



UNIVERSITEIT VAN PRETORIA
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YUNIBESITHI YA PRETORIA

**An Investigation on the Establishment of a Truth and
Reconciliation Commission (TRC) for the Republic of
Indonesia**

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A mini-dissertation submitted in partial fulfilment of the requirements for the degree

LEGUM MAGISTER (LLM)

in

Multidisciplinary Human Rights Programme

University of Pretoria

Faculty of Law

April 2012

DECLARATION

I, **Dinie Suryadini M. ARIEF**, declare that the work presented in this dissertation is original. It has never been presented at any other university or institution. Where other peoples' works have been used, references have been provided, and in some cases, quotations made. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LL.M Degree in Multidisciplinary Human Rights.

Signature : _____

Date : _____

Supervisor : **Prof. Karin van Marle**

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Date : _____

DEDICATION

To my son,

Zayyan Ramaradya Ahza

ACKNOWLEDGEMENTS

I am indebted to many people without whom this mini-dissertation would not have been possible.

I am heartily thankful to my supervisor, Prof Karin van Marle, whose encouragement, guidance, support and incisive insight from the initial to the final stage enabled me to complete this mini-dissertation.

I would like to express sincere appreciation to the Centre of Human Rights and the Faculty of Law at the University of Pretoria for giving me the opportunity to learn and extend my knowledge in the field of Human Rights.

I would like to thank Mrs Margaret Mkhathshwa, for her friendship and endless support.

I owe my deepest gratitude to my parents, family and most of all to my dear husband and son. Thank you for all your inspiration, encouragement, devotion and faith in me. Without you this would not have been possible.

Lastly, I offer my regards and blessings to all of those who supported me in any respect during the completion of this mini-dissertation.

SUMMARY

The issue of advancing the promotion and protection of human rights has become a central theme for Indonesia in this Reformation Era. Transitional justice is particularly essential in achieving such advancement. However, scars of unresolved human rights violations committed during the former authoritarian regime have never been fully resolved. Issues of human rights violation in Indonesia's Papua province is a central theme in this research as it is a vital issue for Indonesia's national unity. Indonesia needs to comprehend the aspiration of the Papuans and rise above the difficulties that encompass a series of historical factors and intertwining events of human rights violations. National and international scrutiny on unresolved human rights issues in Papua and issues of separatism in the province further ignite the urgency for Indonesia to acknowledge and address. To undermine its importance would be a ticking time bomb.

The establishment of a Truth and Reconciliation Commission (TRC) for Indonesia was once discussed and considered, but the initiative never materialised. Nonetheless, the spirit to continue for such establishment never faded. This research therefore attempts to delve on what Indonesia can learn and adopt from the South African TRC, which finally would give recommendations for Indonesia, specifically in resolving human rights violations in Papua.

South Africa's TRC is regarded as the most novel and unique truth commission ever established. Its success was beyond expectation and has been praised and recognised around the world. It has also often been described as a model of restorative justice - 'A shift in a nation from totalitarianism to form a democracy, a commitment to the attainment of a culture of human rights, respect for the rule of law, and a determination to make it impossible for the gross violation of human rights of the past to happen again'. This becomes the foundation in which this particular model was used in this research. Its democratic nature, its process of truth-seeking, amnesty, reparation and rehabilitation to victims are just some important features that the South African TRC had presented for the world to learn from.

It is important to note that key elements that contributed to the success of the South African TRC cannot be adopted without adapting it to the subject in formulation. Having its own unique situation and characteristics, Indonesia has to make its own model of TRC for its blueprint of transitional justice – a 'historic bridge' that would serve as a way forward in bringing peace, justice, reparation and reconciliation to the Papuans. Transitional justice is a process that often goes through several phases. For Indonesia, establishing a TRC would be that next important phase.

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LIST OF ABBREVIATIONS

ABRI	Indonesian Armed Forces
AZAPO	Azanian People's Organisation
BGRN	Nationalist People's Movement
BRIMOB	Police Mobile Units
BUK	United For Truth of Papua
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	International Covenant on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
DPA	Papuan Customary Council
DPR	Indonesian's People's Representative Council
ELSHAM	Institute for Policy Research and Advocacy
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICTJ	International Centre for Transitional Justice
INFID	International NGO Forum on Indonesian Development
KODAM	Military based commando
KONTRAS	Commission on Missing Persons and Victims of Violence
KOMNAS HAM	Indonesian Human Rights National Commission
LIPI	The Indonesian Institute of Sciences
MPR	Indonesia's People's Consultative Assembly
OPM	Free Papua Movement
PDP	Papuan Presidium Council
PTFI	PT Freeport Indonesia
RRC	Reparation and Rehabilitation Committee
RANHAM	Indonesia's National Human Rights Plan Action
TAP MPR	People's Consultative Assembly Decree
TNI	Indonesian National Force
TRC	Truth and Reconciliation Commission
TRIKORA	People's Tri Command
UDHR	Universal Declaration of Human Rights
UIR	Urgent Interim Reparations



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UNCHR
UN
UNTEA
UPR
US

United Nations Commission on Human Rights
United Nations
United Nations Temporary Executive Authority
Universal Periodical Review
United States of America

Chapter I

Introduction

1.1 Thesis Statement

Indonesia is at the verge of facing great challenges in the struggle to uphold its commitment for democracy and the promotion and protection of human rights. Most notably is the exigency for the government to redress past human rights allegations conducted during the previous authoritarian regime. Therefore, Indonesia needs to take firm action to conclude these issues in order to strengthen its national integrity and unity.

Indonesia needs to respond to the international scrutiny over human rights issues in Papua by making it a top priority.¹ This research is based on the assumption that because Indonesia's failure to establish a Truth and Reconciliation Commission (TRC), human rights issues in Papua have prevailed. Hence, there is a need for the establishment of a specialised TRC to resolve such human rights issues. The investigation brought forward in this research is in light of the South African TRC experience which could aid Indonesia's endeavours of a more viable TRC for Papua. This analysis and investigation will hopefully serve as an important contribution to the government of Indonesia, in upholding justice and reconciliation for past human rights abuses in Papua.

1.2 Hypotheses

This research is based on the following hypotheses: firstly, Indonesia needs to resolve all allegations of past human rights violations that were committed during the former authoritarian regime. Establishing a TRC is an important element in strengthening the country's democracy and achieving transitional justice. Secondly, a pivotal point for Indonesia is the issue of Papua province as a concern for resolution, recalling its highly politicised human rights issues and sensitivity towards the country's national unity. Through a victim centred TRC, it would achieve accountability, transparency, and build trust towards the government in its

¹ The term Papua or Papua province in this research refer to both West Papua province and Papua province of the Republic of Indonesia and may be used interchangeably.

endeavours for upholding its promise in resolving past human rights issues.

1.3 Research Question

This research endeavours to:

1. Delve into the TRC of South Africa as a favoured model for Indonesia to learn from.
2. Examine the possibility for Indonesia to establish a specialised TRC to resolve the human rights allegations in the Papua province.

1.4 Background

It has been more than a decade since the fall of the former President Soeharto's authoritarian regime (New Order regime). This historical moment serves as a significant turning point for Indonesia's political and justice system.² Indonesia is currently on the verge to achieve a democratic and just transition where it is still striving to bring justice for past crimes allegedly committed during the former regime. In doing so, it is faced with numerous challenges.³

The government in particular is bombarded with numerous allegations of human rights violations committed by government officials of the New Order regime, especially in provinces such as Aceh and Papua. These allegations are mainly brought to the attention of the international community by non-governmental organizations and stakeholders in international forums.⁴ Committed to resolve past

² Soeharto was the second President to the Republic of Indonesia, having held the office for 32 years from 12 March 1967 – 21 May 1998. The legacy of Soeharto's 31-year rule is debated both in Indonesia and abroad. Under his "New Order" administration, Soeharto constructed a strong, centralized and military-dominated government. An ability to maintain stability over a sprawling and diverse Indonesia and an avowedly anti-Communist stance won him the economic and diplomatic support of the West during the Cold War. For most of his presidency, Indonesia experienced significant economic growth and industrialization, dramatically improving health, education and living standards. By the 1990s, the New Order's authoritarianism and widespread corruption were a source of discontent. In the years since his presidency, attempts to try him on charges of corruption and genocide failed because of his poor health. As cited in <http://en.wikipedia.org/wiki/Soeharto> (accessed 10 April 2011).

³ Transitional justice is a response to systematic or widespread violations of human rights. It seeks recognition for victims and to promote possibilities for peace, reconciliation and democracy. Transitional justice is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse. As cited in <http://ictj.org/en/tj/> (accessed 10 April 2011).

⁴ Various cases on allegations of human rights violations received by the Indonesian

human rights issues, in 2000, Indonesia's People's Consultative Assembly (*Majelis Permusyawaratan Rakyat* or MPR) took the initiative of issuing a decree on the Consolidation of National Unity and Integrity (TAP MPR V 2000). This decree initiated the proposal for the establishment of a TRC as part of measures which would be undertaken by the government aiming to uphold the supremacy of law, prosecution and resolution of cases of corruption, collusion and nepotism, and human rights violations in the country.⁵ The decree explicitly mandated the establishment of a TRC that would focus on abuses of power and human rights violations and open the path for comprehensive measures. Following this decree, the Indonesian's People's Representative Council (*Dewan Perwakilan Rakyat* or DPR) passed and enacted Law 26 Year 2000 on Human Rights Courts. The law stipulates that gross violation of human rights that occurred prior to the entry into force of the decree may be investigated by a truth commission as an extra judicial instrument which will then be regulated into another specific law.⁶

It was not until 2004 that Indonesia finally celebrated the prospect for a tangible commitment for an establishment of a TRC with the submission of the draft bill of Law 27 Year 2004 on the establishment of a TRC (*Komisi Kebenaran dan Rekonsilias*).⁷ Nevertheless, the features that were brought in Law 27 Year 2004 were highly criticised. Various stakeholders such as human rights activists and

Government so far has been submitted by, as follows: (a) United Nations Committee Against Torture (Conclusion and Recommendations of the Committee against Torture: Indonesia 22/11/2001), Committee Against Racial Discrimination (Seventy First Session, Geneva, 30 July – 18 August 2007), UN Special Procedure Mechanism, Permanent Forum on Indigenous Issues, Expert Mechanisms of the Rights of Indigenous Peoples; (b) International and National NGO's (Human Rights Watch, Forced Migration Organization, International Crisis Group, Amnesty International, The Lowy Institute for International Policy, Faith Based Network on West Papua, Fransiscans International, Asian human Rights Commission, Department of State AS, West Papua Advocacy Team, East Timor and Indonesia Action Network, Kontras, Elsam etc).(C) National Commission of Human Rights based in Jakarta and Papua (Report on the Commission of Human Rights Violation Investigation in Papua/Irian Jaya, 8 May 2008) As cited from Directorate of Human Rights and Humanity, Directorate General of Multilateral, Ministry of Foreign Affairs, Socialization Report in Jayapura, 31 August – 2 September 2009.

⁵ Chapter IV Indonesia's People's Consultative Assembly Decree No. V/MPR/2000 concerning the Consolidation of National Unity and Integrity (TAP MPR V 2000) 4.

⁶ Art 47, Law 26 Year 2000 on Human Rights Court.

⁷ On 7th September 2004, the DPR issued a draft of the Law No. 27 Year 2004 consisting 46 articles which regulates and serve as a foundation for the creation of a "Commission of Truth and Reconciliation" (TRC) to resolve and clarify human rights violations which include act of genocide and gross violation of human rights that were committed specifically during the era of the New Order regime and before the year 2000. The bill aimed in determining the grant of amnesties for perpetrators and reparations for the victims. The law seeks to establish a panel of 21 persons charged with contributing to national reconciliation and unity through three main functions, which are: the clarification of cases brought before the panel, making recommendations on possible amnesties for perpetrators, and proposing reparations for the victims.

human rights NGOs had several concerns. The International Centre for Transitional Justice (ICTJ) viewed the draft as showing serious conceptual and operational weaknesses that would severely compromise the ability of the truth commission to operate in a credible, independent and effective way.⁸ Among the ICTJ's concerns is the narrow research conducted, which is limited to a case-by-case investigation. This precludes the analysis of context and patterns of several waves of violence experienced in Indonesian history.⁹ Other concerns include the inclusion of the concept of amnesty that are exchangeable for reparation in a manner that is prejudicial to the rights of victims; and the absence of power to issue public policy recommendations in order to prevent the repetition of abuses.¹⁰ Despite all the criticism towards the perfection of the law and after having the bill challenged in the Constitutional Court, the law was annulled.¹¹

The annulment was a setback in Indonesia's effort towards transitional justice. Ruti Teitel explains that in the event of transitional justice, various legal responses should be evaluated on the basis of their prospects for democracy.¹² She reiterates the dilemmas of justice in political transformation and transitional justice, that law is caught between past and future, backward and forward looking as well as retrospective and perspective. She notes that law in ordinary social function provides order and security, where in extraordinary periods of political upheaval, law should be used to maintain order and enable transformation. She put forward law as a normative element of a transitional society, by referencing previous transitional processes from European and Latin America. Indonesia's decision to rectify allegations of human rights violations conforms to her theory of reparatory justice as it is backward looking and implies rectification of past wrong doings, and therefore such efforts needs to be further assessed.

Considering that the mandate for establishing a TRC has been decided by the Indonesian government, the aim in this research is to understand the concept and

⁸ E Gonzales *Comment by ICTJ on the Bill Establishing a Truth and Reconciliation Commission in Indonesia* (2005) 1. As cited in <http://ictj.org/sites/default/files/ICTJ-Indonesia-TRC-Bill-Comment-2005-English.pdf> (accessed 10 April 2011).

⁹ According to the views of the ICJ, this is mainly important since the allegations of human rights violations not just occurred during the limited timeframe, there are even allegations which exceeds the set time frame of investigation. As above.

¹⁰ As above.

¹¹ See Indonesia's Constitutional Court Decision No 006/PUU-IV/2006 on the Decision on the Petition for Judicial Review on Law of the Republic of Indonesia No. 27 Year 2004 concerning Commission for the Truth and Reconciliation against the 1945 Constitution of the Republic of Indonesia.

¹² R G Teitel *Transitional Justice* (2000) 6.

practice of truth commissions experienced by other countries, specifically the South African experience. Desmond Tutu identifies, in his book, truth commissions as one of the several mechanisms by which countries with bitter histories can reconcile their peoples.¹³ The clear objective for the establishment of these bodies is to provide a forum where victims and perpetrators of human rights violations have the opportunity to heal their wounds by speaking openly about their true feelings.¹⁴ This is crucially important for Indonesia to acknowledge.

Papua province, formerly Irian Jaya, is the most eastern province of Indonesia and shares a border with Papua New Guinea.¹⁵ It is argued to be the most marginalised province in Indonesia and subjected to past violations of human rights. Many scholars have researched this matter. Catholic Diocese of Jayapura notes social, political, and human rights conditions in Papua prior to 2005 and underlines the government's inability to overcome the allegations of human rights violations in the province.¹⁶ Elizabeth Brundige identified the alleged violations of human rights range from issues of deprivation of their right to self determination and human rights abuses by Indonesian authorities, to the exploitation of land and natural resources, the exclusion from development and the allegation of genocide.¹⁷ Theo van den Broek added that these allegations stretches through a wide range of human rights violations, including violence against individuals and violations against groups or villagers committed by the government that date back to the 60's and 70's.¹⁸ Such serious allegations have to be answered by the current government as a top priority, especially during the political transition and democratisation process of the country. During the 58th meeting of the United Nations Commission on Human Rights

¹³ D Tutu *No future Without Forgiveness*, (2000) 260 – 261.

¹⁴ Refer to P Hayner *Unspeakable truths; transitional justice in historic perspective* (2002); J Malamud-Goti, 'Transitional governments in the breach. Why punish state criminals?' (1990) 12 (1) *Human Rights Quarterly* 1-16; C L Shiram, *Confronting Past Human Rights Violations: Justice vs Peace in Times of Transitions* (2004) 6.

¹⁵ Papua Province hereinafter shall be referred to both the Province of West Papua and Province of Papua. Province of Papua with Jayapura as its capital, and the Province of West Papua with Manokwari as its capital. Indonesia has 35 provinces which stretch a vast area of 1,919,440 km² which consists of 17,508 islands, with the population of approximately 230 million people.

¹⁶ Catholic Diocese of Jayapura (et al) *Memoria Passionis in Papua 2005* (2005) Office for justice and Peace, Catholic Diocese of Jayapura

¹⁷ E Brundige, W King et al 'Indonesian Human Rights Abuses in West Papua: Application of the Law of Genocide to the History of Indonesian Control' (2004) April *Allard K. Lowenstein International Human Rights Clinic* cited in http://www.law.yale.edu/documents/pdf/intellectual_life/west_papua_final_report.pdf (accessed 11 April 2011).

¹⁸ T v d Broek 'Human Rights Violation in Papua has a Genocide Pattern' (own translation) Seminar on Gencide in Papua, convened by Elsham West Papua and Sinde GKI of Tanah Papua in Abepura, 13 March 2004, 4.

(UNCHR), Van den Broek also stated that the situation in Papua includes the absence of freedom of expression and aspiration and the hindrance of self-determination.¹⁹ This submission was received by the Indonesian government, but has systemically been replaced with violence,²⁰ detention, and torture²¹. He also stressed that there is a sense of fear and intimidation as a result of secret military action committed by the government's security enforcements. This is to paralyse the freedom and separatist movements in Papua - stigmatization by the government was given towards specific community groups and treated them as state enemy.²² The government also conducted evident practices of impunity towards the perpetrators of human rights violations.

The outburst of separatist movements in Papua, which date back to the 60's and 70's, escalated military intervention in the region by establishing a new military based commando (*Komando Daerah Militer/KODAM*). It should be noted that allegations of human rights came from the lack of knowledge and awareness of human rights values and regulations by the security enforcements which caused them to commit these allegations. This, however, cannot be a justification. Criminalization and reparations should be set in place.²³

It is time to address the demands for the settlement of issues in the Papua Province as it has become more intense than ever.²⁴ The intensity became even stronger when international actors such as NGOs started to voice their demands, adding pressure to the Indonesian government over the multifaceted and complex

¹⁹ T v d Broek, Franciscans International and Dominicans for Justice and Peace Association , Statement during the 58th meeting of UNCHR, 9th Session – Statements on Human Rights Violations in various parts of the world, *Palais des Nations*, Geneva, Swiss, 10 April 2002 1

²⁰ 136 people reportedly killed by security officials within the period of 1998-2001 (Annual Report of ELSHAM 2001).

²¹ 830 people reportedly detained and or tortured within the period of 1998-2001 (Annual Report of ELSHAM 2001).

²² Their community group was sought to have close linkage with the growing separatist movements in Papua. Such groups which were stigmatise by the government came from various mountain regions, specifically the Dani ethnic groups.

²³ The UN Declaration of Basic Principles of Justice for Victims of crimes and abuse of Power to identify the victims of such breach of human rights, adopted by the UN General Assembly No 40/34 in 29 November 1985 and Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

²⁴ In 2008-2009, within the international forum, such as Human Rights Council, Human Rights Committees in the UN, and European Parliament, received 20 reports regarding the human rights conditions in Papua submitted by Human Rights Watch, Amnesty International, as well as UN Special Rapporteurs.

issues in Papua. Ignoring it would lead to the further strengthening of separatist movements and international scrutiny; hence jeopardize Indonesia's national unity.

By granting special autonomy to Papua through the enactment of Law 21 Year 2001 on Special Autonomy for Papua Province (Papua Special Autonomy Law), the willingness of the government to resolve the issues in Papua was proved. However, one has to question to what extent. Article 45 and 46 stipulates the mandate for the establishment of a TRC to resolve human rights issues in Papua. However, such mandate is hindered with the annulment of the previously mentioned Law 27 Year 2004.²⁵ Nonetheless the mandate in TAP MPR V 2000, Law 26 Year 2000, and the Papua Special Autonomy Law were never amended, leaving an open door to establish a specialised TRC specifically for Papua which will be proposed in this research.

There is currently no cited literature which specifically delves into the assessment of a TRC establishment in the context of the Papua province. However, there are few general papers that discuss the establishment of a TRC in Indonesia. Daniel Sparingga made a clear notion that despite all efforts made by the government for transitional justice, it is still thought to be slow, discriminative and not thoroughly resolved.²⁶ He acknowledged that with the existence of the mandate to establish a TRC, Indonesia is faced with various circumstances and different level of intensity, scale and period of transition that are not experienced by other countries. While facing the burden to set straight the past government regime, Indonesia is also faced with a destructive economic crisis and territorial separation issues. He identified potential barrier factors and pessimistic thoughts of Indonesia in overcoming its issues. It is agreed that the factors presented by Sparingga are unique to the situation and nature of Indonesia. However, reservation is held with regard to his undermining of Indonesia's capability in achieving a TRC, which he based solely on the lack of leadership. He fails to recognise that Indonesia could learn from successful TRC establishments from other countries, such as South Africa. In his literature Sparingga also failed to give recommendations of real actions towards the government to undertake all foreseeable obstacles. He also failed to

²⁵ Specialised law in this context mean a specific law issued by the Government which regulates the specific terms, rules, and regulation of the mandated TRC as stipulated in Law 27 Year 2004.

²⁶ D Sparingga *'TRC: Resolution for the Authoritarian Regime Heritage and Saviour of Indonesia's Future'* (own translation), a paper during the Seminar on Development of National Law, held by the Department of Justice and Human Rights of Indonesia, 14-18 July 2003

offer possible advantages that Indonesia may embrace from the factors that are evident in Papua such as cultural factors that are embedded in Papua. Another scholar, Satya Arinanto²⁷ took a more narrative and normative stance in the establishment of a TRC in Indonesia. Hence neither of the above contributed to the case study of the Papua province in which its importance and lack of research need to be delved into.

The investigation of South Africa's best practices in its TRC will be framed among others through literature from Cornelius Wilhelmus Els, Hugo van der Merwe, and Russell Ally.²⁸ Van der Merwe narrowed his assessment in the South African transitional justice model with insights of the impact of the TRC's amnesty process on survivors of human rights violations which reflects the South African experience thoroughly. Els, on the other hand, focuses not only on South Africa, but also other Southern African countries, with the main aim of assessing other factors which contribute to the process of reconciliation, such as, the Catholic communities in the region. Ally comprehensively details all related legislation, process and evaluation of impact prior, during, and after the establishment of the TRC in South Africa. Du Bois narrows the experiences of South Africa with its challenge to resolve past human rights violations through the establishment of a truth commission as a mechanism to such transition.²⁹ All the above literatures gives the research important aspects on the TRC in South Africa. This will be examined for best practices and important factors to be gained in the establishment of Indonesia's TRC in relation to this research.

It is indeed time for the Indonesian government to make a stand to its commitments for the promotion and protection of human rights. The establishment of a TRC will reveal the truth and set straight perceptions of impunity by the international and national community towards the human rights issues in Papua. Formulating a specialised commission as a TRC should be considered by undertaking best practices and analysis of a successful TRC, as conducted in South

²⁷ S Arianto 'TRC: Problems and Establishment Prospects in Indonesia' (own translation), during the Seminar of National Law Development VIII, Denpasar, 14-18 July 2003.

²⁸ C W Els 'Reconciliation in Southern Africa: The Role of the Afrikaans Churches: a historical and analytical study of the contributions of the Afrikaans Churches to the process of reconciliation in Southern Africa, with special reference to their response to the work of the truth and reconciliation commission', Thesis(PhD), Science of Religion and Missionology) – University of Pretoria; 2007; H van der Merwe & A R Chapman *Truth and reconciliation in South Africa: did the TRC deliver?* (2008); R Ally, *The Truth and Reconciliation Commission: Legislation Process and Evaluation of Impact* (1991).

²⁹ A du Bois – Pedain, *Transitional Amnesty in South Africa*, (2007)

Africa, while considering the political and social culture in the region for its success.³⁰

The biggest challenge for Papua is communicating the idea of TRC to the public that is widely spread geographically.³¹ This challenge has to be undertaken in order to engage civil society within the process to seek support for its success. The idea of TRC may serve as an answer for the lingering issues in Papua, particularly in unfolding the real truth and guarantee the protection of human rights in the future.

Indonesians have high hopes for the establishment of a TRC as it sheds light in resolving past human rights issues. Therefore, this research will, in particular, focus on the issues of a TRC for Papua province as the main case study because it is highly politicised, both nationally and internationally.³²

1.5 Structure

This research will consist of the following chapters:

Chapter II

A Road towards a Transitional Justice in Papua: Reality Vs Perception

This chapter aims to analyse the process of democratization in Indonesia. It focuses on the Papua province because, since its integration into Indonesia up to the political transition in 1998, interrelated problems have emerged. This section is supported with information acquired from various perspectives, ranging from the views of the government, civil society and the human rights activists in Papua. The

³⁰ South Africa have experience politically motivated gross human rights violations in their recent political history and had resolved it through the TRC that it has established, now completed and submitted its report to the government. With the level of success that South Africa has experienced, it is seen to be one of the best practices that Indonesia could seek for example. The South African TRC was also criticised for its shortcomings, among others refer to L Graybill 'Assessing South Africa's Truth and Reconciliation Commission' in *Canadian Journal of African Studies / Revue Canadienne des Études Africaines*, Vol. 36, No. 2(2002), 356-361; G Simpson 'A brief evaluation of South Africa's Truth and Reconciliation Commission: Some lessons for societies in transition, paper written prior to the publication of the South African TRC Final Report, Oct 1998, cited in <http://www.csvr.org.za/wits/papers/paptrce2.htm>; G Simpson, P van Zyl 'South Africa's Truth and Reconciliation Commission', *Temps Modernes*, 585, (1996) 7-12; V Jardine 'Truth and Reconciliation Commission: success or failure?' unpublished MHCS dissertation, University of Pretoria, 2008.

³¹ J B Herawan 'Filling the proposal for a TRC in the context of Papua' (own translation) Paper at the Workshop on Ideas for the upholding of human rights in the future by KONTRAS Papua, 10-14 June 2002.

³² The issues of separatism, international interest towards the richness of resources in Papua province, and the support of states towards the separatism acts in Papua which has come to a worrying state – though these are currently based on perception and investigation of Indonesian intelligence.

analysis will also attempt to give an in-depth scrutiny on national and international perceptions of the situation in Papua. It suggests how to prevent misleading perceptions which could degenerate the existing situation within the province.

Chapter III

Best Practices from South Africa's TRC

This Chapter will analyse best practices on the implementation of a TRC, focusing on the experiences of South Africa. Through the analysis, one will be able to consider whether it is feasible to adopt a similar model in order to resolve issues in Papua.

Chapter IV

The Case of Papua: Indonesia's Priority for National Unity

Based on the analysis made in the previous chapters, a specified formulation based on best practices and specialised values needing adjustment for the situation on the ground is considered. This could give a solution to the human rights issues of the past and create a future blueprint for the implementation and protection of human rights, especially in Papua.

Chapter V

Conclusion

This chapter concludes the analysis and gives recommendations for solutions that could be used by the government.

Chapter II

A Road towards a Transitional Justice in Papua: Reality Vs Perception

2.1 History of Papua

Papua is located in the eastern most part of the Republic of Indonesia on the island of Irian Jaya. Its borders are directly adjacent to Papua New Guinea. This part of Indonesia was formerly known as Netherlands New Guinea, *Irian Barat* or West Irian, Irian Jaya and now Papua.³³ It is essential to be acquainted with the history of the Papua, in order to understand the current situation underlying the province. As noted by The Indonesian Institute of Sciences (LIPI), 'the problems and causes of the conflict in Papua are, to a great extent, the consequences of a web of events from earlier regimes.'³⁴

Papua spans an area of approximately 421,981 square kilometres, which constitutes about 22% of the entire Indonesian territory. Despite its size, it is inhabited by only a small percentage of the entire Indonesian population, approximately 1.5%.³⁵ Papua's history in becoming part of Indonesia has caused contestation and controversy. Such history dates back to the 17th century when Dutch navigators established footholds on the island.³⁶ By the 19th century, the West New Guinea was internationally recognized as part and parcel of the Netherlands East Indies. As a Dutch colony, Papua served mainly as a station from where the Dutch could control sea-lanes of the spice trade.³⁷ It also served as an area of exile for Indonesian people that opposed the Dutch and struggled for freedom. With such activities residing in Papua, it made the area an active ground for the Indonesians to struggle for anti-colonial and independence in the early 20th century.³⁸

³³ R A Erlangga et al (eds) *Historical Facts on Irian Jaya* (2005) 1.

³⁴ LIPI Team 'Papua Road Map: Negotiating the Past, Improving the Present and Securing the Future' (2008) 3.

³⁵ According to the 2010 Data from Statistic Indonesia (*Badan Pusat Statistik Indonesia*) the population in West Papua Province are approximately 760, 422 people and Papua Province are approximately 2,833,381 people. Thus constituting approximately 1,5% of Indonesia's population of 237,641,326 people as cited in http://www.bps.go.id/tab_sub/view.php?tabel=1&daftar=1&id_subyek=12¬ab=1 (accessed in 10 August 2011).

³⁶ Many records show that the Dutch had entered the island since 1828.

³⁷ Erlangga (n 33 above) 4.

³⁸ As above.

During the Second World War, the Japanese colony had entered the island of Irian Jaya. The Japanese troops invaded most parts of Indonesia which caused the Dutch to flee from the Indonesian territory. The atomic bombing of Hiroshima and Nagasaki, by the Allied forces had immediate impact on the Japanese forces and weakened them. Indonesia's founding fathers, taking advantage of the weakened position of the Japanese forces at that time, proclaimed independence over the entire archipelago. This area used to be the Netherlands of East Indies, which on 17 August 1945, became the Republic of Indonesia.³⁹ Indonesia's declaration of independence was in compliance with the principle of international law on decolonisation known as '*uti possideti juris*' where the territorial border of a new entity established on a former colonial territory conforms to the territorial border of the said colony.⁴⁰ The Dutch ignored such principle by delaying the handover of the administration of Papua and their recognition for Indonesia's sovereignty.⁴¹

In October of the same year, after the Second World War ended, the Dutch came back to Indonesia to claim its former territory without recognising Indonesia's independence. Despite the Dutch's unwillingness to recognise Indonesia's independence, during a Dutch sponsored Conference in Makassar, South Sulawesi in July 1946, the Dutch proposed a federation of Indonesian states in which Indonesia would be divided into three states namely: the State of Indonesia, the State of Kalimantan, and the State of Eastern Indonesia (which would include Papua).⁴² This proposal was rejected by fellow Indonesians, including the Papuans. Another following proposal was the effort to exclude Papua from the proposed State of Eastern Indonesia so that it would become a separate political entity, however, such proposal gained no support.⁴³

³⁹ The Proclamation of Independence initially announced the formation of the Republic's eight provinces: Sumatra, Lesser Sunda, West Java, Central Java, East Java, Sulawesi, Kalimantan, and Maluku. Papua was part of the Maluku province, as it was under the Dutch. As cited in Koentjaraningrat (ed), *History of Irian Jaya (own translation)* (1994) 71-72. See also <http://papuainfo.wordpress.com/2009/08/23/ii-a-world-war-then-revolution/> (accessed 18 August 2011).

⁴⁰ See <http://papuainfo.wordpress.com/tag/1/>, <http://legal-dictionary.thefreedictionary.com/Ut+possideti> and http://en.wikipedia.org/wiki/Ut+possideti_juris (accessed 18 August 2011).

⁴¹ During the meeting of the Committee for the Preparation of the Independence of Indonesia, it was asserted that the territory of the Republic of Indonesia was the entire Netherlands Indies in accordance with the principle of '*uti possideti juris*'. As cited in Erlangga (n 33 above) 43.

⁴² Erlangga (n 33 above) 9. See also <http://papuainfo.wordpress.com/2009/08/23/ii-a-world-war-then-revolution/> (accessed 18 August 2011).

⁴³ Erlangga (n 33 above) 10.

The Dutch efforts in separating Papua from Indonesia ended in 1949, with the Round Table Conference held in the Netherlands between 23 August and 2 November 1949. Representatives from the Republic of Indonesia, the Crown of the Netherlands, and Dutch-sponsored local governments in Indonesia met and made a decision. The decision confirmed the Dutch's recognition for Indonesia's sovereignty and independence with the signing of the Charter of Transfer of Sovereignty.⁴⁴ However, with the above charter, the legitimate transfer of Papua was still in question.⁴⁵ In 1951, most notably, the Dutch government initialized an amendment to its Constitution so that Papua was included in the official geographic definition of the Kingdom of the Netherlands.⁴⁶ While deadlock on the issue of Papua persisted, the world watched with great concern as both sides gained support from other countries.⁴⁷ This issue was undoubtedly scrutinized internationally.

In September 1961, the Dutch Foreign Minister formally presented to the United Nations (UN) General Assembly a plan to turn West Irian over to the UN, which would then administer to and prepare the Papuans for an exercise of self determination. This was another attempt by the Dutch to prevent Indonesia's takeover of the territory. The proposal however did not gain the support of the UN General Assembly. As a defence for such acts, President Soekarno launched the *Trikora* (*Tri Komando Rakyat* or People's Tri Command) Declaration. This was a call to:⁴⁸

“Thwart the formation of a puppet state of Papua by the colonial power; raise Indonesia's Red and White Flag in West Irian; and prepare a general mobilisation to gain control of the contested territory and thus defend national sovereignty and unity.”

This declaration represented Indonesia's readiness to strive for military action for the sake of maintaining the inclusion of Papua within its sovereignty. On the day of the declaration, the Dutch government informed the United States of America's (USA) State Department that their government was willing to consider negotiations on condition that such negotiations were on the basis of the principle of the Papuan self-determination. Without delay, the UN Secretary General informed both the

⁴⁴ Subandrio *Revising the history of West Irian's Struggle* (2001) 218.

⁴⁵ Refer to Art 1 and 2 of the 1949 Charter of the Transfer of Sovereignty.

⁴⁶ As cited in <http://www.vanderheijden.org/ng/history.html#4> (accessed 10 August 2011).

⁴⁷ Indonesia gained support from USSR and China, whilst Netherlands gained support from Australia. Such situation gained international scrutiny as at that time geopolitical map of countries were greatly institutionalized with the situation of the ongoing Cold War. As cited in <http://www.vanderheijden.org/ng/history.html#4> (accessed 10 August 2011).

⁴⁸ Erlangga (n 33 above) 21.

Indonesian government and the Dutch government to start negotiations under the auspices of the UN.

In July 1962, a preliminary agreement, known as the New York Agreement, was reached.⁴⁹ Among the stipulations were the transfer of administration over Papua to the United Nations Temporary Executive Authority (UNTEA) and the authority to transfer all or parts of Papua's administration to Indonesia after 1 May 1963 by the UN Commissioner. The UN Secretary-General would also appoint UN officials to advise, assist, and participate in the arrangement of the act of self-determination, which would have to be completed by 1969. Upon signing the final agreement, full diplomatic relations would be restored between the Netherlands and Indonesia.

The New York Agreement was finally signed on 15 August 1962 at the UN Headquarters in New York.⁵⁰ The agreement left the Indonesian government with the method and procedure for the act of self-determination by the people of Papua, with assistance and participation of the UN.⁵¹ Such processes would ensure that the voice of the Papuan people was heard in determining its own future.

In 1969, the Act of Free Choice was conducted in the form of a series of consultations with tribal councils in the territory. The process was reached through consensus and consultations. Communities chose their representatives who would carry out a political act on behalf of their communities.⁵²

Special Representative of the UN Secretary-General, Ambassador Fernando Ortiz-Sanz, and other UN staff were in attendance during the consultations with the representative councils. They also attended the election of members of the consultative assemblies and when the Act of Free Choice was conducted. In his report to the UN General Assembly, Ambassador Ortiz-Sanz reported that during the consultations, there were petitions opposing the transfer of Papua administration to

⁴⁹ Erlangga (n 33 above) 33.

⁵⁰ The 1962 New York Agreement comprises of 29 articles, which essentially stipulates: 1. The transfer of administration from the Netherlands to the UN (Art. 2 – 11), 2. The transfer of administration from UN to Indonesia (Art.12 and 13), 3. Self determination (Art 14-21). As cited in <http://www.indonesiaseoul.org/archives/papua/The%20History%20of%20The%20return%20of%20Papua.pdf> (accessed in 10 August 2011).

⁵¹ Art XVIII The 1962 New York Agreement.

⁵² Erlangga (n 33 above) 39.

Indonesia. Nonetheless, there were also a good number of petitions in favour of the integration.⁵³ The response agreed by the consultative assemblies was a unanimous consensus in support of being part of Indonesia.

On 2 August 1969, Indonesia's Foreign Minister officially informed the UN Secretary-General that the people of Papua had unanimously chosen to stay with Indonesia. Consequently, on 19 November 1969, in response to the report of the UN Secretary-General on the exercise of self-determination by the people of Papua, the UN General Assembly adopted Resolution 2504.⁵⁴ With the said resolution in place, the process of free choice was legitimately approved by the international community. Thus, the integration of Papua as part of Indonesian sovereignty was finally complete.

2.2 Sparks of Separatism: Voices of the People of Papua?

Papua is a province blessed with rich natural resources. It is abundant with mineral resources and has a vast area of rain forest. Its richness was discovered and made the base for one of the largest mining companies in the world. PT Freeport Indonesia (PTFI), a mining company based in Arizona - USA, is the first foreign mining company which was given the permit to conduct mining in Papua during the New Order regime since 1967. Its permit was renewed from 1991 to 2041. PTFI is a large contributor to Indonesia's fiscal income - approximately US\$330 million.⁵⁵ Unfortunately, despite its richness, Papua is the most marginalised province with its political, social, and economic development lagging behind other provinces in the country. This condition serves as one of the root causes which further triggers the issues of separatism.

During the struggle and negotiations between Indonesia and the Dutch government over Papua, two separatist movements emerged. They are: the Free

⁵³ UN General Assembly 24th Session Agenda Item No 98, A/7723, 9 November 1969 as cited in <http://www.papuaweb.org/dlib/pbb/unga-1969-pepera.PDF> (accessed 10 August 2011)

⁵⁴ UN General Assembly Resolution 2504, as cited in http://en.wikisource.org/wiki/United_Nations_General_Assembly_Resolution_2504 (accessed 15 August 2011)

⁵⁵ PTFI is an affiliate of Freeport-McMoRan Copper & Gold Inc.. The mining site called Grasberg in Mimika. Papua is one of the largest gold mines in the world. PTFI conducts mining, processing, and exploration on copper, gold and silver. To date, it has the largest gold and copper reserve in the world. As cited in W H Purwanto *Papua 100 Years to Come* (own translation) (2010) 61 and <http://www.ptfi.com/about/default.asp> (accessed 1 September 2011).

Papua Movement (*Operasi Papua Merdeka* or OPM) and the Papuan Presidium Council (*Presidium Dewan Papua* or PDP). OPM's struggle was initially motivated by the Dutch propaganda against Indonesia in the situation to separate Papua from Indonesia. Such situation escalated the numerous allegations of human rights violations and inequalities suffered by the Papuans. Dispute was mainly over the benefit sharing and the lack of development as compensation from the rich natural resources in the province.⁵⁶ Another separatist organisation developing in the province is PDP.⁵⁷ The intention of PDP is somewhat different to OPM; its basic claim is to demand a referendum and a re-examination of the 1969 Act of Free Choice. Hence, they both have a similar goal – to strive for Papua as an independent state – but with different approaches in achieving them.

OPM was established in 1964 and used armed forces against the Indonesian government. It struck its first action in 1965 and since then, has become the main organisational group that fought against Indonesian authority.⁵⁸ OPM has never been regarded as a strong based organisation and it does not have a single commando.⁵⁹ OPM's internal structure comprises various fractions of different ethnicity.⁶⁰ The OPM carry out their reigns of terror in order to disrupt security, law and order.⁶¹ After the end of the New Order regime, OPM changed their tactics from minimising the use of force to the struggle for peaceful dialogue with the Indonesian central government. Such dialogue was conducted by their intellectual, religious, and cultural representatives, aiming towards Papua's independence.

Meanwhile, PDP was formed as an alternative approach when the armed actions led by OPM were considered ineffective. The PDP is described as a re-emergence form of the *Niuew Guinea Raad* or New Guinea Council, established in 1961, which was approved and gazetted by the Kingdom of the Netherlands.⁶² The PDP itself started in 1998 after the fall of the New Order regime. It made use of the transitional political momentum at that period where freedom of speech and political

⁵⁶ Erlangga (eds) (n 33 above) 47.

⁵⁷ This organisation was led by Theys Hiyo Elway.

⁵⁸ S Usman & I Din *Tides of Papua's History* (own translation) (2010) 123.

⁵⁹ OPM group among others led by Kelly Kwalik, Hans bonay, and Willem nde.

⁶⁰ Among the ethnic groups involved with OPM are Manokwari, Biak, Jayapura, Marauke, Wamena, Star Mountain etc. As cited in Usman & Din (n 58 above) 124.

⁶¹ Erlangga (eds) (n 33 above) 47.

⁶² In 1961 West Papuan Council (Nieuw Guinea Raad) was formed and introduced a national anthem 'O, My Land Papua' and flag 'Morning Star Flag' for an independent West Papua. As cited in http://en.wikipedia.org/wiki/Papua_Presidium_Council (accessed in 1 September 2011).

space were at its peak.⁶³ PDP made its struggle using political statements by questioning the legitimacy of the integration process of Papua to Indonesia. It aimed at creating international attention, mainly from the UN, to reevaluate the political status of Papua through a referendum of the 1969 Act of Free Choice. However, this council does not have a strong foothold in the province. It lacked support from various ethnical groups and was short of tactical political strategies.⁶⁴

From the brief evaluation on the two separatist movements in Papua above, question and concern is raised. Do they really represent the majority voice of the Papuans? Or do they merely stand as movements that struggle for past values, offering no alternatives for a solution between the grievances of the Papuans and the Indonesian central government? As highlighted by R A Erlangga (eds), the Papuan secessionist argue that they should be separated from the rest of Indonesia because the Papuan people are ethnically Melanesians, making them different from the rest of the Indonesian people.⁶⁵ Papuan secessionists consider Malay as a manifestation of racism. This argument on racial homogeneity cannot be used to define political unity. Furthermore, as urged by the late President Abdurrahman Wahid, more dialogue and negotiations between the Papuans and the central government is needed and the issue of independence should not be an option.

2.3 Allegations of Human Rights Violations in Papua

Allegations of human rights violations in Papua were highly associated with the government's policies for national security in the province, especially with the rise of the separatist movements. After Papua's integration with Indonesia, the New Order regime conducted numerous repressive military operations which not only aimed to secure the territory against pro independence activities in Papua, but was conducted for the security benefit of PTFI which conducted its mining activities in the region.⁶⁶ The conduct of such military security approach brought in a series of unresolved allegations on human rights violations, including allegations of extra-judicial killings, rape, torture, arbitrary arrest and detention. Such an approach also restricted the rights to freedom of assembly and freedom of speech, including the

⁶³ Purwanto (n 55 above) 62.

⁶⁴ Purwanto (n 55 above) 63.

⁶⁵ Erlangga (eds) (n 33 above) 46.

⁶⁶ Papua and Aceh have special meaning to Indonesia's sovereignty; it is a national symbol of unity as reflected in the slogan 'from Sabang (Aceh) to Marauke (Papua)'.

denial of free access to NGOs, human rights groups, international observers and the media.⁶⁷

Several important human rights violations were reported to have occurred under the New Order regime. These were allegedly committed by the Republic's Armed forces (*Angkatan Bersenjata Republik Indonesia* or ABRI), now known as the Indonesian National Force (*Tentara Nasional Indonesia* or TNI). The allegations were noted by the United for Truth of Papua (*Bersatu Untuk Kebenaran* or BUK) which include: *Sadar* Military Operation (1965 - 23 March 1966); *Bharata Yudha* Military Operation (23 March 1966-1967); *Wibawa* Military Operation 1967-1969; *Pamungkas* Military Operation 1969-1971, and Dani Massacre 1977.⁶⁸ These are just a few of the numerous allegations of human rights violations reported in the area.⁶⁹ Severe human rights violations were reported to have been conducted by these military operations, causing deep scars for the Papuans. The military operation's aim to end separatist movements in the area, however, escalated the situation and fanned the separatist movements to conduct more intense activities.

Moreover, reports have also shown that in the Reformation Era (1998-to date) human rights violations still occur. From 1999 to 2009, acts of involuntary capture, torture, and intimidation against civilians committed by the security authority occurred.⁷⁰ Some of these include: Sorong Regency in 5 July 1999, Paniai Area in July 1999, Nabire Case in 29 February 2000, Bloody Paniai Case in 21 May 2000 and Abepura Case in 7 December 2000.⁷¹ In addition, in a written statement by International NGO Forum on Indonesian Development (INFID) at the 61st Session of the UNCHR, concerns for the continuing acts of involuntary disappearances and extrajudicial killings occurring in Papua were reported.⁷²

⁶⁷ See <http://www.petitiononline.com/unreview/> (accessed 5 September 2011).

⁶⁸ See <http://bukpapua.blogspot.com/> (accessed 5 September 2011).

⁶⁹ In the year 1998 alone (before the fall of the New Order Regime) there are reports of torture conducted by TNI and BRIMOB in the efforts to gain information regarding the OPM leaders that hid in the villages. In 24-29 January 1998, they interrogated the village chief of Epouto and Wotai, and then tortured to gain information on OPM. A similar case happened in Madi Village where 2 people were tortured and intimidated with 1 person murdered on the hands of the said authority. In 6 July 1998, the Bloody Biak Case occurred with 500-1000 civilians captured, tortured, and intimidated. As cited from P K Elias, 'Ending the chain of violence in Papua' (own translation), 2009 KAPAS 6-7

⁷⁰ Elias (n 69 above) 7.

⁷¹ KKP HAM Abepura Report and KOMNAS HAM Report 49-53. As cited in Ellis (as 69 above).

⁷² INFID 'Civil and Political Rights, Including the Questions of: Disappearances and Summary Executions' submitted to the 61st Session of the UNCHR on 15 March 2005 E/CN.4/2005/NGO/317 as cited in <http://daccess-dds->

The long awaited justice for the Papuans for the damage and suffering that they experienced to this date never realised. Criminalization against acts of injustice and reparations for the victims needs to be endorsed and implemented. Until such atrocities are addressed, issues of separatism and unrest in Papua will never end. For this reason, the promise for transitional justice has to realise.

2.4 External intervention: International Scrutiny and Perceptions

Currently, separatist movements have become highly active in campaigning for support, both nationally and internationally. Globalization has caused jurisdiction of a state to become borderless. Hence today, external scrutiny towards internal issues of a country is increasing more than ever.

Thus with such scrutiny, it supported in raising international attention to the issues surrounding Papua. Such realities, on one hand, could assist Indonesia in handing a viable solution. On the other hand, however, these realities could have a negative effect. Parties not wishing for peace and security in Papua for reasons that cannot be justified could cause further politicisation internationally.

Numerous cases of allegations of human rights violations have been brought to the attention of the international community and have been received by the Indonesian government. The UN has so far sent special rapporteurs to Indonesia and have mentioned in their report recommendation for the situation in Papua.⁷³ Amongst others are:

Firstly, the UN Committee against Torture at its 27th Session⁷⁴ and its 40th Session⁷⁵ (Conclusion and Recommendations of the Committee against Torture: Indonesia). Both repeatedly mentioned its concerns and recommendations under the

ny.un.org/doc/UNDOC/GEN/G05/130/37/PDF/G0513037.pdf?OpenElement (accessed 6 September 2011).

⁷³ UN Committee against Torture (Conclusion and Recommendations of the Committee against Torture: Indonesia 22/11/2001), Committee Against Racial Discrimination (Seventy First Session, Geneva, 30 July – 18 August 2007), UN Special Procedure Mechanism, Permanent Forum on Indigenous Issues, Expert Mechanisms of the Rights of Indigenous Peoples.

⁷⁴ UN Committee against Torture, Twenty Seventh Session, 12-23 November 2001, CAT/C/XXVII/Concl.13 dated 22 November 2001.

⁷⁵ UN Committee against Torture, Fortieth Session, 28 April – 16 May 2008, CAT/CIDN/CO/28April- 16May 2008.

issue of disproportionate use of force and widespread torture during military operations and the practice of impunity. The Committee is deeply concerned with the numerous ongoing credible and consistent allegations. Further confirmed by the report of the Special Rapporteur on Torture and other sources, there has been a routine and disproportionate use of force and widespread torture and other cruel, inhuman and degrading treatment or punishment by members of the security and police forces during military and “sweep” operations, especially in Papua, Aceh and in other provinces where there have been armed conflicts.⁷⁶ It recommended several important measures, namely for the government to promptly take all necessary measures to prevent security and police forces from using disproportionate force and/or torture during military operations, especially against children, and to promptly implement effective measures to ensure that all persons are afforded all fundamental legal safeguards during their detention.⁷⁷ Recommendations also included the implementation of a prompt, effective and impartial investigation and to bring justice to the perpetrators in accordance with the gravity of the acts, as required by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The government reflected its commitment by highlighting it in its Universal Periodic Review (UPR) to combat impunity and announced a ‘zero-tolerance policy’ for perpetrators of acts of torture and other cruel inhuman and degrading treatment.⁷⁸

Secondly, the Special Representative of the UN Secretary-General on Human Rights Defenders on the protection of human rights defenders, Hina Jilani, visited Indonesia from 5 to 13 June 2007. She noted in her report the need for Indonesia to increase dissemination of human rights knowledge and democracy to its law enforcement authorities. In addition, she urged that all military operations that were conducted, specifically in Papua, should by all means reduce the number of violence and human rights violations.⁷⁹

⁷⁶ Arts 2, 10 and 11 Conclusion and Recommendations of the Committee against Torture: Indonesia

⁷⁷ These include, in particular, training programs for all military personnel on the absolute prohibition of torture. Also refer to arts 2 and 12 Conclusion and Recommendations of the Committee against Torture: Indonesia.

⁷⁸ Indonesia Universal Periodical Review A/HRC/WG.6/1/IDN/4, paragraph 76.4.

⁷⁹ Report of the Special Representative of the Secretary-General on Human Rights Defenders on the protection of human rights defenders, Hina Jilani – during her visit to Indonesia 5-13 June 2007, A/HRC/7/28. As cited in <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/104/96/PDF/G0810496.pdf?OpenElement> (accessed 15 September 2011).

Thirdly, the UN Special Rapporteur on Torture, Manfred Nowak, visited Indonesia from 10 to 25 November 2007. In his report, he underlined issues of impunity and the use of extreme violence.⁸⁰ He recommends that the Indonesian government stop the use of extreme violence during such military and police operations. Nowak however did not give any statements indicating that there has been violation of human rights within these provinces.

Lastly, international and national NGO's, such as Human Rights Watch, Forced Migration Organization, International Crisis Group, Amnesty International, The Lowy Institute for International Policy, Faith Based Network on West Papua, Fransiscans International, Asian Human Rights Commission, Department of State USA, West Papua Advocacy Team, East Timor and Indonesia Action Network, Commission on Missing Persons and Victims of Violence (*Komisi untuk Orang Hilang dan Korban Tindak Kekeraasan* or KONTRAS) and Institute for Policy Research and Advocacy (*Lembaga Studi dan Advokasi Masyarakat* or ELSAM) have further provided allegations of human rights violations in Papua to the international forum.⁸¹ Therefore, in order to avoid misleading perception and a one-sided view on the alleged violations, the government has to investigate, reveal the real truth and uphold justice to avoid misleading perceptions. This is an important step considering the separatist movements in Papua are trying to gain support from both national and international NGOs. As a result, the validity of the information submitted by the NGOs should be verified by the government. The shaping of perceptions by NGOs has significant effects for the government in solving human rights problems in Papua.

Today, studies regarding the struggle of Papua, its nationalism, its human rights situation and its integration into Indonesia are conducted in many universities

⁸⁰ UN Special Rapporteur on Torture, Manfred Nowak, visit to Indonesia, 10-25 November 2007 Doc. A/HRC/7/3/Add.7. As cited in <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/101/61/PDF/G0810161.pdf?OpenElement> (accessed 15 September 2011).

⁸¹ In a report written by Amnesty International on April 2002, it reported that during its mission to Papua in January 2002, it documented cases of extrajudicial executions, "disappearances", torture and arbitrary detentions. But these allegations were not completely resolved through appropriate ad-hoc human rights trials by the Indonesian Government. This paper is though considered outdated since there are numerous improvements by the government in strengthening human rights protection within its country, specifically Papua. One of the allegations of human right violation in Abepura, was successfully brought to trial with meticulous investigation undertaken by the KOMNAS HAM based in Jakarta and Papua and a full report made in 2008. As cited in the Report of KOMNAS HAM Violation Investigation in Papua/Irian Jaya, 8 May 2008.

and by policy researchers, mainly in the USA and Australia.⁸² Again, these studies may benefit in assisting Indonesia resolve the issues surrounding Papua. Nonetheless, what is feared and considered is whether such studies bear any hidden agendas. Many speculations say that despite Papua's richness in natural resources (gold and oil), some states might have a keen interest in separating Papua from Indonesia by supporting separatist movements so as to take advantage of its natural resources.⁸³

All the above mentioned issues and the support of states towards the separatism acts in Papua have come to a troublesome state. Indonesia needs to act fast. International perception must be straightened with the actual realities in Papua. The chain of violence must be stopped. Repressive acts by the government would be counterproductive as it would strengthen the opposition's force and toughen their efforts to demand political separation. Such escalation of violence will have a parallel increase of international attention and intervention.

As reiterated by Yusrianto, Coordinator of the Nationalist People's Movement (*Barisan Gerakan Rakyat Nasionalis* or BGRN), Indonesia should refuse all kinds of external interference for Papua. He added that 'Papuan do not want referendum...actions that fought for a re-referendum are motivated by foreign intervention that aim to put Papua under neo-colonialism and to take over Papua's rich natural resources'.⁸⁴ He urged the Indonesian government to take a stance and not be blinded by only the issue of separatist movements, but also by external interventions which have interests in taking over Papua. He further adds, 'Papuan are people of bows and arrows, thus the armed weapons that they use are definitely sponsored by an external party'.⁸⁵

2.5 Transitional Justice - Ongoing or Stagnant Process?

Transitional justice seeks to address challenges that confront societies as they shift from an authoritarian state to form a democracy. It seeks to confront

⁸² Among others see http://sydney.edu.au/arts/peace_conflict/research/west_papua_project.shtml ; <http://www.yale.edu/gsp/papua/index.html> (accessed 15 September 2011).

⁸³ According to speculations obtained from random interviews of university students, international relation researchers in Indonesia.

⁸⁴ Suryanto (ed) '*Reject Foreign Intervention for Papua*' (own translation) *Antara News* 9 August 2011 as cited in <http://m.antaranews.com/270947> (accessed 15 September 2011).

⁸⁵ As above.

perpetrators, address the needs of victims and start a process of reconciliation and transformation toward a more just and humane society.⁸⁶

Policies and approaches by the Indonesian government to resolve issues in Papua in the Reformation Era had little improvement since it was declared part of Indonesia in 1969. Despite efforts for dialogue, negotiations, consultations and reconciliation, the approach is dominated by security approaches through military operations and interventions to end separatist movements.⁸⁷ The transitional justice dreamt by the Papuans has yet to be realised. The key address is whether or not transitional justice has been an ongoing or a stagnant process.

From what has been discussed in this chapter, and what has been identified by LIPI, the source of the Papuan conflict can be grouped into three main issues: the contradicting issue of Papua's political identity and history as part of Indonesian territory; the failure of development and economic empowerment to the people of Papua; and the lingering issues of accountability for past and present state violence.⁸⁸

Indeed after the fall of the New Order regime, Indonesia is committed to uphold justice by issuing a set of human rights law aiming to promote and protect human rights within its jurisdiction.⁸⁹ Nonetheless, allegations of human rights violations by the security authorities in Papua have yet to be resolved. The government's efforts to develop and improve socio-economic conditions in Papua have not been viable. The aspirations of the Papuans are not accommodated in the political process for the aim in upholding law and human rights. Usman and Din asserts that the demands of the Papuans are mostly misinterpreted by the government as acts of rebellion, rather than inputs by the people who are seeking solution from the government.⁹⁰

⁸⁶ A Boraine 'A Transitional Justice' in C Heyns & Stefiszyn (eds), *Human Rights, Peace and Justice in Africa: A Reader* (2006) 365.

⁸⁷ President B J Habibie, who had succeeded President Soeharto, have initiated communications with the Papuan separatist leaders but resulted with no response. Such policy was also maintained by the following President Abdurrahman Wahid but also ended with no satisfying resolution. As cited in Erlangga (eds) (n 33 above) 48.

⁸⁸ LIPI (n 34 above) 9.

⁸⁹ Amongst other with the enter into force of Law 39 of 1999 regarding Human Rights, Law 26 of 2000 regarding Human Rights Court .

⁹⁰ Usman & Din (n 58 above) 1.

The Papua Special Autonomy Law passed by President Megawati Soekarnoputri, in an effort by the government to facilitate the demands of the Papuans, gave the opportunity for native Papuans in its provincial government to manage all sectors of government which would represent the aspiration of the people of Papua.⁹¹ It also provides a foothold for the promotion and protection of human rights in Papua. Notably, article 45 serves as a promise from the government, in the realisation of upholding, advancing, protecting and respecting human rights in Papua, where a TRC will be established.⁹²

Despite the high hopes for the success of the Papua Special Autonomy Law, its outcome did not meet the expectation. The Papua Special Autonomy Law has yet to be implemented in accordance with its spirit for the promotion and protection of human rights.⁹³ As an example, the Human Rights National Commission representative in Papua (*Komisi Nasional HAM Papua* or KOMNAS HAM Papua),⁹⁴ with the duty to supervise the promotion and protection of human rights in Papua, was unable to fully take control in safeguarding the military operations conducted by security authorities in order to prevent any violation of human rights.⁹⁵ Human rights court mandated by this law also lacks implementation. Lastly, the mandate to establish a TRC was abrogated.

Based on the above reasons, it can be concluded that the transitional justice processes in Papua is stagnant. Aspirations of the Papuan people need to be fulfilled; conflicts need to be resolved, human dignity, security, and stabilization need to be restored. The government needs to act quickly for the sake of the Republic's unity. A gallant step needs to be taken in order for the Indonesian government to reconcile all violations of the past and prevent future human rights violations to occur.

⁹¹ With limitations on several important sectors such as foreign affairs, defence, monetary affairs, fiscal policy, religious affairs, and the Supreme Court, which remain under the authority of the central government. Refer to Arts 1 (b) and 4 Law 21 of 2001 on Special Autonomy for Papua Province. As cited in Erlangga (eds) (n 33 above) 51.

⁹² Arts 44, 45, and 46 Law 21 Year 2001 Special Autonomy for the Papua Province.

⁹³ J S Hardianto 'Ministry of Foreign Affairs: Nobody issues Papua' (own translation) *KOMPAS* 11 August 2011 as cited in <http://regional.kompas.com/read/2011/08/10/15210654/Kemenlu.Tak.Ada.Yang.Masalahkan.Papua> (accessed 15 September 2011).

⁹⁴ KOMNAS HAM is an independent body which has the main function to conduct study, research, supervision, and mediation of human rights violations. As cited in <http://www.komnasham.go.id/profil/tentang-komnas-ham> (accessed 15 September 2011).

⁹⁵ A Wibowo & H Margianto, 'Regarding Papua, Where is Komnas HAM?' (own translation), *KOMPAS* 10 August 2011, as cited in <http://regional.kompas.com/read/2011/08/10/0918094/Soal.Papua.di.Mana.Komnas.HAM>. (accessed 15 September 2011).

Transitional justice needs to be realised, with a TRC as a way forward in bringing peace, justice, reparation and reconciliation to the Papuans. Hence, this next chapter will look at best practices of the TRC in South Africa as a successful predecessor.

Chapter III

Best Practices from South Africa's TRC

3.1 Existing Truth and Reconciliation Commission - Why a Truth Commission?

“*Nunca Mas*” or Never Again and “From Madness to Hope” are just some of the titles of reports from the TRC that were set up in the past. They are tangible proof of spirit for democracies in transition to move forward from a horrific past.⁹⁶ Truth commissions are set up as a way forward for a country that experienced a totalitarian or authoritarian regime. It is intended to have a preventive and restorative cause.

We have witnessed countries in transition trying to uncover the truth about the atrocities and human rights violations brought against the people by the former authoritarian or totalitarian regimes. Their struggle is to transcend their horrific past into a new democratic regime. The experiences from countries in the 1970s, 1980s and 1990s have given us a myriad of lessons learned from the setting up of truth commissions worldwide.⁹⁷ Hayner notes that there have been at least 21 truth commissions in the world, five of which are considered the most illustrative and prominent truth commissions.⁹⁸ In chronological order these are: the National Commission on the Disappeared (Argentina), the National Commission on Truth and Reconciliation (Chile), Commission on the Truth of El Salvador (El Salvador), TRC (South Africa) and Commission to Clarify Past Human Rights Violations and Acts of Violence that caused the Guatemalan People to Suffer (Guatemala). These five truth commissions represent a substantial impact in the development for the evolution of seeking the truth of past atrocities through the working of truth commissions. Judging from their size, mandate, effect on their respective political transitions and scrutiny that these commissions received both nationally and internationally, it is evidently proven that they made a considerable impact.

⁹⁶ “*Nunca Mas*” or Never Again is the title of the report by the Truth Commission in Argentina, while “From Madness to hope” is the title of the report by the Truth Commission in El Salvador. As cited in A Boraie ‘Justice in Transition’ in *Truth and Reconciliation Commission* (1994) 3

⁹⁷ In the 1970’s (mainly in Latin America) and in 1980’s (mainly in Eastern Europe) as cited in Graybill (n 30 above) 1.

⁹⁸ Hayner (n 14 above) 32-49. See also Hayner P B ‘Fifteen Truth Commission 1974-1994: A Comparative Perspective’, (1994) 16 4 *Human Rights Quarterly* 597-655.

The basic question that comes to mind is why a truth commission? Why restorative justice over retributive justice? To answer this question requires a deep understanding of the urgency and the necessity for a peaceful transition. Many scholars argue and debate this issue. Some argue that genuine justice cannot be achieved without an adequate prosecution through judicial processes for perpetrators. Others argue that justice through retribution cannot heal the victims and that acknowledgement of truth and forgiveness is a prerequisite for reconciliation that will support national unity.

Hayner points out several important arguments on the limitation of retributive justice through prosecution during transitional democracies.⁹⁹ She noted that prosecution cannot address the needs of victims and communities that were damaged by the systemic nature of violence over a significant period of time.¹⁰⁰ The tool for transcending past government abuses covers a wide range of legal, political and even psychological questions. Hence the approach for just prosecutorial process will be difficult. Moreover, after a repressive regime, courts are left with incapacity to prosecute because the judiciary is left in shambles, judges are politically compromised, corrupt, or timid; judges lack expertise and resources scarce.¹⁰¹ The overwhelming number of perpetrators, in the above circumstances, results in only few prosecutions. She further underlines that truth commission should not be equated with judicial bodies in achieving justice. It should be seen as a complementary or starting point in the achievement of justice which will support prosecutorial processes itself.¹⁰²

By acknowledging the above limitations, it is logical that transitional democracies will lean towards the establishment of truth commissions. Hayner further asserts that the mandate vested in a truth commission will allow them to:

'[F]ocus on a pattern of events, including the causes and consequences of the political violence and allow[s] them to go much further in their investigations and conclusions than is generally possible on any trial of individual perpetrators'.¹⁰³

The findings and recommendation made by the truth commission can be used not only as information to support trials, but also as a tool in outlining the

⁹⁹ Hayner (n 14 above) 12-16.

¹⁰⁰ Hayner (n 14 above) 12.

¹⁰¹ As above.

¹⁰² Hayner (n 14 above) 16.

¹⁰³ As above.

responsibility of the state and its various institutions.¹⁰⁴ Truth commissions are able to go beyond the minimum facts – ‘to examine the moral and historical underpinnings of the crimes committed’.¹⁰⁵

Succinctly discussed by Alex Boraine, truth commission is considered to be the ‘third way’ to come to terms with the past as it offers the possibility of truth relating to victims and perpetrators, restoring dignity for victims and survivors, providing conditional amnesty and a forum for healing and reconciliation.¹⁰⁶ Furthermore he noted that had the Nuremberg Trial model is used, there would have been no peaceful transition into democracy. A bloody revolution would have been the inevitability.

In this research, I follow the best practices from South Africa’s TRC that is regarded the most novel and unique truth commission ever established. Albeit, its limitations will be discussed in the subsequent subchapter, its success exceeded expectation and has been praised and recognised around the world.

3.2 TRC in South Africa: Best Practices and Limitations

Apartheid has indeed left a deep scar on the people of South Africa.¹⁰⁷ South Africa has a ‘long and tragic history of colonial conquest, racial domination, social injustice, political oppression, economic exploitation, gender discrimination and judicial repression’.¹⁰⁸ Apartheid was not just about political inequality; but also a system of economic exploitation towards the majority black population of South Africa.¹⁰⁹ South Africa’s transition indeed was a shift from an authoritarian and racist regime towards a constitutional democracy. This transition occurred through dialogue

¹⁰⁴ As above.

¹⁰⁵ Example: Haiti (National Commission for Truth and Justice) and Sri Lanka in their clinical commissions failed to go beyond ‘bare facts’ as cited in R I Rotberg & D Thompson *Truth v. justice : The Morality of Truth Commissions* (2000) 4.

¹⁰⁶ A Boraine ‘Truth and Reconciliation in South Africa: The Third Way’ in Rotberg & Thompson (eds) (n 105 above) 143.

¹⁰⁷ South Africa has experienced 350 years of colonialism and 50 years of apartheid – as cited in S Motha “*Begging to be black*” Liminality and critique in the post-apartheid South Africa’ 2010 *Theory, Culture & Society* 2.

¹⁰⁸ Members of National Action Plan Project Steering Committee ‘*National Action Plan for the Promotion and Protection of Human Rights*’ (1998) 14.

¹⁰⁹ The vast majority of South African people live in abject poverty and in hunger, large scale unemployment, lack of access to land, property, resources, education, health care and social service – as cited in Members of National Action Plan Project Steering Committee (n 108 above) 15. See also C Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) *SAHJR* 146-157.

and not through armed forces. It was a struggle to achieve equality and to build a nation with respect to human rights, democracy and peaceful coexistence amongst all South Africans.

The Constitution of the Republic of South Africa Act No. 200 1993 (Interim Constitution) and the Constitution of the Republic of South Africa Act No. 108 1996 (Final Constitution) carries a set of values and principles that would govern the new order to the attainment of an open and democratic society based on human dignity, equality and freedom.¹¹⁰ However most notably, the Interim Constitution and Promotion of National Unity and Reconciliation Act No.34 Year 1995 (The Unity Act) brought a legal revolution and significant history in South Africa with the mandate to establish a TRC for South Africa. As stipulated in the Interim Constitution, the TRC would further serve as a form of the principle building blocks in the “historic bridge” between.¹¹¹

“[T]he past of a deeply divided society and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex”.¹¹²

The apartheid regime in South Africa lasted 45 years and it is a past most South Africans hope to overcome. The first step in doing so is to address the wrongdoings committed by the apartheid regime and draw a “thick line” through the past.¹¹³ South Africa’s TRC is put forward in this research as it represents the latest and most advanced example of post-conflict truth seeking.¹¹⁴ It observed other models of emerging democracies that previously established a truth commission, such as Chile and Argentina. The Unity Act guided South Africa in the establishment of its TRC. It was essentially established to investigate and give a complete picture of the nature, causes and extent of human rights violations committed between 1960 and 1994.¹¹⁵ These important tasks were divided into three commissions designed to work in three interconnected committees. These committees were the Human Rights

¹¹⁰ J Beckmann & I Prinsloo ‘Legislation on school governors’ power to appoint educators: friend or foe?’ (2009) 29 2 *South African journal of Education* 171.

¹¹¹ D Dyzenhaus *Truth, Reconciliation and the Apartheid Legal Order* (1998) 1.

¹¹² See Section 232 (4) Constitution of the Republic of South Africa Act 1993 as cited in Dyzenhaus (n 111 above) 1.

¹¹³ J Elster *Closing the Books: Transitional Justice in Historic Perspective* (2004); J Elster *Retribution and Reparation on the Transition to Democracy* (2006) 6.

¹¹⁴ R I Rotberg ‘Truth Commissions and the Provision of Truth, Justice and Reconciliation’ in Rotberg & Thompson (eds) (n 105 above) 3; Elster *Retribution and Reparation on the Transition to Democracy* (n 113 above) 8.

¹¹⁵ Promotion of National Unity and Reconciliation Act 34 Year 1995, Chapter 2, ss 3.

Violation Committees which investigated human rights abuse within the time frame, the Amnesty Committee which had to consider application from individuals applying for amnesty, in accordance to the provision of the act and the Reparation and Rehabilitation Committee which was to restore victim's dignity and formulate rehabilitation steps.¹¹⁶

The South African TRC has often been described as a model of restorative justice.¹¹⁷ John Elster underlines that South Africa was a nation that evidently experienced a transition:

“[F]rom totalitarianism to form a democracy, a negotiated settlement – not a revolutionary process...[and] a commitment to the attainment of a culture of human rights and a respect for the rule of law...to make it impossible for the gross violation of human rights of the past to happen again.”¹¹⁸

Boraine highlights South Africa's TRC as having unique features compared to other truth commissions, most importantly the celebrated and applauded democratic feature in its establishment.¹¹⁹ This includes providing as many people as possible an opportunity to participate in the formation of the TRC. Such participation by the people is reflected through the Parliamentary Legislation which laid down the commission's procedures, objective and methodologies to guide their work. The commission also granted the powers of subpoena, which enabled the TRC to invite alleged perpetrators, informants and secure files and documents concealed by the previous regime. Such practice was not followed in previous truth commissions.¹²⁰ Another praised feature is the truth revealing process through TRC's hearings. It had managed to successfully peel the layers of atrocities by conducting open hearings – both by the victims and perpetrators. These are just a few of the novel and unique features that were first introduced by the South African TRC. The following subchapters discuss, in greater detail, important features of the South African TRC.

¹¹⁶ Hayner (n 15 above) 41-42

¹¹⁷ M Swart 'Sorry seems to be the hardest word: Apology as a form of Symbolic Reparation' (2008) 24 1 *South African Journal on Human Rights* 53.

¹¹⁸ Elster *Closing the Books: Transitional Justice in Historic Perspective* (n 113 above) 300-301.

¹¹⁹ Boraine (n 106 above) 144.

¹²⁰ Boraine (n 106 above) 145.

3.2.1 The Amnesty Process

The provision on ‘truth for amnesty’, as introduced by the South African TRC, was entrenched in the postamble of the Interim Constitution. It is considered to be the most morally problematic practice of the TRC. However, it was also the most innovative and novel approach of amnesty that was ever introduced.¹²¹

The constitutionality of the amnesty provision was challenged by the Azanian People’s Organisation (AZAPO), an organisation representing a number of human rights victims of apartheid South Africa, brought to the President of the Republic of South Africa.¹²² The case was logged to the South African Constitutional Court in the case between Azanian People’s Organisation (*AZAPO*) and others v *The President of South Africa and others* arguing that section 20(7) of the Unity Act was unconstitutional as it violated the right to have justiciable dispute settled by a court, as guaranteed in article 22 of the Bill of Rights.¹²³ In the decision, the Constitutional Court ruled that the amnesty provision in this case was permissible and constitutional. It argued that in the name of peaceful transition into democracy, as mandated in the Interim Constitution, there is a need to balance the need for justice and the need for reconciliation. Had there been no amnesty as an incentive given to perpetrators, none would have come forward to confess and deliver the truth. It was indeed a political compromise that was necessary to peel the layers of apartheid’s injustice. Without such compromise, justice would not have been achieved through reconciliation and prosecutorial efforts would not have uncovered the real truth of injustices that took place.

As argued in the TRC’s Final Report:

“[E]ven if the South African transition had occurred without any amnesty agreement, even if criminal prosecution had been politically feasible, prosecutions would have yielded much less truth about what had happened and why, and far fewer opportunities for closure, healing and reconciliation.”¹²⁴

¹²¹ A Gutmann & D Thompson ‘The Moral Foundations of Truth Commission’ in Rotberg & Thompson (eds) (n 105 above) 23.

¹²² N Mogale ‘Ten years of democracy in South Africa: Revisiting the AZAPO decision’ in W L Roux & K v Marle *Law Memory and the legacy of Apartheid: Ten years after AZAPO v President of South Africa* (2007) 127.

¹²³ *AZAPO and others v The President of South Africa and others* 1996 4 SA 671 (CC), 1996 8 BCLR 1015 (CC).

¹²⁴ E Kiss ‘Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice’ in Rotberg & Thompson (eds) (n 105 above) 69.

For the South African TRC, as asserted by Elisabeth Kiss, the grant of ‘amnesty was never intended to be easily accessible - it was only available to individuals who [fulfilled] certain requirements and qualifications’.¹²⁵ As stressed in the TRC Final Report, amnesty provisions did not give perpetrators impunity but provided ‘a considerable degree of accountability’.¹²⁶ One of the main requirements was that motives and objects that comprised the foundations of their acts were purely political. They had to make full disclosure of the facts in front of a public hearing before the Amnesty Committee of the TRC.¹²⁷ The grant of amnesty then would be determined by the Amnesty Committee.

Boraine and others maintains that:

“[A]mnesty was the price that South Africa had to pay [in order] to achieve a peaceful transition and to achieve a “limited” form of justice.. may be impracticable on multiple grounds to prosecute. For retributive justice to have worked for victims, evidence would have been needed, and only through the amnesty procedures could that evidence have been developed”.¹²⁸

Another opinion in the granting of amnesty, as noted by Robert I Rotberg, is that of Ronald C Slye. Slye ‘supports amnesty as a tool for increasing both the quantity and quality of information available from the past and its abuses’.¹²⁹ He praised the South African TRC as one of the most important truth commission for its ‘innovative nature’ of amnesty which it introduced.¹³⁰ He regarded it as ‘the most sophisticated ever undertaken for violations of fundamental international human rights’.¹³¹ Nonetheless, he critiqued the TRC’s proceedings for allowing the accused to participate too much and for the absence of ‘rules of evidence, procedure and proof that govern trials in a Western setting’.¹³² He agreed, however, that the quality and quantity of information gained through the TRC was undoubtedly ‘comparable, if not superior, to that which might have been produced in a courtroom’.¹³³

Above all, the pioneered amnesty process by the TRC provided accountability and permitted the possibility of reconciliation. The evaluation of the amnesty process

¹²⁵ Rotberg (n 114 above) 13.

¹²⁶ Final Report, I , chapter 5, par 57-61. As cited in Kiss (n 124 above) 76.

¹²⁷ Chapter 4, ss 16-22, Promotion of National Unity and Reconciliation Act 34 of 1995

¹²⁸ Rotberg (n 114 above) 13.

¹²⁹ Rotberg (n 114 above) 15.

¹³⁰ As above.

¹³¹ As above.

¹³² As above.

¹³³ As above and Boraine (n 106 above) 147.

also notes its limitation. A limitation in such a procedure, seeking truth through amnesty, proved controversial because the confessed perpetrators would go unpunished. Some say that the procedure was a denial of justice. Rotberg, on this matter, commented that ‘forgiveness was preferable to trials that would not only be costly, but could have caused further division in society’.¹³⁴ It is part of the process of reconciliation. The circumstances that faced South Africa left no choice but to undergo the moral political decision of a TRC which granted amnesty in return for ‘understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization’.¹³⁵ Hence, the pioneered amnesty process introduced by the South African TRC provided accountability and permitted the possibility of reconciliation.¹³⁶

Greenwalt emphasises this point:

“[A]lthough political expedience is not justice, amnesties may be highly political and still serve the ultimate ends of justice – amnesty is not a failure to convict, it is something more with the utilitarian result of importance”.¹³⁷

Such amnesty process made it possible for renewed victimization and favoured forgiveness. In consequence, contributes to peaceful transition and stable democratisation in society, so manifesting true restorative justice.¹³⁸

Reflecting Kiss’ observation, the provisions of amnesty in the South African TRC was morally innovative in three ways: it upheld the principle of individual moral accountability; the applicants for amnesty were tried in the court of public opinion; and it created incentives for truth telling so that applications for amnesty became vehicles for uncovering truths about past abuses.¹³⁹ In the end, the South African TRC received 7,133 applications for amnesty, with a total of 1,163 granted.¹⁴⁰ The said figures proved that although there were provisions of amnesty, it was not intended to be easily accessible.

¹³⁴ Rotberg (n 114 above) 14.

¹³⁵ Constitution of the Republic of South Africa Act No. 200 1993.

¹³⁶ Rotberg (n 114 above) 15.

¹³⁷ Rotberg (n 114 above) 15-16.

¹³⁸ Rotberg (n 114 above) 16.

¹³⁹ Kiss (n 124 above) 76.

¹⁴⁰ Total application for amnesty received is 7,113, with 1,163 granted, 5,507 refused and 259 withdrawn. As cited in B S V Minyuku ‘Truth and Reconciliation Commissions and other alternative forms of Justice’ (2003) Oct-Des *African Legal Aid* 30.

3.2.2 Reparation

The TRC presented a clear example of the concept of reparation to reconciliation. It was an attempt to come to terms with the wrongs committed during the apartheid. It was a process that brought together perpetrators and victims to engage in an act of reconciliation.¹⁴¹ This feature of reparation is significant in the South African TRC as it is interweaved into the process of amnesty for perpetrators with the prerequisite of forgiveness from the victims.

By acknowledging the need to transcend a horrific past of injustices, division, and rivalry in the South African history and to also recognise the suffering experienced by the people of South Africa, the obligation to institute reparation is enshrined in the Interim Constitution.¹⁴² The Unity Act further set the mandate for the TRC to develop measures for the provision on reparation.¹⁴³

One of the three committees set up by the TRC that was assigned to focus on the efforts to address reparation towards victims of past injustice is the Reparation and Rehabilitation Committee (RRC). The RRC is mandated “to affirm, acknowledge and consider the impact and consequences of gross violations of human rights on victims and make recommendations accordingly”.¹⁴⁴ Challenges in adhering to the mandate include the interpretation of the concept of reparation and to implement it in a manner that is consistent with South Africa’s domestic and international obligations. Ensuring the advancement of human rights and achieving a ‘better life for all’ are also key requirements.¹⁴⁵

The Unity Act stipulated clearly that the basic concept underlying the obligation for reparation is implemented through a kind of trade-off. This trade-off involves a give-and-take scenario. Victims will only be regarded as such (that is, entitled to reparation in the form of monetary compensation) after amnesty has been

¹⁴¹ J Thompson *Taking Responsibility for the Past: Reparation and Historical Justice* (2002) 48.

¹⁴² Report of the RRC as cited in *Truth and Reconciliation Commission of South Africa*, 2003 as cited in <http://www.info.gov.za/otherdocs/2003/trc/rep.pdf> (accessed in May 20 2011).

¹⁴³ Chapter 5, ss 22-27, Promotion of National Unity and Reconciliation Act 34 of 1995.

¹⁴⁴ Report of the RRC as cited in *Truth and Reconciliation Commission of South Africa*, 2003 Volume Six, Section Two, Chapter Two (n 142 above).

¹⁴⁵ C Jenkins ‘After the Dry White Season: The Dilemmas of reparation and reconstruction in South Africa’ (2000) 16 3 *South African Journal on Human Rights* 446

granted to confessed perpetrators.¹⁴⁶ In its first sight, the reparation stipulated within the Unity Act is seen as reward for victims. Controversy surrounding this matter arose as it limits the number of victims when it was apparent that the majority of the South African population were victims of the apartheid injustice.

The late Justice Ismael Mahomed highlighted the ‘painful choices’ which the Unity Act addressed, having the potential to expose the true process where:

“[T]he reconstruction of society involving in the process a wider concept of ‘reparation’ which would [not only] allow the state to take into account the competing claims on its resources, but [also] to have regard to the ‘untold suffering’ of individuals and families whose fundamental human rights had been invaded during the conflict of the past”.¹⁴⁷

The TRC was suggested to have a healing effect as it confronted the country’s divided and violent past and assisted in the project of ‘nation-building’. According to Catherine Jenkins’ findings, the victims of apartheid perceived the TRC as a process bringing both relief and pain.¹⁴⁸ She elaborates that the TRC gave closure to victims and their families in the course of the disclosure of information about their missing relatives. Although, the recounting and reliving of the past through the TRC process was painful and granting amnesty to perpetrators was difficult to accept.¹⁴⁹ Even though the reparation given to the victims after adhering to such process might compensate for loss and expense, it will never be an equivalent restitution to what had happened and what is lost.

Included in the RRC report was recommendation for the proposal on reparation. It also noted that reconciliation was not possible without reparation.¹⁵⁰ This proposal was aimed at government to further address the issue on reparation both to individual reparation as well as communal or societal reparations. One of the major dilemmas of the RRC in interpreting and drafting these recommendations was ‘the huge gap between the expectations of victims and the understanding of reparation by government and its capacity to deliver’.¹⁵¹

¹⁴⁶ Section 26 of the Unity Act stipulates that “persons are entitled to apply for measures of reparation by virtue of having been referred as a victim to the RRC either by the Amnesty Committee or the human Rights Violations Committee.

¹⁴⁷ M Burton ‘Reparations – It is Still Not Too Late’ in E Doxtader & C Villa-Vicencio (eds) *To Repair the Irreparable: Reparation and reconstruction in South Africa* (2004) 34.

¹⁴⁸ Jenkins (n 145 above) 462.

¹⁴⁹ As above.

¹⁵⁰ University of Witwatersrand, South Africa “TRC Category Reparations” as cited in http://truth.www.wits.ac.za/cat_descr.php?cat=4 (cited in 1 June 2011).

¹⁵¹ Jenkins (n 145 above) 465.

The TRC however, managed to overcome these obstacles and gave two categories of reparation. Firstly, within its Interim Report, it set out the Urgent Interim Reparation (UIR) policy.¹⁵² Secondly, in the Final Report, it sets out a programme for a long term reparation policy.¹⁵³ The main aim for such recommendations of reparation was to adequately fulfil the needs and restore the dignity of victims. The recommendations were based on the norms of 'redress, restitution, rehabilitation, restoration of dignity and reassurance of non-repetition'.¹⁵⁴ Furthermore, reparations and rehabilitation policy were adopted after the Final Report of the TRC was submitted. The proposed policy had five parts namely the: Interim reparation, Individual Reparation Grants (IRG), Symbolic reparation, legal and administrative measures, community rehabilitation programmes and institutional reform.¹⁵⁵ Such proposal would then be decided by the President and Parliament.

With regards to the fulfilment of reparation, according to the data by Biki S.V Minyuku, former Chief Executive and Chief Accounting Officer to the South African TRC, noted that there were approximately 21,759 people who were declared as victims to receive reparation.¹⁵⁶ Amongst them, 17,855 people were declared victims who received UIR. The total cost for providing these grants to the government was estimated at R3, 2 billion, which would be provided within a period of six years.¹⁵⁷ Adding to that, UIR grants totalled between R2000 and R3500 per victim. The number of UIR to victims by 1999 was paid to 15,078 victims.¹⁵⁸ In April 2003, the

¹⁵² TRC's Interim Report to the President in June 1996 included reparations in the form of: (i) the redressing of subsistence needs of the people who had lost a breadwinner; (ii) counselling facilities; (iii) urgent medical attention; (iv) support for terminally ill patients; (v) access to social welfare; (iv) the issuing of civil documents – as cited in Jenkins (n 145 above) 466.

¹⁵³ Such long term reparation policy includes: (i) Individual Reparation Grants (IRG), (ii) Symbolic reparation, (iii) Community rehabilitation programs for the establishment of community-based services and activities to promote healing and recovery, both individuals and of the entire communities affected, and (iv) Institutional reform proposals designed to prevent the recurrence of human rights abuse – as cited in Jenkins (n 144 above) 467-468.

¹⁵⁴ University of Witwatersrand (n 150 above)

¹⁵⁵ As cited in <http://www.justice.gov.za/trc/reparations/summary.htm> (accessed in 1 June 2011).

¹⁵⁶ Minyuku (n 140 above) 30.

¹⁵⁷ P van Zyl 'Unfinished business: The Truth and Reconciliation Commission's Contribution to Justice in Post-Apartheid South Africa' in M. Cherif Bassiouni (ed) *Post Conflict Justice* (2001) 755.

¹⁵⁸ O Makhalemele 'Still not talking: Governments exclusive reparation policy and the impact of the 30000 financial reparations on survivors' as cited in <http://www.csvr.org.za/docs/reconciliation/stillnottalking.pdf> (accessed in 1 June 2011) 4. As of 31 March 2006, approximately 15,330 individual grants have been paid, and approximately 1,500 grants had yet to be paid – the government had difficulty locating the victims. As cited in P Pigou & N Valji 'South Africa, reparations and the TRC's recommendations: A missed opportunity' (2006) 7 *The Reparation Report: The Bi-annual Journal of the Redress Trust* 5 as

President of South Africa further announced the decision regarding the once-off R30.000 grants from the President's fund for the identified TRC victims.¹⁵⁹ Although some UIR payments were made, many applicants thought it was a very slow and timely process.

In response to the TRC Report on the RRC recommendations, the government promised communal (collective) reparations in the form of housing, health care and education. These three main categories of reparation aim to improve the well-being of the people, especially those who suffered under the apartheid regime. In addition, the government also encouraged businesses to invest in order to stimulate job creation, combat poverty and advance the country's development. Such promises were intended to address the socio-economic justice of the victims.

It is evident that the TRC, through its RRC made a significant contribution to the mechanism and concept of reparation adopted by the government of South Africa. It gave detailed recommendations for reparations programmes, including financial, symbolic, and community recommendations. It was able to provide reparations as an obligation enshrined both in its national and international law. However, criticism in the workings of the RRC and the reparation programmes were inevitable. The victims felt the government lacked sensitivity towards their needs. The government failed to address their actual needs in terms of the individual reparation (in the form of a R30.000 grant) by not consulting with them before the decision was made.¹⁶⁰ Another critique was that the RRC's capacity was limited to make an overall assessment of needs, which could serve only as a starting point for the development of a substantial reparations programme to be followed by the government.¹⁶¹ The reparation process was also considered a 'missed opportunity' in the alleviation of poverty and individual reconciliation.¹⁶² South Africa today still faces questions on how to sustain, coordinate and balance programmes that heal individual and

cited in <http://www.redress.org/downloads/publications/THE%20REPARATION%20REPORT%20vol%207%2028%20final%20june%2006.pdf> (accessed 1 June 2011).

¹⁵⁹ Makhalemele (n 158 above) 8; also refer to 'Finalising TRC reparations Payout' 3 July 2003 http://www.southafrica.info/what_happening/news/trc-reparations.htm (accessed in 1 June 2011).

¹⁶⁰ Makhalemele (n 158 above) 19

¹⁶¹ Hayner (n 14 above) 172.

¹⁶² Pigou & Valji (n 158 above) 6.

collective wounds, restore dignity, build unity, create political economic equality, and foster a culture of human rights.¹⁶³

As recent development has unfolded, the proposed regulations regarding the fulfilment of socio-economic reparations to victims are sought to have significant implication in bringing change to the socio-economic rights of the victims. Although it is a slow process, government's efforts need to be supported and continuously scrutinized. Only when such regulations have been enforced, will the socio-economic reparations of the victims for the restoration of their human and civil dignity be truly reflected in South Africa's post-apartheid jurisprudence.

Failure to make reparation seriously threatens the possibility of restorative justice. Hence, such restorative processes will depend on the fulfilment of reparation as promised by the government.¹⁶⁴ As Elster argues, because the legacy of social and economic conditions left by apartheid remains unfinished, it needs to be tackled, otherwise it will be impossible to sustain the so-called 'miracle' of the transition state that it is today.¹⁶⁵ It will be impossible to consolidate democracy and ensure a peaceful future for all South Africans. Restoration through reparation merely provides the victim with possessions, money or new opportunities - it does not restore moral balance and can never restore equality.¹⁶⁶

3.3 Limitations of the South African TRC

After 140 hearings which took place in 61 towns, 22,000 victims' statements covering 37,000 violations, more than 7,000 perpetrators applied for amnesty. After six years, the TRC had become an exhaustive process in terms of money, time and energy. It is considered the most expensive truth commission in history.¹⁶⁷

Van der Merwe and Chapman identified limitations in the TRC's approach to truth finding and reconciliation.¹⁶⁸ Firstly, they found that there was no clear set of standards in guiding the TRC's truth recovery efforts. The cooperation amongst the TRC's subcommittees was also questioned. They underlined that there was no

¹⁶³ Doxtader & Villa-Vicencio (eds) (n 147 above) xvii.

¹⁶⁴ J J Llewellyn 'Doing Justice in South Africa: Restorative Justice and Reparation' in Doxtader & Villa-Vicencio (eds) (n 147 above) 168-169.

¹⁶⁵ Elster (n 118 above) 300.

¹⁶⁶ Thompson (n 141 above) 48.

¹⁶⁷ L S Graybill, *Truth and reconciliation in South Africa: Miracle or Model?* (2002) 4.

¹⁶⁸ Van der Merwe & Chapman (n 28 above) 242 – 248.

delineation of the respective roles, including an adequate system of organizing and information sharing that the subcommittees had amongst each other. This resulted in tension in its efforts to recover the truth.¹⁶⁹ Such deficiencies on the work of the subcommittees can be seen in the seven volume report. The report lacks a central theme and resembles a 'patchwork quilt' of very different types of material rather than an integrated separate part of the report.¹⁷⁰ Secondly, the notion of reconciliation as one of its objectives was not completely achieved. It was not clearly defined in the mandate assigned to the commission and focused more on the reconciliation between survivors and perpetrators than wider relationships between communities and social groups.¹⁷¹

Villa-Vicencio also criticised the TRC Report for not giving the complete picture on the crimes that were committed during apartheid.¹⁷² It was mainly due to the limited time frame of three years where the TRC had to complete their work which made it impossible for the TRC to follow up the investigations. The limited commission's staffs to corroborate facts and conduct investigations were also a problem.¹⁷³

Overall, the TRC's limitation is its failure to clearly define and set its priorities. It was ambitious to resolve the past of apartheid but ignored its true capacity in achieving all its objectives. Most regrettably, the TRC failed to regard apartheid as a systemic discrimination and failed to address real issues of the injustices committed against so much of the population. Little acknowledgement for supporters and beneficiaries of the apartheid, to be acknowledged for their responsibility, was made. Hence, it did not provide a new overall interpretation of South Africa's history during the apartheid period. The TRC was a grand attempt by the South African government, but the time frame given to complete their work was too short and was too limited in its scope to actually address the whole legacy of racial oppression and abuses.¹⁷⁴

¹⁶⁹ Van der Merwe & Chapman (n 28 above) 244.

¹⁷⁰ Van der Merwe & Chapman (n 28 above) 245.

¹⁷¹ Van der Merwe & Chapman (n 28 above) 277.

¹⁷² Doxtader & Villa-Vicencio (eds) (n 147 above) xvii.

¹⁷³ Rotberg (n 114 above) 18.

¹⁷⁴ Van der Merwe & Chapman (n 28 above) 277.

3.4 South Africa's TRC as a Model?

South Africa's TRC is the most comprehensive in its purposes and procedure. It had a wide range of responsibilities, including providing accurate account of atrocities, granting amnesty to those who confessed to their role in political crimes and making recommendations for reparations.¹⁷⁵ The large numbers of functions which constitute investigative, judicial, political, educational, therapeutic, and spiritual functions that are in the South African TRC makes the commission a morally ambitious commission to date.¹⁷⁶ South Africa's TRC failed to provide retributive justice. Nonetheless, it had promoted another kind of justice that is restorative justice. As Kiss asserts, justice should not be seen only as a mere retribution, restorative justice should be considered as an alternative.¹⁷⁷

The TRC broke the silence of apartheid. It established a complete picture on what had happened within the determined period of time by conducting investigations and public hearings, hence providing public education. It also regarded the importance of innovation in a truth commission where it brought forward the truth, a wide array of media coverage during its hearings, participation of society and grass roots into the preparation and process in the setting up of the TRC, and made major compromises. Different to other truth commissions, as presented in its final report, the TRC had succeeded to approach four notions of truth, which included 'factual or forensic truth, personal or narrative truth, social or dialogue truth, and healing and restorative truth'.¹⁷⁸

As Graybill argued, despite all the twist and turns that the TRC had undergone in the road to reconciliation, debates on the amnesty process and scrutiny in the work of commissions, 'it was a remarkable, unparalleled and unprecedented process, holding out the possibility of a workable model for other countries moving through democratic transitions and away from divided past'.¹⁷⁹ In addition, as believed by Tina Rosenberg, the South African TRC 'has been more successful than anything else yet tried'.¹⁸⁰ She contends that 'no institution for dealing with the past anywhere

¹⁷⁵ Gutmann & Thompson (n 121 above) 23.

¹⁷⁶ Kiss describe 'morally ambitious' as the determination to honour multiple moral consideration and to pursue profound and nuanced moral ends. As cited in Kiss (n 124 above) 69.

¹⁷⁷ Kiss (n 124 above) 69.

¹⁷⁸ Van der Merwe & Chapman (n 28 above) 242.

¹⁷⁹ Graybill (n 167 above) 177.

¹⁸⁰ As above.

in the world has taken on as ambitious portfolio'.¹⁸¹ Despite all its success, the TRC is by no means perfect, but regardless of its constraints as a negotiated settlement, a compromise between the morally ideal and the politically possible, it has achieved the best possible outcome.¹⁸²

¹⁸¹ As above.

¹⁸² As above; A Borraine (n 106 above)155.

Chapter IV

The Case of Papua: Indonesia's Priority for National Unity

4.1 Path for a Transitional Justice

The Reformation Era, as the successor of the authoritarian New Order regime, has the responsibility to establish and revive Indonesia's democracy, to prevent human rights violations, to reconcile the old with the new, to resolve past human rights issues, uphold justice and move forward in effective harmony.¹⁸³ As asserted by Heibert Adam and Kanya Adam, there are no universally valid rules determining how emerging democracy should deal with the crimes of a previous regime.¹⁸⁴ Therefore, the need to assess how potential models from other countries coped with similar problems must be addressed. Particularly relating to this notion, this chapter will attempt to highlight the important features that Indonesia can learn and adopt from the South African TRC as a way forward. It can especially learn from the way South Africa dealt with the problem of state-sponsored crimes, reparation to victims and the prevention of atrocities from reoccurring.

Why the South African TRC? Agreeing with Heibert Adam and Kanya Adam, the South African TRC is recognised as a 'novel experiment of restorative justice and nation-building through reconciliation'.¹⁸⁵ This is where the interest in scrutinising the South African TRC becomes important to Indonesia as it has the same spirit and goal. Some similarities in the experience of South Africa and Indonesia, particularly concerning the issue of Papua, are that they both experienced a legacy of oppression and serious violations of human rights, they both experienced a similar fragile democracy and precarious unity, they are committed to the attainment of a culture of human rights and a respect for the rule of law and are determined not to allow for the gross violations of human rights of the past from happening again.¹⁸⁶ Therefore, applying the best practices and limitations of the South African TRC, as presented in the previous chapter, is viable. Despite these similarities possessing a spirit of uncovering the truth of the past, of transitional democracies, addressing

¹⁸³ Rotberg (n 114 above) 3

¹⁸⁴ H Adam & K Adam "The Politics of Memory in Divided Societies' in W James & L van de Vijver (eds) *After the TRC: Reflections on Truth and Reconciliation in South Africa* (2000) 33.

¹⁸⁵ As above.

¹⁸⁶ Boraine (n 106 above) 142.

transitional justice and striving for reconciliation and rehabilitation, one has to bear in mind the circumstances of the subject in formulation.

In the past decade, human rights issues have become a central theme in the government's agenda. Indonesia struggled to fulfil its promise for the promotion and protection of human rights and failed to make significant improvements in the field. Indonesia's National Human Rights Plan Action (RANHAM) of 1998-2004, 2004-2009 and 2011-2014 were intended to be a guideline for the enhancement of the respect, advancement, fulfilment and protection of human rights. These guidelines included the protection of citizens vulnerable to human rights violation, with consideration to Indonesia's religious and cultural values, so conforming to the spirit of The *Pancasila* and the 1945 Constitution of the State of the Republic of Indonesia (*Undang-undang Dasar 1945* or 1945 Constitution). RANHAM's objectives included the realisation of safety, peace and order in the society; the guarantee for the attainment of law supremacy and human rights on the basis of justice and truth; the strengthening of institutions of RANHAM; the ratification of international human rights instruments; the preparation of the harmonisation of human rights law at the domestic level; dissemination and education of human rights; and the implementation of norms and human rights standards, monitoring, evaluation and reporting.¹⁸⁷

To fulfil such commitments, Indonesia made several changes.¹⁸⁸ Firstly, Indonesia made a series of amendments to 1945 Constitution guaranteeing the state the promotion and protection of human rights, which explicitly extends the constitutional rights of its citizens.¹⁸⁹ The amended 1945 Constitution regulates far more elaborate protection on human rights. Secondly, a Constitutional Court was established to act as a judicial review institution which serves as a guardian to protect the constitutional rights of every citizen.¹⁹⁰ Thirdly, reviewing and enacting laws and regulations to conform to the spirit of the amended Constitution and human rights standards. Fourthly, the creation of a National Commission on Human Rights

¹⁸⁷ Presidential Decree No.40 2004 on Indonesia's RANHAM 2004-2009; Presidential Decree No. 23 2011 on RANHAM 2011-2014

¹⁸⁸ Universal Periodical Review – National Report of Indonesia A/HRC/WG.6/IDN/1 (2008) as cited in <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/115/30/PDF/G0811530.pdf?OpenElement> (accessed in 16 April 2011).

¹⁸⁹ Articles within the 1945 Constitution that guarantees the promotion and protection of human rights are: art 4(1), art 28A, art 28B, art 28C, art 28D, art 28E, art 28F, art 28G, art 28H, art 28I, and art 28J of the 1945 Constitution of the State of the Republic of Indonesia, 4th Amendment.

¹⁹⁰ Arts 24(2) and 24C (1) 1945 Constitution and art 10 (1) Law No 24 Year 2003 on the Constitutional Court.

(KOMNAS HAM) to monitor, report, and investigate any alleged human rights violations.¹⁹¹ Lastly, Indonesia became a state party to most of the core international human rights law.¹⁹²

Albeit all of the above advancement, the capacity in upholding its human rights law commitments on ground level is still in question. This is evident in that it still has not resolved numerous human rights allegations, including human rights issues in Papua. As current development shows magnifying national and international spectacle on the issue of Papua, in addition to the active separatist movements demanding independence resolving human rights issues in Papua proves vital for Indonesia's national unity.

With regard to the investigation of the establishment of a truth commission in Indonesia, Indonesia was on the right path. The initiative to establish a TRC was included in the National Reformation Agenda.¹⁹³ Following such inclusion, the MPR passed Decree TAP MPR V 2000 concerning the Consolidation on National Unity and Integrity. It stipulated the mandate to establish a national TRC in order to achieve national reconciliation and to determine policies which would guide the consolidation of national unity.¹⁹⁴ The enactment of Law 26 Year 2000 on the Human Rights Courts further sealed the legal platform for the establishment of a truth commission. This law stipulates in the event of a gross violation of human rights that has occurred prior to the entry into force of this law, such violation would be regulated into another specific law.¹⁹⁵ The initiative was finally concluded with the submission of Law 27 Year 2004 on the Establishment of a TRC to the DPR.¹⁹⁶

As a commitment to the Papuans, the government promised to establish a truth commission for the investigation of human rights violations that had happened

¹⁹¹ KOMNAS HAM has five regional offices in the following provinces: Papua, West Sumatera, West Kalimantan, Sulawesi (Palu) and Nanggroe Aceh Darussalam.

¹⁹² Indonesia has signed and ratified the following international human rights treaties: ICERD, CESC, ICCPR, CAT, CEDAW, CRC and ICMW.

¹⁹³ Lembaga Studi Adokasi Masyarakat (ELSAM), *Supporting the Re-establishment of the Law on TRC* (own translation) as cited in http://www.elsam.or.id/downloads/1301382601_Brief_Paper_Mendorong_Pembentukan_Kem_bali_UU_KKR.pdf (accessed 10 November 2011).

¹⁹⁴ Chapter I B TAP MPR V 2000 (n 5 above) 6.

¹⁹⁵ Art 47, Law 26 Year 2000 on Human Rights Court.

¹⁹⁶ The law seeks to establish a panel of 21 persons charged with contributing to national reconciliation and unity through three main functions, which are: the clarification of cases brought before the panel, making recommendations on possible amnesties for perpetrators, and proposing reparations for the victims.

in the province as mentioned in the Papua Special Autonomy Law. Despite its promises, Law 27 Year 2004 was then annulled when it was challenged before the Constitutional Court with the Decision No. 006/PUU-IV/2006 on 7 December 2007. Consequently, it made the issues in Papua linger, therefore jeopardizing Indonesia's national unity.

As a party to the Universal Declaration of Human Rights (UDHR), article 19, Indonesia is obligated to grant 'the right to truth' to its citizens.¹⁹⁷ Thus, it is the obligation and duty of the state to investigate and reveal the truth on past abuses and atrocities that have occurred. By doing so, Indonesia would fulfil its duty to its citizens to the 'right to know the truth', the 'right to justice' and the 'right to human dignity' – not only for Papua, but for the whole country. This is a difficult but imperative task. As underlined by Crocker, 'the challenge for a new democracy is to respond appropriately to past evils without undermining the new democracy or jeopardizing prospects for future development'.¹⁹⁸ It is an obligation for the government to fulfil such tasks.

In order for truth to be met through reconciliation, it had to recognise historical facts and assimilate into individual and collective consciousness.¹⁹⁹ Hayner specifically acknowledged the importance of a truth commission in the effort to strengthen the rule of law after a period of 'lawless' authoritarian regime.²⁰⁰ She noted that 'if empowered correctly and appropriately, a truth commission could help fulfil some of the state's obligation under international law'.²⁰¹

As experienced in South Africa and many other countries in the world, when breaking out from an authoritarian regime to a democratic form of government, the central tension is between the politics of compromise and a radical notion of justice.²⁰² As the previous chapter concluded, the TRC established in South Africa can be used as a model – with necessary adjustments in consideration of Indonesia's circumstances. Therefore the formulation should be analysed and scrutinized. The justifications of a truth commission as a restorative form of justice should be acknowledged. Despite the achievement of South Africa's TRC, retributive justice is

¹⁹⁷ 1948 UDHR art. 19. As cited in Hayner (n 14 above) 31.

¹⁹⁸ D A Crocker 'Truth Commissions, Transitional Justice, and Civil Society' in Rotberg & Thompson (eds) (n 105 above) 100.

¹⁹⁹ Noted by Cristian Tomuschat, coordinator of Guatemala's Commission, as cited in Rotberg (n 114 above) 14.

²⁰⁰ Hayner (n 14 above) 105.

²⁰¹ As above.

²⁰² Boraine (n 106 above) 156.

not the only option. Overlooking other forms of justice may offer a better outcome. A compromise for a greater good and national unity using the tools of a truth commission should be considered. As reiterated by Boraine, 'restorative rather than retributive justice can be a potent force for transformation and healing'.²⁰³

Indonesia is on the verge of deciding which tools for democracy it should use in order to confront past wrong doings and bring justice, reparation and reconciliation to its people. This is an essential step that is urgently needed for the unity of the Republic. By doing so, the government must first acknowledge a strategic plan. It must devise a blueprint with a comprehensive analytical overview of its institutional and political capabilities and limitations, before taking further steps.

4.2 Proposed TRC for Indonesia's Papua province: Restoring a Just Society

Restorative justice was a critical tool used in South Africa's TRC for enabling it to build a 'bridge between a deeply divided society and a future founded on the recognition of human rights, democracy, and peaceful coexistence'.²⁰⁴ As underlined by Kiss, 'the essence of a commitment to restorative justice according to the South Africa TRC Report is an effort to restore and affirm the human and civil dignity of victims'.²⁰⁵ This research aims to recommend the establishment of a truth commission for Indonesia and more specifically for Papua. This is essential as truth serves justice by overcoming fear and distrust, thus breaking the cycle of violence and oppression that characterise unjust societies.²⁰⁶ Kiss also asserts that a truth commission 'provides a mechanism to do justice and to acknowledge that there were victims and perpetrators on more than one side'.²⁰⁷ She added that 'if the goal is to reorient a society that has lost its moral war, truth commissions are more supple and constructive than that of criminal trials'.²⁰⁸ Thus the proposal by the Indonesian government through TAP MPR V 2000 and Law 27 Year 2004 was on the right path to such acknowledgement.

²⁰³ As above.

²⁰⁴ Kiss (n 124 above) 69.

²⁰⁵ Final Report Chapter 5, par. 2 as cited in Kiss (n 124 above) 70.

²⁰⁶ Kiss (n 124 above) 70.

²⁰⁷ Rotberg (n 114 above) 11

²⁰⁸ As above.

4.2.1 Law No 24 Year 2004 : The annulled Law on TRC

One of the mandates during the transitional period was to resolve the issues of human rights violations committed by the New Order regime to be in line with the concept of transitional justice.²⁰⁹ As previously mentioned, the mandate for establishing a TRC for Indonesia was brought under the legal umbrella of the MPR Decree (TAP MPR V 2000)²¹⁰ and Law 26 Year 2000.²¹¹

TAP MPR V 2000 namely mandates the government to establish a TRC with the duty to unveil the truth and achieve reconciliation. Such unveiling of the truth should be done through investigating the abuse of authority by government and unfold human rights violations of the past, and using all means necessary for the aim of national unity with respect to justice in society. While Law 26 Year 2000 further paves the legal basis for the establishment of a TRC for resolving past human rights abuses through an extrajudicial institution that aims at uncovering the truth of past human rights violations and promote reconciliation.

Following such mandate, on 6 October 2004, the government issued Law 27 Year 2004 on TRC.²¹² This law regulates several important features that would guide the working of the established TRC. Firstly, the cut off date for the investigation of human rights violations are those which occur prior the entering into force of Law 26 Year 2000. Secondly, truth should be uncovered for the sake of victims and their families, which will then receive compensation and rehabilitation. Thirdly, in order to resolve past human rights violations, concrete steps are needed for the establishment of a TRC. This law was made to guide the efforts in resolving all past human rights issues in the country through the auspice of a TRC. As a result, Law 27 2004 regulates a 'uniform' provision in the attempt to resolve different human rights issues in the county. Contrary to what this research aims to investigate, namely that despite different circumstances in every case of human rights issues in Indonesia, as based on its diverse history, culture, and ethnicity, it entails different approaches in

²⁰⁹ Cited in the paper presented by E Soeprpto during a conference with the theme "Resolving the Issues of the Country through a TRC" (own translation) organised by the Institute of Research for Democracy, Le Meridien Hotel, Jakarta 5 December 2001.

²¹⁰ TAP MPR V 2000 was issued in 18 August 2000 regarding Strengthening Indonesian National Unity. See particularly Chapter I, point B, 2nd par and Chapter V.

²¹¹ Law 26 Year 2000 on Human Rights Court, see Art 47.

²¹² Law 27 Year 2004 on TRC consists of 10 Chapters and 45 articles.

resolving them. Hence, the necessity to formulate a specific TRC in accordance with the concerned issue or particular province is imperative.²¹³

Law 27 Year 2004 received criticisms for being principally weak in the process of truth finding and achieving reconciliation. The law was challenged for a judicial review to the Constitutional Court by a number of civil society elements challenging several articles regarding the grant of amnesty, the mechanism of reparation and the negation of criminal prosecution after cases are brought to the TRC violates the constitutional rights of the citizens.²¹⁴ This case is similar to the South African experience on the case of *AZAPO and others v The President of South Africa and others*.²¹⁵ Through such judicial review, the petitioners hoped that the problematic articles would be amended. Regrettably, in its decision, the Constitutional Court ruled to annul the whole enactment of Law No. 27 Year 2004.²¹⁶ The court was of the opinion that, had the challenged articles been amended, the TRC would not achieve its goal. It was an unfortunate and narrow ruling which led to the halt for the establishment of a TRC – thus also the promise for resolving human rights issues in Papua.

4.2.2 The need for a Specialised TRC for Indonesia's Papua

Restorative justice is a 'victim centred' justice where, through truth commissions, a victim's dignity is recognized and their voice is heard. This victim-centred vision of justice underlines the importance of remembering, uncovering, and respecting the painful past. This is an approach that can never be brought had it been resolved through retributive justice of legal prosecution.²¹⁷ Kiss further defines

²¹³ For example: Human rights issues in Papua, Aceh, and Maluku have different historical background and hence need a different set of approaches in terms in resolving the issues in each provinces. If the resolutions of issues are decided to be addressed through the establishment of a TRC, hence the formulation of specific mechanism and methodologies might be different to one another especially in terms on reparation and rehabilitation to victims – which highly depend to the participation of society in determining the established TRC.

²¹⁴ Arts 1(9), 27, and 44 of Law 27 Year 2004 on TRC is said to have violated the 1945 Constitution of the Republic of Indonesia arts 27(1) and 28D (1) on equality before the law, art 28I (2) on the recognition, guarantee, protection, and certainty of law, art 28I (5) on the promotion and protection of human rights in accordance to a democratic law state.

²¹⁵ Refer to n 123 above.

²¹⁶ See Indonesian Constitutional Court Decision No. 006/PUU-IV/2006 on the Decision on the Petition for Judicial Review on Law of the Republic of Indonesia No. 27 Year 2004 concerning Commission for the Truth and Reconciliation against the 1945 Constitution of the Republic of Indonesia.

²¹⁷ Prosecution constrained by rules of evidence, trials lack the narrative scope of truth commission and do not yield comprehensive accounts of regimes. Thus the TRC was able to reconstruct a much more complete picture of human rights violations than would have come

truth commission as an authoritative body that is 'designed to provide societies in transition with ways to deal with their legacies of mass violence, abuse and injustice'.²¹⁸ With such commission given the mandate to develop an official account of past atrocities, it is hoped that it would prevent the atrocities to reoccur.

A truth commission is essential in the resolution of the issues that culminate in Papua. It is a positive combined approach when investigative, judicial, political, educational, therapeutic, and even spiritual functions are employed in the establishment of a truth commission. Indonesia has to consider restorative justice in its blueprint for resolving the growing complex issue in Papua. The debate goes on, as the government needs to realise the difficulties to pursue the issue through legal prosecution. Again, Kiss underlines that:

'Legal obstacles to prosecutions include problems of due process raised by the prospect of prosecuting people for crimes committed under different legal regimes, statues of limitations, evidentiary problems inherent in crimes of society like torture, abductions, and extrajudicial murder, and the defence available to many perpetrators that they were acting under orders... political obstacles to prosecution are no less formidable.. truth commissions are thus hobbled from the start in their efforts to old perpetrators accountable.'²¹⁹

In addition to the above reasons, truth commission's reports would provide specific systemic recommendations for accountability and transparency that would be a valuable resource for future political reconstruction that the government should embark on.

In 2008 LIPI, in their project for a long term conflict resolution in Papua, identified four key agendas and a choice of policies or agendas submitted for consideration by the government.²²⁰ The four agenda spans from recognition, a new paradigm of development, dialogue to reconciliation. They were proposed and pursued through different individual approaches. Albeit the project gave a viable input, it is unlikely to be practical in resolving the issues in Papua through different sets of approaches that are not consolidated with each other. Issues in Papua should be resolved in one single approach that accommodates all necessary action, considering the urgency and resources.

out through the efforts to prosecute individual perpetrators. As cited in Kiss (n 124 above) 73-74.

²¹⁸ Kiss (n 124 above) 69-70.

²¹⁹ Kiss (n 124 above) 75.

²²⁰ LIPI (n 34 above) 4.

With the above premise in mind, I suggest that it is feasible for Indonesia to resolve issues in Papua through a specifically formulated TRC which conforms to the demand of the Papuans and adheres to the uniqueness and intrinsic situation of Papua. Such formulation will be discussed in the following subchapter.

4.3 Formulating a ‘Historic Bridge’: A Blueprint for Papua

The challenges that lie ahead are to transcend the division and rivalry of the past, the need for balance between truth and justice, to prevent reoccurrence of atrocities, achieving reconciliation in post conflict situations, to address the needs of victims and bring perpetrators to justice.²²¹ Based on the analysis brought forward in previous chapters, inspired by the important key indicators for a truth commission by Crocker, below is a specialised TRC for Papua that this research hopes will pave a blueprint to be taken into consideration by the Indonesian government.²²²

4.3.1 Rule of Law

‘Rule of law is especially important in a new and fragile democracy bent on distinguishing itself from prior authoritarianism, institutionalised bias, or the “rule of the gun”...Truth commissions depend on the rule of law to the extent that enabling legislation or constitutional provision – such as the postamble to South Africa’s Interim Constitution – authorise them.’²²³

During the current Reformation Era, Indonesia has equipped and advanced its legal system with a set of legal norms that would further guarantee the promotion and protection of human rights norms. Despite the need to resolve past human rights issues through a TRC, especially for Papua and other provinces like Aceh and Maluku, there has been no constitutional amendment to the 1945 Constitution that would support the mandate as seen in the South African Constitution. Moreover, the attempt to design a TRC through Law 27 Year 2004 was annulled.

Despite the setback in the annulment of the above law, it should not be seen as a stumbling block for establishing a future TRC. What is proposed in this research is for the government to remain innovative and vigilant for the possibility of establishing a TRC. If the previous attempt to establish a TRC failed, urgency builds up in provinces such as Papua, and national unity is threatened. Specialised TRC

²²¹ Rotberg (n 114 above) 6.

²²² Crocker (n 198 above) 100- 109.

²²³ Crocker (n 198 above) 105.

specifically established for a specific province in need is feasible. In the efforts for transitional justice, it is possible for the state to ‘bend’ the frigidness of legal constraints as a logical consequence for the objective of the current situation.²²⁴ It is a necessary step to resolve the past and save Indonesia’s future.

As previously mentioned, resolving human rights issues through a truth commission is primarily mandated through TAP MPR V 2000. It clearly delineates the reformation mandate to establish a TRC for strengthening national unity.²²⁵ TAP MPR V 2002 is in force until the mandate to enact a TRC Law is achieved.²²⁶ Therefore, TAP MPR serves as a strong legal foothold for the mandate of a TRC to be established. Denial of the mandate in the decree would be a betrayal to the reformation mandate and would hinder Indonesia’s future development and progress.²²⁷

Bearing the above premise in mind, adding the TAP MPR V 2000 with article 47 of Law 26 Year 2000 and article 46 and 47 of the Papua Special Autonomy Law, it is feasible for the government to pursue the drafting and issuance of a specific law which serves as a basis of a specialised TRC weaved specifically for the importance and urgency to resolve all issues in Papua.

More than a decade has passed since the above mandates. Indonesia cannot afford to adjourn any longer. The time is now for making a strategic plan. Doing so, through such a TRC for Papua, the government would fulfil its transitional justice obligation and pave a positive milestone for other provinces seeking similar accountability, such as Aceh and Maluku.

²²⁴ Sparingga (n 26 above) 9.

²²⁵ TAP MPR V 2000 (n 5 above), Chapter V

²²⁶ An MPR Decree (TAP MPR) prior to enactment of Law 10 Year 2004 on the Formulation of Law Regulations is the second highest legally binding instrument in Indonesia’s legal hierarchy after the Constitution. After the enactment of the said law, TAP MPR was removed from the hierarchy of law regulations. However, through TAP MPR I 2003 on the Review of the Legal Status of TAP MPR of 1960 - 2002, the status of TAP MPR V 2000 is still in force until a TRC law is enacted. See art 4 (5) of TAP MPR I 2003 on the Review of Legal Status of TAP MPR of 1960 to 2002 and art 7 Law 10 Year 2004 on Formulating Law Regulations.

²²⁷ ELSAM (n 193 above) 8.

4.3.2 Truth

'To meet the challenges of transitional justice a society should investigate, establish, and publicly disseminate the truth about past atrocities. What Boraine calls "forensic truth" or "hard facts" is information about whose moral and legal rights were violated, by whom, how, when, where, and why.'²²⁸

As the South African TRC has shown, public and transparent hearings of testimonies whereby the nation could witness the process of uncovering the truth was a success. This is a valuable lesson the Indonesian government ought to adopt in the establishment of its TRC. The acknowledgement of the past is an important element for the goal of transitional justice to be fully achieved.

In addition to the above, anticipating the limitation of a truth commission in the process of revealing the real truth, Indonesia must decide on a reasonable period of time in which the commission is able to investigate all the cases. It should have the power of subpoena and cross-examination through a specific investigative body. All of which was not fully conducted in the South African TRC.²²⁹

The process of uncovering the truth should also provide a public platform for victims where they are able 'to give their accounts and when they receive sympathy for their suffering, they are respected as a person and treated with dignity rather than – as before- treated with contempt'.²³⁰ As conducted in the South African TRC, the public testimony of victims gave them a platform to express their feelings and provided a sense of closure, assuring their stories had been told to the public. Facilitating such testimony, the government should give full media coverage and extensive public attention. Therefore in accommodating the above goals is to vest the Indonesian TRC law (rule of law) with the responsibility to investigate and establish what Merwe and Chapman describes as 'Macro-truth' and 'Micro-truth'.²³¹ 'Macro-truth' is the assessment on the contexts, causes, explanation for, and patterns of human rights violations that occur. It provides a framework for understanding the broader structural dimensions of the violence which would guide the process in identifying the causes and intellectual master minds of the abuses. Whereas 'Micro-truth' is the assessment of the specific events, cases, and people that were involved in the abuses and helps to point to the circumstances and the identification of

²²⁸ Crocker (n 198 above) 100.

²²⁹ Rotberg (n 114 above) 18.

²³⁰ Crocker (n 198 above) 102.

²³¹ Van der Merwe & Chapman (n 28 above) 241.

individuals, the groups, or the units of the security or the armed forces that committed particular crimes. Having to assess the above truths, it would contribute to clarify the determination of accountability for past abuses.

In South Africa's experience, truth through amnesty as a trade-off is particular in uncovering facts that are hidden and secret, especially from a previous authoritarian regime. As Minow argues, 'some of the story can never be known without the grants of immunity to those who can tell it – here the South African approach to amnesty is especially noteworthy'.²³² In this regard, the prerequisite of amnesty for truth in the Indonesian context will be further discussed in the following subchapter.

4.3.3 Accountability and Punishment

'Full transitional justice requires that there be fair ascriptions to individuals and groups on all sides of responsibility for past abuses and the meting out of appropriate sanctions to perpetrators may range from legal imprisonment, fines, compensatory payments, and prohibitions on holding public office to public shaming.'²³³

In the attempt to establish a truth commission as a morally based alternative to pursue restorative justice, an inevitable cause for the government is to satisfy the public with accountability, transparency, and acceptable forms of punishment for perpetrators which conforms to the definition of restorative justice itself.²³⁴ In doing so, albeit the intention for an amnesty provision to be included in the process of 'uncovering the truth', certain requirements should also be set in place and need to be fulfilled in order to be granted amnesty. Failing to fulfil such requirements, may result in legal prosecution. Hence, giving no room for 'blanket amnesty' that may result in impunity.

For the purpose in delivering accountability and seeking justice of the past, Indonesia should: first and foremost review and amend article 28I (1) of the 1945 Constitution that states: '[T]he right not to be prosecuted under retroactive law shall constitute human rights which cannot be reduced under any circumstances

²³² M Minow 'The hope of healing: What can truth commissions do?' in Rotberg & Thompson (eds) (n 105 above) 239.

²³³ Crocker (n 198 above) 102-103.

²³⁴ Restorative Justice defined by Crocker as rehabilitating perpetrators and victims and (re)establishing relationships based on equal concern and respect. Crocker (n 198 above) 102.

whatsoever'.²³⁵ This article provides impunity for perpetrators of past abuses to be held responsible for their atrocities. It should be noted that the 1945 Constitution may be amended to conform to the ever changing dynamics of politics, democratisation, and the continuing reformation when the national urgency requires it.²³⁶

Secondly, the provision of amnesty in the proposed TRC should be thoroughly assessed. The 1945 Constitution stipulates that amnesty can only be granted by the President after consultations from DPR.²³⁷ Hence, it will be problematic if the mechanism adopted from the South African TRC is used without any adjustment. Other than the restraints given in the 1945 Constitution, international law also has constraints in the use of amnesty. Paul van Zyl explained that the circumstances faced by South Africa in the inclusion of the amnesty provision were different from other countries that have established a TRC.²³⁸ The main difference is that the amnesty provision is entrenched in the South African Interim Constitution. He also added that the political transition in Indonesia is different to that of the South African experience. Hence Indonesia should therefore formulate its own amnesty mechanism into the establishment of its TRC that conforms with its national and international laws that it is party to.

As amnesty imposes a significant cost in terms of post conflict justice, it requires moral justification. Such justification may be met with the formulation of a conditional amnesty for the discovery of the truth by perpetrators to serve as an effective mechanism to uncover human rights violations and criminalisation thereof. Through such conditional amnesty, it could benefit exposing the nature and dynamics of politically motivated human rights violation and also bring peace and justice to the victims.

To achieve such an aim, in the establishment of Indonesia's TRC, the conditional amnesty should be accommodated into its rule of law. The mechanism of the proposed amnesty should in no form be a platform for perpetrators to be waived from criminal liability. It should otherwise be used, as an incentive that perpetrators could be entitled to if they come forward, apply for amnesty and disclose all the facts

²³⁵ Art 28I (1) of the 1945 Constitution of the State of the Republic of Indonesia 4th Amendment.

²³⁶ Chapter XVI Arts 37 (1) and (2) regulates the Amendment to the 1945 Constitution.

²³⁷ Art 14 (2) of 1945 Constitution of the State of the Republic of Indonesia 4th Amendment.

²³⁸ P van Zyl states that it is a breach of art 6 of the ICCPR as cited in the article 'TRC Law, why annulled?' (own translation) in <http://koranburuh.org/keutuhan-ciptaan/opini-perburuhan/469-uu-kkr-mengapa-dicabut.html> (accessed 15 November 2011).

to be served in the court of law. Perpetrators not given the grant of amnesty after the decision by the President will not be waived from criminal liability.²³⁹ Perpetrators failing to come forward, and is proven guilty, will face greater criminal liability. Victims in this mechanism shall indeed have a role to corroborate and acknowledge the facts given by the perpetrators. This will therefore serve as a healing and forgiving forum, giving them a sense of closure in finally knowing the truth about what happened and why these crimes were committed. The grant of amnesty in this mechanism would conform to Indonesia's 1945 Constitution – granted by the President after consideration by the DPR. After the process of truth telling through public hearings, victims will receive reparation and rehabilitation that they are entitled to. No obligation to forgive as a prerequisite to obtain reparation and rehabilitation is required – as was conducted in the South African TRC.

This kind of conditional amnesty is proposed with the aim to eliminate any suspicion that the TRC is used as a substitute tool for prosecution and an opportunity for impunity. Using the conditional amnesty proposed above would strengthen the support that the inclusion of an amnesty provision would fortify the TRC as a tool that would complement judicial processes. Justice for the people would be served as a 'rite of passage' into the new post conflict society and supplement roles in achieving the multiple goals of transitional justice.²⁴⁰ Furthermore, if this is adopted, it would meet the expectation and requirements of international law, in that it avoids impunity, helps to build a human rights culture, and demonstrates commitment to the rule of law.

Another lesson learned by the achievement of accountability from South Africa's experience is its praised media coverage. Media coverage of the hearings serves as an important aspect for the proposed Indonesian TRC. The openness of the process of the TRC would receive international support as it will be proof of the government's benevolence in the effort to achieve full accountability on past wrongdoings. Not only would it set history straight, it would also reshape perspectives of the international community and erase any misleading provocations that happened in the past.

²³⁹ In this regard, a set of rules and requirements for granting amnesty to perpetrators to be followed by the DPR in giving consideration of granting amnesty to the President should be made.

²⁴⁰ Crocker (n 198 above) 104-105

In addition to the above, the process of selection of nominees for commissioners in South Africa's TRC sets a standard for good accountability. The Indonesian government should consider the participation of NGOs, churches, parties, cultural representatives, and civil society. A short list of worthy candidates to serve as commissioners in the truth commission can be chosen from these groups by a panel made up of the President and DPR. Candidates should be qualified in such a way that their credibility would be revealed. They should have a high moral integrity, be impartial, and be committed to the working of a commissioner. The most important requirement of all is that they cannot be high profile members of political parties, nor can they be involved in any acts of the previous regime.²⁴¹ Indeed, such democratic procedure for the selection of commissioners will add to the society's trust and confidence for the proposed established TRC. Hence, overall democracy, transparency, and accountability will be promoted.

4.3.4 Compensation for victims

'States have a duty not only to respect international human rights but also to ensure them...Successive governments are bound by the responsibility incurred by previous governments for wrongful acts committed and not redressed.'²⁴²

'Compensation, restitution, or reparation, in the form of income, medical services or educational and other opportunities, should be paid to individuals and groups whose rights have been violated.'²⁴³

It has become an international obligation transcribed in various international law and has been recognised as customary law which obliges states to provide forms of reparation to victims that have suffered human rights violations.²⁴⁴ Indonesia, as a party to almost all international human rights law, has the obligation to provide such reparation to victims. In the case of Papua as this research assesses, the government should provide reparation guided by the international law it is a state

²⁴¹ Graybill (n 167 above) 4.

²⁴² National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families: Bringing Them Home Report (Sydney: Human Rights and Equal Opportunity Commission, 1997) (hereafter "the Report of the National Inquiry") as cited in <http://www.murdoch.edu.au/elaw/issues/v6n4/buti64.html> (accessed in 20 November 2011).

²⁴³ Crocker (n 198 above) 106.

²⁴⁴ Provisions providing a right to a remedy for victims of violations of international human rights law found in numerous international instruments, in particular art 8 of the UDHR, arts 1 and 2 of the ICCPR, 2 art 6 of the ICERD, art 14 of the CAT, art 39 of the CRC, and of IHL as found in art 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), art 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, and arts 68 and 75 of the Rome Statute of the International Criminal Court. As cited in UN GA Res 60/147 regarding Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

party to and should also make a contingency plan relating to the funding of such reparation.

Regarding forms of reparations, as highlighted in South Africa's experience, the government should consider a wide range of compensation to victims which encompasses a full process of rehabilitation and reparation. As laid down by Van Boren in his 'Principles of Reparation', the content of reparations should include restitution (restoration of liberty, family life), compensation (monetary compensation), rehabilitation (medical and psychological care, including legal and social services), satisfaction and guarantees of non-repetition (public acknowledgement of the facts and acceptance of responsibility including measures to prevent recurrence of any violations).²⁴⁵

The above principles, if followed carefully by the government, will fulfil the material necessity that they are entitled to and help the victims and their families to heal from their physical and psychologically wounds. South Africa's practices in reparation proved a good example through the working of its RRC. South Africa has implemented a nuanced reparation and rehabilitation policy that pursued reparation on both moral (restoration of dignity) and legal grounds. It provided victims with monetary packages that take into account the severity of harm, number of dependents, and access to social services.²⁴⁶

Furthermore, in relation to the mechanism of funding, the government prior to designing the concept of reparation should make full acknowledgement of the source of funding. Other than from the state fund, the source of funding for the reparation to the victims in Papua should also come from PTFI (as explained in chapter two). This will not only show the goodwill of PTFI to give back to the people, but it would also help reduce the tensions that have always existed between PTFI and the Papuans.

Lastly, the government needs to bear in mind that reparation to victims should not take place under political pressure. It should be done out of a pure moral commitment set out by the government for it to be effective.

²⁴⁵ T van Boven (Special Rapporteur of the UN), *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: Final Report*, UN Doc. E/CN. 4/Sub.2/1993/8, 2 July 1993, 7 and Sub-Commission decision 1995/117, U.N. Doc. E/CN.4/Sub.2/1996/17, 24 May 1996 as cited in. <http://www.murdoch.edu.au/elaw/issues/v6n4/buti64.html>.

²⁴⁶ Crocker (n 198 above) 106.

4.3.5 Institutional Reform and Long-term Development

'To reckon fully with past wrong, an emerging democracy must identify the causes of past abuse and take steps to reform the law and basic institutions to reduce the possibility that such violations will be repeated. Basic institutions include judiciary, the police, the military, the land tenure system, the tax system and the structure of economic opportunities.'²⁴⁷

The primary causes for rivalry between the Papuans and the Indonesian government, as its history explained in chapter two, can be highlighted in key points:²⁴⁸

- a. Papuans questioned the legitimacy of their integration into Indonesia during the 1963-1969 political handover from the Dutch to Indonesia.
- b. The Papuan elite felt the sense of rivalry with the Indonesian officials since the Indonesian takeover of 1963 as a cause for military operations conducted in Papua.
- c. The territory's economic and administrative development and the Papuans' continued sense of difference from Indonesians.
- d. The great influx of Indonesian trans-migrants to Papua has caused a demographic transformation of society in Papua, triggering the native Papuans to feel dispossessed and marginalised.

Therefore, the main cause of the problem is economic inequality which resulted in the growth of Papuan nationalists who felt marginalised from the rest of the Indonesians, causing them to struggle for independence. The chain of effects for such activities resulted in military operations by the Indonesian government, which reportedly still occur today, albeit for reasons of national security, have caused allegations of human rights violations during its operations.

The contribution of a TRC in Papua in its report will hopefully give a set of recommendations for institutional reform, provoke national debate to ensure that all problems faced in Papua be immediately resolved and prevent future atrocities from occurring. The South African TRC's sectoral approach to institutional reform and long-term development had an important impact in the South African transitional

²⁴⁷ Crocker (n 198 above) 107.

²⁴⁸ R Chauvel & I N Bakti 'Constructing Papuan Nationalism: History, Ethnicity, and Adaptation' (2005) 14 *Policy Studies East-West Centre Washington* 1-2.

justice. Hearings took place in sectors and institutions such as health, business, the judiciary, the media, prisons and faith commissions. It encouraged each to engage in a process of institutional self-examination and reform.²⁴⁹ The steps that South Africa's TRC took in its institutional reform and long-term development should be adopted by Indonesia. Hearings, dialogue, debate and societal interaction for reformation in key sectors and institutional reformation in the related ministries that were involved in the allegation of human rights violations should also be considered. Such ministries amongst others, include the Ministry of Defence, the Ministry of Justice and Human Rights, the Ministry of Social Services and the Ministry of Energy and Natural Resources. In accord with Gutmann and Thompson, that 'a truth commission can contribute to long-term democratisation and equal respect for all citizens by practicing in its 'process' what it preaches in its 'product''.²⁵⁰

4.3.6 Reconciliation

"A newly democratic society in transition from a conflicted or repressive past should aim to reconcile former enemies and reintegrate them into society."²⁵¹ This notion fits perfectly into what should be done in Indonesia. The rivalry between the Papuan elites and the Indonesian government should end. A peaceful coexistence and democratic society in Papua should be created. To achieve this goal, as underlined by Crocker, people should come together and discuss what they demand from the government regarding issues on public policy, areas of common concern, and forge compromises with which all agree.²⁵²

This is also seen in the South Africa's TRC, where reconciliation is achieved through 'shared comprehensive vision, mutual healing and restoration, or mutual forgiveness'.²⁵³ In the end, the proposed TRC for Papua would be capable of achieving reconciliation to the province and inspire the establishment of other TRCs in the country.

²⁴⁹ Crocker (n 198 above) 107.

²⁵⁰ As above.

²⁵¹ As above.

²⁵² Crocker (n 198 above) 108.

²⁵³ As above.

4.3.7 Public Deliberation

'[A] newly democratic and transitional society should aim to include public debate and deliberation in its goals and strategies for transitional justice... achieving one end will be at the expense of (fully) achieving another... disagreements about ends, trade-offs, and means will be reduced as much as possible through public deliberations that permits fair hearing for all and promotes morally acceptable compromises.'²⁵⁴

The formation of a TRC to redress the situation in Papua must be conducted with open doors, full participation and interaction by the society. It should be publicly vetted in its procedures and preliminary conclusions. It should stimulate public debate and comment and be willing to respond to public criticism.²⁵⁵ Such dialogue is significant to communicate at a grassroots level to accommodate their voice into the established TRC. Openness and the free flow of information would definitely support the TRC formation and create foundational building blocks for its success. Having the support and aspirations of all stakeholders from all layers of society, including NGOs, will definitely gain important momentum for the formation of the TRC.

President Susilo Bambang Yudhoyono expressed his commitment to resolve issues in Papua using the three main approaches of justice, democracy and peace with dignity by stressing the approach of dialogue and persuasion.²⁵⁶ In other opportunities, Indonesia's former Minister of Foreign Affairs, Hassan Wirajuda and former Minister of Defence, Yuwono Sudarsono, also made a public announcement and spoke to the media, stressing the importance of dialogue in Papua.²⁵⁷ On the other hand, the said commitment was also expressed by the people of Papua, specifically during the second Papua Congress in 2000.²⁵⁸ It is evident that both sides are willing to engage in dialogue and stop ongoing military approaches that haunt resolution in Papua.

The problem in the conduct of dialogue is for both sides to have the same goal in resolving past issues in Papua and to put an end to issues of separatism. Dialogue should be made in the efforts to reach a consensus and construct goodwill by embracing the Papuan people, which in this case would be through the

²⁵⁴ Crocker (n 198 above) 109.

²⁵⁵ As above.

²⁵⁶ See Opening Speech of President Susilo Bambang Yudhoyono during the Christmas Celebration with Christians in the Jakarta Convention Centre, 27 December 2005 as cited in N Tebay *Jakarta-Papua Dialogue; A Papuan Perspective*(own translation) (2009) 12. See also LIPI (n 34 above) 4.

²⁵⁷ A Khalik *'Flag rising not act of separatism'* The Jakarta Post 19 September 2008.

²⁵⁸ Tebay (n 256 above) 15.

establishment of a TRC. To achieve this, contributions of cultural resources in Papua are significant. The Papuan Customary Council (*Dewan Adat Papua* or DPA) and various religious institutions, NGOs, political parties, mass organisations and tribal groups in Papua can help as moderators in such dialogue.²⁵⁹ Cultural resources proved an effective contribution to the success of South Africa's TRC and national unity as it helped shaped the opinions and willingness of the people.

Dialogue Jakarta-Papua is a foundational and determining step for the future of Indonesia. Echoing that the proposed TRC for Papua is essential, it embraces the spirit of democracy and envisages the commitment of the government to embrace all Papuans. Most notably, through dialogue, emerge the seeds for the future of a united Indonesia.

²⁵⁹ LIPI (n 34 above) 7.

Chapter V

Conclusion

Analysing all the findings presented in the previous chapters offer undoubted evidence that truth commissions hold emotional, cultural and symbolic power. They are an important agent for transformation in countries that are facing the challenges of transitional justice from an authoritarian regime into a democratic nation.²⁶⁰ They also provide a promising tool where there are perpetrators and violators from multiple sides. They strengthen the rule of law after a period of 'lawless' authoritarian regime, as was experienced by Indonesia.²⁶¹ The Reformation Era as the new democracy has the responsibility to respond effectively to past evils without jeopardizing prospects for future developments.²⁶²

The South African TRC has given a valuable lesson to the workings of a truly novel TRC. It can serve as a model for other countries facing the transition into democracy that struggle to resolve human rights violations of former regimes. However, criticism towards the workings and outcomes of the South Africa's TRC should be learned from and avoided in other establishments of TRC. The failure of the South African TRC to recognise apartheid as a systemic violation of human rights serves as its biggest failure to completely redress the atrocities of apartheid.

As this research tries to delve into the establishment of a specialised TRC for Indonesia's Papua, the proposals put forward in this research hopes to serve as an important input for the Indonesian government. Despite the deep urgency in resolving allegations of human rights violations in Papua, the government should take immediate action. The voices of the people need to be heard and accommodated. A carefully crafted establishment of a TRC starting with Papua province will serve as pivotal momentum for other provinces that are in need of resolutions for past human rights issues. Resolving issues in Papua needs a specific blueprint in order to give a viable and feasible solution considering its uniqueness, intrinsic history and overlaying issues. The established specialised TRC for Papua should aim to achieve truth and justice for the best interests of victims. Most importantly, it should conform

²⁶⁰ C Bundy "The Beast of the Past: History of the TRC" in James & Van de Vijver (eds) (n 184 above) 9.

²⁶¹ Graybill (n 167 above) 179.

²⁶² Rotberg (n 114 above) 11.

to the principles of *Pancasila*, the 1945 Constitution and international human rights law.

Noting the viability of the South African TRC to serve as a model, one has to consider that no model can be fully adopted without adjusting to the subject in matter. It is also evident that in the effort to compare Indonesia and South Africa, both countries have unique features. Chapter four highlights some features which Indonesia could adopt from the South African TRC. First and foremost for the establishment of a TRC in Papua is to provide the rule of law as a platform to move forward. The mandate founded in TAP MPR V 2000, Law 26 Year 2000 and Papua Special Autonomy Law serve as a strong legal platform in which the government should develop the creation of a bill on a specialised TRC for Papua. Moreover, having to assess best practices from the South African TRC, Indonesia can learn from the processes of accountability and punishment, compensation to victims, reconciliation, public deliberation, institution and long term development measures. Through participation of civil society and NGOs in the drafting of such mechanisms, it would fully accommodate the voice of the Papuans. Such participation would achieve a TRC that its procedures and outcomes would satisfy all elements of society, guaranteeing its success. Moreover, not only such TRC would provide truth, transparency, accountability and achieve transitional justice. It would also straighten misleading perceptions that could hinder the peaceful and just resolution of human rights issues in Papua.

Meanwhile, for the inclusion of the amnesty provision as an important factor to uncover the truth, Indonesia should reformulate it in a way that conforms to its national and international obligations. As proposed in this research, the amnesty provision still serves as an important element. Amnesty should be given as an incentive granted by the President in accordance with Indonesia's 1945 Constitution. Perpetrators are only eligible for amnesty after they have disclosed the full truth and passed the consideration of the DPR to be granted for amnesty. The TRC should be treated as complementary in achieving justice and should not override prosecutorial processes. In relation to the above, the right to reparation and compensations for victims will be immediately received, without any prerequisite for them to forgive, as was practiced in the South African TRC.

Transitional justice is a process that often goes through several phases. The proposals in this research hope to bring change to long term future developments, peaceful coexistence, and an end to the violence that haunts the people of Papua. It will bring justice and restore dignity to victims and their families. The government needs to act expediently with a firm political will to put this to end and restore peace in Papua. The rest relies on the commitment of the people themselves to continue the process of reconciliation, in building a better future for the Papuans as an integral and inseparable part of Indonesia.

In light of all findings, Indonesia has fulfilled all requirements in what Du Toit considers as moral foundations to the establishment of a truth commission.²⁶³ These requirements concern historical context, political conditions, legal mandates, and available conceptual frameworks.²⁶⁴ Although the situation and circumstances underlying the establishment of the TRC in South Africa and Indonesia are different, it definitely has the same founded spirit to achieve transitional justice and to build a better future in the new democratic government. There is recognition for the exclamations of the notion 'Never Again!' for such atrocities to reoccur in the future.

Lastly, the proposals and recommendations set out in this research will hopefully be further developed, discussed and debated by all levels of society to serve as a seed of hope for bringing justice to the Papuans. As previously mentioned, it is imperative that civil society and NGOs participate in the formulation of a TRC. Therefore, public deliberation would serve as building blocks for an acceptable compromise for the establishment of a specialised TRC for Papua. *Bersatu dan Jayalah Indonesiaku!*²⁶⁵

²⁶³ A du Toit "The Moral Foundations of the South African TRC: Truth acknowledgement and Justice as Recognition" in Rotberg & Thompson (eds) (n 105 above) 122.

²⁶⁴ As above.

²⁶⁵ Unite and Prosper, My Indonesia!

BIBLIOGRAPHY

Books

Ally R, *The Truth and Reconciliation Commission: legislation process and evaluation of impact* (1991) Pretoria: Centre of Human Rights, University of Pretoria

Bassiouni M C (ed) *Post Conflict Justice* (2001) Ardsley, N.Y.: Transnational Publishers

Catholic Diocese of Jayapura (et al) *Memoria Passionis di Papua 2005* (2005) Jayapura: Office for justice and Peace, Catholic Diocese of Jayapura

Doxtader E & Villa-Vicencio C (eds) *To Repair the Irreparable: Reparation and reconstruction in South Africa* (2004) Claremont, SA : Spearhead ; London : Global

Du Bois – Pedain A *Transitional Amnesty in South Africa* (2007) Cambridge; New York: Cambridge University Press

D Dyzenhaus *Truth, Reconciliation and the Apartheid Legal Order* (1998) Cape Town: Juta

Elster J *Closing the Books: Transitional Justice in Historic Perspective* (2004) Cambridge: Cambridge University Press

Elster J *Retribution and Reparation on the Transition to Democracy*, (2006) New York: Cambridge University Press

Erlangga R A et al (eds) *Historical Facts on Irian Jaya* (2005) Jakarta: CV Surya Fajar

Graybill L S *Truth and Reconciliation in South Africa: Miracle or Model?* (2002) United Kingdom: Lynne Rienner Publishers Inc.

Hayner P B *Unspeakable truths; transitional justice in historic perspective*, (2002) New York: Routledge

Heyns C & Stefiszyn (eds) *Human Rights, Peace and Justice in Africa: A Reader*, (2006) Pretoria: PULP

James W and Van De Vijver L (eds) *After the TRC: Reflections on Truth and Reconciliation in South Africa* (2000) South Africa: David Philip Publishers/ Ohio University Press

Koentjaraningrat (ed) *History of Irian Jaya (Sejarah Irian Jaya)* (own translation) or (1994) Jakarta: Gramedia

Mani R *Beyond Retribution* (2002) United Kingdom: Polity Press

Members of National Action Plan Project Steering Committee, *National Action Plan for the Promotion and Protection of Human Rights* (1998) Houghton: Co-ordinating Committee on the National Action Plan

Purwanto W H *Papua 100 Years To Come (Papua 100 Tahun ke Depan)* (own translation) Jakarta: CMB Press

Rotberg R I & Thompson D (eds) *Truth v. justice: the morality of truth commissions* (2000) Princeton, N.J.: Princeton University Press

Roux W L & Van Marle K *Law Memory and the legacy of Apartheid: Ten years after AZAPO v President of South Africa* (2007) Pretoria: Pretoria University Law Press (PULP)

Shiram C L *Confronting Past Human Rights Violations: Justice Vs Peace in Times of Transitions* (2004) Abingdon ; New York : Frank Cass

Subandrio *Revising the history of West Irian's Struggle* (2001) Jakarta: Yayasan Kepada Bangsa.

Tebay N *Jakarta-Papua Dialogue; A Papuan Perspective* (own translation) (2009) Jayapura: office for Justice and Peace Catholic Diocese of Jayapura

Teitel R G *Transitional Justice*, (2000) Oxford: Oxford University Press

Thompson J *Taking Responsibility for the Past: Reparation and Historical Justice* (2002) Cambridge, UK: Polity ; Malden, MA : Blackwell Publishers

Tutu D *No future Without Forgiveness*, (2000) New York: Image Book

Truth and Reconciliation Commission (1994) Cape Town: Justice in Transition

Usman S & Din I *Tides of Papua's History (Pasang Surut Sejarah Papua dalam Pangkuan Ibu Pertiwi)* (own translation) (2010) Pontianak: Planet Buku.

Van der Merwe & H Chapman A R *Truth and reconciliation in South Africa: did the TRC deliver?* (2008) Philadelphia: University of Pennsylvania Press

Journal Articles

Beckmann J & Prinsloo I 'Legislation on school governors' power to appoint educators: friend or foe?' (2009) 29 2 *South African journal of Education* 171-184

Ellias P K, 'Ending the chain of violence in Papua' (own translation) '*Memutus Rantai Kekerasan di Papua*', (2009) *KAPAS* 6-7

Graybill L 'Assessing South Africa's Truth and Reconciliation Commission' Vol. 36 (2) (2002) *Canadian Journal of African Studies / Revue Canadienne des Études Africaines* 356-361

Hayner P B 'Fifteen Truth Commission 1974-1994: A Comparative Perspective', (1994) 16 4 *Human Rights Quarterly* 597-655

Jenkins C 'After the Dry White Season:The Dilemmas of reparation and reconstruction in South Africa' (2000) 16 3 *South African Journal on Human Rights* 415-485

Klare C 'Legal Culture and Transformative Constitutionalism' (1998) *South African Journal on Human Rights* 146-157

Malamud-Goti J 'Transitional governments in the breach. Why punish state criminals?' (1990) 12 (1) *Human Rights Quarterly* 1-16

Minyuku B S V 'Truth and Reconciliation Commissions and other alternative forms of Justice' (2003) Oct-Des *African Legal Aid* 28-36

Motha S "'*Begging to be black*" Liminality and critique in the post-apartheid South Africa' 2010 *Theory, Culture & Society* 1-21.

Pigou P & Valji N 'South Africa, reparations and the TRC's recommendations: A missed opportunity' (2006) 7 *The Reparation Report: The Bi-annual Journal of the Redress Trust* 4-6

Simpson G & P van Zyl 'South Africa's Truth and Reconciliation Commission' (1996) 585 *Temps Modernes* 7-12

Swart M 'Sorry seems to be the hardest word: Apology as a form of Symbolic Reparation' (2008) 24 *South African Journal on Human Rights* 50-70

Papers, Statements and Thesis

Arianto S TRC: *Problems and prospect of establishment in Indonesia* (own translation) ('*Komisi Kebenaran dan Rekonsiliasi: Permasalahan dan Prospek Pembentukannya di Indonesia*'), during the Seminar of National Law Development VIII, Denpasar, 14-18 July 2003.

Brundige E, King W (et al). Indonesian Human Rights Abuses in West Papua: Application of the Law of Genocide to the History of Indonesian Control', (2004) April *Allard K. Lowenstein International Human Rights Clinic*

Chauvel R & Bakti I N 'Constructing Papuan Nationalism: History, Ethnicity, and Adaptation' (2005) 14 *Policy Studies East-West Centre Washington*

Els C W '*Reconciliation in Southern Africa: The Role of the Afrikaans Churches: a historical and analytical study of the contributions of the Afrikaans Churches to the process of reconciliation in Southern Africa, with special reference to their response to the work of the truth and reconciliation commission*' Thesis(PhD, Science of religion and Missiology) – University of Pretoria; 2007

Gonzales E *Comment by the International Center for Transitional Justice on the Bill Establishing a Truth and Reconciliation Commission in Indonesia*

Herawan JB '*Filling the proposal for a TRC in the context of Papua*' (own translation) ('*Mengisi gagasan Pembentukan Komisi Kebenaran dan Rekonsiliasi dalam Konteks Papua*') a paper during the "Workshop on Ideas for the upholding of human rights in the future" by Kontras Papua, 10-14 June 2002

Jardine V '*Truth and Reconciliation Commission: success or failure?*' unpublished MHCS dissertation, University of Pretoria, 2008

Khalik A '*Flag rising not act of separatism*' The Jakarta Post, 19 September 2008

Simpson G ‘*A brief evaluation of South Africa’s Truth and Reconciliation Commission: Some lesson for societies in transition*’, paper written prior to the publication of the South African TRC Final Report, Oct 1998

Sparingga D ‘*TRC: Resolution for the Authoritarian Regime Heritage and the Savior of Indonesia’s Future*’ (own translation) (“*Komisi Kebenaran dan Rekonsiliasi: Penyelesaian Atas Warisan Rejim Otoritarian dan Penyelamatan Masa Depan di Indonesia*”), a paper during the Seminar on Development of National Law, held by the Department of Justice and Human Rights of Indonesia, 14-18 July 2003

Soeprapto E during a conference with the theme “*Resolving the Issues of the Country through a TRC*” (own translation) organised by the Institute of Research for Democracy, Le Meridien Hotel, Jakarta 5 December 2001

The Indonesian Institute of Sciences (LIPI) Team ‘*Papua Road Map: Negotiating the Past, Improving the Present and Securing the Future*’ Jakarta : 2008

Van Den Broek T ‘*Human Rights Violation in Papua Has a Genocide Pattern?*’ (own translation) (*‘Pola Pelanggaran HAM di Papua Bercorak Pola Genosida?’*); Lokakarya Genoside di Papua, convened by ELSHAM Papua Barat and Sinde GKI of Tanah Papua in Abepura, 13 March 2004,

Van Den Broek T ‘*Franciscans International and Dominicans for Justice and Peace Association, Statement during the 58th meeting of UN Human Rights Commission, 9th Session – Statements on Human Rights Violations in various parts of the world*’ Palais des Nations, Geneva, Swiss, 10 April 2002

Newspapers

Hardianto J S ‘Ministry of Foreign Affairs: Nobody issues Papua’ (own translation) (*‘Kemenlu: Tak ada yang masalahkan Papua’*) KOMPAS 11 August 2011

Suryanto (ed) ‘Reject Foreign Intervention for Papua’ (own translation) (*‘Tolak Intervensi asing untuk Papua’*) Antara News 9 August 2011

Wibowo A & Margianto H ‘Regarding Papua, where is KOMNAS HAM?’ (own translation) (*‘Soal Papua, di mana Komnas HAM?’*) KOMPAS 10 August 2011

Cases

AZAPO and others v The President of South Africa and others 1996 4 SA 671 (CC), 1996 8 BCLR 1015 (CC)

Decision on the Petition for Judicial Review on Law of the Republic of Indonesia No. 27 Year 2004 concerning Commission for the Truth and Reconciliation against the 1945 Constitution of the Republic of Indonesia No 006/PUU-IV/2006

Reports

Annual Report of ELSHAM 2001

Committee against Torture, Fortieth Session, 28 April – 16 May 2008, CAT/CIDN/CO/28April- 16May 2008

Committee against Torture, Twenty Seventh Session, 12 - 23 November 2001, CAT/C/XXVII/Concl.13 dated 22 November 2001

Conclusion and Recommendations of the Committee against Torture: Indonesia.

Directorate of Human Rights and Humanity, Directorate General of Multilateral, Ministry of Foreign Affairs, Socialization Report in Jayapura, 31 August – 2 September 2009

Final Report on the South African TRC

INFID 'Civil and Political Rights, Including the Questions of: Disappearances and Summary Executions' submitted to the 61st Session of the UNCHR on 15 March 2005

Report of the Special Representative of the Secretary-General on Human Rights Defenders on the protection of human rights defenders, Hina Jilani – during her visit to Indonesia 5-13 June 2007, A/HRC/7/28

Report of UN Special Rapporteur on Torture, Manfred Nowak, 10-25 November 2007, A/HRC/7/3/Add.7

Report of KOMNAS HAM Violation Investigation in Papua/Irian Jaya, 8 May 2008

Universal Periodical Review (Indonesia) A/HRC/WG.6/1/IDN/4

UN Committee against Torture (Conclusion and Recommendations of the Committee against Torture: Indonesia 22/11/2001), Committee Against Racial Discrimination (Seventy First Session, Geneva, 30 July – 18 August 2007)

UN Committee against Torture, Twenty Seventh Session, 12-23 November 2001, CAT/C/XXVII/Concl.13 dated 22 November 2001

UN Committee against Torture, Fortieth Session, 28 April – 16 May 2008, CAT/CIDN/CO/28April- 16May 2008.

Van Boven T (Special Rapporteur of the UN), *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: Final Report*, UN Doc. E/CN. 4/Sub.2/1993/8, 2 July 1993, 7 and Sub-Commission decision 1995/117, U.N. Doc. E/CN.4/Sub.2/1996/17, 24 May 1996

Legislations and Treaties

Indonesian

1945 Constitution of the Republic of Indonesia (4th Amendment)

TAP MPR III 2000 on the Legal Source and Hierarchy of Legislation

TAP MPR V 2000 on the Consolidation of National Unity and Integrity

TAP MPR I 2003 on the Review of the Legal Status of TAP MPR between 1960 - 2002

Constitutional Court Decision No 006/PUU-IV/2006 on the Decision on the Petition for Judicial Review on Law of the Republic of Indonesia

Presidential Decree No. 40 2004 on Indonesia's RANHAM 2004-2009

Presidential Decree No. 23 2011 on RANHAM 2011-2014

Law 39 Year 1999 on Human Rights

Law 26 Year 2000 on Human Rights Court

Law 21 Year 2001 on Special Autonomy for the Papua Province

Law 24 Year 2003 on the Constitutional Court

Law 10 Year 2004 on Formulating Law Regulations

Law 27 Year 2004 on TRC

Law 23 Year 2004 on the Elimination of Domestic Violence

South African

Constitution of the Republic of South Africa Act No. 200 1993

Promotion of National Unity and Reconciliation Act 34 of 1995

Constitution of the Republic of South Africa Act No. 108 1996

International

1948 Universal Declaration on Human Rights

1949 Charter of Transfer of Sovereignty

1962 New York Agreement

The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

The UN Declaration of Basic Principles of Justice for Victims of crimes and abuse of Power to identify the victims of such breach of human rights

UN General Assembly 24th Session Agenda Item No 98, A/7723, 9 November 1969

UN General Assembly Resolution 2504

Websites

<http://en.wikipedia.org/wiki/Soeharto> (accessed 10 April 2011)

<http://ictj.org/en/tj/> (accessed 10 April 2011)

<http://ictj.org/sites/default/files/ICTJ-Indonesia-TRC-Bill-Comment-2005-English.pdf>
(accessed 10 April 2011)

http://www.law.yale.edu/documents/pdf/intellectual_life/west_papua_final_report.pdf
(accessed 11 April 2011)

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/115/30/PDF/G0811530.pdf?OpenElement>
(accessed in 16 April 2011)

<http://www.info.gov.za/otherdocs/2003/trc/rep.pdf> (accessed in May 20 2011)

http://truth.www.wits.ac.za/cat_descr.php?cat=4 (cited in 1 June 2011)

<http://www.justice.gov.za/trc/reparations/summary.htm> (accessed in 1 June 2011)

<http://www.csvr.org.za/docs/reconciliation/stillnottalking.pdf> (accessed in 1 June 2011)

http://wwwsouthafrica.info/what_happening/news/trc-reparations.html (accessed in 1 June 2011)

<http://www.bps.go.id> (accessed 10 August 2011)

<http://www.vanderheijden.org/ng/history.html#4> (accessed 10 August 2011)

<http://www.papuaweb.org/dlib/pbb/unqa-1969-pepera.PDF> (accessed 10 August 2011)

<http://www.indonesiaseoul.org/archives/papua/The%20History%20of%20The%20return%20of%20Papua.pdf> (accessed in 10 August 2011)

http://en.wikisource.org/wiki/United_Nations_General_Assembly_Resolution_2504m
(accessed 15 August 2011)

<http://papuainfo.wordpress.com/tag/1/> (accessed 18 August 2011)

<http://legal-dictionary.thefreedictionary.com/Uti+possidetis> (accessed 18 August 2011)

<http://papuainfo.wordpress.com/2009/08/23/ii-a-world-war-then-revolution/> (accessed 18 August 2011).

http://en.wikipedia.org/wiki/Uti_possidetis_juris (accessed 18 August 2011)

<http://www.ptfi.com/about/default.asp> (accessed 1 September 2011)

<http://www.laohamutuk.org/Oil/LNG/Refs/002AbrashFreeport.pdf> (accessed 1 September 2011)

http://en.wikipedia.org/wiki/Papua_Presidium_Council (accessed in 1 September 2011)

<http://www.petitiononline.com/unreview/> (accessed 5 September 2011)

<http://bukpapua.blogspot.com/> (accessed 5 September 2011)

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/130/37/PDF/G0513037.pdf?OpenElement> (accessed 6 September 2011).

http://sydney.edu.au/arts/peace_conflict/research/west_papua_project.shtml (accessed 15 September 2011)

<http://www.yale.edu/gsp/papua/index.html> (accessed 15 September 2011)

<http://m.antaranews.com/270947> (accessed 15 September 2011)

<http://www.komnasham.go.id/profil/tentang-komnas-ham> (accessed 15 September 2011)

<http://regional.kompas.com/read/2011/08/10/15210654/Kemenlu.Tak.Ada.Yang.Mas.alahkan.Papua> (accessed 15 September 2011)

<http://regional.kompas.com/read/2011/08/10/0918094/Soal.Papua.di.Mana.Komnas.HAM.> (accessed 15 September 2011)

<http://www.southafrica.info/about/people/population.htm#religions#ixzz1dxLCM9tq> (accessed 10 October 2011)

http://www.elsam.or.id/downloads/1301382601_Brief_Paper_Mendorong_Pembentukan_Kembali_UU_KKR.pdf (accessed 10 November 2011)

<http://koranburuh.org/keutuhan-ciptaan/opini-perburuhan/469-uu-kkr-mengapa-dicabut.html> (accessed 15 November 2011)

<http://www.murdoch.edu.au/elaw/issues/v6n4/buti64.html> (accessed in 20 November 2011)