The Human Rights Courts: Embedding Impunity

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"[…] for the most fundamental sorts of change,
law is probably always of limited value"
(Lev 1972, 317-8)

Introduction

Since the fall of President Suharto in May 1998, one of the most contentious issues in Indonesia has been the question of what to do with the country's immense legacy of human rights violations, particularly those that occurred under authoritarian rule (1966-1998).[2] Organisations and individuals favourable to the promotion of human rights have argued that accountability for these violations will break the cycle of military impunity, in turn a crucial aspect of strengthening democracy and the rule of law in the country (Linton 2006, 202). In the early *Reformasi* years, there has been significant activity in the realm of human rights, including law-making and the creation of new institutions with a human rights mandate. One of the most important developments has been the establishment of Human Rights Courts in 2000, which have the power to hear and rule on cases of gross human rights violations.

Since their inception, however, only three tribunals – which will be discussed below – have been held at these courts. The most recent tribunal was held in 2005. As such, in practice the Human Rights Courts have ceased to function, while formally they continue to exist. The Indonesian National Human Rights Commission (*Komisi Nasional Hak Asasi Manusia*, henceforth Komnas HAM) has continued to conduct preliminary investigations with a view of bringing these to the Human Rights Courts. Similarly, the Attorney General's Office continues to reserve a part of its annual budget for the prosecution of gross human rights violations even if it has been reluctant to do so. This raises the question what the role is of the Human Rights Courts in contemporary Indonesian state and society.

In exploring this question, my analysis in this chapter will draw on the work of Daniel S. Lev on Indonesian law and society. While Lev's work did not specifically address the Human Rights Courts, his focus on the interconnectedness of law and

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[2] Some historians have challenged the temporal focus on crimes committed during Suharto's New Order period. They argue that the record of extreme violence in Indonesia can be traced back to the thirteenth century (see Linton 2006).

(Lev 2000, 3) is highly relevant to examine the position of the Human Rights Courts. In particular I will use Lev's concept of legal culture as an analytical tool to understand the politics of the Human Rights Courts and, by extension, to interrogate the role of these courts in Indonesia today. Lev's conceptualisation of legal culture was based on Friedman's work on legal culture, which he explored from the 1960s. Friedman defined legal culture as "the ideas, values, attitudes, and opinions people in society hold, with regard to law and the legal system" (Friedman 1994, 118). Legal culture thus describes public attitudes to law, which also serve as the source of law: it determines the impact of legal norms on society (Merry 2010, 47).

Lev distinguished two related components of legal culture that are, as I will argue, particularly useful in understanding the role of these courts in contemporary Indonesian state and society. The first element is procedural legal values that act as a means of social regulation and conflict management. These are, in turn, the cultural basis of the legal system.[3] The second element is substantive legal values, which refers to the fundamental assumption about the distribution of resources in a society and their use as well as social rights and wrongs. These assumptions change over time, as societies themselves change (Lev 1972, 247).

In this chapter, following a historical background of how the Human Rights Courts came into being, the first part of the discussion will focus on the Courts' enabling law, which correlates with the procedural element of legal culture. This will be followed by a discussion of the three tribunals that have been held at the Human Rights Courts since their inception. In this section, I will pay particular attention to the legal proceedings in the courts. This is in order to explore the substantive element of legal culture, tracing the dominant legal values in the legal process. Taking inspiration from Lev's social-political analysis of law and paying attention to power relations and contestations as a lens to examine legal institutions and the law, I argue that while the emergence of the Human Rights Courts signals a shift in the procedural element of legal culture they have not changed legal values consistent with human rights principles embedded in law. In fact, since their inception the Human Rights Courts have served to embed impunity for the security forces, rather than breaking this cycle.

Historical Background

The establishment of Indonesia's Human Rights Courts cannot be separated from the immediate period following the end of authoritarianism and the legal and political reforms that followed. Suharto's New Order was notorious for its systematic violation of human rights. The security forces played a key role in repression and in general escaped accountability for their actions, leading to a culture of impunity (McGregor and Setiawan forthcoming).

[3] Lev defines "legal system" as formal processes that constitute formal institutions together with the informal processes surrounding them. Central institutions of a legal system are bureaucracies, including the courts (Lev 1972, 246-7).

The violence that marked the end of the Suharto regime once more highlighted the dominance of the security forces during the authoritarian regime. In May 1998, security forces opened fire on student protestors in Jakarta, killing four and injuring nearly 700 in what is known as the Trisakti killings. In Jakarta, as well as in Medan and Solo, violent outbreaks resulted in the destruction of property, loss of lives and sexual violence particularly targeted at Chinese Indonesians. The involvement of military in both the attack on the students and in the May 1998 violence brought it into further disrepute. The military responded by rescinding its political role (*dwifungsi*) in September 1998.

The role of the security forces in the violation of human rights influenced reform demands of Indonesia's legal system. International pressure for this should be seen in the context of other countries transitioning from authoritarian rule in the 1980s and 1990s, while domestic pressure placed this demand more broadly in the context of political change. While there certainly was a domestic push for human rights reform, a specific human rights agenda was absent. This was because of the fragmentation of the *Reformasi* movement and its focus on the ousting of Suharto from power (McGregor and Setiawan forthcoming). Nonetheless the Indonesian government developed a new human rights framework relatively quickly.

In November 1998, the *Majelis Permusyawaratan Rakyat* (MPR, People's Consultative Assembly) passed Decree XVII/MPR/1998 on Human Rights. The foundation of legislative reform related to human rights in the post-authoritarian era, this Decree includes many civil and political, as well as economic, social and cultural rights. It also explicitly states that the promotion and protection of human rights is the primary responsibility of the state.[4]

This Decree was the precursor to Law 39 of 1999 on Human Rights that was enacted the following year. This Law includes a wide range of human rights provisions and stipulates that all international human rights law ratified by Indonesia becomes national law.[5] It also strengthened the status and mandate of Indonesia's National Human Rights Commission (*Komisi Nasional Hak Asasi Manusia*, henceforth Komnas HAM).[6]

The Law on Human Rights was followed by Government Regulation 1/1999 on the Human Rights Courts to address cases of gross human rights violations (*pelanggaran hak asasi manusia yang berat*). This Regulation designated Komnas HAM as the sole preliminary investigator in cases where gross human rights violations were suspected.[7] The Regulation was in place until the enactment of Law 26 of 2000 on the Human Rights Courts, which will be discussed in detail below.

In addition to the enactment of these new laws, in 2000 the second round of amendments to the 1945 Constitution saw the inclusion of Chapter XA on human rights. These provisions were modelled on the Universal Declaration of Human Rights (UDHR) (Lindsey 2008, 29) and include a wide range of human rights

[4] Decree XVII/MPR/1998, Article 1.
[5] Law 39/1999, Article 7(2).
[6] Law 39/1999, Chapter VII.
[7] Government Regulation 1/1999, Article 10(1).

guarantees. More controversial was the prohibition on retroactive application of legislation[8], of which some observers argued potentially (see below) could cause problems when prosecuting gross human rights crimes that occurred in the past. Taken together, the new laws represented the establishment of a solid legal framework for the protection of human rights in Indonesia. The reforms[9] were indicative of an increase of procedural legal values in which Indonesia displayed a growing adherence to international norms.

Law 26/2000 on the Human Rights Courts

The second round of constitutional amendments saw the inclusion of a bill of rights that draws on international law. To further realise these rights, a few months later the Law on the Human Rights Courts was enacted. This Law provides for the establishment of courts that have the authority to hear and rule on cases of gross human rights violations.[10] The enactment of this Law, however, eventuated earlier than anticipated: a provision in the 1999 Human Rights Law had envisaged the establishment of the Human Rights Courts by 2003.[11] The fast-tracking of this Law served to pre-empt a proposed international tribunal to try Indonesian officials for crimes committed in the lead up to and following the 1999 independence referendum for East Timor[12] (Linton 2006, 207; Cammack 2016, 191). This seems to suggest that, from the earliest stages, the Human Rights Courts came into existence because of political considerations rather than a genuine attempt to generate change. This resonates with Lev's observations on the politics of courts and that institutions of the law are "fundamentally derivative, founded on political power conditioned by social and economic influence" (Lev 2007, 236).

Article 5 of Law 26/2000 provides that the Human Rights Courts have the authority to hear and rule on cases of gross human rights violations perpetrated by an Indonesian citizen outside the territorial boundaries of the Republic of Indonesia. This limitation is inconsistent with international law, as it does not provide for universal jurisdiction of persons suspected of crimes found in Indonesian territory. International principles state that suspects in such cases should be able to be extradited to another state that is willing or able to prosecute them. Indonesia is obliged to adhere to principles of universal jurisdiction as a state party to the Geneva Conventions of 1949, as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Universal jurisdiction serves to avoid

[8] 1945 Constitution, Article 28I(1).
[9] In addition to these laws, in 2004 the Law on the Truth and Reconciliation Commission (Law 27/2004) was passed, providing for a non-judicial avenue to resolve past human rights abuses. The Constitutional Court cancelled this Law in 2006.
[10] Law 26/2000, Article 4.
[11] Law 39/1999, Article 104.
[12] Although increasingly referred to as Timor-Leste, a reflection of the state's official name (República Democrática de Timor-Leste), in this chapter I use the name "East Timor" as this can be used consistently.

impunity and to prevent those who committed serious crimes from finding protection in other countries.

Article 7 stipulates that the Human Rights Courts have jurisdiction to prosecute two categories of crimes as gross violations of human rights; the crime of genocide (*genosida*) and crimes against humanity (*kejahatan terhadap kemanusiaan*). There is also a provision for command responsibility, which explicitly applies to civilians as well as to the military and police.[13] The elucidation of the Law states that its provisions have been based on the Rome Statute of the International Criminal Court (henceforth Rome Statute), to which Indonesia is not yet a state party. The use of this Statute for the Human Rights Courts Law reflects a global context in which there was more attention for questions of justice in post-authoritarian states and accountability for core human rights crimes. However, the Law did not exactly replicate the jurisdiction of the International Criminal Court (ICC) as it omitted two other crimes identified in the Rome Statute, namely war crimes and the crime of aggression.[14] The omission of one of Indonesia's most pressing human rights concerns – war crimes in internal armed conflict – was not an accident (Linton 2006, 211).

While the Law's definition of genocide is consistent with international principles, ancillary crimes for genocide – such as conspiracy to commit genocide, direct and public incitement to commit genocide, attempts to commit genocide and complicity in genocide – have been excluded. It has been argued that the inclusion of ancillary crimes is necessary to ensure investigation and prosecution at the earliest possible moment (Amnesty International 2001). At the same time, it has been suggested that these ancillary crimes may be able to be prosecuted under various aspects of criminal responsibility in the Code of Criminal Procedure (KUHAP) (Linton 2006, 212).

The Law's provisions on crimes against humanity are inconsistent in a number of ways with international law. While the general definition of the crime has been adapted from the Rome Statute, the provision on crimes against humanity requires a "widespread or systematic attack with the knowledge that the said attack was directly targeted at the civilian population".[15] This suggests that there should be an armed conflict and may be interpreted that there is no crime against humanity unless there was a direct (armed) attack on the civilian population. This may rule out frequent and systematic attacks on the population as well as serious forms of discrimination, which may amount to persecution. As such, the burden of proof for the prosecution has been made very difficult (Linton 2006, 213).

Other provisions in the Law are also problematic from the perspective of international law. The Law's elaboration on extermination[16], for instance, presents a narrow reading of this crime that had been rejected during the drafting of the Rome Statute. Enslavement[17] in the Human Rights Courts Law fails to include the

[13] Law 26/2000, Article 42.
[14] Rome Statute, Article 5(1).
[15] Law 26/2000, Article 9.
[16] Law 26/2000, Article 9(b).
[17] Law 26/2000, Article 9(c).

trafficking of persons, while the definition of torture[18] is also limited. Only when torture is committed as part of a "broad or systematic direct attack on the civilian population", it may be prosecuted as a crime against humanity. An additional element of crimes against humanity in the Rome Statute, on "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health"[19], is missing from the Law on the Human Rights Courts. These limitations in fact raise the threshold of crimes, diminishing the likelihood of conviction. As such, these narrow definitions could lead to impunity.

The penal provisions in the Law on the Human Rights Courts include jail sentences of at least ten and at most twenty-five years for the crime of genocide. Life imprisonment and the death penalty may also be imposed. These punishments also apply to a number of crimes against humanity namely killing, extermination, deportation or forcible relocation, deprivation of liberty and apartheid.[20] Those found guilty of enslavement and torture are subject to a minimum of five or maximum of fifteen years imprisonment.[21] Sexual violence, persecution and enforced disappearance are punishable by a minimum imprisonment of ten, and maximum of twenty, years.[22] The Law does not provide guidance to the grounds to distinguish between maximum and minimal custodial sentences. Moreover, while the penalties are consistent with the provisions of the Rome Statute, the death penalty is at odds with international efforts to abolish capital punishment.

The Law on the Human Rights Courts provides for the establishment of two types of courts. First, the permanent human rights courts for violations that occurred after the Law on the Human Rights Courts was passed.[23] The Law stipulates that permanent courts are established in Central Jakarta, Surabaya, Medan and Makassar, each covering various provinces.[24] To date, the only permanent court has been in Makassar, where the tribunal for Abepura (discussed in detail below) was held. In addition to the permanent courts, the Law provides for the establishment of ad hoc courts, for cases that occurred before 2000.[25] Two tribunals (East Timor and Tanjung Priok, see below) were held at the ad hoc courts in Jakarta. The ad hoc tribunals illustrate that while the principle of non-retroactivity is enshrined in the 1945 Constitution[26] (as discussed in the previous section), in practice principles of international law provide for the investigation, prosecution and punishment of crimes that at the time that they were committed were criminal acts recognised by the community of nations.

Komnas HAM plays a key role in the process of bringing cases of gross human rights violations to court. The Law designates the Commission as the sole body to

[18] Law 26/2000, Article 9(f).
[19] Rome Statute, Article 7(1)(k).
[20] Law 26/2000, Article 37.
[21] Law 26/2000, Articles 38 and 39.
[22] Law 26/2000, Article 40 (1).
[23] Law 26/2000, Article 2.
[24] Law 26/2000, Article 45 (1).
[25] Law 26/2000, Article 43(1).
[26] 1945 Constitution, Article 28I.

conduct a preliminary investigation (*penyelidikan*) into a case where it suspects that gross human rights violations have taken place.[27] It has been argued that Komnas HAM's role should not limit the ability of prosecutors to conduct such investigations. By restricting this task to one body, there are indications that this contradicts the UN Guidelines on the Role of Prosecutors (Amnesty International 2001). Komnas HAM's designation as preliminary investigator has displeased the Attorney General's Office (Setiawan 2013 and 2016), an illustration of the deep historical roots of institutional rivalry between the prosecution and other judicial institutions in Indonesia (Lev 1965, 173).

When Komnas HAM opens a preliminary investigation, it may include external members in its investigation team (for instance, NGO representatives).[28] If Komnas HAM is of the opinion that there is sufficient preliminary evidence of gross human rights violations, it forwards the findings to the Attorney General[29] who may then decide whether or not to proceed with an investigation (*penyidikan*).[30] Concerns have been raised regarding the position of the Attorney General as a State, which may subject the decision to open an investigation to political considerations (Amnesty International 2001).

Similar to Komnas HAM, the Attorney General can appoint ad hoc investigators from both government and society[31] who are sworn in.[32] The Law does not make clear whether the Attorney General automatically needs to follow-up with an investigation, this appears to be contingent on whether it is of the opinion that the result of the preliminary investigation is complete.[33] Investigations must be completed within ninety days[34] and then, if the Attorney General's investigation finds evidence of severe human rights violations, brought to the Human Rights Courts. For crimes that took place before the enactment of the Law, an ad hoc court must be established. Ad hoc courts require parliamentary approval and are formally established via Presidential Decree.[35] This procedure has made the process of establishing ad hoc courts vulnerable to political considerations (Setiawan 2016).

The Law stipulates that a panel of five judges hears each case, three of which are non-career or ad hoc judges.[36] The President, on the recommendation of the

[27] Law 26/2000, Article 18(1).
[28] Law 26/2000, Article 18(2).
[29] Law 26/2000, Article 20(1).
[30] Law 26/2000, Article 21 (1).
[31] Law 26/2000, Article 21(3).
[32] Law 26/2000, Article 21(4). The requirement for investigators to be sworn in does not apply to preliminary investigators. This has on various occasions provided the Attorney General's Office with a reason to reject Komnas HAM's findings (see Setiawan 2013 and 2016).
[33] Article 20(3) of the Law on the Human Rights Courts stipulates that if the Attorney General believes the results are incomplete, it must return them to the preliminary investigator (Komnas HAM). The Commission then must deliver the requested information within thirty days. Human rights organisations have commented that these time frames, while supposedly included to ensure the swift processing of these cases, are too rigid considering the complexity of the subject matter (Amnesty International 2001).
[34] Law 26/2000, Article 22(1).
[35] Law 26/2000, Article 43(2).
[36] Law 26/2000, Article 27(2).

Chairperson of the Supreme Court, appoints these judges to the Human Rights Courts.[37] In the case of an appeal to the Supreme Court, the President on the recommendation of the People's Representative Assembly (*Dewan Perwakilan Rakyat,* DPR) appoints ad hoc judges.[38] Ad hoc judges need to meet a number of criteria, including that they "must have knowledge about and concern for the field of human rights".[39] Ad hoc judges are appointed for a term of five years that may be renewed once.[40] The same applies to ad hoc judges in other specialised courts. However, a tenure of five years is inconsistent with international guidelines that recommend a long and non-renewable term of office to ensure an independent and impartial tribunal (Amnesty International 2001).

The appointment of ad hoc judges for the Human Rights Courts lacks public consultation and participation of an independent, non-political body. While this is also a concern for the appointment of ad hoc judges to other courts, it should be pointed out that by comparison provisions regarding the appointment process in the Law on the Human Rights Courts are particularly minimal. Specific Government Regulations were issued for the appointment of ad hoc judges to the Industrial Relations Courts[41] and the Fisheries Courts.[42] These include provisions on who may propose candidate judges and outline the selection process including administrative requirements and the written test that candidates must complete. The lack of clear guidelines pertaining to the selection of ad hoc judges for the Human Rights Courts makes this process even less transparent, potentially having a detrimental impact on the appointment of appropriate candidates and thereby the independency of the courts.

Provisions regarding the protection of witnesses and victims are also problematic. Under Article 34, the Law determines that witnesses and victims have the right to physical and psychological protection from any threats, intimidation and violence that may be directed towards them. This protection is by Law the task of the security apparatus.[43] While this is common, it should be recognised that the security forces are likely to be implicated in the crimes that are heard at the courts. The providing of witness and victim protection is essential for any court investigating human rights violations. Without adequate protections witnesses may not come forward, thereby further jeopardising the trials and ultimately justice.

The establishment of the Human Rights Courts is an important step forward in a country that "provides a textbook example of the direct link between impunity for atrocities going back over decades and perpetual cycles of violence" (Linton 2006, 201). However, the Law is limited in scope and by design any attempts to prosecute

[37] Law 26/2000, Article 28(1).
[38] Law 26/2000, Article 33(4).
[39] Law 26/2000, Article 29. Interestingly, the requirements for ad hoc judges in the Human Rights Courts do not include a stipulation that they must not be members of political parties, as is the case for ad hoc judges in other specialised courts such as the Fisheries Courts and the Anti-Corruption Courts.
[40] Law 26/2000, Article 28(3).
[41] Government Regulation 41/2004 on the Procedure for the Appointment of Ad Hoc Judges to the Industrial Relations Court and Ad Hoc Judges for the Supreme Court.
[42] Government Regulation 24/2006 on the Procedure of the Appointment and Dismissal of Ad Hoc Judges for the Fisheries Courts.
[43] Law 26/2000, Article 34(2).

cases are at the mercy of political considerations rather than objective criteria. This indicates that while the establishment of the Human Rights Courts has changed the procedural legal values that inform legal culture, a close reading of the Law shows that these values also remained contested. In considering procedural legal values it is thus necessary to differentiate between the broader objectives of laws and regulations in place and their specific provisions, which may show that these oppose one another. The following sections will analyse the cases that have been brought to the Human Rights Courts, paying attention to the social and political ideas that inform substantive legal behaviour.

East Timor

The fall of Suharto saw increased international scrutiny of the Indonesian occupation of East Timor (1975-1999). In January 1999 President B.J. Habibie, who had succeeded Suharto, announced a referendum regarding special autonomy for East Timor to be held on 30 August of that year. Following this announcement, a systematic campaign of violence and terror was directed against those who rejected special autonomy. The perpetrators of this violence were voluntary militias, which were recruited and armed by the Indonesian military (*Tentara Nasional Indonesia*, TNI). The violence escalated further after it was announced that East Timorese had voted overwhelmingly in favour of independence. It has been estimated that 1,400 civilians were killed, 250,000 were forcibly displaced, and 70 per cent of infrastructure was destroyed (Cammack 2016, 193).

There was international condemnation of the violence perpetrated in East Timor and this led the Indonesian government to devise ways to minimise this criticism. Of primary concern was to convince the international community that Indonesia would be able to bring this case to justice. Komnas HAM was asked to conduct a preliminary investigation into gross human rights crimes in East Timor. In September 1999, Komnas HAM established the *Komisi Penyelidik Pelanggaran HAM Timor Timur* (Investigatory Commission on Human Rights Violations in East Timor or KPP HAM TimTim).[44] The KPP HAM was mandated to gather facts, data and other information on the violations of human rights in East Timor since 1999, investigate the degree of involvement of the state apparatus and compile the findings of the inquiry as preliminary evidence for the investigation and prosecution in a Human Rights Court.

Albert Hasibuan, Chair of the KPP HAM, stated that while there were some problems during the investigation - including intimidation and harassment of investigators - the military proved largely willing to cooperate with the investigation. He attributed this to the TNI being largely unaware of the potential consequences of the investigation (Setiawan 2013, 50). The cooperative stance may have also been informed by an effort from the TNI to regain control over the situation and prevent the case from being heard at an international tribunal (Cammack 2016, 195). This was

[44] Decree of the Chair of Komnas HAM 770/TUA/IX/99.

a plausible outcome because, at the same time that Komnas HAM was conducting its investigation, a UN-mandated Commission was conducting a separate inquiry. This Commission came to similar conclusions as the KPP HAM. Within the United Nations there was significant scepticism whether Indonesia would be able to prosecute the perpetrators. However, it was decided that national courts should be given priority.

The KPP HAM concluded that the Indonesian authorities were responsible for the gross human rights violations that took place between January and October 1999. This included mass murder, persecution, forced disappearances, gender-based violence and the forced movement of civilians. It found evidence that the military, police and civil administration were involved in the creation, support, training and arming of militias that were largely responsible for the violence. The Commission added that the violence was not the result of the inability of the security forces to protect civilians, but a direct result of a "conscious and planned Indonesian effort to terrorise East Timorese independence supporters" (Cammack 2016, 195).

When Komnas HAM's report was published, it caused quite a stir. The report's detail was widely praised, which included a list of those members of the TNI and government that were primarily responsible for the atrocities committed. The KPP HAM recommended the Attorney General's Office to further investigate more than 100 individuals including the four highest-ranking members of the Indonesian Armed Forces. This included General Wiranto, who as Commander of the TNI carried ultimate responsibility (Cohen 2003, 17).[45] Wiranto was subsequently removed as Coordinating Minister of Politics, Law and Security from the Wahid Cabinet (Setiawan 2013, 51).

The Attorney General's Office responded to the Komnas HAM report by forming a team of fifteen prosecutors. They were mandated to investigate five incidents, rather than abuses that occurred throughout 1999. After this investigation, prosecutors charged eighteen defendants, who were prosecuted in twelve trials, with crimes against humanity for acts of murder or assault as part of a systematic attack directed against a civilian population. The defendants were members of the TNI (ranging from the rank of Major General to sub-district Army officers), the Indonesian police, civilian officials and one militia commander. All were charged for acts committed by subordinates based on command responsibility (Cammack 2016, 199).

The ad hoc tribunal for East Timor was established by way of Presidential Decree 53 of 2001.[46] Trials were held between 2002-2003. There was minimal support for the proceedings, which was illustrated by ad hoc judges not being paid for their work for up to nine months (Kompas 2002). Prosecutors barely consulted with the KPP HAM and used little of the documentary evidence gathered by this Commission. In fact,

[45] Other high-ranking members of the Indonesian Armed Forces identified in the report were Lieutenant General Johny Lumintang (Deputy Commander of the Armed Forces), Major General Zacky Anwar Makarim (Director of the Intelligence Service of the Indonesian Army) and Major General (retd.) H.R. Garnadi (Vice Chairperson of the Task Force for the Popular Consultation on Special Autonomy of East Timor).

[46] This Presidential Decree also provided for the establishment of an ad hoc tribunal for Tanjung Priok.

when the indictments were made public it was evident that the Attorney General's Office had constructed a case that was fundamentally different from the findings of the KPP HAM (Cohen 2003, 19). Amongst others, the KPP HAM distinguished between more occurrences and patterns of crimes, applied a wider timeframe and identified more alleged perpetrators.[47]

In so doing, the prosecution in the East Timor tribunal failed to produce sufficient accusative evidence, although this was readily available. The prosecution was also flawed in that it did not presented an account of the violence that was sufficient to justify convictions. In fact, most of the evidence presented was favourable to the defence (Cohen 2003, 13-15). Cammack has attributed this to the prosecutors' unwillingness to charge active military commanders. Prosecutors systematically talked down defendants' contribution to the crimes or presented other justifications. Very little testimony from East Timorese victims was presented, which was favourable to the defendants. The prosecutors also demonstrated little understanding of basic legal concepts, for instance in failing to recognise that a conviction under the command responsibility provision requires evidence of the commission of crimes by subordinates. Overall, prosecutors' arguments largely reinforced the central claims of the defence that the violence had occurred as a result of opposing political factions. As such, the defendants were found not guilty of crimes against humanity (Cammack 2016, 200-202, 207).

Of the eighteen defendants, twelve were acquitted and six were convicted. In four convictions, the sentences handed down were lower than the minimum stipulated in the Law on the Human Rights Courts. In the case of Adam Damiri, who was the most senior military officer to be brought to trial, the prosecutor asked for the defendant to be released. However, the court found that Damiri failed to prevent certain crimes and handed down a sentence of three years. All convictions were subsequently overturned on appeal (see Table 1). The legal process at the Human Rights Courts thus illustrates that there is a gap between procedural and substantive legal values.

Cammack's analysis of the verdicts shows that there is no clear explanation for the different outcomes. He argues that the pattern of convictions (or acquittals) cannot be explained based on the strength of the evidence alone and that the different verdicts resulted primarily from the composition of the panels of judges. For all trials, there was a pool of twenty-three judges, eighteen of whom served on more than one trial. Of these judges, the majority voted consistently to acquit or convict, suggesting that the composition of panels determined the outcome of the trial (Cammack 2016, 208).

[47] For a detailed overview of the discrepancies between the findings of the KPP HAM and those of the Attorney General's Office, see Cohen 2003, 20.

Table 1: Charges, Sentences and Appeals at Indonesia's Human Rights Courts[48]

Trial	Defendant	Charge	Sentence	Appeal
East Timor				
I	Timbul Silaen	10 years, 6 months	Acquitted	Upheld
II	Abilio Jose Soares	10 years, 6 months	3 years	3 years (High Court) Acquitted (Supreme Court)
III	Herman Sedyono	10 years	Acquitted	Upheld
	Liliek Kushadianto	10 years, 6 months	Acquitted	Upheld
	Ahmad Syamsudin	10 years	Acquitted	Upheld
	Sugito	10 years	Acquitted	Upheld
	Gatot Subiyaktoro	10 years, 3 months	Acquitted	Upheld
IV	Asep Kuswani	10 years	Acquitted	Upheld
	Adios Salova	10 years	Acquitted	Upheld
	Leoneto Martins	10 years	Acquitted	Upheld
V	Endar Priyanto	10 years	Acquitted	Upheld
VI	Soedjarwo	10 years	5 years	Acquitted
VII	Hulman Gultom	10 years	3 years	Acquitted
VIII	Eurico Guterres	10 years	10 years	5 years (High Court) Acquitted (Supreme Court)
IX	Adam Damiri	Release	3 years	Acquitted
X	Tono Suratman	10 years	Acquitted	Upheld
XI	M. Noer Muis	10 years	5 years	Acquitted
XII	Yayat Sudrajat	10 years	Acquitted	Upheld
Tanjung Priok				
I	Sutrisno Mascung	10 years	3 years	Acquitted
	Asrori	2 years	Acquitted	Upheld
	Siswoyo	2 years	Acquitted	Upheld
	Abdul Halim	2 years	Acquitted	Upheld
	Zulfatah	2 years	Acquitted	Upheld
	Sumitro	2 years	Acquitted	Upheld
	Sofyan Hadi	2 years	Acquitted	Upheld
	Prayogi	2 years	Acquitted	Upheld
	Winarko	2 years	Acquitted	Upheld
	Idrus	2 years	Acquitted	Upheld
	Mushon	2 years	Acquitted	Upheld
II	Rudolf Butar Butar	10 years	10 years	Acquitted
III	Pranowo	5 years	Acquitted	Upheld
IV	Sriyanto	10 years	Acquitted	Upheld
Abepura				
I	Johny Wainal Usman	10 years	Acquitted	-
II	Daud Sihombing	10 years	Acquitted	-

[48] Compiled from Cohen 2003; ELSAM 2004; International Crimes Database (http://www.internationalcrimesdatabase.org) and KontraS (https://www.kontras.org/data/Matrix%20Putusan%20Pengadilan%20HAM%20di%20Indonesia.htm).

In the judgments, the discussion of law was "uniformly simplistic and imprecise" (Cammack 2016, 209). For instance, the systematic elements of crimes against humanity were equated to the existence of a pattern or similar actions. The judgments did not discuss definitions of crimes against humanity, even if they recognised that civilians were the target of collective violence. In general, there was a disregard of the severity of the crimes committed in East Timor (Cammack 2016, 224).

In the handful of cases that resulted in a conviction, judges credited the testimony of East Timorese witnesses, while discounting that of members of the security forces (Cammack 2016, 212-213). The convictions that were secured were also remarkable considering the close attention the military paid to the trial, including their physical presence in the courtroom, thereby also placing considerable pressure on witnesses. Judges appeared to be largely aware that convictions would most likely not lead to punishment. Despite this, some remained committed to delivering an independent verdict (Cammack 2016, 223).

Despite the commitment of some judges, the ad hoc Human Rights Court for East Timor has been widely and justly criticised for acquitting a majority of those who were brought to trial. In its verdicts, the Courts reproduced the "civil war" narrative put forward by the defendants and the Indonesian authorities (Drexler 2010, 56). The influence of this narrative, together with weak prosecution, meant that the military and political elites could evade responsibility for their role in the violence. As such, procedural legal values did not trigger a change in what Lev has referred to as substantial legal value or new meanings of right and wrong. This pattern would be repeated in other cases heard by the Human Rights Courts.

Tanjung Priok

While the establishment of the East Timor tribunal was strongly influenced by international scrutiny, the Tanjung Priok tribunal was largely the consequence of domestic pressures. Religious sentiments, and particularly the rise of political Islam, played an important role in this development. Islamic organisations started to form political parties and started advocating justice for the Tanjung Priok killings because most of those victimised were Muslim (McGregor and Setiawan forthcoming).

The Tanjung Priok killings took place in September 1984. Local military officers arrested a number of Islamic activists, arguing that they had invited preachers that were critical towards government policies. These activists and preachers were concerned with the drafting of a new law that required all social and religious organisations to adopt the state ideology *Pancasila* as their sole foundation.[49] The arrests caused anger among the local community and hundreds of demonstrators took to the streets. Security force then opened fire on the protestors. It remains unclear how many people were killed, with some estimates putting this as high as 400 deaths (Sulistiyanto 2007, 77; McGregor and Setiawan forthcoming).

[49] Law 3/1985 on Political Parties and Functional Groups. This Law replaced Law 3/1975.

The combination of increased attention for human rights abuses that occurred under the Suharto regime, the resurgence of political Islam, and coalitions between released political prisoners of Tanjung Priok and human rights organisations led to significant pressure on the authorities to address the matter. In September 1998, a Parliamentary team was established to establish the truth about the killings. Victims' groups, supported by human rights organisations, started to voice more strongly their desire for their case to be heard in court (Sulistiyanto 2007, 79).

In December 1998, Komnas HAM announced that it had nearly finalised collecting information on the killings, in which it particularly focused on the roles of Benny Moerdani (at the time Chief of the Armed Forces) and Try Sutrisno (at the time Commander of Jakarta's Military Command). In March 1999, Komnas HAM publicised its recommendation for the case to be heard through the courts. It should be noted that the Commission arrived at this conclusion without establishing a separate investigatory committee. In addition, Komnas HAM announced this well before it established the KPP HAM for East Timor. That a tribunal was then held for East Timor first generated a sense of unfairness amongst those who advocated for the Tanjung Priok case (Sulistiyanto 2007, 79-81).

In February 2000, Komnas HAM established an investigatory commission for Tanjung Priok (*Komisi Penyelidikan Pelanggaran Hak Asasi Manusia Tanjung Priok* or KPP HAM Tanjung Priok). Komnas HAM heard about 90 witnesses, including Moerdani and Sutrisno. They denied giving orders to shoot the demonstrators and argued that the killings occurred because of fighting among the protestors (Sulistiyanto 2007, 82). This largely mirrors the argument put forward in the East Timor trials by the defendants that the violence was the result of a horizontal conflict, rather than one in which the state bore responsibility.

In June 2000, Komnas HAM announced that it had not found evidence of mass killings and that the military had been forced to shoot the protestors as the crowd was uncontrollable. The report thus did not recommend any further legal process. At the same time it urged the government to conduct further investigations and to ask for forgiveness from the public, as well as offer rehabilitation and compensation to the victims and their families. The weak report was attributed by former Komnas HAM member Asmara Nababan to the strong representation of members in the KPP HAM with a background in the security forces (Setiawan 2013, 52). This outcome was deeply disappointing for victims and human rights organisations, while Islamic parties in Parliament rejected the report.

In response, President Aburrahman Wahid ordered the Attorney General's Office to undertake a further report in July 2000, while Komnas HAM also set up a second investigation team. In this investigation, new forensic evidence gathered through the exhumation of graves indicated that the number killed was much higher than estimated by the military. In addition, it was evident that people were killed as they were shot or due to other violence perpetrated by the military. In October 2000 Komnas HAM stated that twenty-three people, including Moerdani and Sutrisno, were suspected of gross human rights violations in Tanjung Priok and recommended for them to be tried at an ad hoc Human Rights Court. In early 2001, the Attorney

General's Office set up a team to deal with the Tanjung Priok investigation. The ad hoc court for Tanjung Priok was established simultaneously with that of East Timor by way of Presidential Decree 53/2001 (Sulistiyanto 2007, 83).[50]

However, there were significant delays in the appointment of ad hoc judges (Kompas 2003) and proceedings in the tribunal for Tanjung Priok did not commence until 2003. In the meantime, senior members of the military led by Try Sutrisno negotiated an *islah*, or form of Islamic reconciliation, with a select number of victims. Sutrisno presented the *islah* as an approach that was more acceptable in a religious (and specifically Islamic) community. The invocation of these cultural arguments, however, served to shield the military from prosecution. As a result of the *islah* agreements and the compensation received by some victims, they subsequently changed or withdrew their testimonies (McGregor and Setiawan forthcoming).

Prosecutors indicted fourteen defendants. They all argued that they were not guilty of crimes against humanity. Instead, they stated that the killings were the result of the protestors clashing, leaving the military with no choice but to open fire. Only two defendants were convicted, with their sentences overturned on appeal (see Table 1). As in the East Timor tribunals, the limited amount of convictions was the result of weak indictments by the prosecution that failed to include the systematic and widespread elements of the crimes. Command responsibility was also overlooked in the indictments, while prosecutors also did not use much of the evidence gathered by Komnas HAM thereby weakening its argument. The legal process was also undermined by intimidation by the security forces, with KOPASSUS (Special Forces) officers attending the hearings (Sulistiyanto 2007, 85-87). The role of the military in undermining legal processes in Indonesia follows a historical pattern (Lev 1972, 271-272; Lev 2007, 242). Taken together, the Tanjung Priok tribunal illustrates that procedural legal values meant very little when the military is involved.

Abepura

The first - and so far, only - tribunal held in the permanent Human Rights Courts is that of Abepura. Being the first, this tribunal sets a precedent for potential future proceedings. The Abepura tribunal is also significant because it dealt with human rights violations in Papua, where the security forces remain largely unaccountable for their actions.

The tribunal concerns the events that started on 7 December 2000, when 300 people armed with traditional weapons attacked the police station near the market in Abepura, Papua. One police officer and two members of the Police Mobile Brigade (Brimob) were killed, while several shops were burned. The police suspected that the attack was conducted by highlanders and retaliated by attacking student dormitories (mainly highlanders) and attacked the sleeping students. The police detained 90, of whom some were tortured and three were killed (Chauvel 2003, 12).

[50] This decree was later in the year replaced by Presidential Decree 96/2001. This new decree specified the location and time frame of the cases, which earlier had been omitted.

In response to the Abepura killings, Komnas HAM established an investigation commission (*Komisi Penyelidik Pelanggaran Hak Asasi Manusia Papua/Irian Jaya* or KPP HAM Papua/Irian Jaya) in accordance with the 2000 Law on the Human Rights Courts. This was a major step towards addressing cases of torture and summary killings in Papua (Hernawan 2016, 83). The process was obstructed by a lack of cooperation by the police and the intimidation of witnesses. When Komnas HAM's team arrived in Papua, the local office of the Ministry of Law and Human Rights sent an official letter that the investigation was illegal, advising the local police not to cooperate. Local police intimidated witnesses who gave testimony to the Commission. When Komnas HAM published its findings in May 2001 the National Chief of Police accused the Commission of being biased (Human Rights Watch 2001, 21).

The report concluded that there was strong evidence of gross human rights violations, including arbitrary detention, restrictions on freedom of movement, persecution based on gender, race and religion, as well as torture and extrajudicial executions. The report identified twenty-four members of the police and Brimob as possible suspects, including senior officers. It recommended for the events in Abepura to be investigated further by the Attorney General's Office with a view of bringing it to trial in a Human Rights Court (Amnesty International 2002, 13-14).

In 2004, proceedings started at the permanent Human Rights Courts in Makassar. The prosecutor only charged two persons out of the twenty-four identified as responsible by Komnas HAM. This weakened the prosecution, as it made it more difficult to prove a chain of command across Papua that affected the violence and identify the facilities in different locations that were used to conduct the operation (ELSAM 2004, 20-21). Both defendants were charged for crimes against humanity including murder, persecution, deprivation of liberty and torture. They were also charged for acts committed by their subordinates based on command responsibility. A significant flaw in the prosecutor's indictment was that while it showed the widespread element of the violations, it did not address the systematic nature of this violence. In fact, the prosecutor failed to define what it understood by "systematic". The omission is problematic because the systematic aspect is necessary to secure a conviction. In ignoring the relationship between the events in Abepura and Indonesian policies on Papua, the prosecutor overlooked the major cause of human rights violations in this area (ELSAM 2004, 17-19).

During the proceedings it became evident that the panel of judges largely lacked an understanding of human rights law. Their knowledge of international law on gross human rights violations was also minimal. The weak indictment may have led judges to be largely unresponsive towards the extraordinary nature of the crimes (Dewi, Niemann and Triatmodjo 2017, 45). The defendants denied having perpetrated, or being responsible for, the gross violation of human rights. Rather, they argued that the violations committed were the result of an attack by Papuans against the Indonesian nation. The statement of one of the defendants, Daud Sihombing, illustrates this:

> "if there were gross violations of human rights in the manner in which the Abepura case was dealt with, this was not [at the hands of] the police but the attackers themselves (*si penyerang itu sendiri*), as the police never committed any attack against anyone. […] Their attack was truly widespread and was prepared and planned beforehand conceptually and systematically […] The police only chased and arrested as part of a *hot pursuit*. […] I should not be brought to this hearing and prosecuted for gross human rights violations, but I should receive an award from the state and be named a national hero. Because I have sacrificed [myself] to protect many people who are threatened and treated by the Papua Merdeka separatists" (ELSAM 2004, 24).

Sihombing's statement uses both the widespread and systematic elements of gross human rights violations, accusing the Papuan population of having committed these crimes. The defendant thus used the argument that the events in Abepura were a horizontal conflict and that the security forces did not perpetrate gross human rights violations. It is suggested that if transgressions occurred, this was because the security forces were left with no other choice. Defendants in the Tanjung Priok and East Timor tribunals had also used this line of argument successfully.

In referring to "separatists", Sihombing framed the event as a threat to the unity of the Indonesian state – a trope that throughout history has been used by military and political elites to justify mass violence (McGregor and Setiawan forthcoming). In portraying victims as subversives, the discourse in effect dehumanises them: as threats to the Indonesian nation, they are unworthy of protection from the law. This process of dehumanisation is powerful and has been systematically used towards Papuans. One witness recalled that when he was beaten in detention a police officer said "your mother eats pig and you have the brains of a pig! Even with your college degree you won't get a job. You Papuans are stupid; stupid and yet you think you can be independent" (Human Rights Watch 2001, 17).

The effect of this was evident when the Court delivered its judgment. Both defendants were acquitted (see Table 1) and victims' claims for compensation, which were brought forward in a simultaneous class action, were also dismissed (Feith 2006). While there were weaknesses in the indictment of the prosecution, the Court failed to address the evidence of human rights violations presented. Therefore, in its decision the Human Rights Court put forward that when human rights violations were used as an instrument of government policy, human rights principles – as guaranteed both by international and national law - were irrelevant.

Conclusions

When the Human Rights Courts were established, there was some hope that these courts would hold perpetrators of gross human rights crimes to account. Yet, these Courts have led to few prosecutions and even fewer convictions. With no cases heard in the past thirteen years, it seems safe to say that Indonesia's Human Rights Courts exist only in name.

There are a number of interrelated reasons why the Human Rights Courts have failed to meet expectations. First, institutional rivalry between Komnas HAM and the prosecutorial services together with the political role of the Attorney General has led to very few cases being pursued by the Attorney General's Office. Only three tribunals were held at the Courts, while many of Komnas HAM's preliminary investigations have been rejected (Setiawan 2013, 2016).[51] Second, in the cases that did proceed to the Courts, the prosecution has left much to be desired. Indictments have been weak, and much of the evidence gathered by Komnas HAM was not taken into account making it more difficult to secure a conviction. Third, in all three tribunals the security forces actively interfered with the legal process through their physical presence during the proceedings. An independent judicial process was therefore difficult to ensure. The presence of the military also illustrates how the security forces used the Human Rights Court to regain influence and power that had been curtailed in the early *Reformasi* period. Fourth, in the three tribunals discussed - for all their differences in time, place and scope - the presiding judges showed limited understanding of the case before them and the legal principles that applied. The Courts disregarded the severity of the crimes that took place and reinforced the narratives put forward by defendants that the violence that took place as a result of horizontal conflicts. This shows that while there appeared to be a greater awareness of international human rights law among legal drafters, the consistent implementation of these norms by judges left much to be desired.

In this chapter, I have used Lev's concept of legal culture as an analytical tool to explore what the role is of the Human Rights Courts in Indonesia today. The elements of procedural and substantial legal values provide a lens through which it is possible to assess the politics of the Human Rights Courts. Procedural legal values refer to the increase of formal law in the area of human rights and the creation of the Human Rights Courts. This resurgence of the importance of legal norms and institutions in the post-authoritarian era served to break with the past, both symbolically and practically. However, this chapter has shown that a close reading of the Law on the Human Rights Courts reveals how these new values were also contested.

The increase in procedural legal values did not translate in a change of substantial legal values. The three tribunals held at the Human Rights Courts show that what was considered "right" and "wrong" was not determined by the human rights values recognised in law, but by political power plays that ultimately served to protect members of the security forces from being held to account. In acquiescing to political values, the Human Rights Courts answer to "a question of convenience unconnected with what is right" (Lev 1972, 301). The Human Rights Courts have served to embed impunity for the security forces and rendered judicial culture subservient to military imperatives, rather than legal process.

Inevitably, this leaves us with the question how to ensure that the Human Rights Courts will set historical records straight and hold perpetrators of gross human rights

[51] This is not to argue that Komnas HAM's investigations have been faultless – in fact, there is ample scope for improvement of the Commission's investigations. However, the main stumbling block in bringing cases of gross human rights violations to court is the Attorney General's Office.

crimes accountable. In answering this question, I once again turn to Lev who wrote that in thinking about how to create a functioning legal system, we first need to understand how this system "was destroyed and what forces counted most in reducing it to rubble" (Lev 2007, 237). As this chapter has shown, the Human Rights Courts are based on a Law that still leaves much to be desired. A much larger challenge are the politics that affect the functioning of the Courts. This is illustrated by a reluctant and weak prosecution that is unwilling to follow up on the reports of Komnas HAM, interference from the security forces and a general lack of understanding of human rights laws and the severity of the crimes heard at the Courts. The task of fundamentally reforming the Human Rights Court, and by extension Indonesia's human rights framework, in order to break the cycle of impunity is immense. This will require much more than legal and political change alone and relies upon deep reform in which human rights norms and processes are taken seriously.

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