Post-Conflict Justice in Southeast Asia: The Limited Impact of the Rome Statute on Indonesia and in the Region

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This paper discusses the evolving trends on post conflict justice in Southeast Asia, especially with regard to the direct or indirect impact of the Rome Statute. We find three patterns – those which are non-State parties to the Rome Statute but demonstrate the influence of international criminal law on domestic mechanisms, such as Indonesia. We highlight the practices that reflect the influence from the Rome Statute and also explore those which deviate from it. For State parties to the Statute, Cambodia is currently conducting the Khmer Rouge Trials in the hybrid Extraordinary Chambers in the Courts of Cambodia (ECCC). And third, we have States like Malaysia and the Philippines which have very recently moved towards the ratification or accession of the Rome Statute. Here, we examine what the motivations might be and how this might influence the neighboring countries and the Association of Southeast Asian Nations (ASEAN) to gradually accept the de facto and de jure influence of international criminal law as enshrined in the Rome Statute.

Introduction

The International Criminal Court (ICC) has come a long way in complementing national justice mechanisms in addressing post conflict situations. Since the entry into force of the Rome Statute of the International Criminal Court (Rome Statute) on 1 July 2002,[1] the number of States that have ratified the Statute has reached 114.[2] Nine years after its establishment, the ICC has exercised its jurisdiction to investigate and try crimes against humanity and war crimes that were alleged to have occurred in Uganda,[3] Democratic Republic of the Congo (DRC),[4] Central African

[1] Rome Statute of the International Criminal Court (Rome Statute), 17 July 1998, 2187 UNTS 90/37 ILM 1002 (1998)/[2002] ATS 15, <www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf> visited on 12 April 2011.

[2] UN Treaty Collection, *Rome Statute of the International Criminal Court*, Status as 12 October 2010 (ICC Ratification and Accession Status), http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en visited on 12 April 2011.

[3] The situation concerning the Lord's Resistance Army in Uganda was referred to the ICC Prosecutor by the Ugandan President, Yoweri Museveni in December 2003. ICC, *Situation in Uganda*, ICC-02/04, Referral, 29 November 2004, <www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0204/Uganda.htm> visited on 12 April 2011.

[4] In 2004, the President of the Democratic Republic of Congo (DRC), Joseph Kabila, referred the situation of crimes under ICC jurisdiction that allegedly took place anywhere in the territory of the DRC to the ICC Prosecutor. ICC, *Situation in Democratic Republic of Congo*, ICC-01/04, Referral, 19 April 2004, <www.icc-

Republic (CAR),[5] Darfur,[6] Republic of Kenya,[7] and, recently, the situation in Libyan Arab Jamahiriyah.[8] After the first Review Conference in mid-2010, in compliance with Article 5(2) of the Rome Statute, the Assembly of States Parties has expanded the ICC's jurisdiction to cover the crime of aggression from 1 January 2017.[9]

Despite earlier doubts that the ICC would not be able to live up to expectations, the Court has steadily gained credibility in the international community. Apart from the increasing number of States ratifying the Rome Statute, the two referrals made by the United Nations Security Council (UNSC) on the situations in Darfur[10] and Libya[11] to the ICC also serve as important indicators of international support for the ICC. This is rather remarkable since, out of the all the permanent five members of the UNSC, only Britain and France are party to the Rome Statute while the incumbent powers of the developed and developing world – China, Russia, and the US – remain non-party to the Rome Statute.[12]

It might be observed that there are some states which are not party to the Rome Statute that are taking steps to enhance their domestic legislation, thereby demonstrating that they are

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cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/recent%20updates?lan=en-GB> visited on 12 April 2011.

[5] In 2005, the Government of the Central African Republic (CAR) referred the situation of crimes under ICC jurisdiction that allegedly occurred anywhere on the CAR territory to the ICC Prosecutor. ICC, *Situation in the Central African Republic*, ICC-01/05, Referral, 7 January 2005, <www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0105/Central+African+Republic.htm> visited on 12 April 2011.

[6] The UNSC referred the situation in Darfur concerning the crimes under ICC jurisdiction that allegedly occurred in Darfur since 1 July 2002. The UNSC referred the Darfur situation to the ICC Prosecutor in 2005 through the adoption of UNSC Resolution 1593 (2005). ICC, *Situation in Darfur, Sudan*, ICC-02/05, Referral, 31 March 2005, <www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/darfur%20sudan?lan=en-GB> visited on 12 April 2011.

[7] The investigation on the Kenyan 2007 – 2008 post-election situation was launched based on the Prosecutor's *proprio motu* in accordance with Art. 15(1) of the Rome Statute and approved by the Pre-Trial Chamber II in 2010. ICC, *Decision Pursuant to Article Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, Pre Trial Chamber II, ICC-01/09-19, 31 March 2010, <www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200109/court%20records/chambers/pretrial%20chamber%20ii/19?lan=en-GB> visited on 12 April 2011.

[8] The situation in Libya was referred recently by the UNSC to the ICC Prosecutor through the adoption of UNSC Resolution 1970 (2011). The UNSC refers the situation on the occurrences of alleged crimes under ICC jurisdiction that took place in Libya since 15 February 2010. ICC, *Situation in the Libyan Arab Jamahiriya*, Referral, ICC-01/11, 26 February 2011, <www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/> visited on 12 April 2011.

[9] Assembly of State Parties, *Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*, Resolution RC/Res.6, 13th Plenary Meeting, 11 June 2010, Annex I, Art. 15bis(3), p. 19.

[10] Darfur Situation, *Supra* note 6.

[11] Libya Situation *Supra* note 8.

[12] ICC Ratification and Accession Status, *Supra* note 2.

willing and able to investigate, prosecute, and try perpetrators of crimes in line with those under the jurisdiction of the ICC, which are, namely, genocide, crimes against humanity, war crimes, and the crime of aggression.[13] This trend is occurring in Southeast Asia.[14] Notwithstanding the fact that Southeast Asia is greatly under-represented at the ICC, the region offers interesting insights on the implementation of international criminal law. In the past years, Philippines and Malaysia have been quietly and steadily moving towards complying with the provisions of the Rome Statute with the express aim of ratification of or accession to the treaty. Even more radically, Indonesia, a non-party to the Rome Statute, has shown an unexpected compliance in line with the provisions of the Rome Statute in dealing with its domestic issues of post-conflict justice. Most widely known, of course, is what is being carried out in Cambodia. Cambodia was the first Southeast Asian state to ratify the Rome Statute[15] and is now conducting the Khmer Rouge trials in its hybrid tribunal – the Extraordinary Chambers in the Courts of Cambodia (ECCC).

Given the three disparate but converging paths Southeast Asian states are forming towards the acceptance and exercise of international criminal law in domestic jurisdictions, this paper will focus on the handling of post conflict justice in the region, emphasizing the explicit and implicit influence of the Rome Statute, particularly on Indonesia. The authors recognize that Cambodia is also an important case study as it demonstrates the interplay of international and municipal criminal law in a hybrid tribunal in one of the most horrific conflicts in Southeast Asian history. However, given the historical, social, political, and legal complexities, as well as the language barriers, the authors are unable to adequately analyze Cambodia in great detail to be able to do it justice within the confines of this thesis. A seminal study on the implementation of the Rome Statute in Cambodian law remains the 2006 report of the same name by the International Federation of Human Rights.[16] In addition, given that international criminal justice is still a relatively new concept in Southeast Asia, the examination of international criminal law issues for the region remains largely descriptive yet analytical. While emerging patterns are being observed, a lot more fieldwork and study needs to be done by a greater pool of scholars and practitioners before theoretical and normative dimensions of international criminal law can be framed with respect to Southeast Asia. It would be premature and perhaps even erroneous to do so otherwise, given that the East Timor trials and the first ECCC judgment on Duch are most definitely not conclusive.

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[13] Rome Statute, A.5(1).

[14] Southeast Asia comprises of eleven States – Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Timor Leste, and Vietnam. All, except Timor Leste, are members of the Association of Southeast Asian Nations (ASEAN).

[15] Cambodia remains the sole Association of Southeast Asian Nations (ASEAN) member state who is party to the Rome Statute. Philippines and Malaysia have indicated their ratification/accession to the treaty in the near future. Timor Leste, not a member of the ASEAN international organization, was the second Southeast Asian state to ratify the Rome Statute.

[16] *Implementation of the Rome Statute in Cambodian Law*, Report of the International Federation of Human Rights, March 2006, No. 443/2, at <www.fidh.org/IMG/pdf/cambodge443angformatword.pdf> visited on 1 May 2011.

This paper can be divided in two parts. The first section discusses the alleged crimes, as classified in the Rome Statute, which occurred in Indonesia. We examine how Indonesia deals with them, highlighting the practices that reflect the influence from the Rome Statute and those which deviate from it. The second section of this paper analyses the recent development in ASEAN and its ten member States and how it might influence the region to move towards the ratification or accession of the Rome Statute, special attention will be given to Malaysia and the Philippines since they have moved towards acceding and ratifying the Rome Statute.

Indonesia

Indonesia is probably the only country in Southeast Asia that has expressly acknowledged that crimes against humanity,[17] a crime stipulated in the Rome Statute,[18] has occurred in its territories in the past. The most violent period in modern Indonesian history was during the Soeharto dictatorship(1967–98) where extrajudicial killings, torture, disappearances were common, agents of the state acted with impunity, freedom of expression was severely curtailed, and those who tried to demand accountability and information about the abuse of state power were in turn dealt with harshly. It is believed that "almost every Indonesian has a family member, relative, or acquaintance who is a victim of state violence".[19]

It was unsurprising therefore that the end of the Soeharto regime in 1998 was met with a kind of political and democratic renaissance where people took to the streets in protest against the status quo. Decades of pent-up injustice and anger over the state abuse of the civilian population came to the fore. For the first time, the Indonesian people had access to information about the widespread human rights violations in various parts of their country. Their new sense of freedom from oppression after the downfall of Soeharto compelled the Habibie government to investigate and try perpetrators of those crimes. With regard to the East Timor conflict, Indonesia was under high pressure from the international community to establish an international human rights tribunal to try the perpetrators of international human rights and humanitarian law violations in the wake of the recommendations of the UN Commission of Inquiry on East Timor in 1999.[20]

As a result, Indonesia therefore implemented domestic post-conflict justice measures which, while laudable in attempt, if viewed critically and objectively, were not too successful and could

[17] President of the Republic of Indonesia, President Statement Addressing Victims of May 1998 Violence, 15 July 1998, attached in Seri Dokumen Kunci 2, Komnas Perempuan, October 2002, p. 119, <www.komnasperempuan.or.id/publikasi/Indonesia/Seri%20Dokumen%20Kunci/2%20SERI%20DOKUMEN%20KUNCI%202.PDF> visited on 12 April 2011.

[18] Rome Statute, A.7.

[19] Hilmar Farid and Rikardo Simarmata, *The Struggle for Truth and Justice: a Survey of Transitional Justice Initiatives throughout Indonesia*, Occasional Paper, International Center for Transitional Justice, January 2004, p. 20.

[20] United Nations Office of the High Commissioner for Human Rights, *Report of the International Commission of Inquiry on East Timor to the Secretary General*, Res 1999/S-4/1 of 27 September 1999, par. 153.

even be seen as travesties of justice in some instances. First, to appease international and domestic expectations, the Indonesian Government established numerous independent fact-finding teams.[21] Second, Indonesia enacted a series of laws which attempted to mete out punitive justice by establishing the first national human rights court. The most significant of these laws was (and remains) *Law No. 26 of 2000 on the Human Rights Court* (*Law No. 26/2000*).[22] Law 26/2000 adopted the Rome Statute's provisions and established a permanent human rights court to ensure the criminalization of the crimes under Rome Statute in Indonesia's criminal law.[23] Indonesia even went as far as to apply retroactive jurisdiction on acts that took place prior to the establishment of the national human rights court.[24]

Pinning its hopes on democracy, freedom, and human rights, Indonesia entered a phase that can only be described as "euphoric". Having a judicial platform that promised to redress past injustice, the Indonesian people pressed the government to investigate the human rights abuses committed by state agents in the preceding years. In the period between 2000 and 2006, the Indonesian National Human Rights Commission (Komnas HAM) had submitted at least six reports on alleged past abuses conducted by the authorities against civilians to the Indonesian Attorney General Office (AGO).[25] Three cases proceeded to the human rights court, in which two cases were examined in ad hoc human rights courts[26] and the other was tried by the permanent human rights court.[27]

The judicial mechanism that has been established to address post conflict justice in Indonesia is proving to be quite a challenge to the Indonesian Government and judiciary. The handling of post conflict justice for Indonesian provinces such as the former East Timor, Nagroe Aceh Darussalam, and Papua is still considered insufficient due to significant gaps in domestic legislation, e.g., the annulment of Law No. 27 of 2004 concerning National Commission for Truth and Reconciliation that leaves a legal vacuum since the Special Autonomy Laws in Aceh and

[21] There are two primary ways in which the Indonesian government can establish fact-finding teams to probe past human rights violations – (1) the adoption of Parliament or Presidential Decrees, or (2) in accordance with the mandate of Komnas HAM.

[22] Republic of Indonesia, Law No. 26 of 2000 concerning the Establishment of the Human Rights Court, State Gazette No. 208, 23 November 2000.

[23] Ibid., Elucidation, Art. 7

[24] Ibid., Elucidation, Part. I, par. 9.

[25] ICTJ and Kontras, *Derailed: Transitional Justice in Indonesia since the Fall of Soeharto*, Joint Report by ICTJ and Kontras, 7 April 2011, pp. 39 – 41.

[26] Presidential Decision No. 53 of 2001 on the Establishment of Ad Hoc Human Rights Court within the District Court of Central Jakarta as amended by Presidential Decision No. 96 of 2001, State Gazette No. 111, 1 August 2001. Art. 2 of this Presidential Decision stipulates the establishment of two ad hoc human rights court to try alleged violations taking place in Liquica, Dili, and Soae (East Timor) in April and September of 1999 and in Tanjung Priok in September 1984.

[27] Abepura incident (Papua) was the first case ever proceeded to the Indonesian permanent human rights court in Makassar in 2002.

Papua require the establishment of Truth and Reconciliation Commissions that should be governed by Law No. 27 of 2004.[28]

It must be borne in mind right from the outset that the rule of law is weak in Southeast Asia, both domestically in the individual states and regionally in the ASEAN institution. Hence the judiciary and legal mechanisms are unable to adequately ensure justice. The civil and political infrastructure must be constructed to ensure efficacy, political will emanating from the executive and legislature is critical for the people's access to justice.

Law No. 26/2000, the Rome Statute, and the Human Rights Courts of Indonesia

Law No. 26/2000 is the cornerstone of the Indonesian Government's efforts to ensure the adjudication of post conflict justice domestically after the fall of Soeharto's New Order regime.[29] Fully enforced by the time of President Abdurrahman Wahid's administration on 23 November 2000, it established a special chamber within the already-existing Court system to be the permanent human rights court of Indonesia.[30] While the trials of alleged cases of past human rights abuses that took place prior to the enactment of Law No. 26/2000 are conducted by ad hoc human rights courts, the trials of alleged crimes that happen after the enactment of Law No. 26/2000 shall be conducted by the permanent human rights court. Article 45(1) stipulates that there should be four establishments of human rights court in the District Court of Central Jakarta, Surabaya, Medan, and Makassar. Each human rights court has jurisdiction in West, Central, and East part of Indonesia respectively.[31] Cases of the pre and post-referendum violence in East Timor (1999) and Tanjung Priok incidence (1984) were tried before the *ad hoc* human rights court in Central Jakarta. Meanwhile, there was only one case that ever proceeded to the permanent human rights court in Makassar concerning the Abepura incident in 2001.

[28] Republic of Indonesia, Law No 27 of 2004 concerning the National Commission for Truth and Reconciliation, State Gazette No. 114, 6 October 2004. Later on it was nullified by the Constitutional Court in the end of 2006 through the Decision of the Indonesian Constitutional Court on the Invalidation of Law No. 27 of 2004 on Truth and Reconciliation Commission, No. 006/PUU-IV/2006, 7 December 2006, pp. 120 – 131.

[29] Beginning with *Law No. 39 of 1999 on Human Rights* which was followed by the *Government Regulation in Lieu of a Law No. 1 of 1999*, these laws were soon superseded by *Law No. 26/2000 on the Human Rights Court* (*Law No. 26/2000*). The Indonesian Government along the way also enacted other domestic legislation to support the work of the human rights court such as the Government Regulation No. 3 of 2002 on Compensation, Restitution, and Rehabilitation to the Victims of Gross Human Rights Violations, Law No. 27 of 2004 on the Truth and Reconciliation Commission, and for Aceh and Papua the Government enacted Law No. 21 of 2001 on the Special Autonomy for Papua Province and Law No. 11 of 2006 on the Regional Government of Aceh.

[30] Law No. 26 of 2000, Art. 2.

[31] Law No. 26 of 2000, Art. 45(2).

To support the implementation of Law No. 26/2000, the Indonesian Government enacted Law No. 21 of 2001 concerning the Special Autonomy for Papua Province (Law No. 21 of 2001)[32] and Law No. 11 of 2006 concerning the Regional Government of Aceh (Law No. 11 of 2006).[33] Both Laws mandated the Central Government as well as the Regional Government of Papua and Aceh to work together to establish a human rights court in the respective region.[34] The regional human rights court in Papua shall operate in accordance to Law No. 26/2000;[35] meanwhile Law No. 11 of 2006 obliged the Government to establish Aceh regional human rights court within a year after the enactment of Law No. 11 of 2006.[36] The regional human rights courts in Papua and Aceh only have the jurisdiction to try gross human rights violations that took place after the enactment of the Special Autonomy Laws,[37] while the investigations and prosecutions of gross human rights violations that took place prior to the enactment of the Special Autonomy Laws are still enabled under Article 43 of Law No. 26/2000 concerning the establishment of *ad hoc* human rights court. Unfortunately, despite the mandates that have been clearly stipulated under the Special Autonomy Laws, to date the Government has not established the two regional human rights courts in Aceh and Papua.

Law No. 26/2000 also enshrined the crimes proscribed in the Rome Statute in Indonesia's criminal law,[38] notably, crimes against humanity and genocide.[39] Both acts were not proscribed as crimes under the Indonesian Penal Code prior to the enactment of Law No. 26/2000. In this regards, Law No. 26/2000 adopted the provisions on crimes against humanity and genocide directly from the provisions of the Rome Statute.[40] The Law also introduced the concept of command responsibility for the first time to the Indonesian Penal System.[41] Similar to the inclusion of crimes against humanity and genocide, the concept of command responsibility was also directly adopted from the Rome Statute.[42] These were considered as uplifting developments since at the time Law No. 26/2000 was enacted, the Rome Statute had not come into force and the ICC was not yet established.[43]

[32] Republic of Indonesia, Law No. 21 of 2001 concerning the Special Autonomy for Papua Province (Law No. 21 of 2001), State Gazette No. 135, 21 November 2001.
[33] Republic of Indonesia, Law No. 11 of 2006 concerning the Regional Government of Aceh (Law No. 11 of 2006), State Gazette No. 62, 1 August 2006.
[34] Law No. 21 of 2001, Art. 45(2); and Law No. 11 of 2006, Art. 228(1).
[35] Law No. 21 of 2001, Art. 45(2).
[36] Law No. 11 of 2006, Art. 259.
[37] Law No. 21 of 2001, Art. 45(2); and Law No. 11 of 2006, Art. 228(1).
[38] Law No. 26 of 2000, Elucidation, Art. 7.
[39] Ibid., Arts. 7 – 9.
[40] Rome Statute, Arts. 6 – 7.
[41] Law No. 26 of 2000, Art. 42
[42] Rome Statute, Art. 28
[43] Law No. 26 of 2000. The Preamble and Elucidation of Law No. 26 of 2000 indicates Indonesia's contention to adhere to international law and customs concerning the criminalization and punishment of international crimes.

Law No. 26/2000 also comes with its own unique legal character such as the applicability of retroactivity for alleged crimes against humanity and genocide that took place prior to the enactment of Law No. 26/2000 [44] and Komnas HAM's competence to conduct initial investigations on the alleged crimes under the human rights court jurisdiction.

Article 43 of Law No. 26/2000 states that cases of gross human rights violations that occurred prior to the stipulation of Law No. 26/2000 should be addressed by an ad hoc human rights court. The establishment of such *ad hoc* court should be based on the recommendation made by the Indonesian People's Representative Assembly (Dewan Perwakilan Rakyat, DPR) and the approval of the President.[45] Article 43 explicitly justifies the application of retroactivity in the Indonesian Penal System. It proved to be very controversial since the application of retroactivity in criminal matters contradicts the Indonesian Constitution, Penal Code and Law No. 39 of 1999 on human rights.[46] Furthermore it violates the commonly held principle of *nullum crimen sine lege*.[47]

Despite its controversial nature, the application of retroactivity for crimes against humanity and genocide under Law No. 26/2000 could deter abuse of power that might result in gross human rights violations and additionally it serves as an affirmation of Indonesia's compliance to international law and customs with regards to accountability for international crimes. Article 15 of ICCPR confirms that a prosecution should not be retroactive however, it makes an exception when it comes to "any act or omission which, at the time it was committed, was criminal according to the general principles of law recognized by the community of nations".[48] This implies that crimes such as genocide, war crimes, and crimes against humanity might be punished by means of retroactive domestic criminal laws.[49]

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[44] Ibid., Art. 43.

[45] Law No. 26 of 2000, Art. 43.

[46] Constitution (Fourth Amendment), Art. 28I(1); Penal Code, Art. 1(1); and Law No. 39 of 1999, Arts., 4, 18 and 19. Obviously, when the draft bill was first presented to the DPR, it received strong opposition from the military and Golongan Karya (Golkar) factions. However, the majority in the DPR at that time believed that without the retroactive application of the Law it would be very difficult to convict the perpetrators of gross human rights violations in East Timor and in other provinces and to convince the Indonesian public and the international community on Indonesia's serious endeavours to uncover past abuses and to end impunity. Additionally, in relation with the principle of non-retroactivity under the Indonesian Constitution, it was argued that the Constitution provides an exception on the application of retroactivity principle. According to the elucidation of Law No. 26/2000, Article 28i of the Constitution that prohibits the use of retroactive principle does not hinder the *ad hoc* human rights court to implementing its mandate under Law No. 26/2000. Article 28i need to be read together with Article 28j(2) of the Constitution, which entails State obligation to observe laws guaranteeing the protection of human rights including, if necessary, through the implementation of the retroactive principle.

[47] Republic of Indonesia, Law No. 1 of 1946 on Indonesian Penal Code, Art. 1(1); and Constitution of the Republic of Indonesia of 1945 (Fourth Amendment), Art. 28I(1).

[48] Ibid.

[49] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd revised edition, Germany, N.P. Engel Publisher, 2005, p. 368. According to the *travaux preparatoires* of article 15(2) of

Despite its promising prospects, the retroactive clause has only been used twice – East Timor and Tanjung Priok (see below). In justifying their lack of action in continuing Komnas HAM Investigation reports on past human rights abuses, in 2006 the AGO argued that according to Article 43 of Law No. 26/2000) it is not obliged to investigate cases of gross human rights violations that occurred prior to the enactment of Law No. 26/2000 before an *ad hoc* human rights court is established.[50] The DPR stated its objection on this view, it believed that AGO had taken a misleading interpretation of the Law and that DPR as a legislative organ does not have investigative power to determine whether there are sufficient grounds for the occurrences of gross human rights violations.[51] Furthermore, the DPR argued that there is nothing in Article 43 that indicate that an *ad hoc* court should be established before the AGO can conduct its investigation. In fact the AGO is obliged to follow up Komnas HAM investigations if Komnas HAM has made findings that gross human rights violations had taken place.[52] Only by then the DPR can make recommendation to the President to establish an *ad hoc* human rights court.[53] Interestingly, this was the approach that the AGO had taken to handle the East Timor and Tanjung Priok cases.

Later on in 2007, the Indonesian Constitutional Court confirmed the DPR standing on the establishment of *ad hoc* human rights court. In a case brought by Eurico Gutterres in 2007 concerning the Examination on the Compliance of Law No. 26/2000 with the 1945 Constitution, the Indonesian Constitution Court stated that:

> The DPR in recommending the establishment of an *ad hoc* human rights court should observe the results of the investigations carried out by institutions that are authorized to do so. Therefore, the DPR could not rely merely on its own assumption without receiving the investigations results from the authorized institutions, the Komnas HAM as the preliminary investigator (*penyelidik)* and AGO as the investigator (*penyidik*) as prescribed under Law No. 26/2000.[54]

The decision explicitly stipulated that the DPR can only recommend the establishment of an *ad hoc* human rights court after receiving investigations results from the AGO. Therefore there should not be any more issues of legal uncertainty when it comes to the continuation of Komnas HAM findings on allegations of past grave human rights violations and the

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ICCPR, this exception is strongly related to the principles of international law recognized in the Nuremberg Charter and judgments.

[50] Koran Republika, *Penyidikan Kasus Talangsari tak Perlu Tunggu Pengadilan HAM*, 11 September 2008, <www.koran.republika.co.id/berita/2610/Penyidikan_Kasus_Talangsari_tak_Perlu_Tunggu_Pengadilan_HAM> visited on 26 April 2011

[51] Gayus Lumbuun, *Pengadilan HAM: Kejagung Seharusnya Gunakan Penalaran Hukum*, Suara Karya, 30 November 2006, <www.suarakarya-online.com/news.html?id=161254> visited on 26 April 2011.

[52] Ibid.

[53] Ibid.

[54] Constitutional Court, Examination on the Compliance of Law No. 26 of 2000 with the 1945 Constitution, 18/PUU-V/2007, Judgment, 21 February 2008, p. 94, <www.mahkamahkonstitusi.go.id/putusan/putusan_sidang_Putusan%2018_PUU-V_2007%20Baca%2021%20Feb%2020081.pdf>, visited on 27 April 2011.

establishment of an *ad hoc* human rights court. Unfortunately, despite the decision of the Constitutional Court, to date, the Komnas HAM and DPR still face resistance from the AGO to proceed with the prosecution of past human rights abuses that have been investigated by Komnas HAM.

However, the experience of the human rights courts – permanent and ad hoc – in Indonesia has shown that the application of the provisions on crimes against humanity and genocide in Indonesia have proven to be difficult if not impossible. This is due to the fact that, first, Law No. 26/2000 adopted its articles directly from the Rome Statute without an appropriate supportive framework of domestic legislation. This caused a serious problem as both genocide and crimes against humanity were completely new to Indonesia's penal system. Whereas practices in the ICC are supported by the inclusion of Elements of Crimes to the ICC Statute that assist the Prosecutors, Judges, and legal counsels in interpreting and applying the crimes falling under the jurisdiction of the ICC,[55] Law No. 26/2000 and the Indonesian Criminal Code however do not provide any guidance to law enforcers on how to interpret and apply the crimes under the jurisdiction of the Court.

Second, Law No. 26/2000 has not proscribed war crimes as a crime falling under the jurisdiction of the human rights court. This is surely a setback from the Government's avowal to uncover past human rights abuses and to end impunity. The absence of war crimes in Law No. 26/2000 prompted many to criticize that it was a deliberate attempt from the Government to reduce implications to the Indonesian military and to prevent scrutiny of issues concerning separatist movements and internal armed conflict.[56] Be that as it may, the classification of war crimes in domestic law should not be omitted since Indonesia has acceded to the Four Geneva Conventions of 1949[57] through the enactment of Law No. 59 of 1958.[58] Even though there are still ambiguities on the implementation of international treaties in Indonesia, the fact that Indonesia has acceded to the Four Geneva Conventions of 1949 obliges Indonesia to implement

[55] Rome Statute, Art. 9; and the ICC Elements of Crimes

[56] Suzanah Linton, *Accounting for Atrocities in Indonesia*, 10 Singapore Year Book of International Law, 2006, p. 14; Donny Andhika AM, *Amandement UU HAM Ancam Petinggi Militer*, Media Indonesia, 22 march 2011, <www.mediaindonesia.com/read/2011/03/03/212312/16/1/Amendemen-UU-HAM-Ancam-Petinggi-Militer> visited on 24 April 2011.

[57] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31/[1958] ATS No. 21; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85/[1958] ATS No. 21; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135/[1958] ATS No. 21; and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287/[1958] ATS No. 21 (the Four Geneva Conventions of 1949).

[58] Republic of Indonesia, Law No. 59 of 1958 concerning the Accession of the Republic of Indonesia to the Four Geneva Conventions of 12 August 1949, State Gazette No. 109, 31 July 1958.

the Geneva Conventions in good faith and not to frustrate the object and purpose of the Conventions,[59] especially not by granting impunity to war criminals.

The third problem is related to the anomalies in the adoption of crimes against humanity into Law No. 26/2000. The Indonesian version of crimes humanity unfortunately contains many legal gaps since it did not completely adapt the Rome Statute provision on crimes against humanity, there are some elements omitted or narrowed. The provision on crimes against humanity under Law No. 26/2000 does not provide explanation, unlike in the Rome Statute,[60] with regards to 'attack against any civilian population'. Under international law; as long as the 'civilian population' is predominantly consisted of civilians, the presence of certain non-civilians would not change the character of the population.[61] According to Linton, the absence of a definition on 'civilian population' could create a dangerous loophole, because of the numerous internal conflict and separatist movements that happen in Indonesia and indications where the military and police often treat sympathizers of separatist movements as legitimate targets.[62] Furthermore, Article 9 of Law No. 26/2000 only provides a limited list of crimes against humanity,[63] it does not include a 'catch-all' provision such as that provided in Article 7(1)(k) of the Rome Statute. It indicates that Law No. 26/2000 only proscribed crimes against humanity in a very narrow scope so as to exclude other forms of acts that might constitute crimes against humanity.

In addition, as seen above, articles 18 and 19 of Law No. 26/2000 empowers Komnas HAM with the sole authority to conduct the initial investigation on alleged cases of crimes against humanity and genocide instead of the police force. The AGO is obliged to proceed with prosecution within seventy days of the concluded investigations[64] given that Komnas HAM's investigation should be declared as complete and sufficient grounds for prosecution.[65] This authority was considered revolutionary since, at that initial stage of investigation, Komnas HAM would be acting as a law enforcer, exceeding the competences that should be accorded to a

[59] Vienna Convention on the Law of Treaties, 23 May 1969, UN Doc. A/Conf.39/27 / 1155 UNTS 331 / 8 ILM 679 (1969) / 63 AJIL 875 (1969), Art. 26.
[60] Rome Statute, Art. 9(2)(a).
[61] Prosecutor v. Dusko Tadic, IT-94-1T, Judgment, 7 May 1997, par. 638; Prosecutor v. Dragoljub Kunarac et al., IT 96-23-A & IT-96-23/1/A, Appeals Judgment, 12 June 2002, par. 90.
[62] Suzannah Linton, *Accounting for Atrocities in Indonesia*, *Supra* no. 62, p. 15
[63] Law No. 26 of 2000, Art. 9. Crimes against humanity under Article 9 of Law No. 26 of 2000 only consists of crimes such as: a) killing; b) extermination; c) enslavement; d) enforced eviction or movement of civilians; e) arbitrary appropriation of the independence or other physical freedoms in contravention of international law; f) torture; g) rape, sexual enslavement, enforced prostitution, enforced pregnancy, enforced sterilization, or other similar forms of sexual assault; h) assault of a particular group or association based on political views, race, nationality, ethnic origin, culture, religion, sex or any other basis, regarded universally as contravening international law; i) enforced disappearance of a person; or j) the crime of apartheid.
[64] Ibid., Art. 24.
[65] Ibid., Art. 20(3).

National Human Rights Institution under the Paris Principles of 1993.[66] Furthermore, Law No. 26/2000 has even endowed Komnas HAM with the power to probe into past gross human rights violations prior to the enactment of the law.[67]

However, the actual investigative powers Komnas HAM holds are hampered by various bureaucratic structures. Komnas HAM's power to conduct investigations stop once submits its report to the AGO – contrasted with the usual criminal investigations in Indonesia, this is a severe limitation of power. In the criminal justice system of Indonesia, the initial police investigators are permitted to be involved in the second phase of investigation carried out by the AGO prior to prosecution.[68] It has been commented that communications between the AGO and Komnas HAM after the latter delivers its reports is negligible – the two offices responsible for ensuring criminal justice are not cooperating.[69] Moreover, there are huge discrepancies in the number of suspects identified by Komnas HAM and the statistics in the AGO reports,[70] with the result of only thirty six suspects that have been indicted by the Attorney General's Office (AGO) in East Timor, Tanjung Priok, and Abepura cases.[71] After the finalization of the fourth investigation in 2002, the Attorney General Office (AGO) followed up three Komnas HAM findings concerning allegations of crimes against humanity in East Timor, Tanjung Priok, and Abepura (Papua) with prosecutions. Since the alleged crimes in East Timor and Tanjung Priok took place prior to the enactment of Law No. 26/2000, the establishment of an ad hoc human rights court located in Jakarta in 2001 was required.[72] Meanwhile, the trial of Abepura case took place in the permanent human rights court at the district court of Makassar, North Sulawesi. Unfortunately, the adjudication of these three cases was deemed as failures given the number of controversies and criticisms, e.g. lack of commitment from the AGO to proceed with Komnas

[66] United Nations General Assembly Resolution, Principles Relating to the Status of National Institutions Competence and Responsibilities, 48/134, 1993.
[67] Ibid., Arts. 18(1) and 43.
[68] Republic of Indonesia, Law No. 8 of 1981 on the Codification of Rules and Procedures for Criminal Matter, State Gazette No. 76, 31 December 1981, Arts. 1(2), 1(4), 4, and 6. Under the Indonesian Penal Code, there are two stages of investigation. The first stage of investigation is to determine whether or not a crime has taken place, this stage is known as *Penyelidikan*. The police force has the soul authority to conduct the investigation at this stage. The second stage of investigation falls under the authority of both the AGO and Police force and is known as *Penyidikan*. This stage aims at to determine the suspect once the *Penyelidikan* stage is completed.
[69] Komnas HAM, *Human Rights Annual Report of 2006*, *supra* note. 312, pp. 93 – 94; Koran Republika, *Penyidikan Kasus Talangsari tak Perlu Tunggu Pengadilan HAM*, 11 September 2008, <www.koran.republika.co.id/berita/2610/Penyidikan_Kasus_Talangsari_tak_Perlu_Tunggu_Pengadilan_HAM> visited on 26 April 2011; ICTJ and Kontras, *Supra* no. 23, pp. 43 – 44;
[70] ELSAM, *Pengadilan Hak Asasi Manusia Kasus Abepura: Perkara Johny Wainal Usman dan Daud Sihombing*, Monitoring Report, 2004, p. 6 – 8; ELSAM, *Pengadilan Hak Asasi Manusia Ad Hoc Kasus Tanjung Priok*, January 2004, p. 6; David Cohen, *Intended to Fail: the Trials Before the Ad Hoc Human Rights Court in Jakarta*, International Center for Transitional Justice, Occasional Paper Series, August 2003, p. 20.
[71] Ibid. The AGO only prosecuted 2 people for Abepura case, 14 people for Tanjung Priok case, and 20 people for East Timor case.
[72] Presidential Decision No. 53 of 2001 as amended by Presidential Decision No. 96 of 2001, Art. 2.

HAM findings, intimidation against witnesses, insufficient witness protection, and so forth.[73] In an outrageous travesty of justice, the court eventually acquitted all of the defendants. In the East Timor, Tanjung Priok, and Abepura cases[74]

Moreover, the AGO refused to take up the rest of Komnas HAM findings in other cases for prosecutions in front of the court, even though this meant that the AGO had acted in contradiction with its obligation prescribed under the Indonesian Penal Procedural Law.[75] There is relentless reluctance both from the Government and the AGO to follow up Komnas HAM findings on alleged gross human rights violations and this renders as if the handling of cases of gross human rights violations in Indonesia are not of great necessity.

In addition, so far there is no clear mechanism under the law on how the KPP HAM findings on gross human rights violations cases that took place prior to the enactment of Law No. 26/2000 should be followed up. This is one of the reasons, in addition to the intentional 'amnesia', why KPP HAM findings usually ends up neglected by the AGO. Although the challenges for Komnas HAM to carry on its mandate are by no means limited to what has been previously mentioned, however it is immediately apparent that legal, social, and cultural deficiencies undermine every dimension of Komnas HAM endeavors. The effect has been to render Komnas HAM works futile to implement this particular mandate to any meaningful extent.

At present, Komnas HAM's power to act as the State's sole investigator to probe into allegation of gross human rights violations seems to be considered as close to non-existing by the AGO and the Government and most of its findings regarding allegations of gross human rights violations in Indonesia are often ignored. Nevertheless, these challenges do not stop the Komnas HAM from carrying on its mandate to probe into alleged gross human rights violations that fall under the jurisdiction of the human rights court. As a matter of fact, Komnas HAM has received great support from civil society organizations and the people at large as well the parliament (Dewan Perwakilan Rakyat, DPR), which recently has recommended the government to establish another ad hoc human rights court to address enforced disappearance of persons that took place during the reform movement of 1997 – 1998 based on Komnas HAM investigation.[76]

The complexities of the legal, social, and cultural issues that hampered Komnas HAM's in fulfilling its mandate, and the dynamics between each issue that underpin the totality of the historic failures to handle cases of gross human rights violations in Indonesia, require a comprehensive analysis and assessment on the works of Komnas HAM, the continuation of its

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[73] Suzannah Linton, *Unravelling the First Three Trials at Indonesia's Ad Hoc Court for Human Rights Violations in East Timor*, Leiden Journal for International Law, 17: 2 (2004), p. 303 – 304; David Cohen, *Intended to Fail: the Trials Before the Ad Hoc Human Rights Court in Jakarta*, *Supra* no. 70, pp. 59 – 62.

[74] Working Group for Human Rights Court Monitoring, *Pengadilan yang Melupakan Korban* (*The Court that has Forgotten the Victims*), KONTRAS, ELSAM, and PBHI, Jakarta, 24 August 2006, p. 9.

[75] Law No. 8 of 1981, Art. 7(1).

[76] Komnas HAM, *Siaran Pers Hari HAM ke-61*, Jakarta 25 December 2009, <www.komnasham.go.id/portal/id/content/siaran-pers-hari-ham-ke-61> visited on 26 April 2011.

findings by competent authorities and the impacts of Komnas HAM mandate to the treatment of gross human rights violations in Indonesia. This is a necessary antecedent for the formulation of solutions in order to make functional improvements to Komnas HAM in implementing its mandate to investigate allegations of gross human rights violations as well as the improvement of the handling of gross human rights violations in the future.

Indonesian Post-Conflict Justice in Practice

Keeping in mind the difficulties inherent in the evolving post-conflict justice system in Indonesia outlined above, we go on to examine the cases of crimes against humanity committed in Indonesia and their outcomes.

Since 1998, the Indonesian Government has established at least four major fact-finding teams to investigate gross human rights abuses in the country. The first investigative team set up in the reform era in 1998 was the Joint Fact-Finding Team for the May 1998 Incidents Tim Gabungan Pencari Fakta (TPGF). [77] TPGF's mandate was to examine the violence that occurred in the 13-15 May 1998 riots in major Indonesian cities such as Jakarta, Surabaya, Palembang, Lampung, Medan, and Solo.[78] The TGPF report concluded that high-ranking military officials were involved in orchestrating the persecution of the Chinese community in Indonesia – rape, pillage, and murder[79] – as well as the abduction and disappearances of political activists and students.[80] Evidence strongly pointing toward the "widespread and systematic nature" of the violence was that it was carried out almost simultaneously in Jakarta, Surabaya, Palembang, Lampung, Medan, and Solo and caused 1217 people to lose their lives in Jakarta alone.[81] While the TGPR exhorted the Government to try the military officials and civilians who had taken part in the crimes,[82] as well as for compensation rehabilitation for the victims of sexual violence, apart from the public apology made by President Habibie,[83] there is no indication that the Indonesian Government will follow up with the TGPF recommendations of prosecuting the perpetrators involved either in the human rights court or according to municipal criminal law.

In 1999, the Independent Commission for the Investigation of Violence in Aceh (Komisi Independen Pengusutan Tindak Kekerasan di Aceh, KPTKA)[84] was established. KPTKA identified that the years of martial law in Aceh – imposed to maintain peace and security in the natural

[77] Joint Ministerial Decree between the Ministry of Defense, Commander of the Indonesian Army, Ministry of Justice, Ministry of Interior, Ministry of Foreign Affairs, Ministry of Women Affairs, and the Attorney General, 23 July 1998.
[78] Joint Fact-Finding Team for the May 1998 Incident, *Report on May 1998 Incidents*, National Commission on Women's Rights (Komnas Perempuan), Jakarta, 2002, pp. 5 and 12.
[79] Ibid., p. 18.
[80] Ibid., pp. 18 – 23.
[81] Ibid., pp. 5 – 6 and 20.
[82] Ibid., p. 35.
[83] Ibid., Annex: Presidential Statement of 15 July 1998, p. 119.
[84] Republic of Indonesia, Presidential Decree No. 88 of 1999 on the Independent Commission for the Investigation of Violence in Aceh, 30 July 1999.

resources-rich province – had led to severe human rights violations committed by the Indonesian army and the rebel forces of the Free Aceh Movement (Gerakan Aceh Merdeka, GAM).[85] The report noted that the crimes committed – torture, rape, summary killings, and abduction – were conducted as part of a widespread or systematic attack against the Acehnese civilians, hence amounted to crimes against humanity.[86] In this instance, the Attorney General's Office of Indonesia (AGO) proceeded with prosecution of twenty-four Indonesian soldiers and one civilian for the attack on Tengku Bantaqiyah religious school in Beuton Ateuh in 1999 that had claimed more than fifty civilian lives and four other occurrences of human rights abuse in Aceh.[87] Since the crimes involved the participation of both civilian and military personnel, the cases were brought in front of a *Koneksitas* court.[88] It is significant that the then Attorney General, Marzuki Darusman, had originally preferred to bring the case before an Indonesian human rights court, except that the Indonesian Parliament was divided over the establishment of an hoc human rights court at that time.[89] All of the 25 defendants, comprised of low-ranking military officers and one civilian, were convicted by the Court and sentenced to 8.5 – 10 years of imprisonment.[90]

The third fact-finding team was established in 2002 to investigate those responsible for the outbreak of violence between the Muslim and Christian communities in Maluku (Moluccas) in 1999 that resulted in the estimated death of 5000 people.[91] Regrettably, however, the final report of this fact-finding team never reached the public and judicial proccedings never took place.[92]

In 2006, the fourth fact-finding team was established to investigate human rights violations and abuse of power by the authorities that took place in the longstanding religious tensions in Poso, Central Sulawesi, in 1998 and 2006.[93] Unlike the other fact-finding teams, the Poso fact-finding

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[85] The authors rely on the KPTKA's summary report entitled *DOM dan Tragedi Kemanusiaan di Aceh*, cited in Suzannah Linton, *Post-Conflict Justice in Asia*, The International Institute of Higher Studies in Criminal Sciences, date unknown, p. 127 www3.hku.hk/law/upload/images/suzannah/Post_Bangkok_Final_Draft_of_PCJ_in_Asia.pdf visited on 20 April 2011; and ICTJ and Kontras, *Derailed: Transitional Justice in Indonesia since the Fall of Soeharto*, *Supra* No. 25, p. 18.

[86] Ibid.

[87] Tapol, *Seeking Justice in Aceh still has a Long Way to Go*, Tapol Report, 13 April 2000, <www.tapol.gn.apc.org/reports/r000413aceh.html> visited on 20 April 2011.

[88] The *Koneksitas* court consists of a mixed panel of civilian and military judges; this is in accordance with Art. 22 of Law No. 14 of 1970 on Judicial Power as amended by Law No. 35 of 1999, (State Gazette No. 147, 31 August 1999).

[89] Tapol, *Seeking Justice in Aceh still has a Long Way to Go*, *Supra* no. 87.

[90] Amnesty International & Human Rights Watch, *Indonesia: Aceh Trial — Amnesty International and Human Rights Watch Call for Full Accountability*, *Human Rights Watch,* 17 May 2000.

[91] Republic of Indonesia, Presidential Decision No. 38 of 2002 on the Establishment of the National Investigation Team on the Maluku Conflict, 6 June 2002.

[92] ICTJ and Kontras, *Derailed: Transitional Justice in Indonesia since the Fall of Soeharto*, *Supra* No. 25, p. 21.

[93] Ibid., p. 20.

team was established informally by the then Vice President, Jusuf Kalla on 30 October 2006[94] and comprised officials from the police and military. While the report of the fact-finding team was classified,[95] separate reports by human rights groups indicate that there was strong evidence that crimes against humanity had occurred during the conflict and at least a thousand people were killed.[96]

Regardless of the Government's robust initiatives at that time to uncover alleged human rights abuses, the reports produced by those independent fact-finding teams hardly ever resulted in the prosecution of the perpetrators, apart from the Aceh trials at the *Koneksitas* court. Moreover, a significant proportion of the crimes against humanity that were committed in Aceh still remain uninvestigated. According to the Memorandum of Understanding between GAM and the Indonesian government that facilitated the transition of Aceh into peace, a human rights court is to be established for Aceh.[97] To date, this clause remains highly controversial and deadlocked in the legislature.

For the most part, however, Komnas HAM is now responsible for following up with the results of the fact-finding teams, according to Law No. 39 of 1999 and Law No. 26/2000 in the Indonesian post-conflict justice framework. These laws endow Komnas HAM with the competence to act as the *sole investigator* of crimes under the human rights court's jurisdiction.[98] Komnas HAM has been very active in this respect, launching investigations and submitting the reports to the AGO for the latter to conduct investigations and begin prosecution. So far there are only three investigations initiated by Komnas HAM that had proceeded to the ad hoc human rights court (for cases that occurred prior to the enactment of Law No. 26 of 2000) and the permanent human rights court (for cases that occurred after the enactment of Law No. 26 of 2000). Meanwhile, the fate of the rest of the investigations results still rest on the AGO hands to bring them to trial.

More importantly, Komnas HAM has undertaken investigations of the biggest cases of gross human rights abuses in East Timor, Tanjung Priok, and Papua.[99] On 23 September 1999, the Komnas HAM, acting under Article 18 of Law No. 26/2000, established the Investigative

[94] ICTJ, *Jihadism in Indonesia: Poso on the Edge*, Asia Report No. 127, 24 January 2007, p. 13.
[95] Ibid., pp. 19 – 20; ICTJ and Kontras, *Derailed: Transitional Justice in Indonesia since the Fall of Soeharto*, *Supra* No. 25, p. 20.
[96] ICTJ and Kontras, *Derailed: Transitional Justice in Indonesia since the Fall of Soeharto*, *Supra* No. 25, p. 20.
[97] Memorandum of Understanding between GAM and the Indonesian Government, A.2(2).
[98] Republic of Indonesia, Law No. 39 of 1999 concerning Human Rights, State Gazette No. 165, 23 September 1999, Art. 76(1); and Law No. 26 of 2000, Arts. 18 – 19.
[99] Komnas HAM mandates have also included investigations on the 1) violence against civilians during the 1971 election; 2) the extrajudicial killings in early 1980s; 3) Tanjung Priok incidence of 1984; 4) Cases of violence occurred during the imposition of the Martial Law in Aceh; 5) the attack on the Indonesian Democratic Party's headquarter on 27 July 1996; and 6) the May 1998 riot, including the enforced disappearance of activists and students, that triggered the downfall of Soeharto. See ELSAM, *Weakening Human Rights Enforcement: Debt, Poverty, and Violence* (Melemahnya Daya Penegakan Hak Asasi Manusia: Hutang, Kemiskinan, dan Kekerasan), 2003 Human Rights Report, p. 24.

Commission on the Human Rights Violations in East Timor (KPP HAM) to investigate the alleged human rights abuses that took place in the then Indonesian province of East Timor between January and October of 1999.[100] KPP HAM, an independent fact-finding team established by Komnas HAM, concluded its investigation and handed in the report to the AGO. The investigation report found indications of crimes against humanity such as mass killings, torture, forced disappearance, rapes and sexual slavery, forced removal, and a "scorched earth" policy had been carried out occurred in a systematic and widespread manner against the civilian population that opted for independence in East Timor.[101] The report identified thirty-three suspects consisting military personnel and the national police as well as militias and civilians, including high-ranking military and State officials, such as the then Commander of the Indonesian Armed Forces General Wiranto, the former Udayana Regional Commander Major General Adam Damiri, and the former Governor of East Timor, Abilio Soares.[102] The report was considered as bold and revolutionary, since it was the first report ever throughout Indonesia's history that highlighted the role of the State in gross human rights violations. It was this report of KPP HAM that pressured the Parliament and President to approve the establishment of an ad hoc human rights court under Law No. 26/2000 to try the perpetrators.[104]

However, the proceedings at the *ad hoc* human rights court failed to live up to expectations. The first indicator was the promulgation of Presidential Decree No 53 of 2001 on Establishment of Ad Hoc Human Rights Court within the District Court of Central Jakarta that was later on amended by Presidential Decision No. 96 of 2001; the presidential decree curtailed the *tempus delicti* of the alleged crimes from January – October 1999 as indicated by the KPP HAM report[105] to the period of April *and* September 1999 under Article 2 of the Presidential Decision.[106] Moreover, from the 33 alleged perpetrators identified in the KPP HAM findings, the AGO only indicted 20 people for crimes against humanity, 12 were acquitted at the first instance, and the rest were finally acquitted at the appeal or cassation phases.[107]

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[100] Komnas HAM, Decision of Komnas HAM Chairman No. 770/TUA/IX/99 on the Establishment of the Investigative Commission on the Human Rights Violations in East Timor, 23 September 1999. Komnas HAM at that time set up the time-frame for the investigation to include the situations prior to and after the 1999 referendum that lead to East Timor independence. The Presidential Decision No. 96 of 2001 later on narrowed the time frame to the month of April and September 1999.

[101] KPP HAM, *Final Report on Grave Human Rights Violations in East Timor,* National Commission of Human Rights, Jakarta, 31 January 2000, para. 152, 170 – 175.

[102] Ibid, para. 181 – 183.

[104] Presidential Decision No. 53 of 2001 as amended by Presidential Decision No. 96 of 2001, Art. 2.

[105] Ibid., par. 18.

[106] Presidential Decision No. 53 of 2001 on Establishment of Ad Hoc Human Rights Court within the District Court of Central Jakarta as Amended by Presidential Decision No. 96 of 2001.

[107] KONTRAS, *Matrix Putusan Pengadilan HAM di Indonesia: Monitoring dan Dokumentasi KONTRAS,* 1 September 2006, <www.kontras.org/data/Matrix%20Putusan%20Pengadilan%20HAM%20di%20Indonesia.htm> visited on 28 April 2011.

Despite the robust efforts of Komnas HAM and the DPR to uncover past human rights abuses in East Timor, the Government, the AGO, and arguably, the judiciary, simply did not demonstrate enough will to prosecute and punish those responsible for pas human rights abuses. This tendency of Government's unwillingness was demonstrated in the case of Major General Adam Damiri where the Prosecutor sought for acquittal because the Prosecutor had not been able to prove any of the charges on the defendant.[108] The request was turned down by the judges and instead, the *ad hoc* human rights court convicted Adam Damiri to 3 years of imprisonment.[109] Adam Damiri was later on acquitted by the Appeal Chamber.[110]

On 8 March 2000, Komnas HAM launched its second investigation through the Investigation Commission on Human Rights Violations in Tanjung Priok (KP3T) to uncover the truth behind the violence in Tanjung Priok between August and September 1984.[111] Given the external pressures, the initial report of KP3T was lackluster. It was heavily criticised, especially by the Moslem community, as it failed to name the suspects and acknowledge that crimes were indeed committed.[112] In response to public pressure, KP3T came up with a second report of its investigation on 11 October 2000 which detailed that summary killing, unlawful arrest and detention, torture, and enforced disappearances had taken place.[113] Although KP3T did not decide conclusively whether the crimes amounted to crimes against humanity but it stressed that the perpetrators should be tried for these past human rights abuses.[114] After receiving this report, the Government together with the Parliament agreed that the perpetrators should be tried before an ad hoc human rights court, since the alleged crimes had taken place prior to the enactment of Law No. 26 of 2000.[115] The AGO proceeded with the investigations and launched the prosecution against 14 suspects as opposed to 23 Government actors identified by KP3T.[116]

Similar to the East Timor trials, the Tanjung Priok trials also invited many criticisms. Many also considered the process of the trials were flawed and compromised. One of the indicators was the visit of the Indonesian military to the victims and their families to offer reconciliation and compensation, which resulted in the withdrawal of some of the Prosecutor's witnesses for the

[108] David Cohen, *Intended to Fail: the Trials Before the Ad Hoc Human Rights Court in Jakarta*, *Supra* no. 70, p. 13
[109] Ibid.
[110] Ibid.
[111] Komnas HAM, Decision of Komnas HAM Chairman No. 002/Komnas HAM/III/2000 on the Formation of the Investigation Commission on Human Rights Violations in Tanjung Priok as amended by Decision No. 003/Komnas HAM/III/2000 , 14 March 2000.
[112] KP3T, *Report of the Investigation Commission on Human Rights Violations in Tanjung Priok*, National Commission of Human Rights, 12 June 2000.
[113] KP3T, *Executive Summary: Follow-Up Report of the Investigation Commission on Human Rights Violations in Tanjung Priok*, National Human Rights Commission, 13 October 2000.
[114] Ibid.
[115] Presidential Decision No. 53 of 2001 as amended by Presidential Decision No. 96 of 2001, Art. 2.
[116] Working Group for Human Rights Court Monitoring, *Pengadilan yang Melupakan Korban*, *Supra* no. 74, p. 3.

trials.[117] Another indication of flawed practice was the inconsistencies in the Court's judgments on the assessment of the occurrence of crimes against humanity.[118] For example, in the trial of RA Butar Butar the Court stated that crimes against humanity had taken place during the Tanjung Priok incident on 12 September 1984 specifically at the North Jakarta Police Headquarter however, in a different judgment concerning the defendant Sutrisno Mascung, the Court found that crimes against humanity had not taken place even though the *tempus delicti* and *locus delicti* were similar to those in the RA Butar Butar trial.[119] The *ad hoc* human rights court at the first instance acquitted 2 defendants and convicted 12 defendants to 2 to 10 years of imprisonment; and all defendants, similar to the East Timor trials, were finally acquitted at the appeal and cassation phases.[120]

The Tanjung Priok trials, at the first instance, also addressed the question of reparation. In the judgments of RA Butar Butar and Sutrisno Mascung, the Court decided that the defendants shall pay compensations to the victims or families of the victims of Tanjung Priok incident.[121] However, the Court did not specify the amount of the compensations that should be given and it did not state the names of the beneficiaries of such compensations.[122] Moreover, the reasoning that the Court applied in rendering its judgment of compensation was criticized for not being victim-oriented. In rendering reparation, the Court was of the opinion that since the defendant is convicted for committing crimes under the jurisdiction of the Court therefore automatically, as a result of the crimes that were committed, victims and their families are entitled to seek compensation, restitutions, and rehabilitation.[123] Therefore, according to this approach, the judges perceived that a decision to render reparation to the victims of crimes under the human rights court's jurisdiction solely depends on the Court's finding of an individual conviction and not of State's responsibility on the occurrences of human rights abuses. This approach was again confirmed in the court of appeal when the court overturned the *ad hoc* human rights court judgment for reparation when the court of Appeal acquitted the defendants.[124]

The third investigation launched by Komnas HAM was Investigation Team (KPP HAM Papua) to identify and gather all relevant facts and information relating to alleged grave human rights violations that took place in Abepura, Papua in December 2000.[125] It was alleged that the police

[117] Ibid., p. 4
[118] Ibid.
[119] KONTRAS, *Pemantauan Persidangan: Pengadilan HAM ad hoc Tanjung Priok (September 2003 – Agustus 2004)*, <www.kontras.org/index.php?hal=data> visited on 29 April 2011.
[120] Ibid.
[121] Ad Hoc Human Rights Court, *Prosecutor v. Sutrisno Mascung*, Judgment, 01/HAM/TJ.PRIOK/08/2003; and Ad Hoc Human Rights Court, *Prosecutor v. Rudolf Adolf Butar Butar*, Judgment, 02/HAM/TJ.PRIOK/09/2003.
[122] KONTRAS, *Pemantauan Persidangan: Pengadilan HAM ad hoc Tanjung Priok (September 2003 – Agustus 2004)*, *Supra* no. 119, p. 5.
[123] Wahyu Wagiman and Zainal Abidin, *Praktik Kompensasi dan Restitusi di Indonesia: Sebuah Kajian Awal*, Position Paper on Witness and Victim Protection, Jakarta, 31 Maret 2007, p. 17.
[124] Ibid.
[125] Komnas HAM, Decision of Komnas HAM Chairman No. 020/KOMNAS HAM/II/2001, 5 February 2001.

carried out reprisals on civilians who were allegedly involved in separatist movements in Papua after an unknown group attacked a police post in Abepura and causing the death of one police officer.[126] Classified as a separatist act, the District Chief Police issued a wide search and arrest warrant to detain suspects.[127] This later on ignited excessive retaliation by the Indonesian police force in the form of indiscriminate search and attack against civilians, especially students.[128]The Abepura incident preceded the Wasior violence in March 2001 and the Wamena incident in April 2001.[130] KPP HAM Papua identified that torture, summary killings, persecutions, unlawful arrests and detentions, and forced removal of civilians who were allegedly involved in separatist movements had taken place.[131] It also firmly acknowledged that crimes against humanity had occurred and recommended that the perpetrators be brought to the human rights court for justice.[132] It was the first case ever brought before one of the Indonesian permanent human rights courts in Makassar.

KPP HAM Papua findings came down to 2 prosecutions against the then Mobile Brigade Commander, Johny Wainal Usman and District Police Chief, Daud Sihombing. Despite the fact that the AGO only proceeded in prosecuting two suspects in comparison with the twenty-four suspects identified by KPP HAM Papua, the Prosecutor made a significant breakthrough with the inclusion of reparation request for the victims since the law was vacuum on the question of the procedure to seek reparation.[133] However, similar with the two cases before the *ad hoc* human rights court, the two defendants were acquitted and the Prosecutor's request for reparation was also overturned since none of the defendants was convicted.[134]

In 2003, the the Komnas HAM Chairman, Abdul Hakim Garuda Nusantara, decided to conduct major investigations on grave human rights violations that occurred during the reign of Soeharto (1967–98).[135] This time the investigations went back as far as 1965, starting with the

[126] KPP HAM Papua, *Final Report of the Investigation Commission on Human Rights Violations in Papua/Irian Jaya, National Human Rights Commission, Jakarta, 8 May 2001,* p. 30.
[127] Ibid. pp. 31 – 32.
[128] Ibid., p. 44.
[130] KPP HAM Papua, *Final Report of the Investigation Commission on Human Rights Violations in Papua/Irian Jaya,Supra* no. 126, pp. 16 and 30.
[131] Ibid., pp. 46 – 51.
[132] Ibid., pp. 57 – 62 and 64.
[133] Nothing under Law No. 8 of 1981 on the Codification of Rules and Procedures for Criminal Matter, Law No. 26 of 2000, or Government Regulation No. 3 of 2002 that indicate the procedure of which the Prosecutor can seek for reparation for the victims of human rights abuses.
[134] Wahyu Wagiman and Zainal Abidin, *Praktik Kompensasi dan Restitusi di Indonesia: Sebuah Kajian Awal*, *Supra* no. 123, p. 18; and KONTRAS, *Pemantauan Persidangan: Pengadilan HAM untuk Kasus Abepura (Mei 2004 – September 2005)*, <www.kontras.org/index.php?hal=data> visited on 29 April 2011.
[135] Komnas HAM, Decision of Komnas HAM Chairman No. 07/KOMNAS HAM/I/2003 on the Appointment of Ad Hoc Team Members on the Investigation and Assessment of Gross Human Rights Violations during the Soeharto Era I (Pengangkatan Anggota Tim Ad Hoc Penyelidikan dan Pengkajian Pelanggaran HAM Soeharto 1), 14 January 2003.

investigation on the 1965–66 massacres during the abolition of the Indonesian Communist Party (PKI) on the island of Buru.[136] The investigation revealed that in that period, over a million people that were suspected of having connections with the communist party or leftist views had been killed or disappeared and at least another million were imprisoned without trial.[137]

Finally, in 2004, an ad hoc team[138] was established to investigate alleged grave human rights violations that took place in Talangsari, South Sumatera, in 1989 between the police and military against the Moslem community over suspicions of a plan to desecrate the Pancasila, Indonesia's basic principles of statehood.[139] A skirmish between the youths from Talangsari village and military personnel in February 1989 led to the death of Captain Soetiman.[140] The military reprisals that followed caused the deaths of at least 130 people and the disappearance of about 240.[141] The ad hoc team found that summary killing, enforced disappearances, unlawful detentions and arrests, torture, and unlawful removal of civilians had taken place and that these amounted to crimes against humanity under Law 26/2000.[142] The report identified the alleged perpetrators as military personnel and recommended bringing the matter before an ad hoc human rights court.[143]

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[136] Ibid.

[137] ICTJ and Kontras, *Derailed: Transitional Justice in Indonesia since the Fall of Soeharto*, *Supra* No. 25, p. 94.

[138] Ad hoc Investigation Team on Grave Human Rights Violations in Talangsari Incident, *Executive Summary*: *Grave Human Rights Violations in Talangsari Incident*, National Human Rights Commission, Jakarta, 2008, p. 12.

[139] Komnas HAM, 2004 Annual Report, Jakarta, February 2004, p. 110.

[140] KONTRAS, *1989 Talangsari Incident*, Position Paper, Jakarta, 2006, p. 3, <www.kontras.org/data/KERTAS_POSISI_TALANGSARI_2006.pdf> visited on 22 April 2011.

[141] Ad hoc Investigation Team on Grave Human Rights Violations in Talangsari Incident, *Executive Summary*, *Supra* No. 138, p. 17.

[142] Ibid., p. 45.

[143] Ibid.

[227] Law No. 26 of 2000, Art. 35(1).

On the issue of reparations, Law No. 26/2000 stipulates that "every victim of gross human rights violation and/or his/her heir/heiress are entitled to acquire compensation, restitution, and rehabilitation."[227] The granting of these reparations to the victims or their families shall be stipulate in the human rights court's judgment.[228] Reparation shall be given by the perpetrator of crimes under Law No. 26/2000 after he/she is convicted by the human rights court.[229] However, in the case where the convicted is unable to give such reparation to the victim as stipulated in the Court's judgment, then the State shall give the reparation.[230] In furtherance of the reparation provision under Law No. 26/2000, the Government enacted Government Regulation No. 3 of 2002 concerning Compensation, Restitution, and Rehabilitation to the Victims of Gross Human Rights Violations (GR 3/2002).[231] GR 3/2002 stipulates the mechanism on how the State shall give reparation to victims of crimes prescribe under Law 26 of 2000 in cases where the perpetrator is unable to provide reparation.[232] Furthermore, in 2006, the Government enacted Law No. 13 of 2006 concerning Witness and Victim Protection (Law No. 13 of 2006),[233] which provides the victims rights to representation before the Court to seek for reparation for gross human rights violations.[234]

The approach used under the Indonesian legal framework on reparation of victims of gross human rights violations is almost similar to that of the Rome Statute. Article 75 of the Rome Statute stipulates that "The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation." However, as a part of local remedies provided for victims of gross human rights violations, the Indonesian legal framework on reparation adopt a very narrow approach compare to the approach taken under the Rome Statute.

Article 35 of Law No. 26/2000 adopted the provision from Article 75(1)–(2) of the Rome Statute however, it did not adopted the Rome Statute provision in its entirety. For example, the Indonesian human rights court does not have the power to "make an order directly against a convicted person" to make reparation to the victims as stipulated under Article 75(2) of the Rome Statute. Second, the Rome Statute provides for mechanism on how victims may be heard before the ICC and sought reparation.[235] There is nothing under Law No. 26/2000 that sets out victims' participation before the Court to seek reparation, in fact, there is nothing under the Law that provide the mechanism on how victims can proceed with their right to receive reparation before the human rights court. Even though Law No. 13 of 2006 established victims' participation before the Court to seek reparation, no reference was made to Law No. 26/2000.

[228] Ibid., Art. 35(2).
[229] Ibid., Elucidation, Art. 35.
[230] Ibid.
[231] Republic of Indonesia, Government Regulation No. 3 of 2002 concerning Compensation, Restitution, and Rehabilitation to the Victims of Gross Human Rights Violations, State Gazette No. 7, 13 March 2002.
[232] Ibid., Art. 1(4 – 5).
[233] Republic of Indonesia, Law No. 13 of 2006 concerning Witness and Victim Protection, State Gazette No. 24, 11 August 2006.
[234] Ibid., Art. 7.
[235] Rome Statute, Art. 75(3); and ICC Rules and Procedures, Rules, 95(1).

From the perspective of international law, the Indonesian legal framework concerning reparation of victims has taken the notion of individual criminal responsibility for granted so as to curtail the right of victim to receive reparation if the alleged perpetrator of the crime is not convicted. The narrow approach on reparation that has been adopted is indicated in Article 35 of Law No. 26/2000 where reparation only consists of compensation, restitution, and rehabilitation.[236] Whilst under international law, The term 'reparation' is used as a general term to cover a wide range of remedial forms including restitution, compensation, satisfaction, rehabilitation and guarantee of non-repetition.[237] The absence of satisfaction and guarantee as of repetition as forms of reparation has further confirmed the absence of Indonesia's responsibility for internationally wrongful act despite the fact that the human rights court had concluded that gross human rights violations had taken place in Indonesian territories and involved the omission and/or conduct of state organs/officials.

Indonesia's Steps toward the Accession of the Rome Statute

In 2004, Indonesia had stated its intention to become a party to the Rome Statute. This intention was embodied in the Presidential Decision No. 40 of 2004 concerning the National Action Plan on Human Rights (RANHAM).[238] Indonesia was determined to accede to the Rome Statute before the end of 2008.[239] However, until the expiration of RANHAM in 2009, Indonesia has not realized its intention to accede to the Rome Statute. The main resistance to accede to the Rome Statute comes from the Indonesian Defence Ministry and the armed forces. Back in 2008, the then Indonesian Minister of Defence stated that there is no need for Indonesia to hasten the ratification of the Rome Statute since there is nothing urgent in the handling of grave human rights violations in Indonesia.[240] Furthermore he added that the military has learnt their lesson from the East Timor and Tanjung Priok cases, and there will be no more grave violations of human rights.[241] Meanwhile, the Indonesian armed forces stated that they still have concerns

[236] Law No. 26 of 2000, Art. 35.
[237] *See* the International Law Commission Articles on Responsibility of States on Internationally Wrongful Acts 2001 (ILC Articles on State responsibility), article 34; *see also,* the UN Economic and Social Council, *Civil and Political Rights, Including the Question of Independence the Judiciary, Administration of Justice, Impunity: The Right to Restitution, Compensation and Rehabilitation of Gross Violations of Human Rights and Fundamental Freedoms*, E/CN.4/2000/62, 18 January 2000, Principles X, p. 10, par. 21 and the UNGA Resolution on *the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human rights Law and Serious Violations of International Humanitarian Law*, A/Res/60/147, 21 March 2006 (the Guidelines on the Right to a Remedy and Reparation), Principle X, p. 7, par. 18.
[238] Republic of Indonesia, Presidential Decision No. 40 of 2004 concerning the National Action Plan on Human Rights (2004 – 2009), 11 May 2004.
[239] Ibid., Preparation for the Ratification of International Human Rights Instrument, p. 16.
[240] Suara Pembaruan, Indonesia Tidak Perlu Ratifikasi Statuta Roma, 14 August 2009, <www.prakarsa-rakyat.org/artikel/artikel.php?aid=36052> visited on 30 April 2011.
[241] Ibid.

over the implication of Law No. 26/2000 if Indonesia acceded to the Rome Statute especially concerning the applicability of retroactive jurisdiction of the Indonesian human rights court.[242]

Regrettably, this view is also shared by prominent Indonesian legal scholars, which basically stated that the ratification of the Rome Statute will be disadvantageous for Indonesia because:[243] 1) the ratification will constitute an interference to Indonesia's judicial system; 2) Indonesia will be bound by the obligation to cooperate with the International Criminal Court (ICC); 4) Indonesia's procedural laws and other supporting legislations are not sufficient to accommodate the crimes that fall within the jurisdiction of the ICC; and 5) the fact that super powers countries such as the United States, China, and Russia have not ratified the Statute and therefore before the super power countries ratified the Statute, Indonesia, as well as other developing countries, shall not hasten its phase to ratify the Statute.[244]

Many believed that the concerns of the Government are groundless since Indonesia has already had a legal framework to deal with gross human rights violations and that ICC works on the basis of complementarity.[245] Indeed, there are still some legal deficiencies that need to be amended however, this should not hamper Indonesia's intention to accede to the Rome Statute. A step that is now underway, due to the relentless efforts of Komnas HAM and Indonesian human rights NGOs, starting with the initiative to amend Law No. 26/2000 to accommodate the provisions of the Rome Statute that have not adopted properly under Law No. 26/2000.[246] However, until this moment, there has not been any official statement from the Indonesian Government confirming Indonesia's move to accede to the Rome Statute.

Conclusion: Current Developments in Southeast Asia

In the authors' view, Indonesia and Cambodia represent the more progressive instances of the growth of international criminal law; yet they remain wide of the mark. Cambodia is one of the two countries in Southeast Asia (the other being Timor Leste) that has ratified the Rome Statute. Cambodia is carrying out proceedings in the Extraordinary Chambers in the Courts of Cambodia

[242] Statement made by the representative of the Indonesian Armed Forces during an inter-departmental meeting held by the Directorate General of Human Rights, Ministry of Law and Human Rights, Jakarta, 14 November 2008.

[243] Defence Media Centre, Forum Diskusi Pakar Hukum Dephan tentang Statuta Roma, 23 September 2008: <www.dmcindonesia.web.id/modules.php?name=News&file=article&sid=265> visited on 30 April 2011.

[244] Republika, Mengais Harapan pada International Criminal Court, Jakarta, 18 July 2008: <www.infoanda.com/linksfollow.php?lh=BgcEUFJbBAkG> visited on 30 April 2011.

[245] Koalisi Masyarakat untuk Ratifikasi Statuta Roma, *Koalisi minta Pemerintah Ratifikasi Statuta Roma,* Jakarta, 17 February 2011, <www.jurnas.com/news/20606/Koalisi_Minta_Pemerintah_Ratifikasi_Statuta_Roma/1/Nasional/Hukum> visited on 30 April 2011.

[246] Donny Andika AM, *Amandemen UU HAM Ancam Petinggi Militer*, Media Indonesia, Jakarta, 22 Maret 2011, <www.mediaindonesia.com/read/2011/03/03/212312/16/1/Amendemen-UU-HAM-Ancam-Petinggi-Militer> visited on 30 April 2011.

(ECCC) are directed at crimes that took place during the Khmer Rouge era prior to the establishment of the ICC. However, the Khmer Rouge Trials are fraught with difficulty, lack financial support, and face continued opposition from the political leaders who try to limit the number of cases examined by the ECCC. Leaving aside analysis of Cambodia and the Rome Statute as it is beyond the scope of this paper,[247] the authors would like to give a swift overview of the other regional developments with regard to the Rome Statute.

Meanwhile, the Philippines and Malaysian Governments have signed the instruments of ratification and accession respectively in 2011 and now are in the process of obtaining the Philippines' Senate concurrence and enacting implementing legislation for Malaysia.[250] However, the rest of the Southeast Asian States have not yet moved towards ratifying or acceding to the Rome Statute.

Even though not much has been said with regards to ASEAN and individual Southeast Asian countries concerning their commitment to become parties to the Rome Statute however, recent developments have shown that States in Southeast Asia are moving towards to the accession of the Rome Statute. It is especially true when it comes to the progress made by individual Southeast Asian countries. Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore, Thailand, and Viet Nam have participated in the Assembly of States Parties sessions as observers pursuant to Article 122(1) of the Rome Statute.[251] Furthermore, major players in Southeast Asia

[247] Please, however, read *Implementation of the Rome Statute in Cambodian Law*, *supra* note 16.

[250] Media Statement by M. Kula Segaran in Parliament, *Bipartisan Group of Parliamentarians for Global Action Welcomes the Government of Malaysia's Decision to Accede to the Rome Statute of the International Criminal Court*, Parliament, 21 March 2011, <www.dapmalaysia.org/english/2011/mar11/bul/bul4499.htm> visited on 13 April 2011; and Nina Corpuz, *DFA Hopes for Early Concurrence of Rome Statute*, ABS-CBN News, 7 March 2011, <www.abs-cbnnews.com/nation/03/07/11/dfa-hopes-early-senate-concurrence-rome-statute> visited on 11 April 2011.

[251] These States are granted the status of Observatory Signatory States pursuant to Art. 122(1) of the Rome Statute due to the fact that they are signatories to the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998.

such as Indonesia,[252] Malaysia,[253] and the Philippines[254] have given their commitment to ratify or accede to the Rome Statute. The Governments of the Philippines and Malaysia, for example, have even signed the instruments of ratification/accession and now the ratification and accession processes are being considered by the Countries' respective Senate and Parliament.[255]

The reasons whether Southeast Asian states ratify or accede to the Rome Statute are unclear. However, the activism of civil society and national parliaments and the openness of state officials, foster the process. For instance, Malaysian Minister of Law, Datuk Seri Nazri Aziz, affirmed the commitment made by the Malaysian Parliamentarian Lim Kiat Siang during the 6th Parliamentarians for Global Action (PGA) Consultative Assembly Meeting in Kampala in 2010:

> Malaysia cannot fail in its duty to stand with the rest of the World in ending impunity … Asian countries must stand in the forefront of this endeavour to transform the 'culture of impunity' into a 'culture of responsibility.'[257]

A year later, the Malaysian Cabinet has endorsed the instrument of accession to the Rome Statute and now the Parliament is in the process of drafting the implementing legislation.[258] In March 2011, the PGA, facilitated by the Malaysian Parliament, moves forward with their agenda to encourage countries in Asia and the Pacific to ratify or accede to the Rome Statute by

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[252] Presidential Decision No. 40 of 2004 (RAN-HAM 2004 – 2009), Annex, p. 16 <www.kontras.org/uu_ri_ham/RAN%20HAM%202004-2009.pdf> visited on 13 April 2011.

[253] Malaysia gave its commitment to accede to the Rome Statute during the 6th Consultative Assembly of Parliamentarians for the International Criminal Court and the Rule of Law in 2010. Kula Segaran (Malaysian MP), *Universality and Effectiveness of the Rome Statute System – Mainstreaming the Rule of Law in Development Cooperation and Using the ICC as Catalyst for Law Reform,* Speech given during the 6th Consultative Assembly of Parliamentarians for the International Criminal Court and the Rule of Law, Kampala, Uganda, 27 – 28 May 2010, p. 6, <www.pgaction.org/uploadedfiles/CAPVI%20Speech%20Kula%20Segaran.pdf> visited on 13 March 2011.

[254] The Philippines signed the Rome Statute on 28 December 2008, <www.treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en> visited on 13 March 2011.

[255] Bernama, *Malaysia Accedes to Rome Statute of ICC*, Malaysian Mirror, 21 March 2011, <www.malaysianmirror.com/media-buzz-detail/6-nation/52519-malaysia-accedes-to-rome-statute-of-icc> visited on 13 April 2011; and Marvin Sy, *Aquino Decision to Ratify Rome Statute Welcomed*, The Philippine Star, 13 march 2011, <www.philstar.com/Article.aspx?articleId=665734&publicationSubCategoryId=63> visited on 13 March 2011.

[257] Lim Kiat Siang (Malaysian MP), *Call for Action Plan by ASEAN MPs to Secure Ratification of Rome Statute by Majority of ASEAN Nations on 10th Anniversary of ICC on July 2, 2012,* Welcome Remarks, Asia-Pacific Working Group of the Consultative Assembly of Parliamentarians for the ICC on the Rule of Law, PGA and Malaysian Parliament, 10 March 2011.

[258] *Supra* no. 255.

adopting the Kuala Lumpur Action Plan to Promote the Universality of the Rome Statute of the ICC in the Asia Pacific (Malaysia Action Plan).[259] The Action Plan lays out country-specific actions that should be pursued by the respective PGA member to boost up the ratification or accession of the Rome Statute process in their respective country.[260]

It is uncertain what results these efforts might bring about in the neighbouring states, but at the very least, they raise awareness and action for international criminal law in the ASEAN region which remains, to date, reticent about broaching matters pertaining to international criminal law and post-conflict justice. While the ASEAN Foreign Ministers "acknowledged that the establishment of the international Criminal Court is a positive development in the fight against impunity for crimes against humanity, war crimes, and genocide" during the 14th EU-ASEAN Ministerial Meeting in Brussels in 2003,[261] information on ASEAN's position on the establishment and the operation of the ICC is limited. ASEAN as a whole has tended to remain silent on issues of human rights and internal conflict due to its "ASEAN Way" of non-interference. Nonetheless, given the development of human rights in the region, the public activism, the establishment of the ASEAN Intergovernmental Commission on Human Rights, as well as with Cambodia, Malaysia, and the Philippines expressly abiding by the Rome Statute, there are growing opportunities for the ratification of and accession to the Rome Statute to be debated at the regional level.

[259] Working Group of the Consultative Assembly of Parliamentarians for the ICC and the Rule of Law, *Kuala Lumpur Action Plan to Promote the Universality of the Rome Statute of the ICC in the Asia Pacific*, Parliamentarians for Global Actions, Kuala Lumpur, 10 March 2011, <www.pgaction.org/uploadedfiles/Kuala-Lumpur%20Action%20Plan%20to%20promote%20the%20Universality%20of%20the%20Rome%20Statute%20of%20the%20ICC.pdf> visited on 14 April 2011.

[260] Ibid., para. 6 – 10.

[261] ASEAN, *Joint Co-Chairmen's Statement*, 14th EU – ASEAN Ministerial Meeting, Brussels, 27 – 28 January 2003, <www.aseansec.org/14034.htm> visited on 13 April 2011.

Appendices of Indonesian law

1. Republic of Indonesia, Law No. 13 of 2006 concerning Witness and Victim Protection, State Gazette No. 24, 11 August 2006
2. Law No. 11 of 2006 concerning the Regional Government of Aceh), State Gazette No. 62, 1 August 2006
3. Law No 27 of 2004 concerning the National Commission for Truth and Reconciliation, State Gazette No. 114, 6 October 2004
4. Law No. 21 of 2001 concerning the Special Autonomy for Papua Province, State Gazette No. 135, 21 November 2001.
5. Law No. 26 of 2000 concerning the Establishment of the Human Rights Court, State Gazette No. 208, 23 November 2000.
6. Law No. 39 of 1999 concerning Human Rights, State Gazeete No. 165, 23 September 1999.
7. Law No. 8 of 1981 on the Codification of Rules and Procedures for Criminal Matter, State Gazette No. 76, 31 December 1981,
8. Law No. 59 of 1958 concerning the Accession of the Republic of Indonesia to the Four Geneva Conventions of 12 August 1949, State Gazette No. 109, 31 July 1958
9. Law No. 1 of 1946 on Indonesian Penal Code
10. Government Regulation in Lieu of a Law No. 1 of 1999 concerning Human Rights Court, State Gazette No. 191, 8 October 1999.
11. Government Regulation No. 3 of 2002 concerning Compensation, Restitution, and Rehabilitation to the Victims of Gross Human Rights Violations, State Gazette No. 7, 13 March 2002
12. Presidential Decision No. 40 of 2004 concerning the National Action Plan on Human Rights (2004 – 2009), 11 May 2004
13. Presidential Decision No. 38 of 2002 on the Establishment of the National Investigation Team on the Maluku Conflict, 6 June 2002
14. Presidential Decision No. 53 of 2001 on the Establishment of Ad Hoc Human Rights Court within the District Court of Central Jakarta as amended by Presidential Decision No. 96 of 2001, State Gazette No. 111, 1 August 2001.
15. Presidential Decree No. 88 of 1999 on the Independent Commission for the Investigation of Violence in Aceh, 30 July 1999