Chapter 3

Ordinary Laws and Extraordinary Crimes: Criminalising Genocide and Crimes against Humanity in the Draft Criminal Code?

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Every Thursday since 2007, survivors of human rights violations, their family members and representatives of human rights organisations gather in front of the Presidential Palace in Jakarta. This is Indonesia's longest-running human rights protest, and it is known as Kamisan ('Thursdays'). While initially staged as a protest by those affected by human rights violations under the authoritarian New Order (1965-98), over time the gathering has also offered a platform for protests against more recent violations. The ongoing presence of those directly affected by human rights violations, and their consistent calls to hold perpetrators of serious crimes to account, makes it clear that the Indonesian legal system has largely failed to establish an effective human rights framework.

After the end of authoritarianism in 1998, Indonesia witnessed many political and legal reforms. In the realm of human rights this included the ratification of international treaties, the enactment of domestic laws, the introduction of new mechanisms, and the strengthening of existing institutions charged with the promotion and protection of human rights. However, in practice it has proven to be extremely difficult to hold violators of human rights to account in a court of law. Less than a handful of cases have been heard by the Human Rights Court [1], while the investigations of other cases have come to a standstill at the level of the Attorney General's Office. It is thus evident that Indonesia's criminal justice system has limited ability to adequately respond to serious human rights violations (Clarke 2008; Herbert 2008). It is in this light that proposed revisions to the KUHP (*Kitab Undang-Undang Hukum Pidana*, Criminal Code), which seek to insert new offences of gross human rights violations into the Code, are particularly relevant.

The chapter will start by briefly looking back at serious human rights violations committed under the rule of President Soeharto (1965-98). It then discusses human rights law reforms after 1998, paying particular attention to Law No. 26 of 2000 on the Human Rights Courts. The Law's definitions of the crime of genocide and crimes against humanity will be analysed vis-à-vis their conceptualisations in international law, as well as the processes of bringing human rights crimes to trial. The chapter will then turn to an analysis of the provisions relating to gross human rights proposed in the Draft Criminal Code. While acknowledging that there may be some time before these proposed revisions are codified into law – if at all, the suggested amendments offer a lens through which it is possible to discuss the broader issue of human rights reform in Indonesia, and the prosecution of gross human rights crimes in particular. By placing the proposed amendments in the wider context of human rights reform in Indonesia, and drawing on Otto's (2002) concept of 'Real Legal Certainty', this

[1] Tribunals were held for violations held in the lead-up to, and following, East Timor's independence referendum in 1999, the 1984 Tanjung Priok massacres, and for crimes committed in Abepura in 2003 (Setiawan 2019).

chapter seeks to explore to what extent legal reform may improve accountability for gross human rights crimes.

Gross Human Rights Violations under Indonesia's New Order

The failures of the Indonesian human rights system are perhaps best demonstrated by the fact that twenty years since the fall of authoritarianism, justice is yet to be delivered for crimes committed under the repressive regime of President Soeharto. Both international and domestic human rights organisations have consistently raised the need for Indonesia to provide redress for these victims (Human Rights Watch 2017). Addressing past crimes is widely regarded as a crucial step in a country's transition process to more democratic forms of governance. From this perspective, legal processes are used to forge both a symbolic and actual break with the past. Recently, particular attention has been given to the 1965-66 violence that formed the basis of Soeharto's New Order (Kuddus 2017: 45), largely as a result of domestic and international advocacy.

On 30 September 1965, a group calling itself the 30th of September Movement kidnapped and killed six high-ranking military officers and a lieutenant. The Army Strategic Reserve (Kostrad), under the command of then Major General Soeharto, swiftly suppressed the Movement and attributed the murders to the PKI (Partai Komunis Indonesia, Indonesian Communist Party). Consequently, a violent campaign against members of the PKI and its sympathisers was instigated across Indonesia. It is estimated that the army and army-affiliated militias killed approximately 500,000 people, while an additional 600,000 – 750,000 were detained, often for lengthy periods of time without trial (McGregor 2013: 138). They suffered from inadequate rations, were denied adequate medical treatment, and were subjected to torture and other forms of inhumane treatment, as well as sexual violence. Those who survived persecution in connection with the 1965 violence were denied an array of civil rights upon their release, and suffered systematic discrimination and exclusion in their communities. The persecution of the PKI and its affiliated organisations led to the destruction of the Indonesian political left.[2]

The patterns of the violence used by the military in 1965 and 1966 were replicated in other settings. During the Indonesian occupation of East Timor (1975-99), for example, the military used killings, mass detention, torture, sexual abuse and long-term imprisonment to crush opposition. Similar methods were used against political opposition in territories with separatist claims, such as Papua[3] and Aceh, as well as dissidents (Drexler 2008: 2). Other, 'smaller-scale military attacks on civilians' (Lindsey 2001: 286) included the 1983-5 Petrus (*penembak misterius*, mysterious shooters) killings, in which disguised members of the military abducted and murdered gangsters on the orders of Soeharto (Lindsey 2001: 288); the 1984 Tanjung Priok killings, in which the military opened fire on demonstrators (Sulistiyanto 2007: 77); the 1989 Talangsari case in which the military attacked an Islamic minority group,

[2] Recent scholarship has argued that the annihilation of the leftist movement in Indonesia constitutes a genocide (see, for instance, Melvin and Pohlman 2018). However, the drafters of the Convention on the Prevention and Punishment of the Crime of Genocide (1948) explicitly excluded political groups from its scope (Schabas 2009: 117).

[3] In this chapter, the term Papua is used to refer to the entire western half of the island of New Guinea, which is Indonesian territory. It comprises of the provinces of Papua and West Papua.

killing over 100 (Utami 2017: 52); and the 1997-98 disappearances of twenty-five pro-democracy activists, of whom the fate of thirteen remains unknown (Setiawan 2016: 18). Other examples of military violence during the New Order towards regime critics are the murders of labour activist Marsinah (1996) and journalist Udin (Lindsey 2001: 286).

Indonesians were well-aware of the violence perpetrated by the security forces. Fear and violence were thus constant elements of New Order state and society. Human rights violations were not isolated incidents, but a systematic part of state policy and behaviour towards those considered enemies of the regime (Heryanto and Mandal 2003: 4-6). The final weeks of the New Order regime made this once again clear. Severe violence perpetrated by the security forces erupted across the country and, in particular, in Jakarta. In May 1998, military agents were the key instigators of looting and violence directed particularly at the ethnic Chinese community (Purdey 2006: 127-8). The military also opened fire on student protestors, killing four and wounding nearly 700, in what is known as the Trisakti killings (Setiawan 2016: 24).[4] The violence perpetrated by the military towards the end of the Soeharto regime brought the armed forces into further disrepute and strongly influenced calls, both within Indonesia and abroad, to hold those responsible to account (McGregor and Setiawan 2019).

'Real Legal Certainty' and Gross Human Rights Violations

Until legislative reform in the area of human rights took place after 1998, Indonesian law included very few provisions for the protection of human rights in general. Legal provisions criminalising serious human rights crimes were absent altogether. The 1945 Constitution[5], for instance, included minimal human rights guarantees. Most of these were in Chapter X on citizens (*warga negara*).[6] The inclusion of only very limited human rights guarantees in the 1945 Constitution was the result of the integralist theory of the state, which largely excluded ideas of individual rights.[7] The notion of an integralistic state also gave the President extensive powers over the executive (Lubis 1993; Bourchier 2015). While the colonial era Criminal Code that applied under the New Order - and which still applies today - includes several relevant 'conventional' offenses, including murder, arson, assault, torture, rape, the destruction of property, kidnapping and criminal conspiracy, there were no specific provisions with regards to gross human rights crimes. Moreover, the available

4 The Trisakti killings are usually referred to together with the Semanggi I and Semanggi II cases, although these took place after Soeharto's resignation (Setiawan 2016: 24).

5 From 1949 to 1959, Indonesia mostly adhered to the 1950 Provisional Constitution, which recognised individual rights in relation to the state, including freedom from torture or other forms of cruel, inhuman or degrading treatment or punishment (art. 11). For an extensive discussion, see Lubis 1993: 60-85.

6 These provisions concern citizenship (art. 26), equality before the law (art. 27), freedom of association and speech (art. 28), freedom of religion (art. 29), participation in national defence (art. 30), and the right to education and (art. 31). In addition, art. 34 stipulates that the poor and abandoned children will be looked after by the state.

7 The notion of human rights was, however, not entirely alien to Indonesia. Some drafters of the 1945 Constitution, such as Muhammad Yamin and Muhammad Hatta, believed that it was very important to have provisions on 'citizens' rights' in the Constitution, taking inspiration from the 1776 American Declaration of Independence and the 1787 Bill of Rights (Lubis 1993).

provisions meant little in cases where the security forces were involved. There was thus virtually no legal redress for the abuse of state power against its citizens.

This brings us to a discussion of Otto's concept of 'Real Legal Certainty'. Legal certainty refers to the existence of predictable rules as well as their legal interpretation and application by the judiciary and other law enforcement organisations (Otto 2002: 24). Using this conceptualisation, it is evident that while there were some legal norms during the New Order, they were far from sufficient for the prosecution of gross human rights crimes. In addition, the relevant authorities often did not apply those legal norms that did exist. While this is in itself was a major problem, a more pressing concern was that during the New Order judicial independence was eroded and law became a tool of the state. In such circumstances, Indonesians were unlikely to benefit from formal legal certainty.

People need Real Legal Certainty. This is defined by Otto as the extent to which in a given situation: there are clear, consistent and accessible legal rules issued or acknowledged by the state; these rules are applied by government institutions; citizens' (generally) conform to such rules; the rules are consistently applied by independent and impartial judges in the case of dispute settlement; and these judicial decisions are put into practice. In summary, the existence of Real Legal Certainty can be determined by legal rules, legal institutions and to the wider social context in which they operate (Otto 2002: 25).

Real Legal Certainty is often difficult to achieve because of various factors. Otto has distinguished four categories of so-called 'countervailing forces', namely: social and cultural values; political power structures; the economic interests of powerful groups; and the capacities of the institutions of the state (Otto 2002: 29). While Otto has mainly considered these factors separately from each other, when applied to New Order Indonesia it is evident that they may also overlap. At first glance, political power structures can be identified as undermining Real Legal Certainty, the military's control over politics effectively prevented the application of human rights norms (McGregor and Setiawan 2019). At the same time, military dominance was strongly tied to the economic interests of the ruling elites and the limited power of state institutions. Similarly, the New Order's criticism of the international human rights regime in the 1990s under the banner of 'Asian values' illustrated how notions of cultural particularism were being used as political tools to avoid responsibility for the protection of human rights (Setiawan 2013: 34). As such, it is clear that the factors that negated the chances of Real Legal Certainty under the New Order were intertwined with one another, rather than isolated in one particular category.

Human Rights Reforms after 1998

The resignation of Soeharto in 1998 saw a wave of optimism in both Indonesia and globally regarding the democratic trajectory of the nation, including justice for gross human rights crimes. The question of the criminalisation and prosecution of human rights crimes in Indonesia entered the political and legal arena influenced by domestic and international pressure to address the involvement of the military in violence against civilians (Lindsey 2008: 28). This led to the military's withdrawal from its political role, as well as a number of human rights reforms.

The post-1998 period saw Indonesia's swift acceptance of key international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant of Economic, Social and Cultural Rights (ICESCR). However, Indonesia has not ratified any of the Optional Protocols that allow for individual complaints to be brought to the United Nations. It has also not ratified the Rome Statute, which allows for the prosecution of individuals for gross human rights crimes. Despite these lacunae, human rights norms are now – at least formally - firmly entrenched in the Indonesian legal system.

As a result of these reforms, the relevant framework for the prosecution of human rights violations, in addition to provisions in the Criminal Code that pre-dated 1998, now consists of the amended 1945 Constitution, Law No. 39 of 1999 on Human Rights, and Law No. 26 of 2000 on the Human Rights Court (HRCL).[8] The process of prosecuting gross violations of human rights includes decisions made by, and interactions between, the various institutions and agencies that have been given those responsibilities through the legislation in place. As will be discussed in more detail below, they include the national legislature, the DPR (Dewan Perwakilan Rakyat), the courts, Komnas HAM (Komisi Nasional Hak Asasi Manusia, the National Human Rights Commission) and the office of the Jaksa Agung, the combined Prosecutor General and Attorney General (AGO).[9] The establishment of this extensive framework, in combination with the end of authoritarianism and the retreat of the military in politics, suggested that there was a more conducive environment for Real Legal Certainty.

The first of the new human rights Laws passed in the *Reformasi* era was the Human Rights Law. This includes a provision for the establishment of Human Rights Courts to prosecute gross human rights violations.[10] The Law's Elucidation states that 'Indonesia's history […] has witnessed human rights violations […] of which many fall within the category of gross human rights violations'. It defines these as 'mass killings (genocide), arbitrary or extra judicial killings, torture, enforced disappearance, slavery and systematic discrimination'. The Human Rights Law also determines that specialised courts would be established within four years,[11] and that human rights abuses would be tried by existing courts in the interim.[12]

The large-scale abuses that took place in Indonesian-occupied East Timor[13] in the lead up to, and following, the 1999 independence referendum, triggered increased pressure on Indonesia for a more comprehensive human rights framework in line with international standards (Herbert 2008: 460). This led the Habibie government to issue

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8 The framework nominally also includes Law No. 27 of 2004 on the Truth and Reconciliation Commission, which provides for cases of human rights violations to be settled outside of court. However, in 2006 the Constitutional Court struck down this law, finding it to be unconstitutional. Under the presidency of Joko Widodo, new non-judicial mechanisms have been introduced to deal with past human rights violations. As these mechanisms do not include prosecution, they are not included in this chapter. For a detailed overview of the initiatives introduced under Joko Widodo, see McGregor and Setiawan 2019.

9 For a detailed flowchart, see Herbert 2008: 472.

10 Article 104(1).

11 Article 104(2).

12 Article 104(3).

13 While the country is now increasingly referred to as Timor-Leste, I use East Timor in this chapter, as this is how the Indonesia human rights tribunal dealing with that country referred to it.

an interim emergency Law, Government Regulation in Lieu of Law (Peraturan Pemerintah Pengganti Undang-undang, Perpu) No. 1 of 1999, which was passed in an effort to prevent Indonesia being subjected to an international human rights tribunal (Cammack 2016: 191; Dewi, Niemann and Triatmodjo 2017: 31). The Regulation formed the basis of the 2000 Human Rights Courts Law, which provides for the establishment of permanent human rights courts, as well as ad hoc courts for cases that occurred before the Law's enactment.

Before moving to a discussion of the provisions in the HRCL related to gross human rights violations, it is necessary to briefly discuss the second round of amendments to the 1945 Constitution. These occurred after the enactment of the Human Rights Law and the Perpu, and a few months before the HRCL was passed. This amendment cycle saw the addition of a specific chapter (Chapter XA) on human rights, which was largely modelled on the Universal Declaration of Human Rights (UDHR), once again underlining Indonesia's acceptance of the international human rights regime (Lindsey 2008: 29).

A particular important article in this chapter relevant to the prosecution of human rights crimes is art. 28I(1) or the principle against retroactivity. According to this provision 'the right not to be prosecuted under retrospective laws is a human right that may not be diminished under any circumstances'. The dominant interpretation of this article is that crimes that occurred prior to 2000, and are not included in the pre-existing Criminal Code, cannot be prosecuted. While principles of customary international law hold that gross violations can be prosecuted retrospectively (Clarke 2008: 438), Indonesian civil society organisations have warned that the Constitutional principle against retroactivity could shield perpetrators of human rights abuses from being held to account. I will revisit this constitutional provision vis-à-vis the proposed amendments to the Criminal Code later in this chapter, but will first turn to an examination of these crimes in the HRCL, which to date is the most relevant piece of Indonesian legislation dealing with gross human rights violations and the prosecution of these crimes in a court of law.

Extraordinary Crimes in the Human Rights Courts Law

Law No. 26 of 2000 on the Human Rights Courts defines gross human rights violations (*pelanggaran hak asasi manusia yang berat*) as the crime of genocide and crimes against humanity.[14] The crime of genocide is defined in the HRCL as

> any act committed with the intent to destroy or exterminate (*menghancurkan atau memusnahkan*), in whole or in part, a national, racial, ethnic or religious group, by killing members of the group, causing serious bodily or mental harm to members of the group; deliberately inflicting on the group living conditions to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; or forcibly transferring children of the group to another.[15]

The Law defines crimes against humanity as

[14] Article 7.
[15] Article 8.

> any of the following acts when committed as part of a widespread or systematic attack where it is known that the attack is directly aimed at the civilian population, in the form of: murder; extermination; enslavement; deportation or forcible transfer of the population; deprivation of liberty or other arbitrary deprivations of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or other forms of sexual violence of comparable gravity; persecution of any group or collectivity based on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as prohibited under international law; enforced disappearance of persons; or the crime of apartheid.[16]

The Elucidation of the HRCL sets out that these definitions are based on the 1998 Rome Statute. This is the treaty that established the International Criminal Court (ICC), which has the jurisdiction to prosecute individuals for international crimes of genocide, crimes against humanity, war crimes and the crime of aggression. The latter two crimes have not been included in the HRCL.

The HRCL's provisions on command responsibility also appear to have been based on those in the Rome Statute. This article holds military commanders responsible for crimes committed 'by troops under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces'.[17] This requires evidence that the commander knew, or had reason to know, that a subordinate committed a crime[18] and failed to take measures to prevent or repress them or report the subordinate to the competent authorities for further inquiry, investigation and prosecution.[19] The HRCL also stipulates that police and civilian commanders can be held liable for the actions of their subordinates.[20]

The use of the definitions of international law, and, in particular, the Rome Statute in the HRCL is interesting, considering that Indonesia is yet to sign the Statute. Indonesia's reluctance to become a state party to this treaty has been attributed to government fears that ratification may lead to it being held to account for human rights violations in an international court (HukumOnline 2013).[21] Nevertheless, the fact that the drafters of the HRCL have based its core definitions on the Rome Statute illustrates that international human rights concepts command authority in the Indonesian context. Also, it reflects the demands of legal reform in the immediate post-authoritarian context – in which the Law was drafted – that saw increased pressure on Indonesia to develop a legal framework largely consistent with international norms.

A particular interesting point is that the Elucidation (explanatory memorandum) to the HRCL underlines that gross human rights violations constitute 'extraordinary crimes'.

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16 Article 9.
17 Article 42(1).
18 Article 42(1)(a).
19 Article 42(1)(b).
20 Article 42(2).
21 The ICC does not replace the authority of national courts, and only investigates and prosecutes these crimes where states have proved unable or unwilling to do so. The court only has jurisdiction over crimes when they are committed in in the territory of a state party or committed by a national of a state party.

As such, these crimes 'have a broad impact both at the national and international level and *are not criminal acts that are regulated in the Criminal Code*' (emphasis added). This appears to confirm the view of the drafters of the HRCL that these crimes cannot, or should not, be provided for in the Criminal Code.

The penal provisions in the HRCL include prison sentences of at least ten and no more than twenty-five years for those found guilty of the crime of genocide. Life imprisonment and the death penalty may also be imposed.[22] These punishments also apply to those found guilty of a number of crimes against humanity, namely killing, extermination, deportation or forcible relocation, deprivation of liberty, and apartheid.[23] Those found guilty of enslavement and torture are subject to a minimum of five or maximum of fifteen years imprisonment.[24] Sexual violence, persecution and enforced disappearance are punishable by a minimum imprisonment of ten, and maximum of twenty, years.[25] These penalties are, with the exception of the death penalty, largely consistent with the provisions of the Rome Statute, which state that imprisonment may not exceed a maximum of thirty years and that life imprisonment must be justified by the extreme gravity of the crime.[26]

The Human Rights Courts Law provides for the establishment of two types of courts: the permanent human rights courts for violations that occurred after the HRCL was passed,[27] and the ad hoc courts for cases that occurred before 2000.[28] In the process of bringing cases of gross human rights violations to court, a key role is played by Komnas HAM, which has the sole authority to conduct preliminary investigations (*penyelidikan*).[29] If Komnas HAM is of the opinion that there is sufficient evidence of gross human rights violations, it can forward its findings to the Attorney General's Office, which then conducts the main investigation (*penyidikan*) in such cases.[30] If the AGO's investigation also finds evidence of severe human rights violations, prosecution can take place through a permanent or ad hoc court, depending on when the crimes took place. Because of their special nature, ad hoc courts require approval by the DPR and are formally established by Presidential Decision.[31] While on paper this process appears to be straightforward, in practice it has been convoluted, with limited outcomes.

Human Rights Courts in Indonesia

Since 1998, Komnas HAM has completed many investigations of cases where it suspected the gross violation of human rights. Only three of these cases – East Timor, Tanjung Priok and Abepura – have been heard in a Human Rights Court. One of the main stumbling blocks in this process has been the AGO's reluctance to follow up on Komnas HAM's investigations, using various, and sometimes creative, reasons to justify its inaction.

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22 Article 36.
23 Article 37.
24 Articles 38 and 39.
25 Article 40 (1).
26 Article 77.
27 Article 2.
28 Article 43(1).
29 Article 18(1).
30 Article 20(1), art. 21(1).
31 Article 43(2).

For example, in 2002, responding to Komnas HAM's investigation into the Trisakti, Semanggi I and Semanggi II cases, the AGO claimed that the documents submitted by the Commission were incomplete. After the required documents were delivered, it was argued that Komnas HAM's inquiry was not valid, as the members of the investigation team had not been sworn in. Three years later, the AGO stated it would not open an investigation into the case, as it believed there were no indications of gross violations of human rights, thereby dismissing Komnas HAM's findings altogether. Komnas HAM's investigations into the May 1998 violence and human rights violations in Papua[32] were rejected on similar grounds. In 2006, the AGO stated it would not follow up on Komnas HAM's findings regarding the 1997-8 disappearances of activists until the DPR approved the establishment of an ad hoc court. In 2012, the AGO returned Komnas HAM's reports on the 1965-6 violence and the Petrus killings, arguing that these would be difficult to investigate as they occurred too long ago (Setiawan 2016: 24-5).

The three cases that have proceeded to the Human Rights Courts, have not led to the punishment of violators of gross human rights crimes. The first ad hoc human rights tribunal was held in 2002 and 2003 to try Indonesian officials for crimes committed in the lead-up to, and following, the 1999 independence referendum in East Timor. The Court tried eighteen defendants from the military, the police and the civil administration. They were all indicted for crimes against humanity, specifically murder or assault as part of a widespread, and systematic, attack directed at civilians. They were also charged for acts committed by subordinates. However, only six defendants were convicted at trial and all were eventually acquitted on appeal. Analyses of these trials have shown that the court failed to identify and punish perpetrators (Cammack 2016: 191).

The ad hoc Human Rights Court for East Timor increased calls to address human rights crimes that occurred in Indonesia. Influenced by the rise of political Islam in the early *Reformasi* period, victims and survivors of the 1984 Tanjung Priok case called for trials of military commanders who served at the time. An ad hoc Human Rights Court for Tanjung Priok was held between 2003 and 2004. Fourteen defendants were indicted for crimes against humanity. Only two were convicted (to three and ten years imprisonment respectively), but even these were overturned on appeal (Sulistiyanto 2007: 88).

A similar pattern was discernible in the Abepura tribunal,[33] which was the first and only case to be heard at a permanent Human Rights Court. Proceedings were held between 2004 and 2005 in the court in Makassar, where only two defendants stood trial, far less the twenty-four persons identified by Komnas HAM in its investigation as being responsible for the crimes committed. Both defendants were indicted for crimes against humanity, including murder, assault and torture. They were not held responsible for crimes committed by their subordinates, although testimonies of

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32 These are the cases of Wasior (2001) and Wamena (2003).

33 On 7 December 2000, an unidentified group of people attacked the police headquarters in Abepura, Papua. In this attack, two police officers and a security guard died. Brimob (Korps Brigade Mobil, Mobile Brigade Corps) paramilitary police troops retaliated by attacking civilians. The investigation by Komnas HAM stated that these attacks led to the deaths of two persons and 105 were tortured (Elsam 2004: 4-5)

survivors clearly identified the chain of command (Elsam 2004: 10-11). The court acquitted both men and victims' claims for compensation were also dismissed (Feith 2006).

In short, the cases heard by the Human Rights Courts have been unsuccessful, as in all proceedings only a few convictions were secured, and all were eventually overturned on appeal. This has been largely attributed to weaknesses in the prosecution. In all three cases, discrepancies existed between the findings of Komnas HAM's investigations and the charges that defendants faced. The proceedings were also influenced by the presence of security forces during hearings, intimidating victims who gave testimony, and possibly also judges (Elsam 2004; Sulistiyanto 2007; Cammack 2016). By holding the lower- and middle-ranked officials to account, the courts have largely ignored the element of command responsibility. As such, it is evident that the Indonesian military has been able to operate largely without reference to law (Fitzpatrick 2008).

While the HRCL codified gross human rights crimes in Indonesian law and established a new mechanism for the prosecution of such serious offences, in practice this Law has been largely ineffective. The repeated refusal of the Attorney General's Office to follow up on investigations by Komnas HAM, the minimal amount of cases heard by the courts, and the outcomes of trial proceedings have preserved impunity, rather than broken it. This is the result of a number of intertwined factors, such as weaknesses in the prosecution, as well as significant external pressure on the court and witnesses, including from the military. The legal process in this regard is also weakened by endemic corruption and a lack of independence of judges (Clarke 2008: 433; Herbert 2008: 459).

In addition, the HRCL itself has also contributed to these outcomes because of a lack of clarity in some of the Law's provisions. The HRCL, for instance, does not specify exactly what evidence Komnas HAM needs to present to the AGO or whether the Commission's investigators need to be sworn in (as is the case for AGO investigators). In the case of the ad hoc courts, the Law does not explicitly state whether an investigation by the AGO should be preceded by the establishment of an ad hoc court or followed by it. These loopholes in the Law have provided the AGO with reasons to postpone further investigations or abandon them altogether.

The ambiguities in the HRCL illustrate that there are insufficient clear and consistent legal rules when it comes to the prosecution of gross human rights violations. In addition, the implementation of the HRCL, as well as broader goals of human rights reform, are undermined by various factors, including a weak judicial system and the ongoing influence of powerful interest groups, particularly the security forces (Setiawan 2016: 23-8). These 'illiberal' forces are unlikely to withdraw from the socio-political context; in fact they appear to have been gaining traction (McGregor and Setiawan 2019). This poses significant challenges for achieving Real Legal Certainty, which is dependent on a state and society 'oriented towards a legal system, and a legal system that has succeeded in being the major normative frame of reference' (Otto 2002: 25).

Extraordinary crimes in the Draft Criminal Code

The failure of the existing human rights framework to deliver justice for gross human rights violations underlines the necessity for legal reform in this area. Both Komnas HAM and human rights organisations in Indonesia have long advocated for amendment of the 1999 Human Rights Law and the 2000 HRCL. While both laws have been included in the 2015-9 Prolegnas (*Program Legislasi Nasional*, National Legislation Program), it does not appear that amendment of these laws is imminent. Instead, it is proposed that gross human rights violations will be introduced in the new Criminal Code. As discussed earlier in this chapter, the KUHP is limited in its capacity to enable the prosecution of gross human rights violations. It does not include provisions on crimes against humanity or the crime of genocide, nor does it criminalise command responsibility, a crucial element for holding the architects of gross violations to account. As such, the Criminal Code as it stands is of little relevance for the prosecution of serious human rights crimes.

A key driver for the revision of the Criminal Code is the desire of lawmakers to include all criminal acts in an effort to comprehensively codify Indonesian criminal law. It is from this perspective that gross human rights violations were also included in the Draft. In this section I will discuss the Draft Code's provisions on gross crimes against human rights that have been included in Chapter IX of the second book. This chapter identifies gross human rights crimes as the crime of genocide (art. 400), crimes against humanity (art. 401) as well as crimes committed in times of war or armed conflict (art. 402). Furthermore, art. 403 states that when these crimes occur, those in command (military, police or otherwise) are responsible for crimes committed by their subordinates.

The Draft Criminal Code defines genocide as acts 'exclusively aimed at denying the existence of a societal group based on skin colour, religion, gender, age or physical or mental disabilities'. [34] The Draft Criminal Code determines that this crime is punishable

> by death or life imprisonment, or imprisonment of at least five years and at most twenty years, [for] every person who committed with the intent of destroying of eliminating whole or in part of a national, racial, ethnic or religious group: killing members of the group, causing serious bodily or mental harm to members of the group; inflicting on the group conditions of life calculated to bring about its physical destruction whole or in part; imposing measures to prevent births within the group; forcibly transferring children of the group to another group.[35]

The next article (art. 401) stipulates that crimes against humanity attract the same penalties. It defines crimes against humanity in line with the provisions in the HRCL, adding to the list of offenses 'other inhuman acts that are similar to those that lead to either severe mental or physical suffering'.[36] For both the crime of genocide and crimes against humanity, the Draft Code determines that any person aiding and abetting in such crimes will be subject to the same punishments.[37]

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34 Elucidation to the Draft Criminal Code.
35 Article 400.
36 Article 401(1)(k).
37 For the crime of genocide: art. 400 (2); for crimes against humanity: art. 401(2).

In addition to crimes against humanity and the crime of genocide, the Draft Criminal Code also identifies crimes committed in times of war or armed conflict (*tindak pidana dalam masa perang atau konflik bersenjata*) as a gross human rights violation. These crimes include

> killing; torture or inhuman treatment, including biological experiments; causing great suffering or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or other protected persons to serve in the forces of a hostile power; to deprive prisoners or other protected persons of the rights to a fair and regular trial; unlawful eviction or deportation, transfer, or unlawful confinement; or the taking of hostages.[38]

These offenses, too, are punishable by death, life imprisonment or a prison sentence of at least five, and at most twenty, years.[39] The inclusion of crimes committed in war or armed conflict broadens the scope of gross human rights violations compared to that in the HRCL. This is negated by art. 405, however, which states that the provision does not apply to situations 'related to internal tensions, such as riots, violence that is separate and sporadic in nature or other acts that have similar characteristics'. The provision will therefore not be able to be applied to one of Indonesia's most pressing human rights concerns: crimes in internal armed conflict.

The Draft Criminal Code also includes provisions regarding command responsibility. Article 403 stipulates 'a military commander or person effectively acting as a military commander shall be held criminally responsible for gross human rights crimes'.[40] This includes cases where the military commander knew, or should have known, that the forces were committing or about to commit such crimes,[41] and where he or she failed to take all necessary measures to prevent these acts, or to bring the matter to other authorities for investigation and prosecution.[42] Similar provisions apply to 'superiors, whether from the police force or other civil groups'.[43] Commanders found guilty of these crimes may be subjected to the death penalty, life imprisonment, or a prison sentence of at least five years and not more than twenty years.[44]

There are a number of differences between the provisions in the Draft Criminal Code and the HRCL. This is particularly evident in the addition of crimes committed in times of war and armed conflict, which are currently not offences under the HRCL. The HRCL, however, requires 'malicious intent' (*permufakatan jahat*), a term absent from the Draft Criminal Code. This is a significant omission, as the element of intent is a key element of international law on the crime of genocide (Schabas 2009: 241). The main differences are, however, the penalties for gross human rights crimes, which with regard to imprisonment have been lowered in the Draft Criminal Code (see Table 1). The Draft Criminal Code also applies the same penalties to all gross violations of

38 Article 402.
39 Article 402.
40 Article 403(a).
41 Article 403(a)(1).
42 Article 403(a)(2).
43 Article 403(b).
44 Article 403.

human rights, while the HRCL applies different penalties for crimes against humanity.

Table 1: Penalties for gross human rights crimes in Law No. 26 of 2000 on the Human Rights Courts and the Draft Criminal Code

	Law No. 26 of 2000 on the Human Rights Courts	Draft Criminal Code
Crime of genocide	Capital punishment, life imprisonment or a prison sentence between ten and twenty-five years	Capital punishment, life imprisonment or a prison sentence between five and twenty years
Crimes against humanity	Capital punishment, life imprisonment or a prison sentence between ten and twenty-five years for murder, extermination, deportation or forcible relocation, deprivation of liberty and apartheid. A prison sentence between ten and twenty years for sexual violence, persecution and enforced disappearance. A prison sentence between five and fifteen years for enslavement and torture.	Capital punishment, life imprisonment or a prison sentence between five and twenty years
Crimes committed in times of war and armed conflict	-	Capital punishment, life imprisonment or a prison sentence between five and twenty years
Command responsibility	Penalty in accordance with the crimes committed.	Capital punishment, life imprisonment or a prison sentence between five and twenty years

The Elucidation to the Draft Criminal Code states the crimes included in this chapter have been modelled on international law. Specifically, it states that the definition of the crime of genocide was based on the International Convention on the Prevention and Punishment of the Crime of Genocide (1948), whereas the definition of war crimes is based on the 1949 Geneva Convention for the Protection of Victims of War. The Elucidation states that these conventions are relevant to Indonesian law, as Indonesia is a member of the United Nations and therefore bound by its statutes. This perhaps explains why the Elucidation does not mention the Rome Statute, to which Indonesia is not a party. Yet, the fact that there is no reference to the Rome Statute is puzzling, as it can be regarded as a more recent international standard on gross human rights violations. It was also crucial in informing the draft of the HRCL, regardless of Indonesia's ratification status, and the wording of the provisions of the Draft Criminal Code are very similar to those in the Rome Statute.

The Elucidation also states when the provisions on gross human rights violations do not apply. This includes 'acts that are aimed at the assimilation of those groups into Indonesian society, for instance through education, guidance, and others, to raise their

living conditions so they can play an appropriate role in societal life'.[45] Should the Draft Criminal Code be passed in its current form, this provision may serve to preclude the prosecution of human rights crimes that occur in less developed parts of Indonesia, specifically Papua. Here, the government has long claimed that its actions are in the interest of the development of Papua within the context of the Indonesian state.

While acknowledging that these provisions have not been enacted yet, and taking into account the lengthy process of criminal law reform in Indonesia, the proposed inclusion of gross human rights violations, or the so-called extraordinary crimes of international law, in the Criminal Code should prompt serious reflection on what these additions may mean for the prosecution of human rights crimes. Komnas HAM has been critical of these proposals, and Commissioner Roichatul Aswidah (who between 2012-7 was also chair of the Commission's team with regard to past human rights violations) has stated that 'extraordinary crimes have a special character and are different from ordinary crimes' (Kompas 2017). As such, Komnas HAM is of the opinion that 'the inclusion of these crimes in the Draft Criminal Code reduces their character from extraordinary to ordinary crimes' and has the potential to entrench impunity. The Commission instead argued for the enactment of a new Law on Gross Human Rights Violations to replace the HRCL (Suara 2017). This Law would also detail the process of investigating and prosecuting gross human rights violations, addressing some of the problems that have arisen between Komnas HAM and the AGO. The positioning of Komnas HAM with regard to the provisions in the Draft Criminal Code has been shared by many NGOs, such as those in the National Alliance for the Reform of the Criminal Code (Aliansi Nasional Reformasi KUHP), who also argue that amendments to the HRCL would be more appropriate.

In addition, the proposed provisions have the potential of creating a two-track method for prosecuting gross human rights violations: through the 2000 Human Rights Courts Law and the Criminal Code. While prosecutions under the Criminal Code may offer a 'fall-back position' (Herbert 2008: 460) where such endeavours fail through the HRCL, the inconsistencies between the provisions in the Criminal Code and the HRCL pertaining to punishments are highly problematic. Furthermore, additional problems may arise considering the hierarchy of laws and the relationship between the Criminal Code, the HRCL and the Constitution. Of particular concern would be how the new provisions in the Criminal Code relate to the Constitutional principle against retroactivity and, in particular, whether Indonesia would follow international interpretations that gross human rights crimes can, in fact, be prosecuted retrospectively. The proposed additions to the Criminal Code regarding serious human rights crimes thus appear to muddy the waters even further.

Conclusion

The proposed inclusion of gross human rights violations in the Draft Criminal Code has been mainly driven by a desire to fully codify Indonesian criminal law, rather than to improve the prosecution of serious human rights crimes. The proposed amendments to the Draft Criminal Code are largely consistent with international and national law where it concerns the definitions of gross human rights violations and

45 Elucidation on art. 400.

also include crimes of war and aggression, which at present are not offences under Indonesian law. However, this chapter has also outlined some inconsistencies between the proposed additions to the Criminal Code and Law No. 26 of 2000 on the Human Rights Courts, most importantly in terms of penal provisions. Moreover, concerns have been raised about the potential incorporation of these extraordinary crimes in Criminal Code. This includes what has been labelled as the 'degradation' of the special characteristic of gross human rights violations, as well as uncertainties that may emerge as a result of a two-track system for the prosecution of human rights crimes. As such, the inclusion of gross human rights crimes in the Criminal Code will most likely not contribute to holding those accountable for human rights violations to account.

This chapter has placed the proposed inclusions of gross human rights violations in the Draft Criminal Code in the broader context of human rights reform in Indonesia. It has used the concept of Real Legal Certainty as an analytical tool to discuss to what extent laws and legal reform contribute to bring perpetrators of past human rights crimes to justice. The presence or absence of Real Legal Certainty can be attributed to legal rules, institutions, and the wider contexts in which they operate. This reflects the fact that the effective implementation of laws is dependent on multiple factors. While the existence of clear legal norms is important for attaining Real Legal Certainty, it is also dependent on the consistent application of these rules by government institutions and the judiciary. Citizens, too, need to conform to these rules as much as possible. At the same time, that process is both supported and negated by various factors, including the interests of powerful groups and the capacities of state institutions. While on paper the powers of state institutions involved in the promotion and protection of human rights have been significantly strengthened in the post-authoritarian period, in practice this has barely translated into meaningful change. This can, in part, be attributed to weaknesses in legal drafting, as illustrated by the complicated process of prosecuting gross human rights violations. However, what has been more concerning in the Indonesian context is that powerful interest groups and, in particular, the military continue to yield significant power over the legal process, resulting in persisting impunity.

In a context where it is evident that the law and legal institutions cannot be used instrumentally to effect change, the addition of gross human rights crimes to the Draft Criminal Code has little meaning. Should these changes be passed they will only further weaken the human rights framework. For any reforms to have the desired effect – to come to a situation where human rights norms are recognised in law, where the state and its agencies refrain from infringing on these rights, and where there is redress should these infringements occur – substantial political, social and ideological change is required.

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