

INDONESIA

I. INTRODUCTION

1. The Legal Framework

1.1. The Constitution

The Republic of Indonesia has a population of more than 228 million people. It is a multiethnic country, the majority of inhabitants are Javanese. Other groups are Sundanese, Papuans, Madurese, coastal Malays and several other communities, such as Chinese.¹

Indonesia proclaimed its independence from the Netherlands on 17 August 1945 and became legally independent on 27 December 1949. The Republic of Indonesia is, according to Article 1 (1) of its Constitution, a unitary state, consists of 27 provinces, 2 special regions and 1 special capital district as of late 2002.²

The Indonesian Constitution dates back to 17 August 1945.³ It lays down the state philosophy known as the *pancasila* principles.⁴ The original 1945 Constitution recognised only a select list of human rights for Indonesian citizens, such as the right to equality. It contained no prohibition of torture. While the provisional Constitution of 1950 included all the provisions of the Universal Declaration of Human Rights, it was only in 2000, after a gap of more than forty years after the restoration of the 1945 Constitution in 1959, that a new chapter on human rights consisting of ten articles became part of the present Constitution.⁵ The new Chapter XA of the Constitution recognises fundamental civil rights, such as the right to life.⁶ However, it does not accord individuals a right to a remedy.

The judiciary is divided into general courts of justice, i.e. district courts of first instance, appeals from which are heard by the High Court.⁷ The Supreme Court hears appeals from state courts in specified cases and reviews decisions of the High Court on point of law but not of fact. Besides courts of general jurisdiction, there are religious courts, military courts and administrative courts.

¹ See Initial Report of State Parties due in 1999, Addendum, Indonesia, UN Doc. CAT/C/47, Add.3, 16 July 2001, paras.31-44 and *Mieke Kooistra, Indonesia: Regional Conflicts and State Terror*, Minority Rights Group International, 2001, p.5.

² See 2001 CAT Report, para. 31 for status as of 2001. Recently, Papua was divided by Presidential Instruction 1/2003 dividing the province into three separate provinces, thus adding two new provinces. However, the Papua Legislative Council reportedly vowed to file a judicial review with the Supreme Court against the decree. See <http://www.rghr.net/mainfile.php/0507/477/>.

³ Abrogated by Federal Constitution of 1949 and Provisional Constitution of 1950, restored 5 July 1959.

⁴ Belief in the One and Only God; A Just and civilized humanity; the Unity of Indonesia; Democracy guided by the inner wisdom in the unanimity arising out of deliberations of representatives; and Social Justice for the whole of the people of Indonesia.

⁵ Second Amendment of the Constitution, 20 August 2000.

⁶ See Articles 28 A-J, Text in Indonesia CAT report, supra, para.50.

⁷ See on the judiciary in Indonesia Law 14/1970 concerning the Basic Principles of Judicial Power, Law 2/1986 concerning the General Judicial System, and Law 35/1999 on Amendment of Law 14/1970.

In 2000, a Human Rights Court was set up by Presidential Decree, with a mandate to try perpetrators of human rights violations committed in East Timor in specified periods in 1999 as well as the 1984 Tanjung Priok massacre in Jakarta.⁸ In 2001, a constitutional amendment provided for the establishment of a Constitutional Court that has the power to review the constitutionality of laws but cannot hear individual human rights petitions.⁹ Indonesian law does not expressly guarantee the independence of the judiciary.¹⁰

1.2. Incorporation and Status of International Law in Domestic Law

The Republic of Indonesia has ratified the following relevant international treaties on human rights and humanitarian law¹¹:

- Geneva Conventions of 1949 (30 September 1958)
- Convention on the Elimination of all Forms of Discrimination against Women (13 September 1984)
- Convention on the Rights of the Child (5 September 1990)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (28 October 1998)
- International Convention on the Elimination of All Forms of Racial Discrimination (25 June 1999)

According to article 7(2) of Law No. 39 of 1999 on Human Rights, provisions set forth in international law concerning human rights ratified by the Republic of Indonesia are recognised as legally binding.¹² Thus, all human rights-related conventions that have been ratified by Indonesia become part of domestic law.¹³ The law is, however, silent on the status of these treaties in domestic law. Moreover, while the treaty provisions could in theory be applied by Indonesian courts, there is no known practice to such effect. Interestingly, on 17 May 2000 the Banda Aceh Public Court, in a case in which 24 military personnel were found guilty of torture, took into consideration, *inter alia*, article 7 (1) of the Rome Statute of the International Criminal Court of 17 July 1998, Law No. 5 of 1998 on the Ratification of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment

⁸ Law 26 of 2000. See for a detailed description of the courts' mandate, *infra* III, 2.3.3.

⁹ See Article 24 C, Third amendment to the 1945 Constitution, 9 November 2001. The Court had not been set up in late 2002. See Report of the Special Rapporteur on the Independence of Judges and Lawyers Datu Param Cumaraswamy, submitted in accordance with Commission on Human Rights Resolution 2002/43, Report on the Mission to Indonesia, 15-24 July 2002, UN Doc.E/CN.4/2003/65/Add.2, 13 January 2003.

¹⁰ See *ibid.*, para.9 and 10, including references to Article and 4 (3) of Law 14/1970.

¹¹ Date of accession or receipt of instrument at UN.

¹² In the past there was no specific regulation in Indonesia governing the ratification of international conventions - they could be ratified by a law or by a presidential decree. However, according to a recent House of Representatives Law (DPC) the ratification of specific international treaties in the field of human rights has to be through law rather than presidential decree as has been the case with the CAT. A recent amendment to the Constitution made in November of 2001 (Article 11) provides that a President who makes an international agreements that will 'produce an extensive and fundamental impact on the lives of the people which is linked to the state financial burden, and/or that will require an amendment to or the enactment of a law' shall obtain the approval of the Indonesian House of Representatives.

¹³ Initial Report of Indonesia to CAT, *supra*, para 53. See also International Crisis Group, 'Indonesia: Impunity versus Accountability for Gross Human Rights Violations', ICG Asia Report No 12, Jakarta/Brussels, 2 February 2001, at p.13. See http://www.intl-crisis-group.org/projects/asia/indonesia/reports/A400227_02022001.pdf.

or Punishment and quoted Article 2 of the Convention.¹⁴ Indonesia has incorporated the Convention against Torture by Law No. 5 of 1998.

According to the Initial Report of Indonesia to the Committee against Torture, the Banda Aceh Public Court issued a verdict, in which the Court stated that States parties are obliged to include all acts of torture as criminal acts in their laws.¹⁵ However, there is no indication that this has been acted upon by implementing new legislation (apart from the Human Rights Courts legislation).

2. Practice of Torture: Context, Occurrence, Responses

2.1. The Practice of torture

Throughout its history, Indonesia has suffered from internal repression and conflict. This may be due to its unitary nature,¹⁶ which may not adequately support the self-determination of various peoples. In some cases, such as East Timor, conflicts were triggered by the outright invasion and occupation by Indonesian forces.

East Timor, a former Portuguese colony, was invaded by Indonesia in 1975. Until 1999, Indonesia not only deprived the East Timorese population of its right to self-determination but also engaged in a policy of suppression which was marked by serious human rights violations, including systematic killings and torture.¹⁷ Immediately prior to and especially after the majority of the East Timorese population voted for independence in a referendum on 30 August 1999, pro-Indonesia militia and Indonesian security forces embarked on a campaign of violence, killing around 2,000 people, committing acts of torture, including rape, and forcing several hundred thousand people to flee.¹⁸ East Timor eventually gained independence in 2002.¹⁹

West Papua (Irian Jaya), then called West New Guinea, remained under Dutch control until 1962. The Indonesian government responded to the calls for self-determination by invading West-Papua in 1962. The ensuing struggle for the status of West-Papua resulted in a referendum, the so-called Act of Free Choice, in July 1969, which brought West Papua under Indonesian sovereignty. The UN participated in the process and approved the result even though the referendum was apparently not carried out in accordance with the international agreement governing its conduct

¹⁴ Banda Aceh Public Court No. 11/PID.B/KONEKS/2000/PN-BNA Initial Report of Indonesia to CAT, 16 July 2001, UN Doc. CAT/C/47/Add.3, para 91.

¹⁵ Ibid., para 82.

¹⁶ When Indonesia became independent in 1949 after the transfer of sovereignty from the Dutch, it was, according to the UN Round Table Conference on Indonesia, to become a federal republic. However, eight months later the then government under President Sukarno proclaimed Indonesia to be a unitary state.

¹⁷ See Keith Suter, *East Timor, West Papua/Irian and Indonesia*, Minority Rights Group, 1997, pp.10 et seq and the reports of the Secretary-General on the situation in East Timor as well as reports by Special Rapporteur on Torture issued throughout the 1990s.

¹⁸ The Human Rights Investigation Team (KPP HAM) of East Timor recorded 394 cases of torture and ill-treatment committed by military armed groups in the period January-December 1999. See *Alternative NGO Coalition Report on the Situation of Torture in the Republic of Indonesia*, October 2001, p.48.

¹⁹ For a good historical overview, including a new chapter on the events of 1999, see *East Timor: The Price of Freedom*, by John G Taylor, Zed Books, 1999.

nor in accordance with international standards concerning self-determination.²⁰ Since 1970, the *Organisasi Papua Merdeka* (OPM) has fought an armed struggle against Indonesia with the goal of establishing an independent West-Papua. Indonesia has since 1963 responded to popular demands for independence in West-Papua by declaring it to be a military operational zone, by the use of force and by seriously violating fundamental human rights, such as the right to life and freedom from torture.²¹

Aceh, which was an independent sultanate until the early twentieth century, is, like West Papua, not only rich in natural resources but also with a distinct culture. As a result of a rebellion against the rule of the central government, which began in 1953, Aceh gained the status of a special region in 1959, enjoying some form of autonomy. Tensions rose again after the Indonesian government began to exercise tighter central authority over Aceh. This eventually led to the declaration of independence of Aceh by Hasan M. Tiro, the leader of the Aceh-Sumatra Liberation Front, on 4 December 1976. The Liberation Front developed into the Free Aceh Movement (*Gerakan Aceh Merdeka*, GAM). Its rise in popularity was in 1989 answered by a major counter-insurgency operation by the army, which turned Aceh into a Military Operational Zone from 1989 to 1998. During this period, a total of 3430 torture cases and 1321 murder cases were reported. 802 cases of torture were recorded for the period September 1998 - December 1999 and 699 cases for the year 2000, many of which resulted in the death of the victim.²² An agreement on the cessation of hostilities, signed on 9 December 2002 has brought renewed hopes of peace although the practice of torture continues.

From 1965 to 1998, Indonesia was dominated by the politics of President Suharto. He came to power in 1965 as a result of an aborted coup, followed by large-scale massacres against alleged supporters of the Communist Party, many from the Chinese minority. Torture was frequently resorted to and reportedly state-sponsored during the years of the Suharto regime, especially in East Timor, Aceh and West Papua. It was mainly committed by members of the armed forces and directed against those who opposed the policies of the Suharto regime. In particular, those that called for self-determination, especially in East Timor and West Papua, and also the civilian population in these areas were affected. Moreover, it was employed during routine police interrogations as a means of obtaining evidence.²³

After 1998, the practice of torture continued to be widespread. It has been apparently frequently resorted to in West Papua and Aceh where the conflicts have persisted, and has been accompanied by widespread human rights violations reportedly perpetrated by armed forces.²⁴ The main perpetrators of torture are reportedly members of the Indonesian Police (BRIMOB Unit) and the Indonesian

²⁰ See Suter, East Timor, *West Papua/Irian and Indonesia*, supra, pp.20 et seq. and Kooistra, *Indonesia: Regional Conflicts and State Terror*, supra, p.23.

²¹ According to estimates, more than 100,000 people have been killed in West Papua since 1963. See Military Madness, *New Internationalist*, West Papua, 344, April 2002, p.18. See on the current torture practice, *Alternative NGO Report*, supra, pp.46-48.

²² *Ibid.*, p.45.

²³ ICG, *Impunity report*, supra, p.2.

²⁴ According to figures from the Indonesian NGO ELS-HAM for the period of July 1998 to May 2001, there were 95 extra-judicial killings and 623 cases of arbitrary detention and torture. According to figures provided by the NGO KontraS, on file with REDRESS, there have been several hundred cases of torture in Aceh alone in the period January to June 2002. See also figures in *Alternative Report*, pp.43 et seq.

armed forces, TNI (Tentara Nasional Indonesia), who employ a wide range of torture methods.²⁵ Torture has been predominately used as a tool to intimidate the local population and political opponents of the regime in conflict regions. It has also been employed as a means to extract statements and confessions from those accused of non-political crimes.²⁶ Most recently, it also includes alleged perpetrators of terrorist acts and those suspected of belonging to groups resorting to such acts. The main victims are civilians, political activists, human rights defenders, journalists and criminal suspects.²⁷ In a recent case, the British researcher, Lesley McCulloch who was carrying out research into corruption in the military in Aceh, together with the American Joy Lee Sadler, were ill-treated and sexually harassed in detention and made to witness frequent beatings and other forms of torture of other detainees.²⁸ Many cases of rape and sexual harassment in custody have been reported.²⁹ More than 1,000 incidents of involuntary disappearances have been documented over the last 37 years, which continued to occur after the end of the Suharto era.³⁰

2.2. Domestic Responses

The National Commission on Human Rights (*Komnas Ham*) was established on the basis of Presidential Decree No. 50 of 7 June 1993. Its work is governed by Act No. 39 on the 1999 Law on Human Rights.³¹

In 1998, the new Government launched a National Plan of Action on Human Rights from 1998-2003, the main points of which are: i) preparation for ratification of international human rights instruments; ii) dissemination of information and education of human rights; iii) implementation of priority issues on human rights; and iv) implementation of the international human rights instruments that have been ratified by Indonesia. In implementing this plan, the Government has amended the Constitution to include a Chapter on Human Rights and has passed several laws aimed at improving the legal framework for the protection of human rights, notably Law No. 39 on Human Rights. The Government also set up a Human Rights Court responsible for trying perpetrators of human rights atrocities committed in East Timor in 1999.

The government also, on 1 August 1998, issued an instruction as a Standard Operation Procedure to army officers in handling human rights in troubled areas, such as respect and protect human rights and do not kill, rape, or inflict harm. However, in late 2001, the President told troops to do everything "to hold the

²⁵ Ibid.

²⁶ Ibid., p.51.

²⁷ Ibid., p.52.

²⁸ TAPOL, American Woman's life at grave risk from Indonesian detention, Press Release, 28 November 2002.

²⁹ See Suraiya Kamarazzaman, *Country Report- Violence towards women in Aceh*, Asian Human Rights Commission, 24 October 2001.

³⁰ Kontras, an Indonesian NGO, has recorded 1266 cases of involuntary disappearances from 1965 to June 2002. See Kontras, Reflection on International Involuntary Disappearances Day, Summary Report: Four Years Effort on Revealing Disappearances in Indonesia, 30 August 2002.

³¹ See the website of the Commission for further information www.komnasham.or.id. Komnas Ham has something of a chequered history. While it has carried out several investigations into cases of serious human rights violations, it is, according to Paul Barber, TAPOL, by many observers still regarded suspiciously as a tool of the military and the bureaucracy.

country” together and not to worry about violating human rights.³² Presidential Decree No. 89 of 2000 on the Status of the National Police of the Republic of Indonesia envisaged the separation of police from the armed forces as of 1 April 1999 with a two-year transition period. The Police was to become fully independent by 1 January 2001. At the time of writing, several law reform initiatives are pending in Parliament relating to various aspects of criminal justice but it is not known whether a specific offence of torture is to be inserted into the Penal Code.³³

In June 1999, President Habibie appointed a 27-member “Independent Commission to Investigate Violence” in Aceh.³⁴ Komnas Ham suggested in August 1999 that a Truth and Reconciliation Commission be established specifically for Aceh. However, this has not been acted upon as the bill stalled in the Indonesian Parliament.³⁵

Moreover, high-ranking officials have publicly apologised for past human rights abuses in Aceh, such as General Wiranto, when he announced the end of the military operation areas (known as DOM) period in August 1998 and President Habibie, in Banda Aceh in March 1999.³⁶ However, nothing more has been done to address these abuses and, indeed, General Wiranto later stated that no officer would be brought to trial over Aceh, “because they were merely carrying out their duties.”³⁷

2.3. International Responses

Throughout the period of the Suharto regime, several UN bodies, individual governments and human rights organisations drew attention to the serious human rights violations taking place in Indonesia, in particular in East Timor.³⁸ Following the massacres in East Timor in 1999, the UN set up a transitional administration and a court to try human rights violations.³⁹ Moreover, the Working Group on Enforced or Involuntary Disappearances has repeatedly reminded the Government of its obligation to conduct investigations in order to clarify the fate and whereabouts of the victims of enforced disappearance.⁴⁰

While the Sub-Commission, in a statement made by its Chairperson on 24 August 1999 on the Situation of Human Rights in Indonesia, welcomed changes in Indonesia after 1998, it stated that it: “remains concerned, however, at the persistent reports

³² See TAPOL, Megawati’s Carte Blanche to Troops an alarming setback for human rights in Indonesia, 30 December 2001, <http://tapol.gn.apc.org/pr011230.htm>.

³³ Amnesty International, Indonesia, *Commentary on Indonesia’s first report to the UN Committee against Torture*, November 2001, AI Index: ASA 21/048/2001, p.8

³⁴ See ICG, Impunity, *supra* and Koolstra, Indonesia: Regional Conflicts and State Terror, MRG, *supra*, p.17.

³⁵ See Human Rights Watch, Indonesia, The War in Aceh, August 2001 http://www.hrw.org/reports/2001/aceh/indaceh0801-04.htm#P279_51707. HRW explains that the Bill was stalled as of July 2001 and ‘seemed likely to die a lingering death’.

³⁶ *Ibid.*

³⁷ TAPOL, *Backgrounder on Aceh, Indonesia, January 2002 – A State of War, Thousands Killed* <http://tapol.gn.apc.org/st020131.htm>. Following the Cessation of Hostilities Agreement in December 2002, the chief of the armed forces has been lobbying hard against trials for past abuses in Aceh - ‘TNI chief cautions against human rights trials for Aceh’, Jakarta Post, 16 December 2002.

³⁸ See e.g. Situation of human rights in East Timor, UN Do. A/54/660, 10 December 1999.

³⁹ UN Security Council Resolution 1272 of 25 October 1999 and UNTAET Regulation 2000/11 of 6 March 2000.

⁴⁰ Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. E/CN.4/2002/79, 18 January 2002, para.168. In 2002, 562 out of a total of 638 cases of reported disappearance, most of which had occurred in 1991 and 1992, remained outstanding. See *ibid.*, paras. 164 et seq.

of human rights violations, including extrajudicial killings and ill-treatment, as well as continued serious violence and abuses, for example in Aceh and Ambon."⁴¹ Equally, the various thematic Special Rapporteurs expressed their concern about reports of serious human rights violations in various parts of Indonesia.⁴²

The Committee against Torture, in considering the initial report of Indonesia in November 2001, while welcoming the ongoing efforts of Indonesia to reform its legal system and revise its Constitution and legislation in order to safeguard human rights, articulated its concern about various aspects of the continuing practice of torture.⁴³ The Committee also expressed concern about the climate of impunity, the failure of Indonesia to provide in every instance, prompt, impartial and full investigations and the insufficient levels of guarantees of independence and impartiality of the National Commission of Human Rights.⁴⁴ It recommended that Indonesia amend its legislation to make torture a crime and requested Indonesia to ensure that the proposed ad hoc human rights court for East-Timor would have the capacity to consider the many human rights abuses, which were alleged to have occurred there during the period between 1 January and 25 October 1999.⁴⁵ In the consideration of the report, the chairman of the Committee, Professor Burns, while acknowledging the progress made by Indonesia, commented that he had never before been so forcefully struck by the discrepancy between the law on paper and in practice.⁴⁶

II. PROHIBITION OF TORTURE UNDER DOMESTIC LAW

Article 28(g) of the Constitution stipulates an express prohibition of torture: "Everyone has the right to be free from torture or inhuman or degrading treatment and has the right to seek asylum in another country," which is a non-derogable right.⁴⁷

⁴¹ Statement by the Chairperson of the Sub-Commission made on 24 August 1999: Situation of human rights in Indonesia, UN Doc. OHCHR/STM/99/33.

⁴² See e.g. in a joint communication sent by the Special Rapporteur on violence against women, Special Representative on human rights defenders, the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on torture and Chairman-Rapporteur of the Working Group on Arbitrary Detention. See Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 2000/45, Addendum, Communications to and from Governments, UN Doc. E.CN.4/2001/73/Add.1, 13 February 2001, para.35.

⁴³ Conclusions and recommendations of the Committee against Torture: Indonesia, UN Doc. CAT/C/XXVII/Concl.3, 22 November 200, para. 7: "a) The large number of allegations of acts of torture and ill-treatment committed by the members of the police forces, especially the mobile police units ("Brimob"), the army (TNI), and paramilitary groups linked to authorities, and in areas of armed conflict (Aceh, Papua, Maluku, etc.); b) Allegations of excessive use of force employed against demonstrators or for purposes of investigations; c) Allegations that paramilitary groups, reported to the perpetrators of torture and ill-treatment in Indonesia, are supported by some parts of the military, and sometimes reportedly are joined by military personnel; d) Allegations of numerous attacks directed against human rights defenders, sometimes leading to death; e) Allegations that human rights abuses related to the Convention are sometimes committed by military personnel employed by businesses in Indonesia to protect their premises and to avoid labour disputes; f) Allegations of inadequate protection against rape and other forms of sexual violence, which are frequently alleged to be used as forms of torture and ill-treatment; g) The high number of persons reported to be suffering from the after-effects of torture and other forms of ill-treatment."

⁴⁴ Ibid para.8.

⁴⁵ Ibid., para 10 (a) and (e).

⁴⁶ See Consideration of Reports submitted by States Parties under Article 19 of the Convention, Summary Record of the 492nd meeting: Indonesia, UN Doc. CAT/C/SR.492, 26 November 2001, para. 39.

⁴⁷ Article 28I (1): "The right to life, the right not to be tortured, the right of freedom of thought and conscience, the right to have a religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted based on retroactive law and regulation are non-derogable human rights."

The right to be free from torture and ill-treatment is also protected by domestic statutory law in Indonesia under Law 39/1999 on Human Rights.

Article 4 of Law No. 39 of 1999 on Human Rights states: "The right to life, the right not to be tortured ... are non-derogable rights which cannot be restricted in any situation by anybody." Article 34 reads: "No one shall be subjected to arbitrary arrest, detention, torture and exile." Article 66 stipulates that: "Every child has the right not be the object of oppression, torture, or inhuman legal punishment." Moreover, Government Regulation No. 30 of 1980 on Discipline of Public Servants states that public servants shall not perform any activities that might be considered as or related to torture.⁴⁸ According to Article 50 of the Law of Criminal Procedure (KUHAP), a detainee should be investigated immediately, and shall not be arbitrarily detained or ill-treated.

Several definitions of torture can be found in Indonesian law. In Article 1 (4) of Law No. 39 of 1999 on Human Rights, torture is defined as: "any activity which is undertaken intentionally so as to cause someone severe pain or suffering, whether physical or mental, in order to obtain a confession or information from that person or a third person, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

Law 26/2000 on Human Rights Courts lists torture as a gross violation of human rights amounting to a crime against humanity, if committed as part of a widespread or systematic attack, which would come under the jurisdiction of the Court. It is defined as "deliberately and illegally causing gross pain or suffering, physical or mental, of a detainee or a person under surveillance".⁴⁹

While Article 1 (4) of Law No. 39 of 1999 incorporates Article 1 of the Convention against Torture, the definition contained in Law 26/2000 is narrower in scope than that provided in the Convention.⁵⁰

III. CRIMINAL ACCOUNTABILITY OF PERPETRATORS OF TORTURE

1. The Substantive Law: Criminal offences and punishment

There is no specific crime of torture in the Indonesian Penal Code. However, torture is explicitly listed as one form of crime against humanity, which falls within the jurisdiction of the Human Rights Courts pursuant to Law 26/2000.⁵¹ The jurisdiction

⁴⁸ Referred to in Initial Report of Indonesia to CAT, *supra*, at para 71.

⁴⁹ Notes to Act Number 26 of 2000 of the Republic of Indonesia Concerning Human Rights Courts, II. Article by Article, Article 9 f.

⁵⁰ See AI, comments, *supra*, pp.4 et seq. and comments by Ms. Gaer, Country Rapporteur during the considerations of Indonesia's report to the Committee against Torture, *supra*, para.12.

⁵¹ See *supra* II. Article 9 of Law 26/2000 reads: "Crimes against humanity as referred to in Article 7 letter b include any action perpetrated as a part of a broad or systematic direct attack on civilians, in the form of, f): torture; g) rape ... or other similar forms of sexual assault; I: enforced disappearance of a person."

of these Courts is specified by Presidential Decree and is presently limited to the incidents and time periods mentioned earlier.⁵² Crimes against humanity committed by means of torture carry a punishment of a term of imprisonment ranging from five to fifteen years.⁵³ Acts of torture might, in certain circumstances be covered by the crime of genocide, which is the other crime that can be tried by the Human Rights Courts pursuant to Law 26/2000.⁵⁴ Law 26/2000 punishes not only attempting, plotting, or assisting in the commission of any of the crimes but also establishes criminal liability on the grounds of command responsibility.⁵⁵

In addition, the Penal Code stipulates, for all those acts of torture and ill-treatment not falling within the ambit of Law 26/2000, several criminal offences which might be invoked to prosecute perpetrators of torture in lieu of a specific offence.

Coercion by public officials is penalised by Article 422 of the Penal Code: "Any State official who in a criminal case uses coercion, whether to force somebody to confess, or to persuade someone in order to give information, will be put in jail for a maximum of four years."⁵⁶ "Maltreatment", which is defined as "equal to intentional damage to health"⁵⁷ is punishable with imprisonment of 2 years and 8 months or a fine, or up to five years imprisonment if the act results in a serious physical injury and a maximum of seven years imprisonment for maltreatment resulting in death.⁵⁸ "Maltreatment committed with premeditation" is punishable by a maximum term of imprisonment of four years, seven years if the act results in serious physical injury and nine years if the act results in death.⁵⁹ "Serious maltreatment", being applicable to a person who deliberately causes to another serious physical injury, is punishable by a maximum term of imprisonment of eight years, which goes up to ten years if the act results in death.⁶⁰ "Serious maltreatment committed with premeditation" carries a maximum punishment of 12 years imprisonment and 15 years if the act results in death.⁶¹

Rape carries a punishment of up to twelve years imprisonment.⁶² There is no specific offence of rape in custody nor is it considered to be an aggravating circumstance in law. Manslaughter carries a punishment of up to fifteen years imprisonment⁶³ and murder is punishable by life imprisonment or a maximum term of imprisonment of twenty years.⁶⁴

⁵² See supra, I., 1.1.

⁵³ Article 39 of Law No.26/2000.

⁵⁴ Articles 7 and 8 Law No.26/2000, incorporating the definition of the Genocide Convention. The crime is punishable by death or imprisonment from ten years to life.

⁵⁵ Article 41 and 42 Law No.26/2000.

⁵⁶ See critical analysis of limited scope of this article in AI, Commentary supra, pp.5, 8.

⁵⁷ Article 351 (d) Penal Code.

⁵⁸ See Article 351 (a), (b) and (c) Penal Code respectively.

⁵⁹ Article 353 Penal Code.

⁶⁰ Article 354 Penal Code.

⁶¹ Article 355 Penal Code.

⁶² Article 285 Penal Code.

⁶³ Article 338 Penal Code.

⁶⁴ Article 340 Penal Code.

Attempts and participation in torture are also punishable on the grounds of general principles stipulated in Articles 53 and 55 Penal Code.

Under the Emergency Law, the civil or military emergency administrators are liable to a maximum term of imprisonment of five years for abuse of their authority.⁶⁵

Article 51 of the Penal Code provides for the defence of superior orders: "1) Not punishable shall be the person who commits an act for the execution of an official order issued by the competent authority; 2) An official order issued incompetently shall not exempt the punishment, unless it was considered in good faith by the subordinate to be issued competently and its execution lied within the limits of his subordination."⁶⁶

Disciplinary sanctions can be imposed on the basis of Government Regulation No. 30 of 1980 on the discipline of public servants. It contains a specific prohibition preventing public servants from performing any activities that might be considered as or related to torture.

2. The procedural law

2.1. Immunities

There are no amnesty laws in Indonesia for the crime of torture.

2.2. Statutes of Limitation

Apart from Law 26/2000, torture is not listed as an offence under Indonesian law and general statutes of limitation apply. The question of retrospective prosecutions under Law 26/2000 was considered in the East Timor trials. Although the judges' reasoning is somewhat confused it appears that what they have done is say that Law 26/2000 does not create new categories of crimes, but simply recognises crimes which were already crimes under international law. The Court therefore decided that Law 26/2000 and prosecutions under it do not offend the principle of non-retroactivity in the Constitution.⁶⁷

⁶⁵ Article 57 of Law No.23 of 1959.

⁶⁶ See also Article 51 (2) of Law No. 23 of 1959 on Emergency Situations: "Unauthorized instruction shall not eliminate the criminal responsibility unless the person receiving the order believes in good faith that the order is lawful and that it is his or her duty to carry out the order".

⁶⁷ According to Article 28 I: "... the right not to be prosecuted based on a retroactive law are human rights that shall not be violated in any condition and by anyone." In contrast, Article 4 of Law No. 39, 1999 and Article 43 of Law No. 26/2000 provide that cases of serious human rights violations can be prosecuted retroactively. This apparent contradiction between these provisions has led to some confusion and different interpretations have been put forward to the effect that either the Constitution takes advantage or that Article 28 I of the Constitution does not apply to Laws No. 39/1999 and Law No. 26/2000. In practice, this problem has been partially solved by the adoption of a presidential decree providing for the competence of the Human Rights Court for prosecuting human rights violations committed during the period specified in the Act. While it thus appears that retroactive prosecutions for human rights violations are possible if provided for by decree, the principal question of whether such violations may be generally prosecuted retroactively has not been satisfactorily answered. See Alternative NGO Report, *supra*, pp. 54-57 and ICG, Indonesia, pp. 15-17. The Permanent Mission of Indonesia to the UN commented on this point as follows: "...the Permanent Mission would like to point out that in view of the fact that the second amendment to the 1945 Indonesian Constitution unequivocally stipulates that no law can be retroactive, modifying the parameters of the above-mentioned Presidential Decree would not achieve its purpose. In other words, although the Constitution explicitly provides for the protection of human rights, Article 28 on the other hand stipulates the principle of non-retroactivity, thereby contradicting Law No. 26/2000 on Human Rights Courts" in: Comments made by State Parties concerning conclusions and recommendations: Indonesia, UN Doc. CAT/C/GC/2002/1, 17 September 2002.

2.3. Criminal Investigations

2.3.1. Under the Criminal Procedure Code

Torture survivors can lodge a complaint with the Department of Justice and Human Rights, the Indonesian National Police, the Attorney-General, and the Department of Defence pursuant to Government Regulation No. 27 of 1983 on the Implementation of the Law of Criminal Procedure.⁶⁸ In practice, the first opportunity for detainees to complain about torture is usually to the judge during the *praperadilan*, a pre-trial hearing to challenge unauthorized arrest and detention procedures.

For torture allegations that come under the provisions of the Indonesian Penal Code, the Indonesian National Police is responsible for the investigation and the Attorney-General (Public Prosecution Service) for the Prosecution.⁶⁹

The Police have sole authority to carry out initial investigations.⁷⁰ Investigations of any criminal cases, including torture, must be conducted immediately or as quickly as possible.⁷¹ A warrant of detention may be served on a suspect or an accused who is strongly presumed to have committed an offence of maltreatment or more serious offences in cases where there are circumstances which give rise to concern that the suspect or the accused will escape, damage or destroy physical evidence and/or repeat the offence.⁷² Medical evidence is to be collected during investigations. Article 58 of the Criminal Procedure Code guarantees the right of a suspect or detainee to contact a doctor but does not provide an express right to have a medical report drawn up.⁷³ Following the completion of the investigation, the police submit the police investigation report (BAP) to the Public Prosecution Service. If the Prosecutor determines that the BAP has shortcomings⁷⁴ or is incomplete,⁷⁵ it may order the police to conduct further investigations. The Public Prosecutions Service has the authority and duty to institute prosecutions in criminal cases.⁷⁶ The required level of substantiation is a 'belief that the prosecution is based upon legally valid evidence'.⁷⁷

⁶⁸ Initial Report of Indonesia to CAT, *supra*, paras 56 and 111.

⁶⁹ See its website for its mandate and work: www.kejaksaan.go.id/engl_act.html.

⁷⁰ Articles 4 and 6 KUHAP.

⁷¹ The Decision of the Chief of the Indonesian Police No. Pol:JUKNIS/01/11/1982, point 5 b. According to the Indonesian Government, the duty of the state to investigate acts of torture promptly and impartially is laid down in Law No.28/1997 on the Indonesian Police, 2/1986 on Public Justice, 14/1985 on the Supreme Court, 31/1997 on Military Courts as well as Articles 20-29 KUHAP. See Response to the Issues raised by the members of the Committee against Torture during their consideration of the reports submitted by the Indonesian Government, in Alternative NGO Report, p.132.

⁷² Article 21 KUHAP.

⁷³ "A suspect or defendant who is detained has the right to contact and to be visited by his personal doctor in the interest of health, whether or not this has any connection with the process of his case."

⁷⁴ Article 14 KUHAP.

⁷⁵ Article 110 KUHAP.

⁷⁶ Article 27 of the legislation governing the Public Prosecutions Service of Indonesia.

⁷⁷ Act 5/1991 on the Public Prosecutions Service of the Republic of Indonesia, Article 8 (2) " In instituting prosecution, the Public Prosecutor shall act for and on behalf of the state and be responsible to hierarchical channels; (3) In the interest of justice and truth based on the Belief in the One Almighty God, the Public Prosecutor shall institute prosecution in the belief that the prosecution is based upon legally valid evidence; (4) In executing his duty and authority, the Public Prosecutor shall always act by virtue of the law and with due observance of the norms of religion, good manners, and morality, and shall also be obligated to delve for the values of humanity, law and justice prevailing in our society."

Where the prosecution is terminated, a third interested party may submit a request for examination of the legality of such measures to a court of first instance.⁷⁸ However, the Attorney-General has, the "duty and authority . . . to terminate cases in the public interest [and] request, in the interest of law, an appeal to the Supreme Court in criminal, civil or administrative cases."⁷⁹ The "Elucidation" to this legislation states that "the interest of the general public" means the interest of the nation and state and/or the interest of society and that "[t]erminating a case as mentioned in this provision constitutes the execution of the opportunity principle which can only be carried out by the Attorney General after paying attention to the suggestion and opinion of the state agencies which are concerned with the matter".⁸⁰

There is a lack of adequate protection of witnesses and victims of torture under Indonesian law.⁸¹

2.3.2. The role of *Komnas Ham*

Torture survivors may also lodge a complaint with *Komnas Ham*. *Komnas Ham* is charged with and authorised to investigate and examine incidents occurring in society that either by their nature or scope are likely to constitute violations of human rights.⁸² Investigations cannot be undertaken or will be suspended if there is, *inter alia*, insufficient evidence, the complaint is not presented in good faith or the complainant is not in earnest, more effective legal measures are available to resolve the complaint or there is a resolution through available legal means.⁸³ *Komnas Ham* has wide investigative powers, such as calling on complainants, victims and accused to request and hear their statements.⁸⁴ If deemed necessary, the *Komnas Ham* may decide to keep confidential the identity of the complainant and victims.⁸⁵ It may also, on approval of the Head of Court, provide input into particular cases currently undergoing judicial process if the cases involve violations of human rights, and the input of the *Komnas Ham* shall be made known to the parties by the judge.⁸⁶ *Komnas Ham* is envisaged to play the role of a mediator. Thus, it does not have any prosecutorial power and may only make recommendations, either to the parties for resolving their conflict through court, to the Government in order that the resolution may be followed up or to the House of Representatives of the Republic of Indonesia for their follow up.⁸⁷

2.3.3. Trials for criminal offences under the Penal Code

⁷⁸ See Article 80 KUHAP.

⁷⁹ Article 32 of Act 5/1991 on the Public Prosecutions Service of the Republic of Indonesia.

⁸⁰ Act 5/1991 on the Public Prosecutions Service of the Republic of Indonesia, "Elucidation."

⁸¹ See Conclusions and Recommendations of the Committee against Torture: Indonesia, *supra*, para 9 (d).

⁸² Article 89 (3) (b) Law No. 39 of 1999, Human Rights are listed in Chapter 3 of that law.

⁸³ Article 91 (1), *ibid*.

⁸⁴ Article 89 (3) (c)-(g) *ibid*.

⁸⁵ Article 92 *ibid*.

⁸⁶ Article 89 (3) (h) *ibid*.

⁸⁷ Article 89 (4) *ibid*.

Cases brought against police officers and other public servants charged with offences under the Penal Code are heard by the ordinary courts⁸⁸, whereas trials against members of the army are heard by military courts.⁸⁹ Indonesia also had, until recently, joint military-civilian courts, which were essentially military courts, which heard '*koneksitas* cases' – where military personnel and civilians were jointly charged with the same offence. In August 2000, the Indonesian People's Consultative Assembly (MPR) adopted a decree on the roles of the military and police in which it declared that military personnel would be subject to military courts in cases involving *military law* and civilian courts in cases involving *ordinary criminal law*. It also declared that members of the police force would be subject to civilian courts.⁹⁰

Trials are inquisitorial in nature. The accused may only be convicted if the judge is convinced of his guilt, based on two separate pieces of evidence.⁹¹ Victims of torture have no specific procedural rights but may testify as witnesses.

The President may grant clemency and restoration of rights and may, in so doing have regard to the opinion of the Supreme Court. He or she may also grant amnesty and the dropping of charges and will in so doing have regard to the opinion of the Indonesian House of Representatives (DPR).⁹²

2.3.4. Investigations and Prosecutions under Law 26/2000

Under Law No. 26/2000, gross violations of human rights, for example, genocide and crimes against humanity, that have been committed in certain parts of East Timor, e.g., Liquica, Dili and Suai in April and September 1999 and the 1984 Tanjung Priok massacre in Jakarta, are subject to a special procedure and the jurisdiction of a Human Rights Court.⁹³ *Komnas Ham* is the only body authorised to carry out initial inquiries into cases of gross violations of human rights under Law No. 26/2000.⁹⁴ *Komnas Ham* may receive reports or complaints from individuals or groups concerning the incidence of gross violations of human rights and conduct an inquiry.⁹⁵ There is neither a time limit for bringing complaints nor a statute of limitations for gross violations of human rights.⁹⁶ Should *Komnas Ham* consider there to be sufficient preliminary evidence, a summary of the findings will be submitted to the investigator.⁹⁷ The decision whether to proceed with an investigation and prosecution rests with the Attorney General who is also empowered to appoint an *ad*

⁸⁸ Article 84 KUHAP.

⁸⁹ Complaints against torture alleged to have been committed by the Indonesian Army are to be lodged with the Military Police, military prosecutors and military judges in accordance with the Law 31/1997 on the Military Court. In case of prosecutions against members of the Indonesian Army, the decision to prosecute is made by military prosecutors following an investigation by the military police. The *Perwira Penyerah Perkara - PEPERA* (Case Submission Officer) institution procedures, and the case is tried by military judges.

⁹⁰ Decree VII/MPR/2000, Clause 3.4a and 7.4, referred to in ICG, Impunity, supra, p.12.

⁹¹ Article 183 KUHAP. According to Article 184 KUHAP, legal evidence consists of the testimony of witnesses; information by an expert (including medial reports); a letter; an indication; and the statement of a defendant.

⁹² See Article 14 of the First Amendment to the 1945 Constitution. <http://confinder.richmond.edu/Indonesia1st.htm>

⁹³ See Presidential Decrees 31/2001 and 96/2001 on the establishment and the remit of the jurisdiction of the Human Rights Court.

⁹⁴ Article 18, Law 26/2000.

⁹⁵ Article 19 *ibid*.

⁹⁶ Article 46 *ibid*.

⁹⁷ Article 20 (1) *ibid*.

hoc investigator and an *ad hoc* public prosecutor.⁹⁸ *Komnas Ham* has no power to challenge the decision of the Attorney General. Investigations must be completed within a period of no longer than ninety days from the date the inquiry findings are received and declared complete by the investigator.⁹⁹ The investigation period may be extended up to a total of 240 days by the Chief Justice of the Human Rights Court.¹⁰⁰ The Attorney General must issue a writ to terminate the investigation if insufficient evidence is obtained during that period.¹⁰¹ Once such a writ is issued, an investigation may be re-opened only if additional proof and evidence for prosecution exists which supplements the initial investigation findings. However, the victim or his/her family have the right, if they do not accept the termination of the investigation, to submit a pre-trial request to the Chief Justice of the Human Rights Court.¹⁰² If the Attorney General decides to initiate a prosecution, he/she has 70 days to do so.¹⁰³

The cases are heard by a Human Rights Court.¹⁰⁴ The Court hears and rules on these cases within a period of no more than 180 days from the date of the cases being brought before it.¹⁰⁵ Provision is made under Article 34 of Law No 26/2000 for the law enforcement and security apparatus to provide protection for witnesses and victims. Under this, President Megawati signed a presidential decree on witness protection on 13 March 2002, a day before the first set of trials in Jakarta began. According to Regulation No. 2/2002 on the Protection of Witnesses and Victims of Human Rights Abuses, every victim or witness in a case of gross violations of human rights has the right to obtain protection from the law-enforcement and security apparatus. Such protection includes safeguards for personal security, concealment of the identity and provision of testimony in court without being seen by the accused. This protection is based on the initiative of the law enforcement or security apparatus or on a request by the victim or witness. It is to be conveyed to *Komnas Ham* at the investigation stage, to the prosecution office at the stage of the police investigation or to the prosecution and the court at the stage of court proceedings. Protection is to be stopped at the request of the victim or witness or when it is no longer required in the opinion of the law enforcement or security apparatus.

3. The Practice

3.1. Investigations and prosecution of crimes under the Penal Code

There are no statistics available on the overall number of complaints lodged by survivors of torture. In general, survivors tend to report to *Komnas Ham* rather than the police. However, most survivors appear to refrain from complaining out of fear of repercussions, in particular in conflict zones. This is borne out by the practice of intimidation of victims, their families, witnesses and human rights defenders.¹⁰⁶

⁹⁸ See Articles 21 and 23 *ibid.*

⁹⁹ Article 22 (1) Law 26/2000.

¹⁰⁰ Article 22 (2) and (3), *ibid.*

¹⁰¹ Article 22 (4) *ibid.*

¹⁰² Article 22 (6) *ibid.*

¹⁰³ Article 24 *ibid.*

¹⁰⁴ Articles 27 (2) and (4) *ibid.*

¹⁰⁵ Article 31, *ibid.* There are also time limits for appeals, see Articles 32 and 33.

¹⁰⁶ See AI, Commentary, *supra*, 24 and 25.

Complaints into torture have only in a few cases resulted in prosecutions, largely due to inadequate or non-existent investigations. There is no independent body charged with investigating and prosecuting torture cases. The police and military authorities are generally seen as reluctant to take any action in torture cases, particularly where senior officials are accused of having committed such crimes. While the independence and impartiality of the National Commission on Human Rights has been called into question, it has, in the course of the last few years, investigated several cases of torture. By the end of 2001, only one of these cases resulted in a prosecution. In a number of instances, the public authorities, particularly the police and army, did not cooperate in the investigations or actively obstructed them.¹⁰⁷ Even where the *Komnas Ham* had established that gross human rights violations, including torture, enforced disappearances and rape, had taken place and recommended prosecution of those responsible, compensation for the victims and ending the culture of impunity within the military, no action was taken by the responsible authorities.¹⁰⁸ *Komnas Ham* has no right to challenge the ultimate decision whether to prosecute, which lies with the Attorney General. This has effectively meant the end to such investigations. The work of *Komnas Ham* has also been hampered because of lack of sufficient resources and *Komnas Ham* has itself been criticised for its reluctance to carry out investigations into human rights violations committed in the course of internal conflict.¹⁰⁹

Torture survivors, human rights defenders and witnesses have reportedly been intimidated into not bringing or withdrawing complaints or support from any case against members of the police or the army. In several cases, victims, including human rights defenders, were tortured, disappeared or extra-judicially killed.¹¹⁰ In one widely reported case, three members of the Aceh based organization, Rehabilitation Action for Torture Victims in Aceh (RATA), together with a fourth person who survived, were abducted, tortured and killed in North Aceh on 6 December 2000. The survivor provided the police with detailed evidence about the perpetrators. As a result, four army officers and four civilian military informers were detained on suspicion of premeditated murder. In February 2001, the investigating officers submitted the case to the Prosecutor of the High Court in Banda Aceh who returned the file to the police as he considered it to be incomplete. Meanwhile, the *Komnas Ham* tried, in vain, to investigate the crime as a human rights case under the new Law 26/2000. In March 2001, the four civilian military informers who had been identified by the survivor as the actual perpetrators of the killings were able to leave detention. The circumstances of their "escape" remain unclear and they remain at large. In April 2001, the prosecutor again returned the file regarding the remaining four military officials to the police requesting further evidence. At the time of writing, no charges had been brought against any of the eight suspects.¹¹¹

Torture survivors have also found it difficult to obtain the necessary evidence. There have been a number of cases where torture victims were unable to receive medical

¹⁰⁷ Ibid., supra, p.22.

¹⁰⁸ Human Rights Watch, *Accountability For Human Rights Violations In Aceh*, Part V: Komnas Ham and Aceh: The Track Record, March 2002, <http://hrw.org/reports/2002/aceh/index.htm#TopOfPage>.

¹⁰⁹ AI, Commentary, supra, p.22.

¹¹⁰ See on the situation in Papua, Amnesty International, *Indonesia: Impunity and human rights violations in Papua*, April 2002, AI-index: ASA 21/015/2002, pp.11 et seq.

¹¹¹ HRW, *War in Aceh*, supra, VIII.

assistance of any type and where the police kept them in detention for days after the torture so that wounds or bruises had time to heal.

The judiciary has also not taken an active role in the protection of torture survivors. While the Law on Criminal Procedure prohibits the use of duress and provides that statements by the accused and witnesses must be given voluntarily,¹¹² there is no express provision excluding evidence that has been obtained by means of torture or ill-treatment. Judges have in several cases not excluded evidence allegedly extracted by means of torture. Furthermore, judges did not order investigations into allegations of torture or ill-treatment - they apparently do not have the power to do so.¹¹³ Observers have noted in particular the failure of judges to use the *pra-peradilan* proceedings to ensure the protection of torture survivors and the criminal accountability of the perpetrators. The *pra-peradilan* procedure takes place before a judge who is called upon to determine whether any arrest or detention is valid. The judge, through this procedure may consent to the release of the detainee, and order compensation and rehabilitation of a person who has been wrongly arrested or detained.¹¹⁴ It is usually the first chance for a survivor to raise an allegation of torture before a judge.

An additional factor undermining the rule of law, which is not confined to torture cases, is the reportedly widespread corruption of the judiciary, prosecution and police.¹¹⁵

There have only been a few cases in which perpetrators of torture have been charged, tried and convicted.

According to the information supplied by Indonesia in its Initial Report to CAT, some perpetrators of torture have been held responsible under criminal law: "... in January 1999, 23 Indonesian soldiers were punished with one to four years in jail and were dismissed from the military because they were convicted of torturing prisoners in Aceh."¹¹⁶ In a case tried in 1999, five soldiers were sentenced to terms of imprisonment of 2 – 6.5 years for beating to death five detainees and inflicting serious injuries on 19 others in North Aceh.¹¹⁷ In another reported case, a police officer was sentenced to three years imprisonment in November 2000 for beating to death a 19 year old student and dismissed from the police force.¹¹⁸

On 17 May 2000, the Banda Aceh Public Court, sentenced 11 members of the armed forces to 8.5 years imprisonment, 13 officials to 9 years, and one of the perpetrators to 10 years imprisonment for killing Mr. Bantaqiah.¹¹⁹ This case concerned a massacre that took place on 23 July 1999 in Beutong Ateuh, West Aceh. A teacher

¹¹² See Articles 117, 153 (2) and 185 (6) KUHAP.

¹¹³ AI, Commentary, *supra*, p.26.

¹¹⁴ Articles 77 and 82 KUHAP.

¹¹⁵ See Report of the Special Rapporteur on the Independence of Judges, *supra*, paras. 27 et seq. and AI, Commentary, *supra*, as well as HRW, *The Indonesian Military and Ongoing Abuses*, 31 July 2002, <http://hrw.org/backgrounder/asia/indo-bck0702.htm>.

¹¹⁶ Initial CAT Report Indonesia, *supra*, para.62.

¹¹⁷ See AI, Commentary, *supra*, p.8.

¹¹⁸ *Ibid.*

¹¹⁹ Initial CAT Report Indonesia, *supra*, para 62.

was killed and 56 of his pupils first wounded and later shot dead. 24 military personnel and one civilian were accused and charged on two counts of murder and two counts of maltreatment. All were convicted and sentences as outlined above. However, the chief suspect, the highest ranking military officer, Lieutenant-Colonel Sudjono, who had, according to victims, ordered his men to throw the wounded victims off the trucks and shoot them, disappeared soon after the investigations began and has since not been accounted for.¹²⁰

In some cases, the accused were convicted of less serious crimes even though the victims alleged that they had been tortured. In one case involving disappearances and extra-judicial killings, in which eleven members of the army's Special Forces (*Kopassus*) accused of kidnapping and detaining nine "radicals" were tried, the military court convicted and sentenced the accused to jail terms ranging from 12 to 22 months. The most senior officer, a major, and four captains were also dismissed from the armed forces. However, the charges related only to the nine kidnapped people, who had subsequently been released, while no mention was made of the other fourteen persons, who were either dead or missing, and who were also believed to have been kidnapped.¹²¹

3.2. Investigations and prosecutions of gross human rights violations under Law No. 26/2000

Trials at the Human Rights Court are ongoing in relation to a number of gross human rights violations committed by members of the Indonesian military and others in East Timor in 1999.

The Attorney-General's office has decided against prosecuting nearly half of the alleged perpetrators put forward by the National Commission for Human Rights. The Prosecution is perceived to show insufficient will to secure convictions of the accused. It has, in particular, been criticised for its failure to address the role of the military in human rights violations, as the military is portrayed as failing to prevent violence rather than actively orchestrating it. The prosecutors have chosen not to use the evidence gathered by a United Nations sanctioned international inquiry in 2000 which concluded that the murders, forcible evacuation and destruction in East Timor in 1999 were mostly part of a systematic campaign organised and run by the Indonesian security forces and their locally recruited militias. The prosecutors have also chosen not to use evidence from two other inquiry teams, including one by the *KOMNAS HAM*.¹²² The indictments have consequently been drafted in such a way as to suggest criminal negligence of the accused rather than deliberately committing crimes against humanity.¹²³

¹²⁰ The Country Rapporteur of the Committee against Torture, Ms. Gaer, after noting the leniency of sentences in some other cases stated that the sentenced handed down in the Bantaqiah case had been stiffer, but that again no charges had been brought against senior officers. See supra, para.14.

¹²¹ The trial remains the only one of its kind in relation to involuntary disappearances in the history of Indonesia, of which 1266 have been recorded by Kontras, an Indonesian NGO, for the period of 1965-2002. The trial was reportedly considered a whitewash by many human rights activists, who believed its conduct was closely related to political rivalries within the military. See ICG, Impunity, pp.3 and 4; and *Accountability for Gross Human Rights Violations*, ICG Asia Report No 12, Jakarta/Brussels, 2 February 2001, at pp3-4.

¹²² Aglionby, J 'East Timor verdicts undermine tribunal', The Guardian, 16 August 2002.

¹²³ International Crisis Group, 'Indonesia: Implications of the Timor Trials', *Indonesia Briefing*, Jakarta/Brussels, 8 May 2002, at p1, http://www.intl-crisis-group.org/projects/asia/indonesia/reports/A400643_08052002.pdf;

In June 2002, the UN increased pressure on the Indonesian Government to produce results over serious crimes in East Timor by releasing its own set of detailed indictments for several cases including the Liquica church massacre. The indictments were released by Timorese Deputy Prosecutor, Siri Frigaard, and include 36 new charges. They firmly establish a chain of command between the Indonesian army and militias.¹²⁴

The Tribunal has, as of 31 December 2002, heard ten cases, three of which resulted in convictions, two in acquittals and the rest are ongoing.¹²⁵

In the first case resulting in a conviction, the former East Timorese Governor, Abilio Soares, was sentenced to 3 years for crimes against humanity, consisting of murder and assault/persecution, based on command responsibility for massacres and attacks carried out by his subordinates.¹²⁶ On 27 November 2002, Eurico Guterres, a former East Timorese militia leader, was convicted of crimes against humanity for leading an attack on the home of a pro-independence campaigner in which twelve people were killed. The Human Rights Court sentenced him to ten years imprisonment.¹²⁷ On 27 December 2002, Lieutenant-Colonel Soedjarwo was sentenced to five years imprisonment for failing to prevent his troops from committing serious human rights violations, including the murder of Pro Independence Civilians in Dili on 6 September 1999.¹²⁸

In August 2002, the Court acquitted the five military personnel that were accused in relation to the Suai Church massacre.¹²⁹ On 15 August 2002, it acquitted Timbul Silaen, Brigadier General, and former East Timorese Police Chief, who had been charged with crimes against humanity.

IV. CLAIMING REPARATION FOR TORTURE

1. Available Remedies

Torture survivors and relatives of torture victims can seek reparation through civil and criminal proceedings. In addition, those having been subjected to torture that falls within the scope of the Human Rights Court, may claim reparation through proceedings under Law 26/2000.

1.1. Constitution and Public Law

¹²⁴ Jolliffe, J. 'UN issues new charges on East Timor war crimes', *The Age* (Australian newspaper), Saturday, 29 June 2002, p25.

¹²⁵ See for updated information on the work of the tribunal the website of the Judicial System Monitoring Programme, www.jsmp.minihub.org.

¹²⁶ Aglionby, J "East Timor governor gets 3 years", *The Guardian*, 15 August 2002.

¹²⁷ Aglionby, J., "Court convicts militia leader of massacre", *The Guardian*, 28 November 2002. According to these article, Guterres announced that he would appeal the judgement.

¹²⁸ Aglionby, J., "Indonesian officer guilty of crimes against humanity in East Timor", *The Guardian*, 28 December 2002. This was the first case in which an Indonesian military officer was convicted as the two persons previously convicted were East Timorese.

¹²⁹ Human Rights Watch, 'Indonesia: Justice for East Timor still elusive', Press Release, 21 February 2002, www.hrw.org/press/2002/02/etimor0221.htm. See also 'Damiri to stand trial on Wednesday', *The Jakarta Post*, 10 July 2002 (www.thejakartapost.com/yesterdaydetail.asp?fileid=20020710.C11).

The Constitution does not provide for a right to a remedy nor for a right to reparation in case of human rights violations. Similarly, Law No. 39 of 1999 on human rights does not stipulate any remedy by which victims may claim reparation.¹³⁰

1.2. Civil Law

Under the civil law, a torture survivor may claim compensation for losses caused by an unlawful act. Liability is based on fault.¹³¹ Superiors and the State itself are vicariously liable on the basis of employers' liability.¹³² Damages are awarded for pecuniary and non-pecuniary harm. Relatives of victims are also entitled to damages resulting from the unlawful act. Suits have to be filed before the District Courts. The award of compensation is independent of any criminal conviction of the tortfeasor.

1.3. Criminal Law

Law No. 14 on Judicial Authority of 1970 provides a legal basis for compensation in cases of unlawful arrest, detention or prosecution as well as for the punishment of officials for such offences. Compensation can be claimed during the *peradilan* procedure that was introduced in 1981. This procedure does not provide for a right to compensation for torture and ill-treatment during detention. However, judges have to take cognisance of whether "the arrest, detention, or other measures caused illness, incapacity to work or death" in determining compensation according to the 1983 Regulation on the Administration of KUHAP. The court determines the compensation which shall be made in accordance with the procedures applicable to decisions in civil cases.¹³³ The amount of compensation to be awarded ranges from Rp.5,000 (\$0.55) to Rp.3 Million (\$330).¹³⁴

Compensation can be claimed as part of the criminal proceedings. In a case where the victim suffers damage because of the criminal act being adjudicated, the chief judge, at the request of the victim, can combine the compensation request with the criminal case.¹³⁵ If the request is submitted in time, i.e. either before the general prosecutor reads his/her criminal charge or, if the latter is absent, before the judge passes his/her verdict, the court may decide the civil compensation claim together with the criminal case.

1.4. Law No. 26/2000

¹³⁰ While Article 7, 1) of Law No.39 stipulates: "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", it does not provide in itself a right to an effective remedy.

¹³¹ Article 1365 Indonesian Civil Code: "Each act violating the law and causing loss to other persons shall obligate persons causing such loss by their fault to compensate for such loss."

¹³² Article 1367 Indonesian Civil Code.

¹³³ Articles 82, 3) c) and 274 KUHAP.

¹³⁴ Article 9, Regulation No.27 on the Administration of the KUHAP.

¹³⁵ Chapter XIII of Law No.8 of 1981 (Articles 98-101 of the Penal Code).

Article 35(1) of Law No 26/2000 on Human Rights Courts reads: "Every victim of a violation of human rights and/or his/her beneficiaries shall receive compensation, restitution and rehabilitation." Such compensation, restitution and rehabilitation are to be included in the ruling of the Human Rights Courts.¹³⁶

On 13 March 2002, the Government passed Regulation No. 3/2002 on the Compensation, Restitution and Rehabilitation of Victims of Human Rights Abuses. According to the regulation, compensation is "redress that is given by the State because the actor is not able to give the whole redress that is his responsibility."¹³⁷ Restitution is "redress which is given to the victim or his family by the actor or a third party, and comprises the return of property, the payment of redress for loss or suffering, or compensating costs for specific actions"¹³⁸ whereas rehabilitation is "the restoration to the situation as it was before, for example honour, good name, position or other rights."¹³⁹ As a general rule, the person responsible for the gross human rights violation has to pay reparation to the victim in form of "restitution" and carries therefore primary liability.¹⁴⁰ The State provides "compensation" only in those cases where the responsible public official is not able to provide redress, thus effectively having subsidiary liability.

The regulation stipulates that the provision of compensation, restitution, and/or rehabilitation must be implemented in an appropriate, speedy and proper manner.¹⁴¹ While the Government Agency named in the ruling has the duty to implement the provision of compensation and rehabilitation, the Ministry of Finance/Treasury is responsible for the execution of payment.¹⁴² The individual perpetrator(s) has the duty to provide restitution.¹⁴³ The responsible Government Agency or the individual perpetrator (s) have to implement the decision within thirty working days from the receipt of the official report from the Attorney General who is in charge of implementing the court's decision,¹⁴⁴ and must report on the implementation with accompanying proof to the Head of the Human Rights Court.¹⁴⁵ If either fail to adhere to the time limit, the victim or the victim's family can report the matter to the Attorney General who, in such a case, is to immediately order the implementation of the decision, at the latest within seven working days following the date of receipt of the order.

2. The Practice

2.1. Reparation cases in relation to torture committed before 1998

¹³⁶ Article 35 (2) Law No.26/2000 (Unofficial translation).

¹³⁷ Chapter I 1 (4). The translation of the regulation was provided by Ms. Ilona Marchant.

¹³⁸ Chapter I 1 (5).

¹³⁹ Chapter I 1 (6).

¹⁴⁰ Restitution may pursuant to the regulation also be provided by a third party.

¹⁴¹ Chapter I 2 (1).

¹⁴² Chapter II (3).

¹⁴³ Chapter II (4).

¹⁴⁴ Chapter III (6), (7).

¹⁴⁵ Chapter III (8).

While some torture survivors and relatives of victims have brought lawsuits against individual perpetrators and the government, there have only been a few successful cases. Before 1998, this was largely due to impunity and the accompanying climate of fear. Victims were reluctant to take the risk of bringing legal action against the perpetrators or the state. One case has however been reported, where the Yogyakarta district court, in a civil action in 1992, ordered the Yogyakarta police to pay Rp.5.2 million (\$2,600 at that time) in compensation to a victim's family, for torture resulting in death, an amount that was increased by the Appeal Court to Rp.7 million (\$3,500).¹⁴⁶

The lack of effective remedies in Indonesia prompted victims to take their cases abroad. Two lawsuits have been brought by East Timorese plaintiffs pursuant to the United States' Alien Tort Claims Act of 1789 and the 1991 Torture Victim Protection Act (TVPA) in relation to serious human rights abuses, including torture, perpetrated by members of the Indonesian Army in East Timor in 1991 and 1999. The first claim, which was filed against General Sintong Panjaitan, the commander at the time of the massacre, resulted in an award of \$14 million in damages in favour of Helen Todd, the mother of the only non-East Timorese killed in the 1991 Santa Cruz massacre.¹⁴⁷ In the second case, Judge Alan Kay of the US District Court in Washington, DC, ruled in September 2001 that General Lumintang was liable for US\$ 66 million in damages for his role in crimes against humanity following East Timor's vote for independence in 1999. The judge granted \$10 million in punitive damages to each plaintiff or their estates. Compensatory damages ranged from \$750,000 to \$1.75 million each.¹⁴⁸

2.2. Reparation cases in relation to torture committed after 1998

After the end of the Suharto era in 1998, torture survivors and relatives of torture victims still face numerous obstacles when considering taking legal action against the State. The biggest obstacle is the lack of adequate protection for victims, witnesses, their families and human rights defenders who are often subject to intimidation, harassment and even murder, as in the case of the three RATA volunteers described above, when trying to assert or when exercising their rights.¹⁴⁹ Other hurdles are the lack of access to justice and resources, especially for people in remote areas, conflict zones and those belonging to marginalised groups in society. Given the inadequate investigations, torture survivors and especially relatives of victims who have been tortured to death continue to encounter considerable difficulties in proving their case when they are brave and resourceful enough to pursue them. In many areas, such as Aceh, there has been a complete absence of any legal action taken against perpetrators of human rights violations.¹⁵⁰ The impunity for perpetrators has also meant that torture survivors and relatives of victims could not successfully utilise the option of bringing supplementary lawsuits as part of criminal proceedings.

¹⁴⁶ LCHR, *Broken Law, Broken Bodies*, supra, p. 82.

¹⁴⁷ 4 Million Compensatory Damage and 10 Million Punitive Damages. See Miller, John M. 'One less place to hide', *Inside Indonesia*, (July – September 2002), <http://www.insideindonesia.org/edit71/Court%20Issues.htm>.

¹⁴⁸ Ibid.

¹⁴⁹ According to one human rights activist, he was threatened with arrest in response to his efforts to take legal action demanding compensation for the killing of the three RATA volunteers and in two other torture cases.

¹⁵⁰ Information provided to REDRESS by sources within Indonesia.

While the Human Rights Court has the power to award reparation, in its practice to date it has refrained from doing so. None of its judgments has contained a ruling on the question of reparation even though the law envisages an automatic inclusion of such a finding. The government regulation on compensation has therefore remained a dead letter.

V. GOVERNMENT REPARATION MEASURES

Indonesia has not set up any reparation scheme for past or present human rights violations. There is also no compensation scheme for victims of crime. It is only independent NGOs that provide treatment for victims of torture.¹⁵¹

On 9 December 2002, the Government of the Republic of Indonesia and the Free Aceh Movement entered a framework agreement on the cessation of hostilities. While this agreement includes a commitment by both sides to cease hostilities and all acts of violence, including acts of torture and other human rights violations, it only provides for a monitoring system by a Commission but not for sanctions committed by violators of the agreement. Moreover, the agreement neither provides for accountability of perpetrators of past human rights violations nor for reparation for the victims of such violations.¹⁵²

VI. LEGAL REMEDIES IN CASES OF TORTURE COMMITTED IN THIRD COUNTRIES¹⁵³

1. Prosecution of acts of torture committed in a third country

1.1. The Law

1.1.1. Criminal Law

The Penal Code provides for the exercise of universal jurisdiction but not for the crime of torture or other human rights violations.¹⁵⁴ The Indonesian Penal Code recognises the active personality principle for several crimes, which might also include torture.¹⁵⁵

¹⁵¹ Such as the Rehabilitation Action for Torture Victims in Aceh (RATA) and PASKA, the abbreviation of *Program Pengembangan Aktifitas Sosio-Ekonomi Korban Konflik Aceh* or Program Activities of Socio-Economy for the Conflict Victims in Aceh.

¹⁵² See for the text of the agreement, the press statement by Tapol, 9 December 2002 Aceh: Framework Agreement on Cessation of Hostilities, 9 December 2002.

¹⁵³ Explanatory note: The status of East Timor during occupation by Indonesia was contested. For the purposes of this section East Timor will be considered as a "third country".

¹⁵⁴ According to Article 4 of the Penal Code, Indonesian Penal Law applies to any person guilty of crimes against the security of state, forgery of money and debt certificates as well as piracy and air hijacking.

¹⁵⁵ See Article 2, Indonesian Penal Code. Article 3 provides that the Act is applicable to any person who is guilty of a punishable act outside Indonesia on board an Indonesian vessel or aircraft. Article 5 reads: "1) The Indonesian statutory penal provisions are applicable to an Indonesian national who outside Indonesia commits: 1st, one of the crimes described in Chapters I and II of the second Book, and in articles 160, 161, 240, 279, 450 and 451; 2^{ndly}, an act deemed by the Indonesian statutory penal provisions to be a crime and on which punishment is imposed by the law of the country where it has been committed; 2) The prosecution of the crime referred to under secondly may also be instituted if the accused becomes a subject after the commission of the act"; Article 7: "The Indonesian

Under Law 26/2000, "A Human Rights Court has the authority to hear and rule on cases of gross violations of human rights perpetrated by an Indonesian citizen outside the territorial boundaries of the Republic of Indonesia."¹⁵⁶ Accordingly, the law allows for the prosecution of Indonesian nationals (active personality principle) for gross violations of human rights of the crime of genocide and crimes against humanity but not for acts of torture as such unless they are a constituent element of one of these crimes. Moreover, the Law does not contain provisions allowing for the exercise of universal jurisdiction or the prosecution for crimes committed against Indonesian nationals (passive personality principle) with regard to gross violations of human rights as defined in the Law. Finally, at the time of writing, the scope of application of Law 26/2000 is limited as Presidential Decree (No 96/2001) restricts the Courts' jurisdiction. However, Law 26/2000 is not explicitly limited to East Timor so it could theoretically be used to prosecute Indonesian citizens in other countries too but a Presidential decree establishing such a Court would need to be passed in order for this to be possible. The basis for prosecutions is Law 26/2000 and the judicial procedure applicable to those prosecutions is governed by the Indonesian Code of Criminal Procedure.

Finally, universal jurisdiction could in principle be exercised on the basis of the provisions of the Convention against Torture as incorporated into Indonesian law but there is no practice to this effect.

Diplomatic immunity is recognised as provided for in the Vienna Convention on Diplomatic Relations, 1961.

1.1.2. Extradition laws

According to the Indonesian government, the CAT can be considered as a "basic principle" in extradition agreements¹⁵⁷ but there appears to be no general rule that persons charged with torture will be extradited. If there is no extradition agreement between Indonesia and the requesting country, persons suspected of committing torture can be extradited according to Law No.1 of 1979 on Extradition. Torture is listed here as an extraditable crime.¹⁵⁸

1.2. The practice

There has been no case in which Indonesian courts have tried Indonesian or foreign nationals on charges in relation to torture. Equally, there have not been any incidents in which perpetrators of torture were extradited by Indonesia.¹⁵⁹ Indonesia has so far refused to extradite or transfer a number of Indonesian military officials to East Timor to be tried for human rights abuses perpetrated in East Timor in the 1990's. It has also been criticised for the lack of cooperation with the serious crimes unit established by United Nations Administration in East Timor (UNTAET) in spite of a

statutory penal provisions are applicable to the Indonesian official who outside Indonesia is guilty of one of the crimes described in Chapter XXVIII of Book II."

¹⁵⁶ Article 5 Law 26/2000.

¹⁵⁷ Initial CAT Report Indonesia, *supra*, para 92.

¹⁵⁸ Article 4 Law on Extradition and attached schedule of crimes. Torture is not defined but rather listed as including "torture" which causes serious injury or death, planned "torture" and serious "torture". According to the Permanent Mission of Indonesia to the UN, the law governing extradition was currently under review. See *supra*, para.6.

¹⁵⁹ Initial CAT Report Indonesia, *supra*, paras 84, 92-97.

Memorandum of Understanding on legal, judicial and human rights cooperation that had been signed between Indonesia's Attorney General and UNTAET on 6 April 2000.¹⁶⁰

2. Claiming reparation for acts of torture committed in third countries

The jurisdiction of Indonesian courts is based on the territoriality principle and is either established at the place of residence of the defendant or the place where the tort occurred.

Reparation could be claimed by East Timorese victims of human rights violations in the course of trials before the Human Rights Courts. It could theoretically also be claimed as part of a supplementary civil lawsuit in those cases where Indonesian courts exercised extraterritorial jurisdiction, either based on the active personality or the principle of universal jurisdiction.

No precedents are known in which Indonesian courts have ruled on whether states would be granted immunity in cases relating to torture.

There are no known cases in which survivors or relatives of victims of torture committed abroad have sought and obtained reparation before Indonesian courts.

¹⁶⁰ AI, Indonesia Commentary, supra, pp.11-12, International Legal Assistance Consortium (Shelby R. Quast, Director General), *Report on East Timor*, (US, March 2002), p.13, http://www.ilacinternational.org/East_Timor/ILAC%20ET%20Report.doc.