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THE RIGHTS OF INDIGENOUS PEOPLES IN INDONESIA IN THE CONTEXT OF ‘RESPONSIBILITY TO PROTECT’

Abstract

The concept of ‘responsibility to protect’ (RtoP) was adopted at the United Nations World Summit by the Member States in 2005. The first pillar of this principle laid down in paragraph 138 of the World Summit Outcome Document of the UN General Assembly obliges states to protect their population from genocide, war crimes, crimes against humanity, and ethnic cleansing. This paper aims to prove that Indonesia not only endorsed this idea at the diplomatic level but also implemented a mechanism which protects the indigenous community in the event of serious human rights violations. The Indonesian system is based on the state’s obligations arising from ratified international human rights treaties and the national institutions, such as the Indonesian National Commission on Human Rights (Komnas HAM) and Human Rights Courts that respond to the first pillar of the responsibility to protect. This paper presents the international and national legislation as well as the mechanism set up by the Indonesian authorities to protect indigenous people in cases of serious human rights violations. It focuses on examples of the actions undertaken by Komnas HAM and the ad hoc tribunal established at the permanent Human Rights Court in connection with situations where the rights of the Papuan people were violated. Despite the imperfection of the system, the conclusion is that the Indonesian state has the instruments necessary to protect the rights of the indigenous communities according to the RtoP principle embodied in paragraph 138 of the UN World Summit Outcome Document.

KEYWORDS

responsibility to protect, Indonesia, Komnas HAM, human rights courts

SŁOWA KLUCZOWE

‘odpowiedzialność za ochronę’, Indonezja, Komnas HAM, sądy praw człowieka

1. INTRODUCTION

At the United Nations World Summit in 2005, Member States adopted the Responsibility to Protect principle (RtoP), which was recognized as an outstanding achievement in the field of human rights and international security. In line with this principle, governments made a commitment to protect their citizens against genocide, war crimes, ethnic cleansing and crimes against humanity.¹ This commitment is included in the first of the three pillars on which the RtoP is based, according to paragraph 138 of the UN World Summit Outcome Document that was adopted by the General Assembly in 2005. The other two pillars relate to assisting other countries to fulfil this obligation, and to declaring that the international community will take action if a country manifestly fails to protect its citizens in the event of atrocity crimes.²

In 2001, the above rules were initially embodied in the report ‘Responsibility to protect’ by the International Commission on Intervention and State Sovereignty (ICISS) established by the Government of Canada and the UN General Assembly (UN GA). The commission specified the responsibilities of states: the responsibility to prevent, the responsibility to react, and the responsibility to rebuild, which should be competences of governments and national institutions. Moreover, the experts noticed that in order to prevent possible conflicts, state authorities should

¹ Ł. Kaługa, *Odpowiedzialność za ochronę jako odpowiedź społeczności międzynarodowej na zbrodnię ludobójstwa*, ‘Międzynarodowe Prawo Humanitarne’ Vol. 5, 2014, pp. 102–123, at pp. 103–106, https://www.researchgate.net/publication/330555710_ODPOWIEDZIALNOSC_ZA_OCHRONE_JAKO_ODPOWIEDZ_SPOLECZNOSCI_MIEDZYNARODOWEJ_NA_ZBRODNI_LUDOBOJSTWA_RESPONSIBILITY_TO_PROTECT_AS_A_RESPONSE_OF_INTERNATIONAL_COMMUNITY_TO_THE_CRIME_OF_GENOCIDE (accessed 24.06.2020).

² United Nations, World Summit Outcome, Resolution adopted by the General Assembly on 16 September 2005, A/RES/60/1, 24 October 2005, paras 138–139, https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf (accessed 28.10.2020).

provide fair treatment to all citizens through good governance based, inter alia, on accountability, transparency and the rule of law.³

This paper aims to prove that in order to fulfil its protection responsibility under paragraph 138 of the UN World Summit Outcome Document of the UN GA from 2005, the Indonesian government responded by adopting international human rights treaties, and establishing national laws and institutions that protect the indigenous communities from serious human rights violation.

During President Suharto's rule (1966–1998), the indigenous peoples were deprived of most of their rights, such as the right to land and natural resources. The government policy has led not only to the expropriation of these communities, but also to the degradation of their natural environment. Injustice and poverty caused rebellions in the population, which were brutally pacified by the security forces.⁴ The scale of violence, the disproportionate use of security forces against the population and, above all, the impunity of the perpetrators caused the society, after the fall of the authoritarian power, to expect the new democratic government would design a system that would strengthen the rule of law and restore the sense of justice among the citizens.⁵

Consequently, the Indonesian government established the Human Rights Courts in 2000, which are competent to handle serious human rights violations. The Indonesian National Commission on Human Rights (*Komisi Nasional Hak Asasi Manusia*, henceforth Komnas HAM) has a mandate to conduct preparatory proceedings in such cases. According to the Indonesian law, Komnas HAM was the only institution to receive such authorization.⁶ One of the aims of the commission's activity is to protect the rights of vulnerable groups, such as indigenous communities,⁷ which is important in the context of protecting their rights as in Indonesia this problem affects 50 million to 70 million people.⁸

³ G. Evans, M. Sahnoun (co-chairs), *The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty*, Ottawa 2001, p. XI, 19, <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (accessed 28.10.2020). The definition of 'good governance', according to the United Nations Economic and Social Commission for Asia and the Pacific, contains these principles; see <https://www.unescap.org/sites/default/files/good-governance.pdf> (accessed 30.10.2020).

⁴ Ł. Boczol, *Zrozumieć Indonezję. Nowy Ład generała Suharto*, Warszawa 2012, pp. 133, 224–229.

⁵ K. Setiawan, *The Human Rights Courts: Embedding Impunity*, (in:) M. Crouch (ed.), *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia*, Cambridge: Cambridge University Press 2019, pp. 287–310, at p. 287.

⁶ *Ibid.*, pp. 287, 294.

⁷ *Visi & Misi*, Komnas HAM, <https://www.komnasham.go.id/index.php/about/2/visi-amp-misi.html> (accessed 24.06.2020).

⁸ As estimated by the Indonesian Peoples' Alliance of the Archipelago (AMAN), which comprised 2,359 ethnic groups claiming to be Indonesian indigenous peoples, in Indonesia the protection of the rights of indigenous peoples concerned 50 million to 70 million people. See *Statement of AMAN/The Indigenous Peoples Alliance of the Archipelago Related to the Siege and*

The actions of the Indonesian government were reflected in its official position expressed at the United Nations in New York on 8 September 2014 in relation to the report of the UN Secretary-General: *Fulfilling our Collective Responsibility: International Assistance and the Responsibility to Protect*. A representative of the Indonesian authorities noted that: 'Indonesia has always supported the three pillars of the responsibility to protect, and committed itself to active participation and deliberation on implementing them. It is our unwavering position that the Responsibility to Protect is, and must be, a universal principle.'⁹

This paper presents how the Indonesian state fulfilled its obligation under the first pillar of RtoP in relation to the indigenous communities. Accordingly, the first part of the paper discusses the legal protection system in place in Indonesia, by means of which the Indonesian authorities implement the arrangements made at the UN 2005 World Summit regarding the 'responsibility to protect'. The second part of the paper describes actions the state took in cases of serious violations of the indigenous peoples' rights in the province of Papua, where the Komnas HAM was involved in the protection of the rights of the Papuan people, and a specially ad hoc tribunal was appointed to resolve one of the cases.

2. THE MECHANISM OF PROTECTION OF THE RIGHTS OF INDIGENOUS PEOPLES AND ITS RELATION TO RTOP

The protection of the rights of indigenous peoples in Indonesia is based on the state's obligations resulting from the international human rights treaties and on national legislation.¹⁰ In this context, an important development was also a national mechanism consisting in strong institutions operating according to the rules of good governance, which were to monitor the human rights situation and to deal with cases of serious human rights violations. Therefore, the Indonesian government established two institutions: the Human Rights Courts and the National Commission on Human Rights, Komnas HAM, to fulfil the human rights mandate.

Recent Attacks against Papua Students in Surabaya, <http://www.aman.or.id/2019/08/statement-of-aliansi-masyarakat-adat-nusantara-the-indigenous-peoples-of-the-archipelago-related-to-the-siege-and-recent-attacks-against-papua-students-in-surabaya> (accessed 24.06.2020).

⁹ *Statement by Deputy Permanent Representative of the Republic of Indonesia to the United Nations at the Informal Interactive Dialogue on the Report of the Secretary-General on 'Fulfilling our Collective Responsibility: International Assistance and the Responsibility to Protect'*, New York, 8 September 2014, <http://s156658.gridserver.com/media/files/indonesia-2.pdf> (accessed 15.10.2020).

¹⁰ It should be noted that Article 7(2) of the Law No. 39 of 1999 on Human Rights recognizes that all international treaties Indonesia ratifies become domestic law.

Indonesia is a state party to eight out of nine international treaties and some optional protocols on the protection of human rights that are described as the core international treaties by the United Nations Human Rights Office of the High Commissioner.¹¹ The wide range of provisions they contain covers many problems that refer also to indigenous communities. Some of them directly relate to the protection of the rights of indigenous communities. An example of this is the joint Article 1 of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights adopted by the UN GA on 16 December 1966, which refers to the right to self-determination and the free pursuit of economic, social and cultural development. Moreover, the International Covenant on Civil and Political Rights grants members of ethnic minorities the right to practice their own culture, religion and language (Article 27). In the context of protecting the rights of indigenous peoples, the Human Rights Committee stated that these rights were particularly important to indigenous peoples as they covered the entire spectrum of their customary activities.¹²

Two articles of the Convention on the Rights of the Child, adopted by the UN GA on 20 November 1989, also deserve attention as they emphasize that children belonging to indigenous communities have the right to practice their own culture, religion and language (Article 30) and stress the importance of educating children in tolerance and friendship (Article 29(d)). Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (adopted by the UN GA on 21 December 1965), which prohibits all forms of discrimination based on race, colour, national or ethnic origin, is also important for the protection of the rights of indigenous peoples, especially as many of the human rights violations against the indigenous community are ethnically motivated. Due to their particular traditions, culture and way of living, the indige-

¹¹ Indonesia is a state party to: the Convention on the Elimination of All Forms of Discrimination against Women (adopted by the UN GA on 18 December 1979), the Convention on the Rights of the Child (adopted by the UN GA on 20 November 1989), the International Convention on the Elimination of All Forms of Racial Discrimination (adopted by the UN GA on 21 December 1965), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted by the UN GA on 10 December 1984), the International Covenant on Economic, Social and Cultural Rights (adopted by the UN GA on 16 December 1966), the International Covenant on Civil and Political Rights (adopted by the UN GA on 16 December 1966), the Convention on the Rights of Persons with Disabilities (adopted by the UN GA on 13 December 2006), the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted by the UN GA on 18 December 1990). Indonesia is not a party to the International Convention for the Protection of All Persons from Enforced Disappearance (adopted by the UN GA on 23 December 2010). See <https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx> (accessed 28.10.2020).

¹² United Nations Human Rights Office of the High Commissioner, *Indigenous Peoples and the United Nations Human Rights System*, Fact Sheet No. 9/Rev.2, pp. 19–20, <https://www.ohchr.org/Documents/Publications/fs9Rev.2.pdf> (accessed 24.06.2020).

nous communities are exposed to acts of discrimination and marginalization in societies they live in.¹³

Regarding the rights of indigenous peoples, it should be noted that the Indonesian government has not adopted the Optional Protocol to the International Covenant on Civil and Political Rights (adopted by the UN GA on 16 December 1966), which is relevant from the victims' point of view. The provisions of the protocol allow individuals to submit a complaint against the state to the UN Human Rights Committee when their government violates the provisions of the above-mentioned pact. In the event of violating these rights by Indonesian state officials, victims or their families cannot appeal to this UN body that is particularly dedicated to monitoring the implementation of the International Covenant on Civil and Political Rights in national legislations.¹⁴

The Republic of Indonesia is not a state party to the Indigenous and Tribal Peoples Convention No. 169 of the International Labour Organization (adopted in Geneva on 27 June 1989),¹⁵ an international legally binding instrument guaranteeing the rights of indigenous and tribal peoples in independent countries and essential for the protection of the indigenous peoples' rights. However, Indonesia's authorities adopted the most comprehensive international document on this subject: the Declaration on the Rights of Indigenous Peoples.¹⁶ It is worth emphasizing that although the declaration is not legally binding, it still constitutes a moral promise and political statement of the state regarding the protection of rights of indigenous communities.¹⁷

The issue of protection of the rights of indigenous peoples was also regularly discussed by the Indonesian authorities as part of the Universal Periodic Review (UPR) sessions in which Indonesia has regularly participated since its launch by the Human Rights Council in 2006.¹⁸ In connection with the ratification of international treaties on the protection of human rights, Indonesia has been regularly cooperating with independent experts in the field of human rights within

¹³ Special Rapporteur on the Rights of Indigenous Peoples, <https://www.ohchr.org/en/issues/ipeoples/srindigenouspeoples/pages/sripeoplesindex.aspx> (accessed 29.10.2020)

¹⁴ UN Human Rights Office of the High Commissioner, *Ratification of 18 International Human Rights Treaties*, <https://indicators.ohchr.org> (accessed 24.06.2020).

¹⁵ International Labour Organization, *Ratifications for Indonesia*, https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102938 (accessed 24.06.2020).

¹⁶ United Nations Declaration on the Rights of Indigenous Peoples (Resolution A/RES/61/295 adopted by the UN GA on 13 September 2007), https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf (accessed 24.06.2020).

¹⁷ H. Schreiber, *Globalizacja i azjatyckie ludy tubylcze*, (in:) J. Nakonieczna, J. Zajączkowski (eds), *Azja Wschodnia i Azja Południowa w stosunkach międzynarodowych*, Warszawa 2011, p. 151.

¹⁸ United Nations Human Rights Council, *Universal Periodic Review – Indonesia*, <https://www.ohchr.org/EN/HRBodies/UPR/Pages/IDindex.aspx> (accessed 03.06.2020).

the framework of special procedures and treaty bodies, i.e. committees to monitor the implementation of international treaties on the protection of human rights.¹⁹

The protection of the rights of indigenous peoples became the subject of discussions between representatives of the Indonesian authorities and the UN Special Rapporteurs during their visits to Indonesia in 1998–2018, such as the missions of the Special Rapporteur on the situation of human rights defenders (5–12 June 2007), on torture and other cruel, inhuman or degrading treatment or punishment (10–23 November 2007), on the right to using the highest attainable standard of physical and mental health (22 March–3 April 2017) and on the right of access to food (9–18 April 2018).²⁰ Despite the fact the Special Rapporteur on the Rights of Indigenous Peoples has not visited Indonesia yet, the expert holds dialogue with the Indonesian authorities on cases concerning violations of the rights of these communities.²¹ However, in 2018–2020, the Indonesian government did not renew the standing invitations for the Special Rapporteurs of the Human Rights Council,²² which was a precedent in many years of cooperation within the UN mechanisms.

Indonesian legislation stipulates that the responsibility for the implementation of human rights rests with the state. The relevant provisions are contained in the 1945 Constitution (Article 28I(4)), the People's Consultative Assembly Resolution (TAP MPR) No. XVII/MPR/1998 (Article 43) and the Law No. 39 of 1999 on Human Rights (Articles 8, 71), which oblige the government and the president to protect human rights in accordance with international treaties and national reg-

¹⁹ See: UN Human Rights Council, *Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1. Indonesia*, A/HRC/WG.6/1/IDN/2, 31 March 2008, https://lib.ohchr.org/HRBodies/UPR/Documents/Session1/ID/A_HRC_WG6_1_IDN_2_E.pdf (accessed 28.10.2020); UN Human Rights Council, *Compilation Prepared by the Office of the High Commissioner for Human Rights in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21*, A/HRC/WG.6/13/IDN/2, 12 March 2012, <https://www.refworld.org/docid/50040d1f2.html> (accessed 28.10.2020); UN Human Rights Council, *Compilation on Indonesia. Report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/WG.6/27/IDN/2, 17 February 2017, <https://www.refworld.org/pdfid/5914663c4.pdf> (accessed 28.10.2020).

²⁰ United Nations Human Rights Office of the High Commissioner, *Indonesia*, <https://www.ohchr.org/EN/Countries/AsiaRegion/Pages/IDIndex.aspx> (accessed 03.06.2020).

²¹ UN Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya. Addendum: Communications sent, replies received and observations, 2012–2013*, A/HRC/24/41/Add.4, 2 September 2013, https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A_HRC_24_41_Add.4_ENG.doc (accessed 03.06.2020).

²² UN Human Rights Office of the High Commissioner, *Standing Invitations*, <https://spinternet.ohchr.org/StandingInvitations.aspx?lang=en> (accessed 03.06.2020). The standing invitations are open invitations extended by states in order to allow UN experts working in protection of human rights to conduct their country visits. See UN Human Rights Office of the High Commissioner, *Standing Invitations for Country Visits to the Special Procedures of the Human Rights Council*, last updated 15 May 2020, <https://www.ohchr.org/Documents/Issues/HRIndicators/MetadataStandingInvitations.pdf> (accessed 28.10.2020).

ulations.²³ In addition, as part of the promotion and protection of human rights, the Indonesian authorities introduced the National Human Rights Action Plans aimed at, inter alia, strengthening the rule of law through strong state institutions, the harmonization of applicable regulations, the implementation of international standards, education in the field of human rights, and constant monitoring of government activities in this area.²⁴ The above actions obliging the Indonesian authorities to protect citizens' rights were in line with the first of the three pillars on which the principle of responsibility to protect is based.²⁵

They also laid a foundation for the establishment of the National Commission on Human Rights, Komnas HAM, by the Presidential Decree No. 50 in 1993, which also dealt with cases of serious violations of the rights of indigenous communities. The 1945 Constitution of the Republic of Indonesia (Article 18B) recognizes the rights of traditional communities, and the Law No. 39 of 1999 on Human Rights (Article 6) also applies to them. However, the problem were the regulations that contradicted the above-mentioned provisions, which in practice resulted in the violation of the rights of indigenous communities in matters such as land ownership, the right to freedom of speech and assembly, or the right to their own culture and religion.²⁶

Komnas HAM was established as an independent institution operating in accordance with the Paris Principles of 1991.²⁷ Since 1999, its mandate has been strengthened under the Law No. 39 of 1999 on Human Rights (Chapter VII), which detailed the powers of the National Commission on Human Rights and the powers of its members. In 2001, the institution received a high rating (status A) confirming the efficient implementation of international standards in the field

²³ L. Alexandra, *Indonesia and the Responsibility to Protect*, 'The Pacific Review' 2012, Vol. 25(1), pp. 51–74, at p. 61.

²⁴ UN Human Rights Council, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21. Indonesia*, A/HRC/WG.6/13/IDN/1, 7 March 2012, pp. 3–4, paras 6–7, <https://www.refworld.org/pdfid/50040bab2.pdf> (accessed 15.10.2020); UN Human Rights Council, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21. Indonesia*, A/HRC/WG.6/27/IDN/1, 20 February 2017, pp. 4–5, paras 16–17, <https://www.refworld.org/pdfid/591464344.pdf> (accessed 15.10.2020).

²⁵ The other two pillars are: the state's obligation towards other states in fulfilling this obligation, and the readiness to act collectively when another state is unable to meet its obligation; see <http://s156658.gridserver.com> (accessed 15.10.2020).

²⁶ UN Human Rights Council, *Summary Prepared by The Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(c) of the Annex to Human Rights Council Resolution 5/1. Indonesia*, A/HRC/WG.6/1/IDN/3, 6 March 2008, para. 36, https://lib.ohchr.org/HRBodies/UPR/Documents/Session1/ID/A_HRC_WG6_1_IDN_3_Indonesia_summary.pdf (accessed 24.06.2020).

²⁷ UN Human Rights Council, *National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1. Indonesia*, A/HRC/WG.6/1/IDN/1, 11 March 2008, <https://www.refworld.org/pdfid/4857754fd.pdf> (accessed 03.06.2020).

of human rights, awarded by the International Committee at the United Nations Office of the High Commissioner for Human Rights.²⁸ The Commission managed to get high evaluations for the next several years.²⁹ After 2008, Komnas HAM established its regional offices among others in Papua, West Sumatra, West Kalimantan and Aceh Darussalam.³⁰

In cases of serious violations of human rights, only Komnas HAM has the right to conduct preliminary investigation. If, in the opinion of its representatives, there is significant evidence that a crime had been committed, the Commission refers the case to the Attorney General. The prosecutor can initiate investigation or dismiss the case. In the event it is recognized that the documentation is insufficient, the prosecutor has the right to refer the case for reconsideration by the Human Rights Commission. Pursuant to Article 22(1) of the Law No. 26 of 2000 on Human Rights Courts, the investigation should be completed within ninety days.³¹

If the prosecutor finds substantial evidence of serious human rights violations, the case must be brought to one of the four permanent human rights courts with its jurisdiction in certain provinces of Indonesia: Central Jakarta, Surabaya, Medan and Makassar (Article 45(1) of the Law No. 26 of 2000) that are competent to adjudicate on cases of gross violation of human rights. The Law No. 26 of 2000 on Human Rights Courts also made it possible to form ad hoc tribunals for cases prior to 2000, before this Law was adopted. Their formation should be approved by the president and members of parliament (Article 43(2) of the Law No. 26 of 2000).³²

It is important to note that the competence of the Indonesian Human Rights Courts has been limited only to cases of genocide³³ and crimes against humanity (Article 7 of Law No. 26 of 2000) with the omission of war crimes and ethnic cleansing that are included in paragraph 138 of the UN World Summit Outcome Document of 2005. The omission of war crimes in the Law No. 26 of 2000 on

²⁸ UN Human Rights Council, *Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1. Indonesia*, A/HRC/WG.6/1/IDN/2, 31 March 2008, *op. cit.*

²⁹ OHCHR and NHRIs, <https://www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx> (accessed 24.06.2020).

³⁰ UN Human Rights Council, *National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1. Indonesia*, A/HRC/WG.6/1/IDN/1, 2008, *op. cit.*

³¹ Law No. 26 of 2000 on Human Rights Courts, <https://policehumanrightsresources.org/content/uploads/2019/07/Law-26-2000-Act-on-the-Human-Rights-Courts-2000-Eng.pdf?x96812> (accessed 15.10.2020).

³² K. Setiawan, 2019, *op. cit.*, p. 292.

³³ Indonesia is not a party to the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the UN GA on 9 December 1948 in Paris; see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en (accessed 24.06.2020).

Human Rights Courts was a controversial decision in the context of the armed conflict that has been going on for many years in the provinces of Papua and West Papua. Some researchers believed that such a state of affairs was not accidental, implying that it was dictated by political reasons. However, from the point of view of the victims of serious human rights violation, an important provision of the Law No. 26 of 2000 on Human Rights Courts was its Article 42, which provides for the principle of responsibility of military commanders or other superiors, including civil leaders. The decision to establish the Human Rights Courts in 2000 reflected the government's need to strengthen the justice system in case of gross violations of human rights.³⁴ The establishment of the above-mentioned institutions operating in line with international human rights standards formed a sound basis for protection of citizens according to the RtoP principle.

3. STATE ACTIONS IN CASES OF SERIOUS VIOLATION OF THE RIGHTS OF INDIGENOUS PEOPLES

Regarding serious violations of the rights of indigenous peoples, Komnas HAM conducted several high-profile investigations, mainly concerning cases in the Papua province. Moreover, in connection with one of the cases, an ad hoc tribunal in the permanent Human Rights Court was formed. Both institutions have taken actions in line with the human rights mandate and the first pillar of the responsibility to protect.

After the political change that took place in 1998,³⁵ the Republic of Indonesia managed to achieve political stability in all provinces of the country, except Papua and West Papua.³⁶ The ongoing military conflict between the Indonesian authorities and the Papuan people³⁷ had a historical background and concerned the postulates of indigenous peoples as regards such rights as ownership of land and natural resources, or the right to their own culture and religion. In addition, some Papuan activists demanded the right to self-determination leading to the

³⁴ K. Setiawan, 2019, *op. cit.*, p. 292.

³⁵ Suharto resigned as President on 21 May 1998; see S. Eklöf, *Indonesian Politics in Crisis: The Long Fall of Suharto 1996–98*, Copenhagen 1999, p. 232.

³⁶ J. Braitwaite, V. Braitwaite, M. Cookson, L. Dunn, *Anomie and Violence. Non-truth and Reconciliation in Indonesian Peacebuilding*, Canberra 2010, p. 1. Both provinces are located in the eastern part of New Guinea island; see A. Ananta, D. R. Utami, N. B. Handayani, *Statistics on Ethnic Diversity in the Land of Papua, Indonesia*, 'Asia & the Pacific Policy Studies' 2016, Vol. 3(3), <https://onlinelibrary.wiley.com/doi/full/10.1002/app5.143> (accessed 30.04.2019).

³⁷ Most Papuans opposed the government; see J. Braitwaite et al., 2010, *op. cit.*, p. 66.

establishment of their own state.³⁸ In 2001 the Indonesian authorities granted special autonomy to Papua (Law No. 21 of 2001 on Special Autonomy for the Papua Province), however, Papuan nationalists claimed that their rights were not respected by successive Indonesian governments.³⁹ Due to this situation, clashes between Papuan activists and the security forces took place in both provinces. Between 2010 and 2018, Amnesty International documented 69 cases of extrajudicial executions that were carried out by the police and military officials. Among the victims, 85 people belonged to the Papuan community.⁴⁰

To deal with one such case, a permanent court was established in Makassar, where an ad hoc tribunal was set up for the *Abepura* case, named after a town in Papua where serious human rights violations had occurred. The case concerned the events of 7 December 2000, when 300 traditionally armed Papuans stormed a police station. One policeman and two members of the paramilitary police force (the Police Mobile Brigade, Brimob) were killed in the attack. In retaliation, police forces attacked sleeping Papuan students. As a result of these incidences, three people died. The police also arrested 90 people; many of the detainees were tortured by security forces.⁴¹

In this case, despite of the difficulties on the part of the police due to its lack of cooperation, Komnas HAM conducted a preparatory investigation in which it collected documentation confirming the possibility of serious human rights violations, such as extrajudicial killings, arbitrary detentions, torture and persecution based on sex, race and religion. In 2004 the case was referred to the Attorney General's Office and then to the Makassar Human Rights Court. The prosecutor accused only two of the 24 people indicated by Komnas HAM as possible perpetrators of committing crimes against humanity (including murder, persecution and torture), despite the fact that, as some critics noted, the prosecutor had not proven sufficiently that the acts committed could be considered systematic. This

³⁸ *History of West Papua*, <https://www.freewestpapua.org/info/history-of-west-papua> (accessed 07.03.2019). Papuans have been demanding independence since 1962–1963 when Indonesia took over New Guinea from the Kingdom of the Netherlands; see C. Webb-Gannon, *Merdeka in West Papua: Peace, Justice and Political Independence*, 'Anthropologica' 2014, Vol. 56(2), pp. 353–367, at p. 353.

³⁹ E.-L. Hedman (ed.), *Dynamics of Conflict and Displacement in Papua, Indonesia*, a collection of papers developed in conjunction with a one-day workshop held on 26 October 2006 at St Antony's College, Oxford, 'Working Paper Series' 2007, RSC Working Paper No. 42, Department of International Development University of Oxford, p. 6. Papua got its name in 1999. Previously, the province was called Irian Jaya. In 2003, Papua was divided into two provinces Papua and West Papua. See B. P. Resosudarmo, J. A. Mollet, U. R. Raya, H. Kaiwai, *Development in Papua after Special Autonomy*, p. 434, https://openresearch-repository.anu.edu.au/bitstream/1885/59427/2/01_Resosudarmo_Development_in_Papua_after_2014.pdf (accessed 15.10.2020).

⁴⁰ Amnesty International, 'Don't Bother, Just Let him Die': *Killing with Impunity in Papua*, 2 July 2018, p. 6, <https://www.amnesty.org/download/Documents/ASA2181982018ENGLISH.PDF> (accessed 24.06.2020).

⁴¹ K. Setiawan, 2019, *op. cit.*, pp. 305–308.

feature is included in the definition of crimes against humanity under Article 9 of the Law No. 26 of 2000 on Human Rights Courts. The police officers were also accused of acts committed by their subordinates under the principle of responsibility of commanders. It is worth noting that both defendants argued that they had acted in the interest of the state, considering the attacked Papuans as separatists presenting a threat to the interests of the state.⁴² Among the threats to the state security, the Indonesian national security strategy lists separatist acts and fights resulting from separatist aspirations as actions that may violate the sovereignty of the state.⁴³ The *Abepura* case ended with an acquittal for both the accused. Legal experts pointed to the weakness of the indictment as the main reason for the unsatisfactory outcome of the trial for the victims. According to the court, the prosecutor did not prove the chain of command that would allow the court to convict other commanders and did not present evidence that those were systematic attacks.⁴⁴

Regarding serious violations of the rights of indigenous peoples, an incident (known as the *Paniai* case) in Enarotali, Papua province, which was also handled by Komnas HAM, remained unsettled until September 2020. In 2014, during a demonstration by Papuan protesters against the beating of eleven Papuan children by police officers, the police opened fire on the demonstrators. As a result of this military action, 11 people were seriously injured. The newly elected president, Joko Widodo, referred to the case and made a public commitment to investigate and punish those responsible. The *Paniai* case was described in detail by the Indonesian media. Amnesty International also included it in a report on serious human rights violations in Papua and West Papua.⁴⁵

In the *Paniai* case, Komnas HAM conducted preparatory proceedings, as a result of which its representatives decided that the investigated case met the criteria of an act of crime against humanity. At the beginning of 2020, the case was referred to the Attorney General, who sent the documents back to the Human Rights Commission for reconsideration.⁴⁶ Critics believed that the actions of the

⁴² *Ibid.*

⁴³ See L. A. Alexandra, *Perception on Human Security: Indonesian View*, 'Human Security in Practice: East Asian Experiences' March 2015, No. 99, p. 7, https://www.jica.go.jp/jica-ri/publication/workingpaper/jrft3q00000026ji-att/JICA-RI_WP_No_99.pdf (accessed 26.09.2019), and the statement of one of the defendants: 'I should not be brought to this hearing and prosecuted for gross human rights violations, but I should receive an award from the state and be named a national hero. Because I have sacrificed [myself] to protect many people who are threatened and treated by the Papua Merdeka separatists.'; see K. Setiawan, 2019, *op. cit.*, pp. 305–308.

⁴⁴ K. Setiawan, 2019, *op. cit.*, p. 308.

⁴⁵ Amnesty International, '*Don't Bother, Just Let him Die*', 2018, *op. cit.*, p. 6.

⁴⁶ For the statement of Komnas HAM on the events of December 2014, see *Komnas HAM Categorises Paniai Incident as Serious Human Rights Violation – Case Submitted to Attorney General*, <https://humanrightspapua.org/news/32-2020/542-komnas-ham-categorizes-paniai-incident-as-serious-human-rights-violation-case-submitted-to-attorney-general> (accessed 24.06.2020).

prosecutor who sent the examined documents back to the Commission members twice over the two months did not bode well for the future of the proceedings. One of the Commissioners, Ahmad Taufan Damanik, even claimed that the actions of the Attorney General's Office did not indicate any willingness to investigate the case, and that further actions depended solely on the political will of the rulers, including President Joko Widodo.⁴⁷

It is also worth noting that over the past twenty years, many of the cases of gross human rights violation have not reached their final stage in courtrooms. It is believed that such a situation was fostered by the atmosphere of rivalry between the institutions of the Attorney General's Office and the Commission on Human Rights, which contributed to the fact that many of the Commission's initial proceedings were rejected by the Attorney General.⁴⁸

4. THE SYSTEM IS THERE BUT POLITICAL WILL IS NEEDED...

Taking into account the fact that Indonesia ratified international human rights treaties, and developed an appropriate mechanism at the national level in the event of serious human rights violations, it should be concluded that the Indonesian authorities have made efforts to protect the interests of indigenous peoples. The competence and many years' prestige of the National Commission on Human Rights, Komnas HAM, which conducted a number of preparatory proceedings, and finally the role of the Human Rights Courts created an appropriate system for prosecuting perpetrators of gross human rights violations, also those related to indigenous communities. The mechanism proves Indonesia's commitment to fulfil the state's obligation to protect its citizens, including the indigenous peoples, against gross human rights violations as it is embodied in the first RtoP pillar. It can also be assumed that acting in accordance with the introduced legislation, international legal standards, and cooperating within the framework of the UN Human Rights Council measures, the Indonesian government has demonstrated engagement in preventive activities against potential crises. These actions correspond to the idea of responsibility to protect as a universal principle that has been accepted by Indonesia.

⁴⁷ Quote from the statement of Komnas HAM Commissioner, Mr Damanik: 'This represents an opportunity for the president to live up to his promise for justice, there are five things which done by the president'; see: *Bloody Paniai Case Likely to Stall as AGO Returns Case Dossier, yet Again*, CNN Indonesia, 5 June 2020, <https://www.indoleft.org/news/2020-06-05/bloody-paniai-case-likely-to-stall-as-ago-returns-case-dossier-yet-again.html> (accessed 24.06.2020).

⁴⁸ K. Setiawan, 2019, *op. cit.*, p. 308.

The problem remains in the political arena, where the interests of a specific group belonging to the indigenous peoples, as is the case of Papuan activists, do not coincide with the interests of the state. However, when human rights violations occur, institutions should be independent of the political will of those in power. In both proceedings mentioned in this paper, the rivalry between the representatives of Komnas HAM and the Attorney's General Office played a significant role. In cases of serious human rights violations, such activities have a destructive effect on the perception of the judiciary by indigenous communities, which were deprived of most of their rights during President Suharto's regime. In the situation of the ongoing armed conflict in Papua, the sense of justice felt by the inhabitants of the provinces is of particular importance, especially if the sovereignty of the state is at stake. In both of the presented cases, the evidence collected by the experts of the Commission on Human Rights was assessed as not meeting the criteria of acts falling within the jurisdiction of Human Rights Courts. The problem was due to the lack of cooperation of the security forces with the system of justice. However, it should be hoped that the international prestige of the Commission and President Widodo's commitments to Indonesian citizens will improve the effectiveness of Komnas HAM's work in protecting human rights, including the rights of indigenous peoples.

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