in a manner that is prejudicial to the rights of victims.

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² At the time of writing this paper, the ratification of this bill had not yet been published in the official gazette.

- The inclusion of an undesirable amnesty clause that would benefit the perpetrators of gross human rights violations and that could politicize and hinder the work of the commission.
- The absence of the power to issue public policy recommendations in order to prevent the repetition of abuses.

The ICTJ has a longstanding commitment to the development of genuine justice initiatives in Indonesia, and maintains solid partnerships with civil society organizations focused on the redress of past abuses, historical clarification, and sustainable reconciliation.³ The objective of this analysis is to contribute to an informed and constructive discussion on the fundamental task of official truth-seeking.

1. Background on the TRC process

1.1. The Origins of the Project

The idea of a truth commission in Indonesia was first entertained around the time of President Soeharto's departure from office in 1998. It was then that the National Human Rights Commission (*Komnas HAM*) proposed the establishment of a panel to investigate human rights abuse under the "New Order".

President Soeharto's successor, B.J. Habibie, did not act on the suggestions by Komnas HAM, but in 2000, the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat - MPR*) issued a comprehensive decree on the issue of national unity, which proposed a truth commission as part of a series of measures aimed at "upholding the supremacy of law [...] the prosecution and resolution of cases of corruption, collusion and nepotism, and human rights violations."⁴

The MPR decree explicitly mandated the establishment of a "Truth and Reconciliation Commission" that would focus on "abuses of power and human rights violations" and open the road to comprehensive measures, including:

"[...] acknowledgements of guilt, requests for forgiveness and the granting of forgiveness, reconciliation, law enforcement, rehabilitation or other such measures as may be beneficial for consolidating national unity and integrity, having regard at all time to the people's sense of justice."⁵

³ The ICTJ has published a comprehensive mapping of transitional justice initiatives in Indonesia. See Farid, Hilmar and Simarmata, Rikardo: "The Struggle for Truth and Justice. A Survey of Transitional Justice Initiatives Throughout Indonesia". Available in Indonesian as "Demi kebenaran. Pemetaan Upaya-Upaya Pencarian Keadilan dalam Masa Transisi di Indonesia"

⁴ "The Consolidation of National Unity and Integrity" (MPR/ V/ 2000). Chapter IV, 4.

⁵ MPR/ V/ 2000. Chapter V, 3.

That same year, the DPR passed a law establishing the ad hoc human rights court to try cases submitted by Komnas HAM.⁶ The law established that “gross violations of human rights occurring prior” to its entry in force may be “undertaken” by a truth commission.⁷

The Department of Justice and Legislation (now Department of Justice and Human Rights) asked for input on the establishment of a truth commission. Following discussion seminars on the issue, a well-established human rights organization, ELSAM (*Lembaga Studi & Advokasi Masyarakat*), submitted in 2000 a paper outlining different options. However, the executive branch did not submit a draft to the DPR until May 2003. As will be discussed below, the draft’s progress in the DPR was exceedingly slow.

Other developments in the field of transitional justice were weak and demonstrated a lack of political will to address the legacy of abuse inherited from the Soeharto regime. The ad hoc human rights court was slow to begin operations - the judges took office only in January 2002 - and when they finally did, the trials focused on only a few cases and were marred by a flawed prosecutorial approach and a lack of genuine willingness to achieve justice.⁸ Furthermore, Indonesia failed to cooperate with the UN-established prosecutorial process in Timor Leste, effectively sheltering people indicted for atrocities.

1.2. Criticisms and Skepticism

One of the reasons the truth commission project failed to gain traction was that its form, loosely modeled after South Africa’s Truth and Reconciliation Commission,⁹ raised significant doubts among human rights groups, intellectuals, and victims’ organizations. Chief among their concerns was a clause enabling the commission to recommend amnesties to perpetrators who acknowledged their participation in crimes investigated by the commission.

Some felt that the differences between the nature of the transitions in Indonesia and South Africa were not taken into account. The political opposition in South Africa had to negotiate comprehensive agreements with the Apartheid government in order to ensure a peaceful transfer of power, including the painful concession of amnesties for perpetrators. Such a need did not exist in Indonesia, as the transfer of power from the authoritarian regime had already taken place.¹⁰

The amnesty procedures included in the early versions of Indonesia’s truth commission bill were criticized as being an ineffective means of contributing to the truth-seeking

⁶ “Concerning Human Rights Courts” Law 26/ 2000.

⁷ Law 26/2000. Article 47.

⁸ See Cohen, David “Intended to Fail. The Trials Before the Ad Hoc Human Rights Court in Jakarta”. Also available in Indonesian as “Dimaksudkan Supaya Gagal. Proses Persidangan pada Pengadilan Hak Asasi Manusia Ad hoc di Jakarta”.

⁹ Law 34 of 1995. “The Promotion of National Unity and Reconciliation Act”

¹⁰ Hamid, Usman “Why RUU KKR has to be Objected?” in *Berita Kontras* N. 8/ VIII/ 2003

process. In the absence of a credible threat of prosecution, perpetrators would not feel compelled to come forward and apply for amnesty.¹¹

As it became apparent that certain sectors of society, including the security forces and their allies, were resistant to accountability measures, some victims and human rights groups began to fear that the proposed truth commission could be utilized as a mechanism to further entrench the pattern of impunity for human rights violations that is pervasive in Indonesia.¹²

1.3. Parliamentary Discussion of the Project

As previously noted, the executive branch sent a draft bill to the DPR in May 2003. However, a special committee in charge of the project was created only in July and, as late as September, had not appointed a chair making substantive discussions difficult.

At the time, critics of the project proposed that the debate should be postponed until a new parliament was inaugurated.¹³ The reason for this suggestion being that since 2004 was an electoral year in Indonesia, general parliamentary elections would take place in May and multiparty presidential elections could be decided – as eventually happened – in two rounds, held in July and September. Any bill approved by an outgoing parliament would have problems of legitimacy after new elections significantly changed the composition of the DPR.

In any event, substantive parliamentary discussion on the TRC project took place after the May elections. The result of the debate was the bill sent on September 7, 2004 to President Megawati Sukarnoputri, at a time when she was also engaged in a highly contested election.¹⁴

2. Objective and Functions of the Proposed TRC

The bill approved on September 7, 2004 seeks to establish a panel of 21 persons charged with contributing to national reconciliation and unity through via three main functions: the clarification of cases brought before the panel, making recommendations on possible amnesties for repentant perpetrators, and proposing reparations for the victims.

The bill opts for a narrow view of truth and reconciliation limited to the factual clarification of cases and their non-judicial resolution via agreements between victims and perpetrators. The bill places a premium on the willingness of victims to forgive

¹¹ Commentary on the Bill on the Truth and Reconciliation Commission of Indonesia, by Douglass Cassel, Priscilla Hayner and Paul van Zyl on behalf of the Ford Foundation, Jakarta. March 6, 2000

¹² The Jakarta Post. May 11, 2004. “Military Objects to ‘Truth’”

¹³ The Jakarta Post. September 20, 2003. “Experts Doubt Merit of Reconciliation Commission”. “Reconciliation and Poor Parliament” *Berita Kontras*. N. 8/ VIII/ 2003

¹⁴ The Jakarta Post. September 6, 2003. “Bill Benefits Rights Abusers: Activist”

repentant perpetrators: those cases would be automatically forwarded to the President of the Republic with the recommendation to award amnesties and reparations.

The commission would not conduct any historical analysis nor determine the patterns, spread or systematic character of the crimes under its mandate. It would limit its recommendations to the individual cases under investigation and could not recommend policies to prevent the repetition of the situations that caused the violations. There is no indication in the bill that any aspects of the commission's work would be conducted publicly in order to acknowledge the victims' experiences. There is no indication either that the commission would issue a comprehensive and public final report with its main findings.

As we will see in the following section, the narrow conceptual options taken by the bill reduce the proposed TRC to an arbitration board for individual cases.

2.1. Definition of Truth and Reconciliation

The preamble of the bill makes reference to the reasons why the creation of a TRC is needed:

[...] gross human rights violations that occurred in the Old and New Orders must be investigated in order to establish the truth, to maintain justice and establish a culture that values human rights and promotes national reconciliation and unity.

[...] the establishment of truth is also for the interest of the victims and their families in obtaining compensation, restitution and/or rehabilitation.

The bill, therefore, is opened with an act of historical acknowledgement: "gross human rights violations" did occur in post-independence Indonesia. The chief function of the commission is the investigation of those atrocities in order to reconcile the nation and uphold its unity.

The notion that national reconciliation can be achieved through truth may raise some doubts: some may argue, for example, that a bitter historical truth, if unveiled, would unleash desires of revenge and renewed conflict. A commission mandated to promote both truth and reconciliation has to answer to those doubts. This requires the commission to find solid conceptual definitions and engage in a rich philosophical debate.

The South African Truth Commission bill, which was used as a model, did not attempt to substitute the judgment of the commissioners by defining complex concepts like "truth" and "reconciliation." The Indonesian bill, on the contrary, defines those concepts, effectively limiting the commissioners' capacity to interpret their mandate. Further, the bill prescribes a very narrow definition of those concepts. Article 1 of the bill defines *truth* as "[...] the truth of an incident, which can be revealed, concerning an incident of a gross human rights violation, both the victims, violators, place and time of the incident."

Additionally, it defines *reconciliation* as “...the result of a process of truth exposition, acknowledgment and amnesty.”

It is regrettable that these complex conceptual pillars have been understood in such a narrow fashion. While the factual truth of *incidents* is essential, a society needs much more than that in order to assess its past including the acknowledgment of victims’ stories and an engagement in historical analysis. Similarly, while national reconciliation is a worthy objective, the bill’s definition of ‘reconciliation’ relegates it to the awarding of amnesties.

2.2. Abandoning Justice

As shown above, the commission’s truth-seeking functions are discharged through the factual clarification of individual ‘incidents’ according to the definitions provided by the bill. That clarification, however, would not necessarily lead to judicial determination. The bill clearly separates the truth commission’s investigations from those of the ad hoc human rights court.

The official parliamentary comment attached to the bill says:

If the Truth and Reconciliation Commission makes a decision concerning a case of gross human rights violation, then the Court of Human Rights does not have the authority to decide the matter anew unless the President refuses a request for amnesty. This is true also in reverse in the case of gross human rights violations that have been decided by the ad hoc human rights tribunal, whereupon the Truth and Reconciliation Commission has no authority to make a decision.

In a situation where the courts were available to receive and efficiently solve violations of human rights and provide redress to the victims, the need to establish a separate process for judicial and non-judicial truth-seeking would seem perhaps appropriate. However, the reality of Indonesia is that the judicial system is either unavailable or unwilling to genuinely prosecute serious human rights violations.

A victim of a human rights violation interested in trials against the perpetrators will be faced with a significant dilemma created by the unavailability of the courts. If the victim decides to submit a case to the commission, he or she accepts the possibility that the commission could recommend an amnesty for the perpetrator. If the victim decides not to take a case to the commission, his or her access to redress will be minimal, since it is unclear that an ad hoc court of human rights would be able to deal with the situation.

While victims coming before the commission will risk losing their right to criminal justice, perpetrators will face no risks, only rewards. Without credible risk of prosecution by the judicial system they could wait to see if they are ever called to testify before the commission. In such an event, they will have the opportunity to acknowledge their participation in the crimes and apologize to the victim: forgiveness would mean the

automatic recommendation of an amnesty, independent of the nature of the crime committed.

A crucial point in favor of the perpetrator is that forgiveness will automatically result in a recommendation of reparations for the victim according to article 27 of the bill. Victims that are poor or destitute, perhaps as a result of the violations suffered, may forgive in order to obtain reparations. The victim's forgiveness would be made official through a formal 'statement of peace:' a written agreement settling issues out of court. According to the official comment, the statement is needed so that, "in the future, parties are prevented from denying the existence of such reconciliation." Such prevention would only apply to victims, evidently, since no perpetrator would have interest in canceling a deal that grants him or her immunity.

The scarce attention devoted to criminal justice in the bill and the effective design of a mechanism tilted in favor of settling issues out of court fails to fulfill the objectives set out by the MPR regulation of 2000. That regulation recommended a full set of measures, including possible amnesties, but it also stipulated that the future truth-seeking mechanism pay "attention to the feeling of justice amongst the people." It is difficult to see how the moral sentiments of justice registered by the Indonesian people would be served by a mechanism that provides incentives for victims who renounce to their right to criminal justice.

2.3. Forgetting the "Never More!"

Many truth commissions have been mandated with making comprehensive recommendations to reform those institutions that permitted or perpetuated human rights abuses. The final reports of these commissions have included specific recommendations aimed at preventing the recurrence of abuses.

However, the concentration on the factual clarification of "incidents" deprives the Indonesian commission of the essential function of establishing an authoritative and impartial historical interpretation of political and institutional responsibilities. A commission concentrated on individual cases will not be able to establish patterns, ascertain the rationale of political actors, or understand the culture of violence that fed longstanding conflicts.

Unfortunately, the bill passed by the DPR is silent on whether the commission should make recommendations on issues such as the reform of the security forces and the judiciary, the vetting of public employees involved in human rights violations, or other mechanisms directed at and preventing the recurrence of abuses.

3. Jurisdiction of the Proposed TRC

3.1. Subject Matter Jurisdiction

Article 1 of the bill defines the human violations under the jurisdiction of the TRC by reference to Law 26/2000 establishing the ad hoc human rights court. Article 7 of that law, in turn, defines “gross human rights violations” as any of the following acts: genocide, the definition of which closely follows the definition stated in the Convention against Genocide,¹⁵ and crimes against humanity, closely following the definition of the Rome Statute of the International Criminal Court.¹⁶

As a result, the proposed TRC will have the authority to examine two of the most serious offenses of concern to the international community: genocide and crimes against humanity including killings, enslavement, arbitrary detentions, torture, sexual violence, persecution and enforced disappearance of persons.

While this is a wide mandate, it is notable that it does not make reference to war crimes, which may hinder the proper investigation of abuses committed in the context of armed conflicts, such as in Timor Leste, or in other places like Aceh and West Papua.

3.2. Personal Jurisdiction

The bill is silent on the personal jurisdiction of the proposed TRC. The bill alludes in separate passages to “violators,”¹⁷ but there is no explicit provision on whether the commission will investigate acts attributable to State agents and those acting under their authorization, and/or acts committed by non-State agents, such as armed dissidents.

This ambiguity regarding the definition of perpetrators weakens the bill. Following international standards,¹⁸ the bill should state that any natural person can be held responsible, including public officials, members of quasi-governmental or private armed groups with links to the State, or members of non-governmental armed movements.

Also, it should be stated that perpetrators may be direct offenders or accomplices. An accomplice can have greater responsibility for the violations when, from a leadership position, directs, encourages, or tolerates the abuses, even if he or she does not personally commit the atrocity. At the same time, the fact that the perpetrator acted on the orders of the Government or a superior, or that the perpetrator held public office should not exempt him or her from criminal responsibility.

3.3. Temporal Jurisdiction

The temporal jurisdiction of the TRC should be explicitly outlined in the bill. In the existing text, no direct mention of a period under investigation is made, and what little temporal context that can be made has to be inferred from the preamble and the official comment attached to the bill. According to these texts and the parliamentary debate, the TRC will focus on violations “(...) occurring prior to the enactment of the Court of

¹⁵ Convention on the Prevention and Punishment of the Crime of Genocide. Article 2.

¹⁶ Rome Statute of the International Criminal Court. Article 7, par. 1

¹⁷ Article 1. sec 1 and 7; Art. 6, sec. a; Art 7, sec. b and d; Art. 18

¹⁸ See the Rome Statute of the International Criminal Court, especially arts. 25, 27, 28, 30, 31 and 33.

Human Rights Act No. 26 of 2000". Given the mention in the Preamble to violations under the "Old Order" and "New Order," which could be interpreted as a period of 55 years spanning from 1945 to 2000.

The commission would be able to operate more effectively if it was given an explicit definition of the time frame under investigation. A broad consultation among Indonesian society should take place to help determine whether the commission should focus on the country's entire history since independence, during the Soeharto era, and whether or not it should also include post-Soeharto violations. In either case, completion of the commission's mandate would be a daunting task, given that victims, witnesses, and evidence of the earliest violations would likely be unavailable. Therefore, in any case, the commission should be granted with enough flexibility to concentrate on the most relevant historical periods.

3.4. Would the TRC Jurisdiction Include East Timor?

Any official Indonesian examination of past violations should include genuine and exhaustive investigation of the crimes committed by State agents and people acting under their authorization or acquiescence in the territory of Timor Leste, a non self-governing territory illegally occupied between 1975 and 1999.

In principle, nothing in the bill would preclude the TRC from examining abuses perpetrated in jurisdictions that were once effectively treated as Indonesian territory, such as occupied Timor Leste. Given the fundamental repercussions of an official investigation of those crimes, the bill should be explicit about it.

The ICTJ believes that it is desirable that Indonesia acknowledge the extent of the violations committed by its agents in the territory of Timor Leste. This could be achieved by – among other measures – initiatives such as the dissemination and official study of the report to be published in April 2005 by the Reception, Truth and Reconciliation Commission (*Comissão de Acolhimento, Verdade e Reconciliação* - CAVR) established by the UN in independent Timor Leste, and the explicit inclusion of the events of Timor Leste under the mandate of the Indonesian TRC.

In its current state though, the TRC bill poses a problem for the examination of those cases related to Timor Leste that were already dealt with by the Ad Hoc Human Rights Court. The TRC bill says that "[...] the Commission has the authority to [...] refuse a request for compensation, restitution, rehabilitation or amnesty if the case has been registered to the Human Rights Court."¹⁹ This provision should not be applied retroactively for the few cases dealt with by the ad hoc human rights courts at a time when the TRC was not available.

If the TRC were indeed established and decided to examine the conduct of the Indonesian state during the occupation of Timor Leste, it would have the advantage of having the wealth of information compiled by the CAVR. In that case, acting under article 7 of the

¹⁹ Article 7, par.1, lit g

bill authorizing the request of information from sources abroad, the Indonesian commission could establish an agreement with the authorities of Timor Leste to examine the information and evidence gathered by the CAVR.

4. Powers, Structure and Duration of the Proposed TRC

4.1. Investigative Powers

The bill delineates the powers granted to the commission as:²⁰

- a. To carry out research in accordance with legislation;
- b. To request information from victims, victims' family members, violators and/or other parties, within and outside the country;
- c. To obtain official documents from civil and military agencies as well as other organizations that exist within and outside the country;
- d. To cooperate/coordinate with related agencies, both within and outside the country, in order to protect victims, witnesses, individuals making statements, violators and evidence in accordance with existing legislation; and
- e. To call on concerned individuals to give information and testimony;

These are significant powers for the fact-finding function assigned to the TRC. Nothing would prevent the commission from taking such steps such as interviews, inspections, exhumations, or the compilation of archival material. However, the effectiveness of those steps would depend of the ability or willingness of other agencies to cooperate with the commission. This raises the fundamental issue of whether the Indonesian law enforcement system is prepared to take measures such as compelling persons or institutions to produce information requested by the commission, conduct technically complex procedures such as exhumations, or to effectively grant protection to persons cooperating with the commission.

The protection of victims and witnesses deserves particular attention. It is clear that if a truth-seeking exercise is to be successful, persons holding valuable information must feel confident that their integrity will be effectively protected against possible risks. However, the experience of the trials before the Ad Hoc Human Rights Court showed a disturbing pattern of intimidation inside and outside of the courtroom, as members of the security forces harassed Timorese witnesses and even the judges.

Considering that the proposed TRC assigns significant importance to the possible acts of forgiveness from the victims, effective protection would also be essential to guarantee that the victims would be able to take their decisions freely and without undue pressures or under threat.

²⁰ Art. 7, num.1

4.2. Power to Recommend Amnesties and Reparations

The bill also gives the TRC the capacity to recommend amnesties to perpetrators and reparations to victims. Article 7, num. 1 states that the commission has the power to:

- f. make a decision concerning the awarding of compensation, restitution and rehabilitation; and
- g. refuse a request for compensation, restitution, rehabilitation or amnesty if the case has been registered by the Human Rights Court.

The mechanisms concerning amnesties and reparations will be analyzed in detail below. Here it will suffice to note that the bill is careful to remove those cases that have been taken to an ad hoc human rights court established in accordance to law 26 of 2000 out of the TRC's jurisdiction.

The reasoning behind these provisions is to establish the Ad Hoc Court and the TRC as two parallel processes. A case registered in the court is not acceptable in the truth commission and a case before the TRC can only be taken to the Court if a perpetrator fails to obtain an amnesty. While this may have been spelled out with the objective of avoiding abuse of the system by people attending two overlapping jurisdictions, the provision seems academic since the courts are generally not available for the victims of serious human rights violations in Indonesia. Because of the poor performance of the Ad Hoc Court, victims will more than likely be inclined to take their cases to the TRC.

4.3. Structure and Period of Operations

According to Articles 16 and 38, the TRC will be a tripartite structure, consisting of a commission's council composed of three sub-commissions:

- The Investigation and Clarification Sub-Commission, charged with factual investigations and consisting of ten members;
- The Compensation, Restitution and Rehabilitation Sub-Commission, consisting of six members; and
- The Amnesty Sub-Commission, charged with issuing amnesty recommendations to the President of the Republic and consisting of five members.

Article 45 of the bill establishes that the commission will be operational for five years from the time its members are installed, with the possibility of a two year extension. Given the length of the time under investigation, this seems reasonable, but needs to be balanced against experience suggesting that lengthy processes may dilute that impact.²¹ It should be also considered that a long period of operations would expose the commission to several changes in the political environment.

4.4. Absence of Public Procedures and Policy Recommendations

²¹ See Hayner, Priscilla *Unspeakable Truths. Facing the Challenge of Truth Commissions*. Routledge. New York and London. 2002. pp. 222-3.

The bill does not state that the commission would be mandated to conduct public events to disseminate its work and educate the public about the crimes under investigation. Nothing indicates that the acknowledgment and apologies offered by the perpetrators would be public, and there is no mention of the possibility for conducting public hearings on specific cases or on general patterns or contexts identified by the commission.

The bill is also silent about the preparation of public reports by the commission, and on the issuing of a comprehensive final report with its main findings, were it to come to any conclusions regarding the patterns of the crimes investigated. Nothing is said either about recommendations that the commission could present as a means toward preventing the repetition of situations and crimes similar to those examined, such as the reform of abusive institutions, the strengthening of civilian control, the vetting of civil servants, etc.

The extraordinary growth of the popularity of truth commissions is due in no small measure to their capacity to create a lasting impact on civic culture through open, public action. Since the experience of the South African TRC, several truth-seeking bodies such as those in Nigeria, Ghana, Sierra Leone and Peru have used public hearings to convey the victims' experiences to the public at large, both as an educational tool and as a measure of symbolic reparations for the victims.

At the same time, all truth commissions to date have ended their operations with the preparation of some sort of comprehensive report whose essential parts, at least, have been publicly released. This is not only a measure of the commission's accountability, but also a concrete contribution to public education and prevention of the repetition of crimes.

5. The Amnesty Mechanism

The bill envisages an amnesty-for-truth mechanism by which the TRC may recommend to the President of the Republic the issuance of an amnesty to perpetrators that acknowledges or contributes to the truth unveiled by the investigations. The sub-commission in charge of amnesties will establish "criteria, requirements and procedures"²² regarding the mechanism, but its general form is already clear.

5.1. The Mechanism Considered in the Bill

The mechanism leading to a possible amnesty would be the following:

Reception and clarification of the facts

- The TRC will receive reports regarding human rights violations from victims, witnesses or possible perpetrators. If those reports are accompanied by a request

²² Art. 23 lit. b

for amnesty, such request will be considered by a specialized sub-commission, under the obligation to settle the matter in no more than 90 days.

- The TRC is able to request additional information and receive information from victims and third parties, in order to clarify the facts.

Consideration of an amnesty in the TRC

- The Amnesty Sub-commission will consider whether apologies and forgiveness have been exchanged between perpetrators and victims. If that is the case, it will ensure that a formal “statement of peace” is signed by both parties. The TRC will recommend that the President of the Republic grant amnesty to the perpetrator(s) and reparations to the victim(s).
- The commission may also recommend an amnesty if the victims refuse to forgive after consideration of the case. If the perpetrator does not acknowledge the facts found by the commission, the case will be referred to the human rights court. In all cases, the commission will have to consider the opinion of society.

Consultation between the Executive and Legislative branches

- If the commission submits an amnesty recommendation, the President of the Republic will have thirty days to decide on whether or not to endorse the TRC recommendation and send his decision to the DPR.
- The DPR will consider the Presidential request and will accept or reject it in no more than thirty days, sending its opinion back to the President’s office.
- The President of the Republic will issue a final decision no more than thirty days after the opinion of the DPR has been received and send his decision to the TRC for communication to the parties involved.

This mechanism is extremely problematic on several grounds that we will examine below. It is unclear why perpetrators would apply for an amnesty without a credible threat of prosecution. It considers the presence or absence of forgiveness only when favorable for the perpetrator, establishes a protracted mechanism of consultation prone to politicization, and sets unrealistic deadlines.

5.2. Scenarios considered by the TRC to rule on an Amnesty Applications

The bill presupposes three scenarios:

- If acknowledgement of the facts by the perpetrator and forgiveness by the victim occur, the bill mandates the TRC to recommend an amnesty.²³
- The perpetrator acknowledges the facts and apologizes, but the victim does not forgive. In this case, “the commission will decide upon recommending an amnesty autonomously and objectively”.²⁴

²³ Art. 28 par. 1. Art. 29 par. 1

²⁴ Article 29, paragraph 2.

- The perpetrator does not acknowledge the truth and the victim does not forgive. In this case, Article 29, paragraph 3 stipulates that, “the perpetrator of the gross human rights violation in question forfeits his or her right to an amnesty and the case will be submitted to the ad hoc human rights court”.

The bill does not consider the possibility that a victim would forgive a non-repentant or non-cooperative perpetrator.

An amnesty mechanism based on the mutual decisions of victims and perpetrators is problematic because it poses a heavy moral and psychological burden on the victims. Additionally, it ignores the nature of the crimes committed and State responsibilities regarding certain crimes. Finally, it lacks any protection against self-incrimination by persons who may be sent for prosecution even after acknowledging participation in crimes.

5.3. Lack of a Threat of Prosecution

Depending on the prosecutorial strategy followed in any given case, incentives can be used to encourage low-level accomplices to provide valuable information. While plea bargain mechanisms and certain forms of lenience constitute positive incentives, they must be complemented by negative incentives, such as a credible threat of prosecution.

It is unclear in the case of Indonesia why a perpetrator would bother to apply for an amnesty, accept the facts, cooperate with the commission or apologize, when the judiciary has proven to be ineffective to prosecute human rights violations. Since, in addition, the bill says nothing regarding the degree of publicity of the TRC findings it is unclear whether perpetrators would run the risk of being exposed.

5.4. Danger of Politicization

The TRC will not have the power to grant an amnesty but to make a recommendation to the President of the Republic. The official comment states that the law “acknowledges that the reward of amnesty remains a prerogative of the President so that the Commission may only make recommendations on the matter.” However, according to Article 25 of the Act, the President of the Republic, upon reaching a decision, must send it to the DPR for approval. This mechanism leaves the possibility of politicizing the procedures open, subjecting the cases to pressures both at the stage of presidential and parliamentary consideration.

5.5. Unrealistic Deadlines

The amnesty procedure, as outlined in the bill, is also unrealistic in its stipulation of short deadlines, which in order to be met would require the involved institutions to be phenomenally efficient. The commission has ninety days to make a decision on an amnesty petition. The commission must then send the decision to the President of the

Republic, who shall have thirty days to arrive at his or her own decision, after which the DPR has an additional thirty days to consider.²⁵

5.6. Unequal Burdens for Victims and Perpetrators.

Supposing that perpetrators would be prepared to appear before the commission to apply for an amnesty, a recommendation would depend on two factors: acknowledgement by the perpetrator and forgiveness by the victim.

Nothing in the bill specifies that the perpetrator has to come forward to disclose new information. The language in several passages of the bill suggests that it would be enough to acknowledge the facts unearthed by the commission. Nothing in the bill spells out what exactly constitutes an acceptable form of acknowledgement; presumably, the criteria will be defined by the TRC.²⁶

The only reason why a perpetrator would proactively contribute to the investigation or to make a complete and unambiguous apology would be an individual strategic consideration on what would better the chance of forgiveness by the victim, or increase the chance for an amnesty recommendation by the commission.

The victims, on the contrary, will have to consider a difficult moral choice. If they chose to forgive the perpetrator (however insincere the apology or incomplete the disclosure) that decision will result in an automatic recommendation for an amnesty and reparations, which may be interpreted as the betrayal of lost or missing loved ones. Not to forgive, for any reason, does not ensure that the perpetrator will face justice, since the commission will still consider the case.

5.7. Ignoring the Nature of the Crimes

An amnesty is the governmental act of erasing the institutional memory of an offense and exonerating the offender of criminal responsibility. If an offense is eligible to an amnesty under international law and the State decides to grant it for reasons of public interest, the authorities should explain their reasoning and assume responsibility for the acts instead of burdening the victims. An amnesty is different from a personal act of forgiveness in the same way in which legal punishment is different from personal revenge.

Any consideration for an amnesty should be based on objective issues, such as the State's responsibilities under international law, its constitution, the legal nature of the crimes, the circumstances of its execution, the quality of the evidence, the motives and intent of the criminal, and the form of personal responsibility involved. Legal consideration of all these factors has made it abundantly clear, over time, that in the case of crimes against

²⁵ Article 24 & Article 25, paragraphs 4 & 5.

²⁶ Article 28 & 29.

humanity or genocide, amnesties are not acceptable and that they violate universal obligations.²⁷

5.8. Lack of Protections Against Self Incrimination

As we have seen, if a victim does not forgive a repentant and cooperative perpetrator, the TRC will decide whether or not to recommend an amnesty. If that amnesty is not granted the case will be referred to court. It is unclear whether the court will be able to use the self-incriminatory information provided by the perpetrator.

Equally troubling is the final scenario considered by the TRC. If a perpetrator does not acknowledge the facts or apologize, the TRC will submit the case automatically to the courts. The bill awkwardly states that such an uncooperative perpetrator “forfeits his or her right to an amnesty,” as if amnesties were entitlements claimable by alleged perpetrators of genocide and crimes against humanity. This means that an innocent accused of wrongdoing, would have to choose whether to go to court or to take the risky choice of acknowledging the facts, hoping to obtain an amnesty.

6. The Reparations Mechanism

The TRC is authorized to recommend reparations for victims.²⁸ Such a recommendation (for which the TRC must consider the position of society) amounts to a final decision since it is spared from the protracted mechanism used for the amnesty decisions.

6.1. Reparations Contingent on Forgiveness

Regrettably, as in the case of amnesties, the bill makes reparations contingent, not on the merits of the case, but on whether or not victims and perpetrators reconcile.

Article 27 says: “Compensation and rehabilitation [...] may be awarded when a request for amnesty is granted.” As the meaning of “may” is unclear, the official comment attached to the bill provides clarification. The comment states: “If the request (of an amnesty) has strong foundations, the President may accept the request and the victims must be awarded compensation and/or rehabilitation.” This makes it clear that once the decision to grant an amnesty has been reached by the commission, the victim will obtain compensation.

²⁷ See, for instance ICTY, Trial Chamber, Prosecutor v. Anto Furundzija Judgment, 10 December 1998, par. 155. Barrios Altos Case, Judgment of May 14, 2001, Inter-Am Ct of HR (Ser.C), No.75. Special Court for Sierra Leone, The appeals chamber, 13 March 2004, Prosecutor ag. Kallon and Kamara. *Decision on Challenge to Jurisdiction: Lomé Accord Amnesty*. See also the Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies. UN Doc S/2004/613.

²⁸ Art. 25. Par. 1 Lit. a

This formulation creates pressure on victims to forgive and forfeit their right to be heard in court in exchange for compensation. The official comment adds: “If the request for amnesty is refused, then compensation will not be awarded by the State and the case shall be settled (in Court).” The provision makes the victim’s right to reparation contingent on forgiving the perpetrators, which they may find morally troubling and unfair and further, runs counter the internationally recognized rights of victims of serious human rights violations to reparation.

6.2. Amnesties are Immediate, Reparations are not

Although the commission’s decisions on reparations are final, the implementation of those decisions is not immediate. Article 21 stipulates that “compensation, restitution and rehabilitation [...] shall be conferred within a period of three years from the date the decision was made [...].”

Monetary reparations would explain the need for reasonable time in order to make budgetary arrangements. There are several other forms of reparations, however, such as the provision of services and civil and political rehabilitation. Some Indonesian victims for instance, former political prisoners, are often in need of political and civil rehabilitation in order to conduct otherwise normal business. It is unclear why the restoration of these rights would not be as immediate as the granting of privileges for an amnesty of a perpetrator of crimes against humanity or genocide.

This lack of clarity is compounded by a clause that requires a government decree to further outline the rules of procedure for reparations.²⁹ While the TRC sub-commission in charge of amnesties will decide on its own criteria, requirements and applicable procedures no similar capacity is bestowed upon the sub-commission in charge of reparations. This lack of balance erodes the commission’s autonomy, to the detriment of victims and opens the possibility of additional political or administrative hurdles.

7. Composition of the Proposed TRC

The bill would establish a commission composed by 21 commissioners, divided in three sub-commissions respectively in charge of investigation of cases, reparations and amnesties. The importance of the tasks assigned to the TRC underlines the importance of choosing persons whose integrity and reputation will lend credibility to the work of the commission. A transparent process of selection, including substantial consultation of civil society, can be a useful tool to contribute to the credibility of the commission.

7.1. Process of Nomination

The bill on the proposed TRC establishes a series of qualifications for the potential commissioners: Indonesian citizenship, personal health, moral qualities, minimum age of

²⁹ Article 21, paragraph 2.

thirty, loyalty to *Pancasila* (the foundational ideology of an independent Indonesia), and knowledge of human rights. The bill also states that candidates must have never been involved in human rights violations, should not be members of the Indonesian security forces, and if they are leaders of political parties and social organizations, they must be willing to renounce affiliation or leadership.³⁰

The selection process, as set in the bill, foresees the nomination of candidates by different segments of society and individuals (Article 31). The President of the Republic will establish a selection committee with a majority of civil society members (Article 33) to reduce the pool of nominees to a short list of forty-two candidates, from which the President will choose a list of twenty-one to be sent to the DPR (Article 34, paragraph 3).

If the DPR does not confirm a candidate, the President will substitute the rejected candidate with another member of the short list, who will then have to be approved by the DPR (Article 35). The process of nomination seems to be subject to robust scrutiny by the political leadership and, if that is the case, it would be advisable to design a similarly robust mechanism for civil society participation in the evaluation of the candidates' credentials.

7.2. Loyalty to Official Ideology

The provision establishing that all commissioners must be loyal to the *Pancasila* could limit the commission's effectiveness. *Pancasila* is a political and moral code that was formulated in 1945 to give a common identity to the variegated components of an independent Indonesia. However, it has often been used during Indonesian history as an official ideology to stigmatize dissent. Human rights monitoring showed that dissidents were accused of disloyalty to *Pancasila*,³¹ and even the foundational MPR decree recognized this: "*Pancasila* as the state ideology has been arbitrarily interpreted by the power holders and has been abused for the purpose of maintaining power."³²

Many persons of high moral integrity may have nuanced views about the historical uses of *Pancasila*, particularly if they come from regions where autonomist or independence-oriented movements have been active. Demanding that all members of the commission share a same vision may deprive the TRC from valuable perspectives in confronting the most serious periods of violence of Indonesian history.

7.3. Non Eligibility of Members of the Security Forces or Civilian Leaders

The bill prohibits the election of members of the security forces as commissioners. This emphasizes the separation of military and civilian roles in public life and is useful. It is

³⁰ Article 32, paragraph 1.

³¹ Orentlicher, Diane for Asia Watch *Human Rights in Indonesia and East Timor*. 1988. Chapter 1 "Pancasila Democracy"

³² MPR V 2000. Official comment. Chapter II.

unclear whether the prohibition would also apply to retired members of the security forces.

On the other hand, the bill requires that members of political parties or leaders of other civilian organizations should be willing to renounce their affiliations or positions, if appointed as commissioners. While political leaders would probably have a conflict of interest if chosen as commissioners, it is not evident that this would apply to citizens that belong to political parties in rank-and-file positions. It is also unclear why the leadership of a “social organization” would be incompatible with a position in the TRC. The variety of social organizations is such that this rule should be revised.

The initial test of legitimacy of a truth commission is the personal quality of its members and the trust that they are capable of inspiring within society. The commission should not be deprived of the participation of capable and committed persons, be they people with a positive leadership in civil society organizations or former members of the security forces with a clean record.

Conclusions and Recommendations

Based on its analysis of the bill, the ICTJ considers that it contains serious weaknesses. If enacted in its current status, the bill will raise substantial difficulties for the proper operation of a truth commission, and will infringe upon the rights of victims. The bill needs extensive revision and/or amendment, based on genuine consultation.

Based on its considerable experience observing and providing technical support to truth commissions in different countries,³³ the ICTJ hopes that Indonesian decision-makers and civil society leaders will carefully consider the following observations.

1. *The bill suffers from considerable ambiguities* including essential aspects of temporal, personal and territorial jurisdiction that should be spelled out with absolute clarity.
2. *The bill limits its truth function to the factual clarification of isolated cases, ignoring the analysis of how widespread and systematic those violations were.* This will hide the nature of the violations and will not address the right of the Indonesian people to know the full history of a painful past. Experience suggests that truth commissions are more effective when they are able to examine larger tendencies and patterns. Holistic analysis allows the comprehensive historical analysis of the periods of violence, thus identifying structural causes, political responsibilities and contributing to prosecutions.

³³ ICTJ has actively provided technical support to the truth commissions established in Timor Leste, Sierra Leone, Ghana, Peru, Morocco and Paraguay and monitors processes to establish truth-commissions in the Democratic Republic of Congo, Liberia, Burundi and Kenya.

3. *The bill avoids the issue of whether the TRC will perform its work in the public light, thus opening the worrying possibility of a commission operating without active outreach to the public and the victims' groups.* Certainly, some investigations need confidentiality and protection for victims and witnesses. However, several commissions to date have identified areas of work that can be confidently conducted in public in order to educate citizens, build trust and acknowledge the experiences of the victims of gross human rights violations. These public activities include public hearings, seminars, open dialogue sessions or symbolic rituals.
4. *The bill sets up a mechanism for reparations that is unfair to victims, subjecting them to unacceptable psychological pressures, and presenting reparations as an incentive to forgive the perpetrators.* Reparations are a right of victims of human rights violations and should not be set up in a way that is detrimental to the right to obtain judicial redress.
5. *The bill is unclear regarding the breadth of reparations available to victims.* Reparations are an essential component of appropriate justice strategies and they should be measured with respect to the magnitude of the damages suffered. Reparations include but are not limited to monetary compensation; they also include the provision of services tailored to the educational, medical and psychological needs of victims, symbolic reparations such as official apologies, the creation of memorials; civil and political rehabilitation; and collective reparations for victimized communities.
6. *The bill does not consider violations of international humanitarian law.* The effectiveness of a truth commission depends on how appropriately it responds to the nature of the violence to be examined. In countries that have experienced chronic or protracted armed confrontations, it is advisable to allow a truth commission to consider offenses under International Humanitarian Law.
7. *The bill includes an amnesty mechanism that is unacceptable for the kind of crimes under the jurisdiction of the commission.* Amnesties for the most serious crimes of international concern, such as genocide or crimes against humanity run counter State obligations under international law. Truth commissions cannot subvert justice. They better serve their objectives by incorporating forms of cooperation with the judicial authorities to fight impunity, which requires a concerted effort to strengthen the capabilities and ensure the fairness of the judiciary.
8. *The bill reduces reconciliation to interpersonal settlements out of court and puts in place a set of incentives for victims to forgive and perpetrators to apologize.* Experience suggests that different commissions must be free to arrive at their own conception of national reconciliation including, but not limited to, interpersonal, local, and societal levels. Experience also suggests that inter-personal reconciliation cannot be imposed or set up in a context where victims can be

pressured by the perpetrator's social influence, or else reconciliation will not be genuine.

9. *The bill does not provide for the publication of a final public report.* Experience shows that comprehensive reports are important parts of the legacy of truth commissions and that they provide the best platform to publicize the most important findings of the commission as well as for policy and reform recommendations needed to prevent the resurgence of violence.
10. *The bill does not put mechanisms in place that ensure that the TRC recommendations are followed.* Practice suggests that it is useful to ensure that an official institution be charged with following up on the truth commission's policy recommendations

The ICTJ urges the government of Indonesia to address issues of truth-seeking in the context of a comprehensive transitional justice strategy that is fully consistent with the rights of victims, the international obligations of Indonesia, and the best practices showed by the comparative experience.

In order to do so, the government must engage in meaningful consultation with Indonesian civil society, learn from the failures of past efforts of accountability, and base its work on international human rights standards. Without full respect for these basic standards and substantive civil society involvement it is unlikely that a truth commission will be successful.

The ICTJ hopes, too, that this study will support Indonesian civil society in their efforts to create a comprehensive transitional justice strategy for Indonesia, including effective, fair, and credible forms of truth-seeking.

The ICTJ would be pleased to offer its assistance to the Indonesian authorities and civil society organizations in further considering the development of transitional justice strategies and initiatives, by making available the experience, not only of our own staff, but also of others who have been responsible for strategies and initiatives in other countries.