

The Scope of Impunity in Indonesia

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Executive Summary

How many human rights violations in Indonesia have not been punished since 1965? The answer of "too many" does not help human rights activists in fighting impunity. This paper has analysed mechanisms of impunity in Indonesia, and tried to find patterns that can be tackled and to give recommendations for priorities in the fight against impunity.

Impunity is "the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims."

The analysis has been structured by using a human rights impact assessment methodology with the following steps:

1. The current situation – a description on the basis of international and Indonesian human rights reports to give an overview of current violations (2004-2005).
2. The political context – focused on impunity it evolved in the analysis of patterns of impunity in the period 1965-2005.
3. The objective for change – focused on fighting impunity by using the UN guidelines by Orentlicher.
4. The issues to be monitored – listing the issues where the patterns of impunity conflict with the objectives for change resulted in a number of specific indicators to be monitored.
5. The conclusions and recommendations – including priorities for change and advocacy.

1 The current situation

The current situation of human rights violations has been analysed by matching the formal commitments in international agreements as ratified by Indonesia with the implementation of the main political and civil rights. It shows that on paper despite promises for ratifications the commitments are insufficient and that in practice there still is a vast amount of violations and that the mechanisms that facilitate impunity are still in place, although the leadership of Indonesia has changed in 1998.

2 The political context

In the analysis of the political context four patterns of impunity became clear:

- The aspects related to power;
- The legal aspects;
- The cultural aspects;
- The international aspects.

2.1 The aspects related to power

The power related aspects are those of the military and police powers that have for decades protected themselves and each other by continuing repression. One of the main findings is that the Indonesian army had two ways of realising impunity: one was the dual function (*dwifungsi*) that gave it the power to repress civilians without control from the civil or judicial administration at the grass roots level; the other is the intended intransparency of the army activities, capacities and policies. The *dwifungsi* resulted in an overruling presence in the whole society of repressive measures and intimidation. Few courageous people had the strength to resist this repression and call for punishment of the human rights violations that this repression amounted to. Those who did were repressed themselves.

Different units of the army contributed to the lack of transparency which unit was responsible for what. This lack of transparency itself gives space to impunity.

Other factors are the use of sexual violence – which results in serious under-reporting of violations -, the economic and political importance of the army in society – which is necessary for the army to survive and again makes it necessary to maintain the level of illegal economic and political interventions. Also the role of the police and of paramilitary groups in several regions in Indonesia are supportive for the continuation of impunity.

2.2 The legal aspects

The legal aspects of impunity are divided in legislation and administration of justice. Laws have been enacted with the aim to obstruct open and critical standpoints about violations. Judicial professionals in the prosecution and the judiciary work in a climate where punishment of human rights violations is hardly possible. Especially the corruption in the judiciary and other legal professions results in trade-offs and the sale of acquittals in those cases where it comes to prosecution. Finally, since 1998 a process of legal reform has been started, but the aim at this moment seems to be that there are so many mechanisms to improve the rule of law, that that number in itself is an obstacle for prosecution and punishment. As an example the number of commissions, courts, laws and regulations to fight corruption is facilitating that cases are not being handled properly. An important role in the legal reform could have been played by the law on a Truth and Reconciliation Commission which was passed by the Indonesian Parliament in September 2004. However, the law is insufficient in a number of important aspects, and will according to many resourcepersons not be a solution in many cases of impunity.

2.3 The cultural aspects

There were many signals and statements from resource persons indicating that the culture of feudalism is still rampant in society and that it makes impunity not only possible, but also an essential element in the current culture. Servility and a non-critical, polite attitude are obvious characteristics of this culture. Two other kinds of attitude are related to this one: a culture of violence – resolving conflicts not by debate but by violence –, and a culture of fabrication: because of the requirement of politeness in society people tend not to search for the truth and expose the facts. Finally there is a culture of corruption that condones the

occurrence of corruption and allows for apologies when it is proven. Together these attitudes strengthen cover-up procedures when considering punishment of human rights violations.

2.4 The international aspects

International treaties do not allow for impunity to happen. Although Indonesia is now in a process of ratifying some of these treaties, reality proves to be different. The lack of implementation of these treaties, and the lack of international pressure to bring about better implementation, are causes for continuing impunity. Part of this problem is the inadequate way impunity is referred to in the treaties, but another part is the lack of political will to exert this kind of pressure. Examples of the human rights violations related to 1965 and those in East Timor since 1975 show that international UN mechanisms have not been effective at all. The only exception is the releases program for political prisoners in 1976-79 enforced by the International Labour Organisation, ILO.

International jurisdiction is the system by which prosecution and trial can be initiated by judicial institutions of other countries than the country where the violation took place. This terrain is changing very quickly, especially after the agreement on the International Criminal Court – to which Indonesia is not yet a party. Genocide and torture are two kinds of violations that can be prosecuted in a few other countries. This international jurisdiction, however, has not yet been realised in the cases of Indonesia or East Timor. The procedures regarding East Timor have been especially disappointing because there the mechanisms were available, but the lack of political will up to the level of the UN Secretary-General was so evident.

In bilateral relations impunity has never been a big issue, as the human rights violations as such as far as we know, were discussed only sparingly. Diplomatic interventions are by nature not transparent. Over the years since 1965 it is shown that foreign bilateral pressure did bring about only very little change in the situation of repression of the hundreds of thousands of persons “involved” in the so-called abortive coup, and had even less attention with regard to the related impunity.

Conditionality in international relations is in essence a means to pressure for certain changes in a developing country by a donor country, or a group of donor countries. Conditionality in general means materializing the power of the donor country over the recipient country, and

it may be questioned whether that is acceptable if it concerns human rights issues. In the case of Indonesia the IGGI (Intergovernmental Group on Indonesia) and after 1992 the CGI (Consultative Group on Indonesia), have been very reluctant in posing demands in return for giving grants, loans and preferences. This reluctance has only grown since the dramatic breach of relations between Indonesia and the Netherlands because of Dutch criticism regarding the Santa Cruz massacre in 1991, and the change of power in Jakarta in 1998.

3 Objectives for change

The objectives for change – change in this case meaning a process towards absence of impunity – have been derived from recently (April 2005) adopted UN guidelines, drafted by Prof. Orentlicher. She divides the objectives for a society without impunity in the following rights-terminology:

- the right to know
- the right to justice
- the right to reparation
- the guarantee of non-recurrence.

In fact the guidelines focus on objectives for change in a transition period from authoritarian to democratic rule, and on the difficulties in handling the history of human rights violations. Therefore in the guidelines an analysis of impunity is lacking and the proposed procedures are very pragmatic. The three rights are essential for dealing with a history of impunity, while the fourth heading is the most important for the future: how to prevent mechanisms of impunity to sustain or resurface. The guidelines have been attached in the annex of the casestudy.

4 Recommendations

After combining the factors in the analysis of chapter II. 2 with the objectives in chapter II.3 a number of indicators have been formulated that need to be addressed in order to develop

effective strategies to combat impunity. The matrix which shows these indicators (attached) is on the one hand a list of important outcomes of this study, but on the other hand it is in itself is not yet workable to develop the required strategies. Priorities have to be identified. For different actors different priorities may be appropriate and a debate on strategy development is necessary.

Considered from the perspective of the assessed obstacles, it is my view that the most important obstacles for the implementation of the rights to know, to justice, to reparation and the non-recurrence guarantee, are the cultural aspects of Indonesian society and the power relations in Indonesian politics. As is shown by the matrix of indicators priority could be given to changes in these two respects in many different ways. I identified five priority areas:

1. Changes as to cultural traditions. Different steps can be identified:

- identification of feudal characteristics and their negative influence on the rule of law, justice and equality by Indonesians themselves, e.g. by a sub-division of the *KomnasHAM* and public debate about them (awareness raising);
- proposals for changes in society, in education, linking these characteristics to the four objectives, and wide discussion on these proposals in order to make strategic choices and formulate a shared vision on the future;
- implementation of those proposals in society; inclusion in education and public discourse of changes towards a more equal society.

Considered from the perspective of the objectives, the cultural aspects guarantee of non-recurrence has highest priority because it relates to prevention of future impunity.

2. Changes in the division of powers. Important aspects in this regard are:

- the army should be made accountable for past human rights violations by a process of truth and justice with a clean judiciary;
- the army should be brought under civilian control, without any political influence or economic interest.
- responsibilities of army units should be clearly defined,
- paramilitary groups should be banned and its members brought to trial to account for their crimes. Again a clean judiciary is required.

These on the one hand are political decisions that have to be taken by a civilian administration, but for the time being the civilian Minister of Defense needs the army as a coalition partner to stay in power. The risk of a coup d'état is still imaginable. On the other hand these decisions are also very dependent on the non-corruptness of the judiciary.

3. Transparency in the legal systems and legal reform:

- effective and transparent prosecution in ordinary criminal procedures
- a clear and transparent fight against corruption
- one clear procedure against corruption headed by the Attorney General's Office, including the newly established the special prosecutor, commissions and tribunals;
- one institution responsible for control on the judiciary, headed by the Supreme Court.

4. The Truth and Reconciliation Commission warrants a high priority because dealing with the past is a necessity. NGOs would still want to amend the law on the TRC (UU27/2004) with the purpose to improve a number of weaknesses:

- that amnesty can be given to crimes that are not amnestiable, such as responsibility for massive extra-judicial executions, enforced disappearances and torture;
- that the perpetrator as such has not been defined and is only considered in terms of individuals and not of institutions while the identified crimes such as war-crimes and genocide are more functional crimes;
- that reparation for the victim is only possible after amnesty is granted to the perpetrator, and
- that the TRC is meant to be a replacement for a judicial process and not, as advised in the Set of Principles, as an additional procedure.

In the implementation NGOs are very unsatisfied with the selection of the membership, which according to them has resulted in a number of members without sufficient knowledge about human rights violations and a relatively high number of (former) military members. At the moment this cannot be "undone". It then requires extra monitoring on what is going on in the TRC and support from the wider human rights movement for their few representatives that were elected in the TRC.

5. Finally what is necessary according to many of my resource persons, is a historic documentation centre with a number of tasks such as:

- To identify issues for critical research on past human rights violations by historians;
- To carry out such research and publish the results widely;
- To advise educational institutions as to changes in historical education curricula;
- To stimulate the public debate on past human rights violations and injustices.

This completely independent documentation centre should have as competencies:

- Access to governmental and judicial data;
- Ample resources to set its own priorities;
- Advise on procedures against perpetrators by the Attorney General's Office;
- Advise on procedures on redress and reparation for victims by the government.

An active historical research into and an overview of past human rights violations would facilitate the treatment of injustices of the past. Individual sufferings relating to the truth of past human rights violations need to be acknowledged in the context of this overview, before decisions can be taken as to justice, reparation and amnesty.

5 *Matrix of Indicators*

reality related indicators	objective related indicators				means of measurement
	the right to know	the right to justice	the right to reparation	the guarantee of non-recurrence	
1. power factors					
the dwi-fungsi of the army	the army is transparent as to its position in the debate on domestic security.	the army has no autonomous powers, and is accountable	the army is accountable	the army is under civilian control.	legislation on TNI, reports by NGOs,
the intended intransparency in the army	responsibilities are defined and clearly allocated	responsibilities are defined and clearly allocated	the different units of the army are accountable	responsibilities are defined and clearly allocated	Act on TNI, reports by NGOs,
the use of sexual violence	no underreporting of violations and sufficient follow-up;	no underreporting of violations and adequate follow-up; witness protection	not yet reported cases are addressed with a view of reparation		Act on TNI, reports by NGOs, WCCs

reality related indicators	objective related indicators				means of measurement
	the right to know	the right to justice	the right to reparation	the guarantee of non-recurrence	
the political influence of the army	no political influence in e.g. establishment of Ad Hoc Human Rights Tribunals and in TRC	no army influence in the establishment of Ad Hoc Human Rights Tribunals and TRC	no army influence in politics in general but in the TRC in particular	no political influence in policy measures	Act on TNI, reports by NGOs, press, ICW
the economic interests of the army	transparency in economic relationships of the army	transparency in economic relationships of the army and responsibilities for human rights violations		no economic interests of the army, especially not in (self-inflicted) conflict areas	Act on TNI, reports by NGOs, press, ICW
the relation between police and army	police acts pro-active in investigations and prosecutions	sufficient formal and informal power of the police over perpetrators			Act on TNI, police reports, NGOs, press
the existence of paramilitary groups	number of attacks of critical individuals and institutions, political parties and religious groups by paramilitary groups	number of trials against paramilitary; investigation into army support and prosecution of supporters	number of allocations to victims of violations perpetrated by paramilitary groups		press, NGOs, police reports
2. legal factors					
repressive laws	No use of the laws that limit freedom of expression; criteria of what are in hindsight unjust verdicts; number of reviews of unjust verdicts in cases of repression of the freedom of expression; number of laws that limit freedom of expression that are repealed	use of the laws that support impunity; criteria of what are in hindsight unjust verdicts; number of reviews of unjust verdicts; number of laws that support impunity, that are repealed	number of reviews and reparation of unjust verdicts, although some will have been formally "legal"; criteria of what are in hindsight unjust verdicts	number of repressive laws that are repealed	press, data-bases, documentation centre
corruption in the law-enforcement	number of corrupted verdicts that are reviewed; analysis of ways to prevent corruption	number of allegations of corruption in law enforcement and number of investigations into these allegations and effective follow-up	number of allegations and investigations into abuse of reparation funds	effectiveness of corruption controlling mechanisms	press, data-bases, documentation centre

reality related indicators	objective related indicators				means of measurement
	the right to know	the right to justice	the right to reparation	the guarantee of non-recurrence	
legal reform with many, overlapping measures	amendments that succeed in restructuring and improving fact-finding competencies of controlling mechanisms	amendment of TRC-law as to the article that does not view the TRC as additional to a judicial process; effectiveness of controlling mechanisms of the judicial process	amendment of TRC-law as to the article that exchanges reparation for amnesty; effectiveness of controlling mechanisms of the judicial process	amendment of TRC-law; effectiveness of controlling mechanisms of the judicial process	press, databases, documentation centre
3. cultural factors					
the culture of feudalism	occurrence of debates and communications on historical facts as among equals; efforts to search for facts in an independent way	rule of law is not subservient to the rule of power; linkage between feudal culture and relation of rule of law and rule of power is researched	number of acknowledged human rights violations and allocation of reparation; criteria in the TRC process	changes in the culture of feudalism in the direction of a climate of checks and balances	TRC reports , surveys
the culture of violence	no acceptance of violent responses to people who speak out	no use of violence during the implementation of the right to justice	number of acknowledged human rights violations and allocation of reparation; criteria in the TRC process	changes in the culture of violence	press, NGOs, surveys, TRC reports
the culture of fabrication	acknowledgement of past human rights violations; activities of historical documentation centre; no occurrence of accepting a would-be reality	number of acknowledged past human rights violations and trials; no "translation" of perpetrators becoming heroes.	number of acknowledged human rights violations and allocation of reparation; criteria in the TRC process	number of obstacles and risks with regard to window dressing measures in relation with long-term policies	TRC reports, press, NGOs, police reports
the culture of corruption	no acceptance of corruptive law enforcement; number of revealed cases of corruption, desinformation and their follow-up	trials against judges, prosecutors and lawyers because of corruption	number of allocations of reparation in cases of human rights violations and unjust justice; criteria in the TRC process; number of allegations and investigations into abuse of reparation funds	no acceptance of corruptive law enforcement	surveys, TRC reports

reality related indicators	objective related indicators				means of measurement
	the right to know	the right to justice	the right to reparation	the guarantee of non-recurrence	
4. international factors					
the international human rights systems	number of international investigations, such as by Special Rapporteurs of the UN; implementation of their recommendations; criteria from the Set of Principles to combat impunity	the use of existing mechanisms of international jurisdiction; criteria from the Set of Principles to combat impunity; criteria from the Principles of Van Boven /Bassiouni	criteria from the Set of Principles to combat impunity; the use of international agreed standards for remedy and reparation (Principles of Van Boven and Bassiouni)	the use of existing mechanisms of international jurisdiction; monitoring of the implementation of recommendations	the Set of Principles to combat impunity; Principles of Van Boven and Bassiouni; UN reports, follow-up reports
existing international mechanisms for international jurisprudence	the use of international mechanisms to investigate and prosecute the perpetrators human rights violations; criteria from the Set of Principles to combat impunity	the use of international mechanisms to investigate and prosecute the perpetrators human rights violations; criteria from the Set of Principles to combat impunity	criteria from the Set of Principles to combat impunity;	the use of international mechanisms to investigate and prosecute the perpetrators human rights violations	the Set of Principles to combat impunity; Principles of Van Boven and Bassiouni
the existence of international agreement and political will to use existing mechanisms to fight impunity	support for international jurisdiction and agreement on the criteria when domestic jurisdiction fails	number of interventions by foreign governments that exert pressure on the Indonesian government	the use of international agreed standards for remedy and reparation (Principles of Van Boven and Bassiouni)	number of interventions that exert pressure by foreign governments on the Indonesian government	the Set of Principles to combat impunity; Principles of Van Boven and Bassiouni
the accession by Indonesia to international treaties	number of ratifications of international treaties	use of international standards in domestic law enforcement		use of international standards in domestic law enforcement policies	UN reports
the existence and the use of a regional human rights mechanism that adequately responds to impunity	use of an Asian human rights instrument and an Asian human rights court to investigate and prosecute perpetrators	use of an Asian human rights instrument and an Asian human rights court to investigate and prosecute perpetrators		the development of a regional human rights instrument and a human rights court and its use;	international NGOs; ASEAN and ASEM policy papers

reality related indicators	objective related indicators				means of measurement
	the right to know	the right to justice	the right to reparation	the guarantee of non-recurrence	
new foreign mechanisms for international jurisprudence	inclusion of international investigation and jurisdiction in new instruments such as the Draft Convention against Disappearances	the development and the use of legal instruments for universal jurisdiction in third countries	the use of international agreed standards for remedy and reparation (Principles of Van Boven and Bassiouni)	the development of more effective international mechanisms to combat impunity; the use of international agreed standards for remedy and reparation (Principles of Van Boven and Bassiouni)	
bilateral relations between governments	the support for human rights organisations, and the support for efforts to establish an active and independent historic documentation centre.	number of interventions that exert pressure by foreign governments on the Indonesian government	an open discussion in Indonesian government and international economic institutions as to what amounts of funding can be used for reparation for the victims.	support for domestic human rights organisations and their coalitions with international NGOs; support for the establishment of a historic documentation centre	the Set of Principles to combat impunity;
conditionality	the analysis of (dis)advantages of bilateral (positive and negative conditionality) interventions through the human rights impact assessment approach	the analysis of (dis)advantages of bilateral (positive and negative conditionality) interventions through the human rights impact assessment approach	an open discussion in Indonesian government and international economic institutions as to what amounts of funding can be used for reparation for the victims.	the analysis of (dis)advantages of bilateral (positive and negative conditionality) interventions through the human rights impact assessment approach	human rights impact assessment studies

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