



Number 006/PUU-IV/2006

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Examining, hearing and deciding upon constitutional cases at the first and final level, has passed a Decision in the case of Petition for Judicial Review of Law of the Republic of Indonesia Number 27 Year 2004 concerning the Commission for Truth and Reconciliation under the 1945 Constitution of the Republic of Indonesia, filed by:

1. **Lembaga Studi dan Advokasi Masyarakat (ELSAM)** having its address at Jalan. Siaga II Number 31, Pejaten Barat, South Jakarta, Telephone (021) 7972662, 398 99777, in this case represented by **Asmara Nababan, S.H.**, born in Siborong-borong, on the 2nd of September 1946, Christian, Indonesian Citizen, the Chairperson of the Executive Board of Lembaga Studi dan Advokasi Masyarakat (ELSAM);
Hereinafter referred to as -----
PETITIONER I;
2. **Komisi untuk Orang Hilang dan Korban Kekerasan (Kontras)** having its address at Jalan Borobudur Number 14, Central Jakarta, in this case represented by **Ibrahim Zakir**, born in Jakarta, on the 31st of May 1951, Muslim, Indonesian Citizen, the Chairperson of the Executive Board of Perkumpulan Komisi untuk Orang Hilang dan Korban Kekerasan (Kontras);
Hereinafter referred to as -----
PETITIONER II;
3. **Solidaritas Nusa Bangsa (SNB)**, having its address at Perumahan Depok Mulya III Blok AF 3 Tanah Baru, Depok, West Java, Telephone (021) 775 0677 in this case represented by **Ester Indahyani Yusuf, S.H.**, born in Malang, the 16th of January 1971, Christian, Indonesian Citizen, The Chairperson of the Executive Board of Solidaritas Nusa Bangsa (SNB);
Hereinafter referred to as ----- **PETITIONER III;**
4. **Inisiatif Masyarakat Partisipatif untuk Transisi Berkeadilan (Imparsial)**, having its address at Jalan. Diponegoro Number 9, Central Jakarta, Telephone (021) 319 00627 in this case represented

by **Rachland Nashidik**, born in Tasikmalaya, on the 27th of February 1966, Muslim, Indonesian Citizen, Executive Director;
Hereinafter referred to as ----- **PETITIONER IV**;

5. **Lembaga Penelitian Korban Peristiwa 65 (LPKP 65)**, having its address at Jalan. Kramat V No. I C, Central Jakarta in this case represented by **Soenarno Tomo Hardjono**, born in Solo, on the 24th of November 1934, Muslim, Indonesian Citizen, Chairperson of Lembaga Penelitian Korban Peristiwa 65 (LPKP 65)
Hereinafter referred to as -----
PETITIONER V;

6. **Lembaga Perjuangan Rehabilitasi Korban Rezim ORBA (LPR-KROB)** having its address at Jalan. Taman Singotero Number 13, Candi Baru, Semarang, Central Java, in this case represented by **Sumaun Utomo**, born in Surabaya, on the 18th of August 1923, Christian, Indonesian Citizen, General Chairperson;
Hereinafter referred to as ----- **PETITIONER VI**;

7. **Raharja Waluya Jati**, born in Jepara, on the 24th of December 1969, Muslim, Indonesian Citizen, private entrepreneur, having his address at Jalan. Mede II No. 11 Utan Kayu Utara Matraman, East Jakarta, Telephone (021) 813 8274;
Hereinafter referred to as ----- **PETITIONER VII**;

8. **H. Tjasman Setyo Prawiro**, born in Semarang, on the 3rd of March 1924, Muslim, Indonesian Citizen, private entrepreneur, having his address at Jalan. Raya Pondok Gede No 19, Rt. 015/Rw. 011, Kramat Jati Sub-district, Kramat Jati District, East Jakarta, Telephone (021) 9147026;
Hereinafter referred to as ----- **PETITIONER VIII**;

- Petitioners I to VI are Petitioners in the form of Private Legal Entities;
- Petitioners VII and VIII are Individual Petitioners;

Based on a Special Power of Attorney, dated the 29th of August 2005, the following persons have been given power of attorney, namely:

1. A.H. Semendawai, S.H., LL.M;
2. Asfinawati, S.H;
3. Betty Yolanda, S.H;
4. Chrisbiantoro, S.H;
5. Edwin Partogi, S.H;
6. Erna Ratnaningsih, S.H;
7. Fajrimei. A. Gofar, S.H;

8. Gatot, S.H;
9. Haris Azhar, S.H;
10. Hermawanto, S.H;
11. Ignatius Heri Hendro Harjuno, S.H;
12. Indria Fernida, S.H;
13. Indriaswati D. Saptaningrum, S.H., LL.M;
14. Ines Thioren Situmorang, S.H;
15. Poengki Indarti, S.H., LL.M;
16. Sondang Simanjuntak, S.H., LL.M;
17. Sri Suparyati, S.H;
18. Supriyadi Widodo Eddyono, S.H;
19. Taufik Basari, S.H., S.Hum., LL.M;
20. Uli Parulian Sihombing, S.H;
21. Wahyu Wagiman, S.H;
22. Yusuf Suramto, S.H;
23. Zainal Abidin, S.H;

All of whom are Advocates and Solicitors of the Jakarta Legal Aid Agency, Lembaga Studi dan Advokasi Masyarakat (ELSAM), Komisi untuk Orang Hilang dan Korban Tindak Kekerasan (KONTRAS), Solidaritas Nusa Bangsa (SNB), and Perkumpulan Inisiatif Masyarakat Partisipatif untuk Transisi Berkeadilan (IMPARSIAL), Yayasan Pengabdian Hukum Indonesia (YAPHI), joined together in the Advocacy Team for Justice and Truth selecting its legal domicile at the Office of the Jakarta Legal Aid Agency, at Jalan Diponegoro No. 74, Central Jakarta, who are acting both individually and jointly;

Hereinafter referred to as ----- **The Petitioners;**

Having read the Petition of the Petitioners;

Having heard the testimonies of the Petitioners;

Having heard and read the affidavits of the Government;

Having heard and read the affidavits of the People's Legislative Assembly of the Republic of Indonesia;

Having heard and read the affidavits of domestic and foreign experts as well as witnesses presented by the Petitioners;

Having heard the testimonies of the National Commission for Human Rights;

Having heard and read the testimonies of the former Chairperson of the Special Committee for the Draft Law on the Commission for Truth and Reconciliation;

Having read the concluding opinion of the Petitioners.

Having read the concluding opinion of the National Commission for Human Rights;

Having examined the evidence;

LEGAL CONSIDERATIONS

Considering that the purpose and objective of the petition are as described above.

Considering that there are three matters to be considered by the Court in this case, namely:

1. The authority of the Court to examine, try and decide upon the petition filed by the Petitioners;
2. The legal standing of the Petitioners to file the petition;
3. The subject matter of the petition regarding the constitutionality of the laws for which judicial review is petitioned by Petitioners.

With regard to the aforementioned three matters, the Constitutional Court is of the following opinion:

I. THE AUTHORITY OF THE COURT

Whereas based on the provisions of Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution), the Constitutional Court has the authority “*to examine cases and conduct at the first and final levels, the result of which shall be final in nature, the judicial review of laws under the Constitution, to settle disputes regarding authority between state institutions whose authorities are bestowed by the Constitution, to decide upon the dissolution of political parties, and to decide upon electoral disputes*”. The provision is restated in Article 10 paragraph (1) of Law of the Republic of Indonesia Number 24 Year 2003 concerning the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to State Gazette of the Republic of Indonesia Number 4316, hereinafter referred to as the CC Law);

Considering that the petition of the Petitioners regards judicial review of Law of the Republic of Indonesia Number 27 Year 2004 concerning the Commission for Truth and Reconciliation (State Gazette of the Republic of Indonesia Year 2004 Number 114, Supplement to State Gazette of the Republic of Indonesia Number 4429, which hereinafter shall be referred to as the KKR Law) under the 1945 Constitution, as a consequence, the aforementioned petition is within the jurisdiction of the Constitutional Court.

II. LEGAL STANDING

Whereas Article 51 paragraph (1) of the Constitutional Court Law (UUMK) stipulates that petitioners in the review of a law under the 1945 Constitution shall be those who believe that their constitutional rights and/or authorities have been impaired by the coming into effect of a law, namely:

- a. individual Indonesian Citizens (including groups of people having a common interest);
- b. customary law community groups insofar as they are still in existence and in accordance with the development of the community and the

- principle of the Unitary State of the Republic of Indonesia regulated in law;
- c. public or private legal entities; or
 - d. state institutions.

Considering also that since the issuance of Decision Number 006/PUU-III/2005, the Constitutional Court has determined 5 (five) requirements for the existence of constitutional impairment as intended in Article 51 paragraph (1) of the Constitutional Court Law (UUMK) as follows:

- a. the petitioners must have constitutional rights granted by the 1945 Constitution;
- b. such constitutional rights are considered to have been impaired by the coming into effect of a law;
- c. the constitutional right impairment shall be specific and actual in nature or at least potential in nature, which pursuant to logical reasoning can be assured of occurring;
- d. there is a causal connection (*causal verband*) between the constitutional right impairment and the law regarding which review is petitioned;
- e. there is a possibility that upon the granting of a petition, the constitutional right losses asserted will not or will no longer occur;

Considering that to examine whether the Petitioners have the proper legal standing to file the petition, the Court must examine (i) under which category the Petitioners qualify, and (ii) which constitutional rights have been impaired by the establishment of the KKR Law;

Whereas Petitioners I up to VI argued that they are private legal entities, as intended in Article 51 paragraph (1) point (c), however based on the evidence presented, there is no validation of establishment as legal entity issued by the Ministry of Law and Human Rights, as required by the applicable regulations. On the other hand, Petitioners I up to VI, who claim to have what they call organizational standing, are only associations, which have no status as legal entities in accordance with the applicable regulations, so that the Court is of the opinion that the Petitioners may only be classified as individual citizens or groups of individuals having common interests. Therefore, their qualification is similar to that of Petitioners VII and VIII as individual Indonesian citizens.

Considering the Petitioners argued their human rights not to be tortured, to live, and to obtain equal treatment without any discrimination are constitutional rights which are guaranteed by the 1945 Constitution. They argue that the establishment of the KKR Law impairs their constitutional rights, because the KKR Law is considered to provide guarantees, respect and protection for the basic rights of the Petitioners as intended in Article 27 paragraph (1), Article 28D paragraph (1), Article 28I paragraph (2) and paragraph (5) of the 1945 Constitution, primarily because Article 1 point 9, Article 27, and Article 44 of the KKR Law provide that compensation and rehabilitation depend on the granting of amnesty, which can negate the right

to rehabilitation and compensation as human rights which must be unconditionally guaranteed, protected and fulfilled based on the 1945 Constitution and can render them uncertain.

Whereas Article 1 point (9) of the KKR Law reads as follows: *Amnesty shall be a pardon granted by the President to the perpetrators of gross human rights violations by taking into account the considerations of the People's Legislative Assembly.*"

Article 27 of the KKR Law reads as follows, "*Compensation and rehabilitation as intended in Article 19 may be granted if the request for amnesty is granted*".

Article 44 of the KKR Law reads as follows, "*The cases of gross human rights violations which have been disclosed and settled by the Commission cannot be filed again to an ad hoc human rights court*".

The Petitioners argued that the aforementioned articles are inconsistent with the 1945 Constitution, as described below:

1. Article 1 point (9) of the KKR Law is inconsistent with Article 28D paragraph (1) of the 1945 Constitution, which provides acknowledgement, guarantees, protection, and equitable legal certainty, and Article 28I paragraph (5) of the 1945 Constitution, which stipulates that to uphold and protect human rights in accordance with the principle of a democratic constitutional state, the application of human rights must be guaranteed by laws that are in line with the constitution.
2. Article 27 of the KKR Law is inconsistent with Article 27 paragraph (1) of the 1945 Constitution, which provides for equal treatment before the law and the government and respect for the law and government, Article 28D paragraph (1) of the 1945 Constitution, which provides for guarantees, protection and equitable legal certainty as well as equal treatment before the law, Article 28I paragraph (2) of the 1945 Constitution which reads, "*Every person shall be entitled to be free from discriminative treatment based on any basis whatsoever and shall be entitled to obtain protection from such discriminative treatment*" and Article 28I paragraph (4) of the 1945 Constitution which reads, "*The protection, advancement, upholding, and fulfillment of human rights shall be the responsibility of the state, especially the government.*"
3. Article 44 of the KKR Law is inconsistent with Article 28D paragraph (1) of the 1945 Constitution which provides for guarantees, protection and equitable legal certainty as well as equal treatment before the law, Article 28I paragraph (2) of the 1945 Constitution which provides that every person shall be entitled to be free from discriminative treatment on any basis whatsoever and shall be entitled to obtain protection from such discriminative treatment, and Article 28I paragraph (4) of the 1945 Constitution which provides that the protection, advancement, upholding, and fulfillment of human rights shall be the responsibility of the state, especially the government.

Considering Petitioners VII and VIII are individuals who argue that they are respectively victims of abduction and forced disappearance in

1997-1998 and former political prisoners during a period of 14 years for alleged involvement in the G-30-S coup, without being tried before a court of law and being found guilty. Based on an assumption that the KKR Law is inconsistent with the aforementioned articles of the 1945 Constitution and impairs the constitutional rights of Petitioners VII and VIII especially with regard to Article 28D paragraph (1) which reads as follows, "*Every person shall be entitled to acknowledgement, guarantees, protection, and equitable legal certainty and equal treatment before the law*", Article 28I paragraph (1) which reads, "*The right to live and the right not to be tortured ...*", Article 28I paragraph (4) which reads, "*Protection, advancement, upholding, and fulfillment of human rights shall be the responsibility of the state, especially the government*", the Court is of the opinion that the aforementioned constitutional rights of Petitioners VII and VIII may be considered as having been harmed by the KKR Law so that the Court can accept the Petitioners as parties meeting the requirements set forth in Article 51 paragraph (1) of the CC Law. Therefore, Petitioners VII and VIII have the required legal standing to file this petition. Whereas with regard to Petitioners I up to VI, who are acting as social organizations providing advocacy and attention and striving to defend the basic rights of victims of human rights violations and participated in the public hearing with the People's Legislative Assembly during the discussions of the KKR Draft Law and consider the human rights set forth in the Constitution as their rights and interests as citizens, in accordance with the Decisions of the Constitutional Court Number 002/PUU-I/2003, Number 058-059-060-063/PUU-II/2004 and Number 008/PUU-III/2005, as well as Number 003/PUU-III/2005, the Court is of the opinion that Petitioners I up to VI have the proper legal standing to file the aforementioned petition.

Meanwhile, two constitutional judges, namely H. A. S. Natabaya and H. Achmad Roestandj, are of the opinion that Petitioners I up to VI do not have proper legal standing to engage in the legal proceedings before the Court. This is based on the argument that the claim made by Petitioners I up to VI as associations of acting in their capacity as victims based on the *a quo* law is not founded, because according to the criminal law the Petitioners as associations cannot possibly be qualified as victims of gross human rights violations based on Law Number 26 Year 2000 concerning the Human Rights Court. Whereas Petitioners VII and VIII, as individuals, also cannot be qualified as victims under the *a quo* law because the Petitioners do not meet the definition of victim as set forth in Article 1 point 5 *juncto* Article 1 point 4 of the KKR Law. Moreover, the KKR institution having the authority to uncover the truth of gross human rights violations has not been established, and especially the authority to conduct investigation and clarification regarding gross human rights violations is still premature.

III. THE PRINCIPAL ISSUE OF THE PETITION

Whereas the arguments in the Petitioners' petition state that Article 27, Article 44, and Article 1 point (9) of the KKR Law are inconsistent with the 1945 Constitution for the following reasons:

1. The provisions of Article 27 of the KKR Law render the rights of the victims to compensation and rehabilitation dependant on the granting of amnesty, not on the substance of the case.
2. Amnesty as provided in Article 27 of the KKR Law requires the existence of perpetrators. As a consequence, if the perpetrators cannot be found, it is impossible that the amnesty would be granted, so that the victims are deprived of the guarantee of reparation;
3. This provision has placed the victims in an unequal and oppressed position because the victims are subject to a burdensome requirement for obtaining their rights, namely it depends on the granting of amnesty.
4. The formulation of Article 27 of the KKR Law creates unequal status between the victims and the perpetrators and discriminates against the victims' rights to reparation not depending on the perpetrators and it also fails to respect the victims' suffering from gross human rights violations.
5. Article 44 of the KKR Law which establishes the KKR as a pseudo-judicial body closes the access for every person to obtain settlement through a judicial process.
6. The provisions of Article 44 of the KKR Law, which does not allow judicial examination by an ad hoc human rights court if the case has been settled through the KKR, deprives citizens of their rights to sue the perpetrators of gross human rights violations as set forth in international law, whether in international practice or international treaties.
7. Amnesty for the perpetrators of gross human rights violation is a violation of international law, but the provisions of Article 1 point (9) of the KKR Law to the contrary states that amnesty may be granted to the perpetrators of gross human rights violations and therefore this article is inconsistent with the legal principles acknowledged by the international community.

Whereas to support their arguments, the Petitioners presented documentary evidence marked as P-1 up to P-36b, two witnesses, and six experts, the testimonies of which have been described in full in the substance of the case, which principally states as follows:

Witness Testimonies.

1. Witness Marullah:

- Whereas the witness is a victim of torture in the Tanjung Priok case who was detained in Guntur and Cimanggis detention centres, and then relocated to Salemba penitentiary. The witness was tried in a juvenile court and was sent to prison for 20 months less the detention period, the remaining term of 17 months was

- served in Cipinang penitentiary;
- Whereas the witness is an eye-witness who informed the authorities about the places where the victims killed in the incident were buried, such as in the Pondok Rangon cemetery, Mengkok cemetery, and Tipar Cakung cemetery. The witness is one of 13 victims who received compensation in the amount of Rp.21,000,000.- (twenty-one million Rupiah).

2. Witness Mugiyanto:

- The witness was an activist of Solidaritas Mahasiswa Indonesia untuk Demokrasi (SMIK - Indonesian Students' Solidarity for Democracy) fighting for campus autonomy and refusing military intervention on campus. He was abducted on March 13, 1998 from his rented house in Klender at around 19:00 West Indonesia Time by the authorities and was taken to the Duren Sawit Military Post. After being interrogated, he was then taken to the East Jakarta Military District Headquarters;
- The witness was charged with violation of the anti-subversion regulations and detained at the East Jakarta Military District Headquarters, before being transferred to the Headquarters of Jakarta Military Region and then to the Headquarters of Jakarta Regional Police, for three months as from March 15 up to June 6, 1998. The witness was released following the downfall of Soeharto and the revocation of the anti-subversion law by the new president, Habibie;
- The witness is one of nine surviving victims. According to his fellow activists, among those abducted during the period of 1997 – 1998 there were 13 persons who are still missing and one of them was found dead after going missing for several days;
- According to the witness, the "Rose Team" judicial process did not implicate the perpetrators. It was far from what was expected by the victims, the victims' families and the witness;
- The witness is very upset because to date despite of the fact that he is a good citizen, people still perceive him as a communist, a rebel and a fundamentalist. As a consequence, the witness has been subject to discrimination, impoverishment and deception. This was an unfair government policy.

Testimonies of Expert Witnesses:

1. Expert Witness Dr. Tamrin Amal Tomagola:

- Whereas the removal of human rights is inconsistent with the first sentence of the Preamble of the 1945 Constitution and it is the duty of the state to protect the human rights of its citizens;
- Whereas to achieve settlement among the parties involved in order to uphold the national unity of Indonesia and solidarity among all components of the nation, the KKR is expected not to leave untreated wounds or gaps and distrust among different groups or components of the nation;

- Actually, the focus and the point of concern of all processes of the KKR should be on the victims and their rights, including the right to forgive and to give pardon. The main and ultimate aspect is the victims' right to pardon, or, in relation to the President, amnesty;
- Therefore, the right to pardon belongs to the victims, which must be pursued through a complete mechanism in the KKR to be settled by the parties involved, without any necessary judicial process;

2. Expert Witness Dr. Asvi Warman Adam, APU.:

- Before 1965, political power was dominated by three parties, namely President Soekarno, the Army and the Indonesian Communist Party (PKI). However, conflicts were common at the lowest level of the hierarchy, involving the PKI, the BPI, as well as their community organizations and Muslim groups. Those conflicts were triggered by unilateral actions;
- On September 30 or October 1, 1965, the balance between Soekarno, the Army and the PKI collapsed. Soekarno was gradually cast aside and the PKI was alleged of masterminding the incident. Between 1965 – 1966, massacres were rampant in Central Java, East Java and Bali;
- RPKAD troops then trained local youths, especially Muslim youths, after which mass arrests and massacres occurred;
- The Indonesian case was very different from the South African case, where many of the perpetrators agreed to give their testimonies/confession in order to obtain amnesty. They were afraid that they would be brought before the court if they refused to testify or confess;
- If the victims are to receive compensation after the granting of amnesty, there may be a connivance, because the victims want the compensation and they can arrange a compromise with the perpetrators, by not telling the whole story;
- The article that makes the fate of the victims depend on amnesty for the perpetrators is very unfair and impossible to implement. The victims' right to obtain compensation is vested in them and not related to the perpetrators;
- History is again used as an agent of freedom, in this case the KKR provides the opportunity for the victims to tell their stories. This is also a part of psychological healing, namely healing the wounds by telling of their past sufferings.

3. Expert Witness Rudi Muhammad Rizky, S.H., LL.M.:

- The Commission for Truth and Reconciliation has formally met the requirements for such a commission based on the Dougatt Principle. The minimum requirement for such a commission is that it be established by the legislative and executive bodies that are elected democratically and such commission must have far-ranging authorities as well as far-reaching mandates;

- Such commission must have the authority to recommend reparation for the victims of gross human rights violations. While perpetrators refusing to cooperate with the commission or refusing to disclose their crimes openly will not obtain amnesty;
- Punishment for the perpetrators is actually an obligation of mankind as a whole. Whereas victim compensation is only for the benefit of the victims or their heirs;
- One of the basic reasons for establishing the KKR Law is to reveal the truth for the interests of the victims and their heirs to obtain compensation, restitution and rehabilitation. The most important thing is the victims and is related to the obligation of an effective remedy;
- Article 27 of the KKR Law provides for "compensation and rehabilitation" that may be granted if the request for amnesty is granted. Amnesty must be granted if the perpetrators confess to their crimes, the actual facts, show remorse and agree to apologize to the victims and their heirs;

4. Expert Witness Prof. Douglas Cassel:

- The KKR Law has failed to fulfill the obligations of Indonesia as a state and has failed to respect the rights of the victims, their families and the Indonesian people based on international human rights law in three ways:
First, it has failed to investigate and reveal the truth about any case related to genocide and crimes against humanity before 2000;
Second, it has failed to provide reparation to the victims and their families;
Third, it has failed to prosecute and properly punish the perpetrators;
- Indonesia as a member of the UN, based on Articles 55 and 56 of the UN Charter as an international treaty, is responsible for human rights;
- Since 1927, the World Court has stipulated that all states have the obligation to conduct thorough and effective investigations, to provide effective reparation for the victims, as well as to prosecute and punish the perpetrators. The victims have the right to know the truth and are entitled to obtain justice in the form of the prosecution and punishment of the perpetrators;
- The scope of such effective reparations must include not only access to justice, but also the following five elements:
 1. Restitution, namely the restitution of the victims' properties or good reputation;
 2. Compensation, in the form of cash money for the losses;
 3. Rehabilitation, including medical or psychological care;
 4. Satisfactory measures, including acknowledgement by the public that it is the responsibility of the state and also a public apology by a high-ranking official;

- 5. Guarantees that such violations of human rights will not be repeated or recur;
- There is a limitation in the granting of amnesty based on the international law and such limitation is specifically applicable to genocide and crimes against humanity, which are the subjects of the KKR Law;

5. Expert Witness Prof. Paul Van Zyl:

- Whereas the currently existing format of the Indonesian Truth Commission fails to meet the standards made by the UN to achieve truth and justice, rather than truth or justice;
- The only KKR granting amnesty for gross human rights violations is the KKR of South Africa. However, the KKR of South Africa, which allowed amnesty, was an exception, rather than a rule. The reason was that such an exception was made because the apartheid government said that democracy could not arrive in South Africa if amnesty was not given and Nelson Mandela as well as the leaders of South Africa Human Rights movement agreed and gave their constitutional covenants to the amnesty. Therefore, the new constitution of South Africa includes a clause allowing amnesty for perpetrators of gross human rights violations. If such a clause was not included in the constitution of South Africa, the Constitutional Court of South Africa would not have given its approval to the amnesty;
- Whereas the convention on civil and political rights has been adopted into domestic law, along with the convention against torture. Article 7 of Law Number 39 Year 1999 concerning Human Rights stipulates that international regulations on human rights which have been ratified by the Republic of Indonesia shall be applicable and legally binding in Indonesia;
- Whereas several articles in the KKR Law constitute violations of international law, as set forth in the international convention on civil and political rights and convention against torture. Those articles are Article 1 paragraph (9), Article 27, Article 28, and Article 44 of the KKR Law, the articles of which allow the Commission to recommend to the President to grant amnesty to the perpetrators of gross human rights violations;
- The amnesty as provided in the KKR Law is inconsistent with Article 6 and Article 2 paragraph (3) of the ICCPR;
- Whereas the Human Rights Commission has now been replaced by the Human Rights Council, and Indonesia has an important role in the council;

6. Expert Witness Prof. Naomi Roht-Arriaza:

- The state is not only required to provide reparation for the victims, but must also ensure or guarantee that at least its national law provides the required protection for human rights in accordance with its international responsibilities or obligations.

- The state must also provide effective access to justice for those claiming to be victims of human rights violations;
- Based on international law, the victims of gross human rights violations are the victims whose human rights have been violated. At the time such a crime or violence is committed, those people obtain the status of victims. The state will grant to the victims the rights to obtain access to justice and to obtain rehabilitation or reparation. Those rights are two separated but interconnected rights;
 - Amnesty may be granted after a conflict. However, there is a limitation, based on which amnesty cannot be granted for certain crimes. According to the current practice and based on the law, amnesty cannot be granted for genocide or crimes against humanity. This is an international agreement included in various treaties, such as the anti-torture treaty, to which Indonesia is also a party;
 - The Truth and Reconciliation Commission of South Africa allows amnesty in return for the truth. However, those who fail to convey the whole truth will be prosecuted;
 - The Truth and Reconciliation Commission of East Timor has a procedure for reconciliation in the community as a part of the procedures of the Commission. However, this procedure applies only for minor crimes. There is no such commission in Columbia, but this country has a law on peace and justice, which allows the reduction of a prison term by five years. In this matter, Columbia only provides the truth and reparation, but does not provide amnesty;

Whereas the Government, the People's Legislative Assembly, the former Chairperson of the Special Committee for KKR Draft Law, and the Chairperson of the National Commission for Human Rights have given their testimonies, in writing and verbally before the court, which are included in full in the case explanation and which basically state as follows:

1. The Government:

- a. Whereas the establishment of the Truth and Reconciliation Commission was a collective initiative which emphasised "the values of peaceful settlement" of the Indonesian people in the context of the protection and enforcement of human rights. In the past (before the application of Law Number 26 Year 2000 concerning Human Rights Court, hereinafter Law on Human Rights Court), gross human rights violations were often disregarded or even deemed non-existent, without any examination and investigation of the perpetrators, the victims and the number of the victims.
- b. Whereas one of the most important issues in the settlement of gross human rights violations occurring in the past is that there is a reconciliation between the perpetrators and the victims (Article 29 of the KKR Law), in order to achieve national reconciliation for stabilizing the national unity and integrity as

mandated by the Stipulation of the People's Consultative Assembly of the Republic of Indonesia Number V/TAP/MPR/2000 concerning Stabilization of National Unity and Integrity.

It is hoped that such incidents will not recur in the future, as described in the motto of the Truth and Reconciliation Commission of Argentina saying "*Nunca Ma'as*" (never to happen again), or that of South Africa saying "*to forgive but not to forget*";

- c. Whereas if the perpetrators voluntarily confess to their crimes, admit the truth of the facts, convey their regret for their crimes and are willing to apologize to the victims or their heirs, but the victims or their heirs refuse to forgive them, the Truth and Reconciliation Commission shall independently and objectively decide upon the submission of a recommendation to the President for the granting of amnesty. This is intended to avoid a protracted settlement of gross human rights violations, which may finally hamper the achievement of national reconciliation;
- d. Whereas if the perpetrators refuse to voluntarily confess to their crimes, admit the truth of the facts and convey their regret for their crimes, they shall lose their right to obtain amnesty from the President and their cases of gross human rights violations may be referred to an ad hoc human rights court based on Article 43 paragraph (1) of the Law on Human Rights Court.
- e. Whereas if the request for amnesty is refused by the President, this shall not be the end of the efforts to uphold justice regarding gross human rights violations occurring in the past, especially for the victims and their heirs. In fact, such a refusal of the request for amnesty provides an opportunity for the victims or their heirs to claim their rights to obtain compensation, restitution and rehabilitation from the state (*please refer to Government Regulation Number 3 Year 2002 concerning Compensation, Restitution and Rehabilitation for the Victims of Gross human rights violations*), in furtherance of the provisions of Article 35 of the Law on the Human Rights Court;
- f. The establishment of a Truth and Reconciliation Commission in various countries has lead to a shift in the concept of justice in settlement of criminal cases, namely from retributive justice/prosecutorial justice to restorative justice/community based justice, which emphasizes the importance of the restorative aspect for those suffering because of the crimes.
- g. Whereas lately the UN has recommended a wider application of the concept of restorative justice in the criminal courts through the United Nations Declaration on the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters. This is in line with the purposes and objectives of the establishment of the KKR Law, which emphasize the settlement of gross human rights violations through an *out of court system*. For that reason, it can be concluded that amnesty is the right of perpetrators who show good faith, who sincerely admit their

crimes and apologize for their past crimes, whereas compensation, restitution and/or rehabilitation are the rights of the victims or their heirs that must be granted by the state;

2. The People's Legislative Assembly:

a. Whereas the establishment of the KKR Law was based on the following considerations:

The settlement of gross human rights violations committed in the past before the Law on Human Rights Court comes into effect is very urgent because dissatisfaction and political friction should not be allowed to persist without any certainty as to the settlement. With the disclosure of the truth about gross human rights violations committed in the past before the Law on Human Rights Court comes into effect through the Truth and Reconciliation Commission, it is expected that national reconciliation can be achieved. This is also in line with Article 47 of the Law on the Human Rights Court, concerning the legal basis for the establishment of the KKR as a means for the settlement of gross human rights violations, other than the matters under the jurisdiction of the Human Rights Court.

b. Whereas the objective of the establishment of the KKR is to settle past gross human rights violations outside the court, in order to achieve national unity and amity as well as to create national reconciliation and unity with the spirit of mutual understanding.

c. Whereas the KKR Law is based on the principles of independence, freedom and impartiality, honesty, transparency and peace;

d. Whereas the provisions of Article 27 of the KKR Law, which provides for the granting of compensation, restitution and rehabilitation to the victims of gross human rights violations or their heirs, following the granting of a request for amnesty by the President, is intended to balance the status of the perpetrators and the victims of gross human rights violations, which will eventually create a sense of justice in the community. Amnesty is the constitutional right of the President granted by the Constitution (taking into account the considerations of the People's Legislative Assembly) as intended in Article 14 paragraph (2) of the 1945 Constitution. Therefore, the victims of gross human rights violations, the perpetrators of which have obtained amnesty, are entitled to obtain compensation and rehabilitation from the state;

e. Whereas the Truth and Reconciliation Commission is not intended merely to punish or pillory or prosecute a person, but primarily to find the truth which in the end will be useful for supporting the restoration of a harmonious

relationship between the perpetrators, the victims and the people, all of whom are basically victims of the crime;

Justice in the KKR is synonymous with the complete disclosure of all incidents by bringing together and confronting the perpetrators and the victims, while avoiding complicated procedural law. The process of the KKR is intended to avoid the recurrence of similar incidents in the future through a reconciliation process based on humanity and awareness of the existence of community interdependence and is not aimed merely at criminal prosecution;

The protection and restoration of the rights of the victims and the people at large are considered as equally important as the criminal prosecution and/or rehabilitation of the perpetrators.

- f. Whereas Article 44 of the KKR Law, which stipulates that cases of gross human rights violations which have been disclosed and settled by the Commission cannot be brought to an ad hoc human rights court, is not inconsistent with Article 28D paragraph (1) and Article 28I paragraph (1) of the 1945 Constitution, because the KKR does not function as a substitute of the human rights court in accordance with the Law on Human Rights Court. In this matter, the KKR Law does not regulate legal prosecutions, rather it only provides for:
- a procedure for the disclosure of the truth;
 - a procedure for the granting of compensation, restitution and/or rehabilitation to the victims; and
 - a procedure for granting amnesty to the perpetrators;

Therefore, to provide legal certainty, cases of gross human rights violations which have been disclosed and settled by the Commission cannot be brought to the Human Rights Court.

- g. Whereas the perpetrators of gross human rights violations who refuse to admit the truth and their crimes and refuse to show their remorse for their crimes shall lose their right to obtain amnesty and may be brought before an ad hoc human rights court, as set forth in Article 29 paragraph (3) of the KKR Law. Therefore, the provisions of Article 29 paragraph (3) may be construed so that the KKR Law does not close the access for any person to obtain settlement through a judicial process;

- h. Whereas Article 1 Paragraph (9) of the KKR Law provides that amnesty shall be a pardon granted by the President to the perpetrators of gross human rights violations by taking into account the considerations of the People's Legislative Assembly. It can be explained that universal amnesty in the context of the KKR Law has a special meaning and is more measurable. Amnesty in the KKR Law may only be granted to those who fully admit their involvement in gross human rights violations which are solely associated with proportionate political objectives;
3. The Former Chairperson of the Special Committee for KKR Draft Law [Mayjen. Pol. (Ret.) Drs. Sidarto Danusubroto, S.H.]:
 - a. The People's Legislative Assembly has made every effort to perform its duties mandated by the people in accordance with the mandate of People's Consultative Assembly Decree Number V/MPR/2000 to the best of its abilities, although it realizes that it has not achieved the optimum result which would satisfy all interested parties. The final results of the work of the People's Legislative Assembly (the Special Committee for KKR Draft Law) is deemed to be better than the preliminary draft conveyed by the Government.
 - b. Two important matters which incited lengthy debates in the discussion of the KKR Draft Law were Article 1 Paragraph 1 and Article 5 of the KKR Law concerning disclosure of the truth and Article 27 of the KKR Law. Some parties expressed their "objection" to the inclusion of the disclosure of the truth in the Law, as it would provide for an opportunity to disclose various national problems in relation to which, various attempts have been made to "leave them behind". Meanwhile, objections to Article 27 were raised by the victims and their families, as Article 27 can be construed as a means to remove the existence of Article 19.
 - c. When the Special Committee dealt with Article 27, there were approximately 15 victims' organizations expressing their objection to this article, including *Forum Komunikasi Eks Menteri Kabinet Dwikora Korban Penyalahgunaan Supersemar, Tim Advokasi Jajaran TNI AD, Tim Advokasi Jajaran TNI AU, Tim Advokasi Jajaran TNI AL, Tim Advokasi Jajaran Polri Paguyuban Korban Orde Baru, Lembaga Perjuangan Rehabilitasi Korban Rejim Orde Baru, Solidaritas Korban Pelanggaran HAM, Komite Aksi Pembebasan Tapol/Napol, Lembaga Penelitian Korban Peristiwa '65 Bali.*

The objection to or refusal of the provisions of Article 27 of the KKR Law conveyed by the victims and agencies fighting for the victims' rights is very comprehensible. However, the political constellation existing at that time forced the factions in the People's Legislative Assembly to accept the formulation of Article 27 of the KKR Law as it is now. The approval of the People's Legislative Assembly of this article was a compromise to avoid protracted discussions on the KKR Draft Law that would lead to a deadlock, and there was a concern about the diminishing number of surviving witnesses, so that the existence of the KKR would no longer be significant as it would have lost the momentum. Therefore, when the KKR Draft Law was ratified, most of the members of the Special Committee were of the opinion that the objections raised by unsatisfied parties could actually be accommodated via existing avenues of recourse, such as by submitting a "Judicial Review Petition" to the Constitutional Court, such as they are doing now.

- d. According to Article 44, cases of gross human rights violations which have been disclosed to and settled by the Commission, cannot be filed again to an ad hoc Human Rights court.

Gross human rights violations constitute "extraordinary crimes", so that they cannot be settled using the available legal provisions, such as the Indonesian Criminal Code, but must use "special treatment". Therefore, in accordance with the mandate of Article 104 of Law Number 39 Year 1999 concerning Human Rights, a Law on the Human Rights Court has been formulated, which is expected to be able to protect Human Rights of individuals and the people, and serves as a basis for law enforcement, legal certainty, justice, and a feeling of safety, both for individuals and the people, to be free from gross human rights violations.

In addition to Ad Hoc Human Rights Court, the People's Consultative Assembly Decree Number V/MPR/2000 also mentions the need to establish a Truth and Reconciliation Commission, as an extra-judicial institution having the duty to uphold the truth by disclosing power abuses and Human Rights violations occurring in the past, in accordance with the applicable laws and regulations and to pursue reconciliation for the purposes of the national interest.

The first issue to be agreed upon by all parties was that reconciliation, which also includes national reconciliation, is mandated by the People's Consultative Assembly Decree Number V/MPR/2000 concerning Stabilization and National Unity, which was followed up with the passing of the Law on Ad Hoc Human Rights Court, and forms a part of an implementation of a constitutional instruction to all state officials, in line with the purposes and objectives of the Amendments to the 1945 Constitution of the Republic of Indonesia, particularly Article 28A – 28 J concerning Human Rights (HAM).

4. National Commission for Human Rights represented by **Abdul Hakim Garuda Nusantara, S.H., LL.M.:**
 - a. Whereas, Law Number 39 Year 1999 mentions a Human Rights court, however this matter of a Human Rights Court is stipulated further in the Law on the Human Rights Court.
 - b. Whereas, violations of human rights occurring in the past may be settled through two legal avenues, in order to achieve justice. The first avenue is through an ad hoc Human Rights Court, the establishment of which is based on a proposal of the People's Legislative Assembly to the President, pursuant to which the President would issue a Presidential Decree. The second avenue is through the KKR.
 - c. If it is true that a case contains an uncontestable truth, compensation and rehabilitation cannot be tied to the granting or refusal of amnesty by the President.
 - d. Amnesty cannot used as a requirement for the granting of compensation and rehabilitation because amnesty is a separate process and conditional in nature. Article 29 Paragraph (2) of the KKR Law states, "In the event that the perpetrators voluntarily confess to their crimes, admit the truth of the facts, convey their regret for their crimes and are willing to apologize to the victims or their heirs, but the victims or their heirs refuse to forgive them, the Truth and Reconciliation Commission shall independently and objectively decide upon the submission of a recommendation to the President to grant amnesty." Therefore, independently and objectively, it cannot be tied to compensation and rehabilitation, as compensation and rehabilitation are the responsibility of the state and relate to the facts found by the Truth Commission.

- e. With regard to Article 44 of the KKR Law which provides that cases of gross human rights violations which have been disclosed and settled cannot be filed again at an Ad Hoc Human Rights Court, the petitioners are of the opinion that the provision is inconsistent with Article 27, Article 28D, and Article 28 of the 1945 Constitution. Article 44 is a logical consequence of the concepts set forth in Article 29, Paragraphs (2) and (3). Amnesty may only be granted by the President, and shall be recommended by the KKR to the President if the requirements have been met.
- f. If the KKR is processed through an ad hoc Human Rights Court, the ad hoc Human Rights Court process will be commenced if the request for amnesty is refused. With regard to this matter, Article 7 Paragraph (1) point 9 of the KKR Law provides that in performing the duties as set forth in Article 6, the Commission has the authority to reject a request for compensation, restitution, rehabilitation, or amnesty, if the case has been filed to a human rights court. Therefore, the refusal of requests for compensation, restitution, rehabilitation, or amnesty depend upon whether the case has been filed or not to a Human Rights Court.
- g. If a gross human rights violation cannot be settled through the KKR, it can be settled through an Ad Hoc Human Rights Court. However, it is more appropriate to settle certain gross human rights violations through the KKR.

THE OPINION OF THE COURT

Whereas before entering the case substance, basically the decision of the legislators to stipulate reconciliation as one of the ways to settle gross human rights violations occurring prior to the issuance of the Law on the Human Rights Court, is not merely a political decision, but it is also a legal mechanism set forth in the KKR Law. This means that the evaluation of this matter shall be conducted primarily in accordance with legal and constitutional principles, which contain the philosophy and outlook of the nation which constitute the spirit of the 1945 Constitution. In addition, the adoption of Section XA as a part of the 1945 Constitution in the second amendment to the 1945 Constitution made in 2000, which also provides for guarantees and protection of Human Rights, also implies that the review of the constitutionality of the KKR Law shall be based on the guarantees and protections of Human Rights as provided in the 1945 Constitution, in which consideration will be given to its consistency with the guarantees and protections of Human Rights provided in the 1945 Constitution.

Whereas as a nation claiming that its national and state philosophy is based on Pancasila as a legal aspiration (*rechtsidee*) and state aspiration (*staatsidee*), the open mindedness and openheartedness to view this issue must be in the context of the broader interests of the Unitary State of the Republic of Indonesia, with the purpose of investigating gross human rights violations in order to disclose the truth, uphold justice and establish a culture of respect for Human Rights, so that reconciliation and national unity can be achieved. This must be done by applying an appropriate approach, by firstly objectively comprehending the conflicts which occurred, despite having to navigate the likelihood of serious risks, in order to attain a safe and peaceful condition enabling the optimal implementation of economic, social, and political development, so that all of the Indonesian people and territory can be protected. On the other hand, as a member of the United Nations which has adopted the principles of Human Rights of the United Nations that actually have been included in the 1945 Constitution, documents of the United Nations concerning Human Rights are also taken into consideration by the Court in construing the 1945 Constitution;

Whereas based on this paradigm, the Court provides its opinion on the petition of the Petitioners as follows:

1) Article 27 of the KKR Law

Article 27 provides that the compensation and rehabilitation as set forth in Article 19 can be granted if the request for amnesty is granted. The elucidation on this article provides that, if the perpetrators voluntarily confess to their crimes, admit the truth of the facts, convey their regret for their crimes and are willing to apologize to the victims or their heirs, the perpetrators of gross human rights violation may submit a request for amnesty to the President. If the request is founded, the President can approve the request, and the victims shall be granted compensation and/or rehabilitation. Meanwhile, if the request for amnesty is refused, the compensation and rehabilitation shall not be granted by the state, and the case will be followed up based on the provisions of the Law on the Human Rights Court.

This provision contains a contradiction between one part and another, specifically the parts regulating:

- a. Perpetrators have voluntarily confessed to their crimes, admitted the truth of the facts and conveyed their regret for their crimes and are willing to apologize to the victims.
- b. Perpetrators can submit a request for Amnesty to the President.
- c. The request can either be granted or refused.
- d. Compensation and or rehabilitation shall only be granted if amnesty is granted by the President.
- e. If amnesty is refused, the case shall be filed to the Ad Hoc Human Rights Court.

The confusion and contradiction found in Article 27 of the KKR Law are related to the emphasis on the perpetrators as the individuals in a crime of individual criminal responsibility, whereas the perpetrators

and victims as well as witnesses of human rights violation incidents prior to the application of the Law on Human Rights Court can no longer easily be found. Reconciliation between the perpetrators and victims as intended in the law *a quo* becomes almost impossible to be achieved, if it is conducted by applying an individual criminal responsibility approach. In applying such an approach restitution (compensation given by the perpetrators or a third party) depends on amnesty. On the other hand, if the purpose is to achieve reconciliation, by applying an approach which does not focus on the individual, the starting point shall be the gross human rights violations and the existence of victims who serve as the measure of reconciliation by the provision of compensation and rehabilitation. Those two approaches, in relation to restitution, compensation, and rehabilitation, cannot be rendered dependant on an irrelevant issue because amnesty is a prerogative right of the President, the granting or refusal of which is up to the President.

The fact that there are gross human rights violations, which the state is actually obligated to avoid and prevent, and victims whose Human Rights should be protected by the state, are adequate to give rise to the legal responsibility of the state and individual perpetrators who can be identified to provide restitution, compensation and rehabilitation to the victims, without any other conditions. Stipulating amnesty as a requirement is a negation of legal protection and justice, which are guaranteed under the 1945 Constitution. It is also a universal practice and custom as included in the *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*, stipulating *adequate, effective and prompt reparation for harm suffered*, aimed at prioritizing justice in handling gross human rights violations, by granting proportional reparation in accordance with the extent of the violations and damages sustained. This constitutes an interpretation used to explain Article 28A, Article 28D Paragraph (1), and Article 28I Paragraph (1), Paragraph (4), and Paragraph (5), so that based on the above reasons the petition of the Petitioners concerning Article 27 of the KKR Law is based on sufficient grounds.

2) Article 44 of the KKR Law

Article 44 of the KKR Law provides that *"cases of gross human rights violations which have been disclosed and settled by the Commission cannot be filed again at the Ad Hoc Human Rights Court."* Based on the General Elucidation on the KKR Law, it can be concluded that the KKR has the duties to disclose the truth and to uphold justice and to establish respect for Human Rights in order to produce reconciliation to achieve national unity, considering the existence of gross human rights violations prior to the application of the Law on Human Rights Court. The KKR is not related to legal prosecution, but it arranges for the disclosure of the truth, granting of restitution, and/or

rehabilitation and provides considerations for amnesty. A question arises as to whether or not the KKR constitutes a substitution or replacement of a court of justice. The general elucidation expressly stipulates that if cases of gross human rights violations have been settled by the KKR, an ad hoc human rights court does not have the authority to make a decision, unless the request for amnesty is refused by the President. On the other hand, if an ad hoc human rights court has made a decision, the KKR has no authority to make a decision. Even though it is stated that the KKR is only an alternative to the Human Rights Court and does not constitute a law enforcement commission, it is clear that it constitutes an alternative dispute resolution mechanism, which will settle a Human Rights dispute amicably and if this effort is successful, it will close access to obtaining settlement through judicial mechanisms. Although the arguments of the Petitioners quote the arguments and principles of international Human Rights opposing impunity, the resolution of Human Rights violations in this manner has been accepted by international practice, such as in South Africa, and is also been recognised in customary law. The closing off of judicial process through an Ad Hoc Human Rights Court if the case can be settled through KKR is a logical consequence of an alternative dispute resolution mechanism so that it cannot be considered to be a justification of impunity. This is due to, in general, the difficulties encountered in resolving through judicial mechanisms gross human rights violations occurring prior the application of the Law on Human Rights Court, due to the lapse of time, causing a loss of evidence as the basis of verification under an individual criminal responsibility approach. Under the stipulations of the KKR Law, the KKR has an objective to uphold justice to the best possible extent via the alternative resolution mechanism. Therefore, the Court is of the opinion that there are not sufficient legal or constitutional grounds for granting the petition, primarily because the provision in question only apply to gross human rights violations occurring prior to the application of the Law on the Human Rights Court;

3) Article 1 Point (9) of the KKR Law

Article 1 Point (9) of the KKR Law stipulates that "Amnesty shall be a pardon granted by the President to the perpetrators of gross human rights violations by taking into account the considerations of the People's Legislative Assembly." Gross human rights violations as intended in Article 1 point (4) of the KKR Law shall be construed as "human rights violation as stipulated by the Law on Human Rights Court, which in Article 7 states that gross human rights violations include a. the crime of Genocide, b. Crimes against humanity." The Law on the Human Rights Court, referring to the Statute of Rome on I the International Criminal Court, classifies the crime of genocide and crimes against humanity as the most serious crimes within the overall international community. In general, the international practice or General Comment of the Commission for the Human Rights of the United Nations are of the opinion that amnesty should not be granted in

cases of gross human rights violations. It is stated that although the KKR is intended to create conducive conditions in achieving peace and national reconciliation, it is necessary to determine the limitations for the granting of amnesty, namely the perpetrators may not take advantage of amnesty. Amnesty should not have legal consequences relating to the rights of the victims to obtain reparation, and further amnesty shall not be granted in respect of violations of human rights and international humanitarian law, which constitute criminal offences, for which amnesty and other forms of immunity are not allowable.

Although the General Comment and Report of the Secretary General of the United Nations have not been accepted as binding law, it seems that such conceptions mirror the content of the 1945 Constitution stipulating the principles of human rights protection as set forth in Article 28G Paragraph (2) of the 1945 Constitution, namely the right to freedom from torture, Article 28I Paragraph (1) of the 1945 Constitution, namely the right to live and the right not to be tortured, Article 28 Paragraph (4) and Paragraph (5) of the 1945 Constitution, namely protection, advancement, and fulfillment of human rights shall be the responsibility of the state. However, Article 1 point (9) only covers the definition as set forth in the general provisions, and is not a regulating norm and is related to other articles, so that the petition of the Petitioners in relation to this provision shall be disregarded and will be considered later along with the other articles related to amnesty, as explained below:

Whereas although the petition granted is only related to Article 27 of the KKR Law, however as the overall implementation of the KKR Law depends on and must pass via the aforementioned article, the declaration that Article 27 of the KKR Law is inconsistent with 1945 Constitution and does not have binding force renders all the provisions of the KKR Law unenforceable. This is because Article 27 is closely related to Article 1 point (9), Article 6 point (c), Article 7 Paragraph (1) point (g), Article 25 Paragraph (1) point (b), Article 25 Paragraph (4), Paragraph (5), Paragraph (6), Paragraph 26, Article 28 Paragraph (1), and Article 29 of the KKR Law. However, Article 27 and the articles related to Article 27 of the KKR Law are articles which strongly affecting the enforceability or unenforceability of all provisions in the KKR Law, so that declaring that Article 27 of the KKR Law not to have binding force will give rise to legal implications, which will render all articles relating to amnesty not having binding force.

Whereas the aforementioned matter can be performed and shall not violate procedural law, although the petition (petitum) filed by the Petitioners relates only to Article 1 Point 9, Article 27, and Article 44 of the KKR Law, because basically the procedural law concerning the judicial review on laws under the 1945 Constitution relates to public interest and its legal consequences are *erga omnes* in nature, it is not appropriate to consider it as a matter of *ultra petita* known in the civil procedural law. The prohibition to try and make a decision beyond the matters being petitioned (petitum) is set forth in the Article 178 Paragraphs (2) and (3) of the HIR and similar provisions set forth in Article 189 paragraphs (2) and (3) of the RBg, namely the procedural

law applicable in District Courts and Religious Courts in Indonesia. This is understandable, as the initiative to defend one of the private rights owned by an individual or private person or otherwise depends on the intention or consideration of the individual, which cannot be exceeded. However, the current development and social needs lead to the partial application of such provisions. Considerations of justice and appropriateness have also been used as reasons, as can be seen amongst other things in the decisions of the Supreme Court dated May 23, 1970, dated February 4, 1970, and dated January 8, 1972 and other decisions, and it has also been confirmed that Article 178 Paragraphs (2) and (3) of the HIR and Article 189 Paragraphs (2) and (3) of the RBg are not applicable absolutely due to the obligation of Judges to be active and to always make decisions which provide true settlement to the case. In addition, a civil lawsuit usually includes a request of the Plaintiffs to the Judge to make the fairest decision (*ex aequo et bono*). Therefore, the Judge has the flexibility to make a decision exceeding the petitum, especially for Constitutional Judges examining cases of judicial review related to the public interest. Although the party filing judicial review is an individual deemed to have legal standing, the law on which the judicial review is requested is applicable to the public and relates to the interests of the people at large, and has legal consequences of wider scope rather than the interests of the Petitioner as an individual. If the intended public interests so require, Constitutional Judges should not only focus on the petition alone. This has become a common practice applied in the Constitutional Court of other countries. For example, Article 45 of Law on the Constitutional Court of South Korea (1987) which reads, "*The Constitutional Court shall decide only whether or not the requested statute or any provision of the statute is unconstitutional: Provided, That if it is deemed that the whole provisions of the statute are unable to be enforced due to a decision of unconstitutionality of the requested provision, a decision of unconstitutionality may be made on the whole statute*". The Court has also applied the abovementioned clause, such as in Case Decision Number 001-021-022/PUU-I/2003 concerning Judicial Review on the Law of the Republic of Indonesia Number 20 Year 2002 concerning Electric Power;

Whereas it is also necessary to take into account the following matters found in the KKR Law:

1. Whereas the KKR has the authority to accept complaints, collect information and evidence of gross human rights violations, summon witnesses and **obtain clarification from perpetrators/victims, determine the category of gross human rights violations in hearings open to public (Article 18 of the KKR Law)**, draw conclusions regarding the existence of gross human rights violations, the perpetrators and the victims, as well as apology, which according to the general elucidation of the KKR Law are in the form of final and binding decisions. A decision of the KKR stipulating **the granting of compensation, restitution or rehabilitation [Article 25 paragraph (1) letter a] will not have binding force if the request for amnesty is refused**. The perpetrators and the victims or the Government are also

not bound by a decision that depends on such an amnesty requirement. Therefore, the authority of the KKR is uncertain.

2. Article 28 paragraph (1) provides that in the event that reconciliation has been reached between the perpetrators and the victims of gross human rights violations, the KKR **may** give a recommendation to the President to grant amnesty. However, Article 29 paragraph (1) provides that if the perpetrators and the victims agree to forgive each other, the KKR **must decide** on an amnesty recommendation. The use of the word "**may**" in Article 28 paragraph (1) and the word "**must**" in Article 29 paragraph (1) indicates a lack of consistency in the KKR Law which leads to legal uncertainty (*onrechtszekerheid*).
3. If the perpetrators admit the truth of the facts, convey their remorse and agree to apologize to the victims, but the victims refuse to forgive them, the KKR shall decide upon the granting of amnesty **independently and objectively**. Such a condition does not support the disclosure of the truth and will instead discourage the parties to disclose the truth and acknowledge the actual facts.
4. If the perpetrators refuse to admit the truth and their mistakes and refuse to convey their remorse, the perpetrators will lose their right to obtain amnesty and they may be brought before an ad hoc human rights court. In such case, there is a possibility of a dispute of authorities between the KKR and the People's Legislative Assembly, because Articles 42 and 43 of Law Year 2000, provides that political decision of the People's Legislative Assembly is required to determine the existence of alleged gross human rights violations to be examined by an ad hoc human rights court. It is not clear whether the authority of the KKR under Article 23 of the KKR Law for clarifying the perpetrators and the victims of gross human rights violations, which according to the KKR Law is implemented by issuing **final and binding decisions, will lose its binding force, or such decisions of the KKR regarding the existence of gross human rights violations is adequate to bring the case to an ad hoc human rights court without requiring any decision of the People's Legislative Assembly.**

Reconciliation provides an alternative opportunity for the perpetrators to confess to their crimes without having to submit to the normal legal processes. The perpetrators have the opportunity to consider the course of action they will take in respect of the case against them.

The KKR Law fails to give certainty to the perpetrators intending to choose the KKR to resolve their cases. Article 28 paragraph (1) of the KKR Law provides that if reconciliation has been achieved between the perpetrators and the victims of gross human rights violations before the coming into effect of the Law on Human Rights Court, the Commission may give a recommendation to the President to grant amnesty. Based on the provisions of Article 1 point (2) of the KKR Law, it can be concluded that a reconciliation must meet the following conditions; (1) disclosure of the truth, (2) confession, (3) pardon. Therefore, if it cannot be ascertained that the three conditions have been met, reconciliation is deemed non-existent. If the truth about a case is not disclosed, either with regard to the incident, place, time, or perpetrators, it is clearly impossible that such reconciliation has been achieved. The KKR Law

does not have any provision which directly states that the refusal of amnesty request will lead to a judicial process against the perpetrators, it instead provides that refusal of an amnesty request will result in an obligation for the perpetrators to assume legal responsibility for their crimes. Based on the above explanation, it is clear that the KKR Law fails to encourage the perpetrators to settle their cases through the KKR, because the law has so many legal uncertainties. Meanwhile, if the victims or their heirs refuse to forgive, they may submit reports to the law enforcement agencies against the perpetrators based on the confessions made by the perpetrators. As this provision creates a possibility of self-incrimination, it would be difficult to expect the achievement of reconciliation as envisaged by the KKR Law. The KKR Law does not expressly provide whether or not a reconciliation can be achieved without any pardon from the victims or their heirs. The provisions of Article 29 paragraph (2) of the KKR Law can create a problem in cases where the victims take the initiative to file a complaint/report to the KKR. The victims should have the intention to forgive the perpetrators from the beginning, namely at the time they choose the KKR for settling their cases. If the victims do not intend to forgive the perpetrators, the available alternative for them is judicial process, not reconciliation. In other words, a reconciliation requires mutual intention from the perpetrators and the victims.

5. With regard to complaints accompanied by requests for compensation, restitution, rehabilitation or amnesty, the Commission must make its decision by no later than 90 days as of the receipt of the request (Article 24 of the KKR Law).

This provision gives rise to a question whether the decision made by the Commission within 90 days also includes the disclosure of "the truth about the gross human rights violations" (*please refer to Article 1 point (3) and Article 5 of the KKR Law*).

Article 25 paragraph (1) provides that Decision of the Commission as intended in Article 24 may be in the form of:

- a. The granting of or refusal to grant compensation, restitution and/or rehabilitation, or
- b. Recommendations in the form of legal considerations in the case of requests for amnesty.

Pursuant to the provisions of Article 25 paragraph (1), the Commission must make decisions within 90 days on requests for compensation, restitution, rehabilitation or amnesty. This provision is completed by Article 25 paragraph (3), (4), (5), and (6), as well as Article 26, which stipulate the timeframe for the making of decisions on requests for amnesty. However, the KKR Law does not determine a timeframe for making decisions on the KKR's findings, namely the disclosure of the truth about gross human rights violations. As the Law provides for a time limit of 90 days for deciding upon requests for compensation, restitution, rehabilitation and amnesty, it is not clear whether decisions regarding such requests must be made prior to finishing the investigation if the time limit has lapsed but investigations and clarifications for the disclosure of the truth require more than 90 days. A complaint or report may be submitted to the Commission, and after

the submission of the complaint, the Commission must conduct investigation and clarification on the incident and the perpetrators.

The provisions of Article 24 read "if the Commission has received a complaint or report of a gross human rights violation, along with a request for amnesty". The phrase "**along with**" is construed that the request is filed at the same time with the complaint or report of gross human rights violation. The problem is that amnesty can only be granted if it has already clear who the perpetrators of the gross human rights violation are, and the perpetrators are granted the right to submit a request for amnesty, while the right to decide is with the President. How can the perpetrators, who have not been clarified, submit a request for amnesty at the same time as the report? The perpetrators can only be identified after the KKR discloses the truth about the existence of the gross human rights violation. Therefore, Article 24 creates a confusion that may lead to legal uncertainty, because the article stipulates a timeframe of 90 days. Amnesty can only be requested, recommended and granted when the perpetrators have been definitely identified. The identification of the perpetrators at the earliest stage can be conducted if there is a "confession" of the gross human rights violation as intended in Article 23 letter (a), or if there has already a reconciliation between the perpetrators and the victims as intended in Article 28. Article 24 provides for a process which is different from that provided by Article 23 letter (a). The process provided by Article 24 is based on Article 18 paragraph (1) letter (a), namely it is the authority of the sub-commission for investigation and clarification. This means that the victims assume an active role in submitting the complaint or report. Whereas pursuant to Article 23 letter (a), the sub-commission for amnesty considerations will exercise its authority in cases where the perpetrators assume an active role by making a "confession". Therefore, it is juridically illogical if a request for compensation, restitution, rehabilitation and amnesty is filed at the same time as a complaint or report, which must be decided upon within a maximum period of 90 days as from the receipt of the request as intended in Article 24 of the KKR Law.

Whereas all the above facts and circumstances create legal uncertainty, both in the formulation of the provisions and the possible implementation of the provisions to achieve the expected reconciliation. By taking into account the considerations above, The Court is of the opinion that it is impossible to achieve the basis and purpose of the KKR, as set forth in Article 2 and Article 3 of the Law, due to the lack of guarantees of legal certainty (*rechtsonzekerheid*). Therefore, the Court has reviewed this Law under the 1945 Constitution and it must accordingly be declared as not having binding legal force. As the KKR Law in its entirety has been declared as not having binding legal force, the Court has accordingly eliminated the opportunity for the settlement of past gross human rights violation through reconciliation. Many options can be selected for achieving such a goal, among others, by achieving **reconciliation** in the form of legal policies (laws), which are in line with the 1945 Constitution and universally applicable human rights

instruments, or achieving **reconciliation** through political policies on **general rehabilitation and amnesty**.

In view of Article 56 paragraphs (2) and (3) as well as Article 57 paragraphs (1) and (3) of the Law of the Republic of Indonesia Number 24 Year 2003 concerning Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to State gazette of the Republic of Indonesia Number 4316);

DECIDES

- **To grant the Petition of the Petitioners;**
- **To declare that Law of the Republic of Indonesia Number 27 Year 2004 concerning the Truth and Reconciliation Commission is inconsistent with the 1945 Constitution of the Republic of Indonesia.**
- **To declare that Law of the Republic of Indonesia Number 27 Year 2004 concerning the Truth and Reconciliation Commission does not have binding legal force.**
- **To order the publication of this decision in the State Gazette of the Republic of Indonesia.**

Hence the decision was made on Monday, December 4, 2006, in the Consultative Meeting of Judges attended by 9 (nine) Constitutional Judges and was read out in a Plenary Session of the Constitutional Court open for public on this day Thursday, December 7, 2006, by us Prof. Dr. Jimly Asshiddiqie, S.H., as the Chairperson acting also as a Member, Maruarar Siahaan, H.A.S. Natabaya, Harjono, Soedarsono, H.M. Laica Marzuki, I Dewa Gede Palguna, Abdul Mukthie Fadjar, and H. Achmad Roestandi, respectively as Members, and assisted by Alfius Ngatrin, acting as Substitute Clerk and attended also by the Petitioners/their Attorneys, the People's Legislative Assembly, and the Government;

CHAIRPERSON,

SIGNED

Prof. Dr. Jimly Asshiddiqie, S.H.

MEMBERS

SIGNED

H.A.S Natabaya.

SIGNED

Soedarsono.

SIGNED

Abdul Mukthie Fadjar.

SIGNED

Harjono

SIGNED

H. M. Laica Marzuki.

SIGNED

H. Achmad Roestandi.

SIGNED**I Dewa Gede Palguna.****SIGNED****Maruarar Siahaan.****DISSENTING OPINIONS**

With regard to the aforementioned Court's decision granting the petition of the Petitioners, the Constitutional Judge I Dewa Gede Palguna has a dissenting opinion, as follows:

On the Legal Standing of the Petitioners

Whereas in determining the parties having legal standing as Petitioners before the Court in a petition for a judicial review on a law, in accordance with the provisions of Article 51 paragraph (1) of the Constitutional Court Law, the party or parties concerned must:

- (1) explain their qualifications, whether as individual Indonesian Citizens, as customary law community groups (insofar as they are still in existence and in accordance with the development of the community and the principle of the Unitary State of the Republic of Indonesia as provided in laws), as legal entities, or as state institutions;
- (2) the impairment of their constitutional right and/or authority in accordance with their qualification as referred to in number (1), as the consequence of the coming into effect of a law.

Meanwhile, the Court has determined the following five requirements for the existence of impairment of a constitutional right and/or authority:

- (1) Petitioners must have constitutional rights and/or authorities granted by the 1945 Constitution;
- (2) Such constitutional rights and/or authorities are considered to have been impaired by the coming into effect of the law in respect of which the judicial review is requested;
- (3) Such constitutional impairment shall be specific and actual in nature or at least potential in nature which pursuant to a logical reasoning can be assured of occurring;
- (4) There is a causal connection (*causal verband*) between the impairment of the constitutional right and the coming into effect of the law in respect of which the judicial review is requested;
- (5) There is a possibility that upon the granting of a petition, the asserted impairment of constitutional rights will not or will no longer occur.

Whereas the KKR Law is a special law, because it aims at revealing the truth of gross human rights violations in the past and is then directed to create reconciliation for the realization of national unity, as confirmed in the considerations particularly points (a) and (b) and General Elucidation of the *quo* law. Hence, basically, there are only two parties having direct interests in

the application of the *a quo* law, namely the victims and the perpetrators of gross human rights violations. Therefore, basically, the constitutional rights of the two parties may be impaired by the application of the *a quo* law.

Whereas based on the aforementioned considerations and the elements of evidence found during the trial, Petitioners V, VI, VII, and VIII *prima facie* may be deemed as meeting the first criteria of the provisions of Article 51 paragraph (1) of the Constitutional Court Law, namely as a group of Indonesian citizen individuals having similar interests who believe that their constitutional rights have been harmed by the application of the *a quo* law, which belief must be further proven. In addition, there is also a question as to whether the Petitioners concerned (Petitioners V, VI, VII, VIII) have met the requirements of impairment of constitutional rights as described above, as must be proven in an examination on the subjects and substances of the petition. Hence, the legal standing of the Petitioners concerned (Petitioners V, VI, VII, VIII) can only be determined at the same time as the examination on the subjects or substance of the petition.

Regarding the Subjects or Substances of the Petition

Whereas the Petitioners argued that Article 1 number (9), Article 27, and Article 44 of the **KKR Law** are inconsistent with the 1945 Constitution for the reasons that are basically as follows:

- (1) Article 1 point (9) of the KKR Law which reads, “*Amnesty shall be a pardon granted by the President to the perpetrators of gross human rights violation by taking into account the considerations of the People’s Legislative Assembly*”, according to the Petitioners, is inconsistent with the 1945 Constitution because:
 - a. Gross human rights violations are crimes of the highest level. Therefore, there are provisions restricting the availability of amnesty for the perpetrators of gross human rights violations;
 - b. The definition of amnesty in the aforementioned article is not in accordance with the principles admitted by civilized communities of the world, and Indonesia is among the aforementioned civilized communities, therefore the availability of amnesty for the perpetrators of gross human rights violations is inconsistent with Article 28D paragraph (1) and Article 28I paragraph (5) of the 1945 Constitution;
 - c. Amnesty for gross human rights violations is inconsistent with international law, but the formulation of Article 1 point (9) of the KKR Law in fact explains that amnesty shall be granted to the perpetrators of gross human rights violations, therefore the aforementioned article is inconsistent with the law accepted by the international communities, of which Indonesia is also a part;
- (2) Article 27 of the KKR Law, which reads “*Compensation and rehabilitation as intended in Article 19 can be granted if the request for amnesty is granted*”, is inconsistent with the 1945 Constitution because:

- a. The provisions of Article 27 of the said KKR Law render the rights of the victims to compensation and rehabilitation dependant on the granting of amnesty, not on the substance of the case, and discriminates against the victims, as well as violates the guarantees of protection and equality before the law as well as respect for human dignity;
 - b. Based on the provisions of Article 27 of the said KKR Law and the Elucidation thereof, reparation (compensation and rehabilitation) can only be given if the request for amnesty is granted, therefore it negates the victims' rights to reparation, whereas the victims' reparation is not at all related to the existence or non-existence of amnesty;
 - c. The concept of amnesty in Article 27 of the KKR Law requires the existence of perpetrators. As the consequence, if the perpetrators cannot be found, it is impossible that the amnesty would be granted, so that the victims are deprived of the guarantee of reparations. This provision has placed the victims in an unequal and oppressed position because the victims are subject to a burdensome requirement to obtain their rights, namely they depend on the granting of an amnesty;
 - d. The implications of the formulation of Article 27 of the KKR Law will cause injustice to the victims because the victims must hope that the perpetrators who have made the victims suffer for all this time will obtain an amnesty with the consequence that the victims' rights to reparation (compensation and rehabilitation) may not be obtained and the victims must pursue other, uncertain means;
 - e. Article 27 of the KKR Law has created unequal positions between the victims and the perpetrators, and has discriminated against the rights to reparation (compensation and rehabilitation) which attach to the victims and do not depend on the perpetrators. Article 27 of the KKW Law also fails to respect the victims' suffering due to gross human rights violations. Therefore, any provision restricting the victims' rights to reparation and negating the state's obligation to grant reparations is a form of discrimination and inequality before the law and is inconsistent with the admissions, guarantees, protections and certainty of fair laws;
 - f. Based on the aforementioned reasons, the constitutional rights of the Petitioners, both as victims or co-victims, to obtain a guarantees of equality before the law, a guarantee of admission, protection, and fair legal certainty, as well as a guarantee to be free from discriminatory treatment have been violated by the provisions of Article 27 of the KKR Law.
- (3) Article 44 of the KKR Law which reads, "*The cases of gross human rights violation which have been disclosed and settled by the Commission cannot be filed again to an ad hoc human rights court*", is inconsistent with the 1945 Constitution because:

- a. Article 44 of the KKR Law giving the KKR the status of a pseudo-judicial body closes the access for all people to obtain settlement through a judicial process.
- b. The provisions of Article 44 of the KKR Law, which does not allow judicial examination by an ad hoc human rights court if the case has been settled through the KKR, deprives citizens of their rights to sue perpetrators of gross human rights violations as set forth in the international law, whether found in international practice or international treaties;

In respect of the aforementioned arguments of the Petitioners, it is necessary to first affirm that the three provisions petitioned for review may not be read and understood severally and separately from the context of the entirety of the provisions of the KKR Law. Therefore, in evaluating the constitutionality of the provisions of the KKR Law petitioned for review, it is necessary to state first the following considerations:

- o whereas, as affirmed in Article 1 paragraph (3) of the 1945 Constitution, Indonesia is a state based upon the rule of law, therefore the appreciation, protection and and fulfilment of human rights are inherent conditions that may not be ignored;
- o whereas the respect for, protection, and fulfilment of human rights are proven not only by the free-standing chapter regulating human rights in the 1945 Constitution (Chapter XA) and the promulgation of a number of laws regulating human rights related to the efforts to observe, protect, and fulfil human rights, but also by the ratification of international legal instruments related to human rights;
- o whereas in relation to the participation of Indonesia as a party to various international agreements, including those related to human rights, Article 4 paragraph (2) of Law Number 24 Year 2000 concerning International Agreements states, *“In drafting international agreements, the Government of the Republic of Indonesia shall be guided by the **national interest** and shall use the principles of equality and mutualism of, and shall pay due observance to, both the applicable national and international law”*. Hence, the participation of Indonesia in various international legal instruments in the field of human rights implicitly shows three things: (a) confirmation that the aforementioned international legal instruments are in line with the 1945 Constitution, which respects, protects, and guarantees the fulfillment of human rights; (b) therefore Indonesia is bound to implement all the provisions in the aforementioned international legal instruments; (c) the promise to implement all the provisions of the aforementioned international legal instruments, to which Indonesia is a party, is not based upon the doctrine of supremacy of international law over national law, but merely because the provisions in the aforementioned various international legal instruments have been received as part of Indonesian national law through the process of ratification, therefore there should be a presumption that the international legal provisions concerned are not inconsistent with the 1945 Constitution, unless it can be proven otherwise, which has not occurred during the process of examination of the *a quo* petition;

- Whereas in the implementation at the national level, two opinions or interpretations with respect to provisions of various international legal instruments concerning gross human rights violation have been developed, namely:
 - *first*, an opinion stating that amnesty is not applicable to perpetrators of gross human rights violation;
 - *second*, an opinion stating that clauses in a number of international legal instruments providing freedom for the implementation of the provisions in accordance with the laws of the respective countries shall mean that amnesty to perpetrators of gross human rights violation may be granted insofar as it is not expressly prohibited in the relevant international legal instrument and insofar as it is deemed beneficial by the relevant country to achieve higher objectives than sentencing the perpetrators.

Whereas based on the above reasons and assessing the three provisions of the KKR Law in respect of which judicial review is requested (Article 1 point (9), Article 27, Article 44), in the context of the entire KKR Law, I, responding to the *a quo* request, hold the opinion that:

- The provisions of Article 1 point 9 of the KKR Law are not inconsistent with the 1945 Constitution because the authority to grant amnesty under the 1945 Constitution is vested in the President upon hearing the opinion of the People's Legislative Assembly as set forth in Article 14 Paragraph (2) of the 1945 Constitution, and besides the granting of amnesty in the context of the entirety of the provisions of the KKR law is intended to guarantee the achievement of higher objectives, namely reconciliation to reach the national unity;
- Article 27 of the KKR Law is inconsistent with the 1945 Constitution, but not entirely because of the reasons asserted by the Petitioners but because the provisions of Article 27 of the KKR Law concerned do not provide legal certainty and justice both to the victims and perpetrators of gross human rights violations. The provisions of Article 27 of the KKR Law do not provide legal certainty to the victims because compensation and rehabilitation depend on something uncertain, namely amnesty – which is entirely under the President's authority to grant or not to grant upon hearing considerations from the People's Legislative Assembly, even, for example, where it has been proven that the person concerned is a victim. It is also not fair for the victims, because, on the one hand, amnesty granted to the perpetrators of gross human rights violation is implicitly stated as a right [Article 29 Paragraph (3) of the KKR Law], but compensation and rehabilitation are not implicitly stated as rights. Whereas, the provisions of Article 27 of the KKR Law also do not provide legal certainty and justice to the perpetrators, because there is no guarantee in the *a quo* law that the perpetrators will automatically obtain amnesty after giving a voluntary confession to their crimes, admitting the truth of the facts, conveying regret for their crimes, and being willing to apologize to the victims and or their heirs. This is because, pursuant to the provisions of Article 29 paragraph (2) of the KKR law, if the victims or their heirs refuse to

forgive, "the Commission shall decide on the granting of a recommendation independently and objectively". The *a quo* law does not specify the meaning of the phrase "the Commission shall decide the granting of recommendation independently and objectively". However, based on logical reasoning, this phrase contains a possibility that the perpetrators will not be recommended to obtain amnesty, even though they have voluntarily confessed to their crimes, admitted the truth of the facts, conveyed regret for their crimes and are willing to apologize to the victims and or their heirs.

- Article 44 of the KKR Law is not inconsistent with the 1945 Constitution because the provisions of Article 44 are key to achieving the purposes of the KKR Law, namely whether the parties (the victims and perpetrators of gross human rights violations) will choose other than the legal avenue (in this case settlement through the Truth and Reconciliation Commission) or through the Ad Hoc Human Rights Court.

Whereas even though there are sufficient reasons to declare that Article 27 of the KKR Law is inconsistent with the 1945 Constitution, the *a quo* petition is not automatically granted for the following reasons:

- A petition can be declared granted if there is no doubt concerning the legal standing of the Petitioners so that the purpose of the granting of the petition can be achieved, namely the restoration of the constitutional rights of the Petitioners which have been violated as a consequence of the application of unconstitutional laws, or at least, the constitutional rights of the Petitioners are no longer impaired. Meanwhile, with respect to the *a quo* petition, based on available evidence during court hearings, the status of the Petitioners as victims of gross human rights violations has not been entirely proven. This is because Article 1 point 5 of the KKR Law defines victims as an "*individual or group of individuals experiencing physical, mental or emotional suffering, economic loss or experiencing neglect, reduction or expropriation of basic rights, as the direct consequence of gross human rights violation; the heirs are also victims*". During court hearings, matters revealed are that the Petitioners, as mentioned above (Petitioners V, VI, VII, VIII) experienced physical, mental or emotional suffering, economic loss or experienced neglect, reduction or expropriation of basic rights, as the direct consequence of **a past event or deed**. The question is, does the intended event or deed constitute a gross human rights violation? In this matter doubt arises because:
 - a. One hand, Article 1 point 4 of the KKR Law stipulates that which is referred to as a gross human rights violation shall be human rights violations as intended by Law Number 26 Year 2000 regarding Human Rights Court (The Human Rights Court Law). Pursuant to Article 7 of the Human Rights Court Law, gross human rights violation include (a) the crime of genocide; (b) crimes against humanity. Hence, in relation to the *a quo* Petitioners, the question is, are the Petitioners victims of

genocide or victims of crimes against humanity? The problem is, pursuant to Article 43 paragraph (2) and the elucidation to Article 43 paragraph (2) of the Human Rights Court Law, to determine the existence of gross human right violations in the past, which includes a determination whether a crime constitutes genocide or a crime against humanity, is based on the opinion of the People's Legislative Assembly. Hence, whether the physical, mental or emotional suffering, economic loss or neglect, reduction or expropriation of basic rights, experienced by the aforementioned Petitioners are the consequence of gross human right violations will depend on the standing or opinion of the People's Representative Assembly. Thus, viewed from this perspective, the a quo Petitioners have not yet fully met the requirements of legal standing as intended in Article 51 paragraph (1) of the MK Law.

- b. On the other hand, the KKR Law stipulates that the KKR has several sub commissions, one of which is the sub-commission for investigating and clarifying gross human rights violations (Article 16 letter a). This sub-commission, pursuant to Article 18 letter (f) of the KKR Law has the authority to "determine the category and type of gross human rights violations' as intended in the Human Rights Court Law. This provision means that the investigation and clarification sub-commission has the authority to determine whether a gross violation of human rights existed in the past and at the same time determining its type, namely whether such violation is genocide or a crime against humanity. Based on this view it can not yet be determined whether the 'physical, mental or emotional suffering, economic loss or neglect, reduction or expropriation of basic rights" experienced by the aforementioned a quo Petitioners, were caused by a gross human rights violation or not, because the KKR (including sub-commission for investigating and clarifying gross human rights violations) has yet to be established until now.
- c. Based on the explanations in letters (a) and (b) above, a determination of the legal standing of the a quo Petitioners, or any party experiencing events similar to the Petitioners, have been rendered uncertain by these two provisions of the law and there is way of resolving it. Indeed, this Court may interpret that if the process chosen to resolve a past gross human rights violation is through the KKR, then the provisions of the KKR Law shall apply, because Article 47 paragraph (1) of the Human Right Court Law provides that, "*gross human rights violations occurring prior to the enactment of this Law may be settled by the Truth and Reconciliation Commission*". However, if the court takes this definition, the legal standing of the a quo Petitioners cannot yet be determined at this time because it has to wait for the establishment of KKR and with the assumption that the KKR will later determine whether the event experienced by the a quo Petitioners was the consequence of gross human rights violation in the form of genocide or crimes against humanity

- In addition, even if the KKR had been formed and had decided that what had happened to the Petitioners *a quo* was a consequence of past gross human rights violation, so that accordingly the Petitioners *a quo* had the required legal standing as intended in Article 51 paragraph (1) of the CC Law, the granting of the petition of the Petitioners *a quo* for Article 27 of the KKR Law would result in larger losses for the Petitioners *a quo*. This is because of the provisions of Article 29 paragraph (2) of the KKR Law, the formulation of which is as quoted above. A person or a group of person, based on a normal reasoning, is unlikely to confess to their crimes or admit the fact that they committed past gross human rights violation and then apologize, without any guarantee that by making such confession and apology, he or they would obtain an amnesty. As a further consequence, it will be difficult to disclose the relevant past gross human rights violation, whereas actually such disclosure is a condition or requisite that cannot be set aside for the restoration of the rights of Petitioners *a quo*. Therefore, the granting of Article 27 by using the arguments of the Petitioners as the basis, as elaborated above, and without taking into account the whole context of the KKR Law, would certainly eliminate the possibility for the Petitioners *a quo* to obtain compensation and rehabilitation, which means that the Petitioners *a quo* would be further harmed.

Therefore, based on the the above considerations, and using the Petitioners' arguments as the basis, this petition should be declared dismissed. Because by at least declaring it dismissed, there would be a better chance for the Petitioners to obtain compensation.

SUBSTITUTE REGISTRAR

SIGNED

Alfius Ngatrin.