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Indonesian Court Holds Retrospective Prosecution Unconstitutional Trials for East Timor Go From Bad to Worse

On Friday 23 July, Indonesia's new Constitutional Court held that the prosecution of Bali bomber Maskur Abdul Kadir was unconstitutional on the grounds of retrospectivity. This decision has profound implications for the trials of the Ad Hoc Human Rights for East Timor (Jakarta Trials) which have a high likelihood of being struck down on the same grounds. The defendants of both the Jakarta and Bali bomber trials were prosecuted under legislation that was introduced after the acts in question occurred. They were therefore subject to unconstitutional retrospective prosecution. Article 28I of the Indonesian Constitution states that the right not to be prosecuted retrospectively is a "basic human right that cannot be diminished under any circumstances at all". The plain wording of this provision clearly allows for no exceptions.

Although human rights instruments such as the International Covenant on Civil and Political Rights clearly allow for an exception to the non-retrospectivity principle for the prosecution of crimes against humanity, to apply this exception is to reject the Indonesian Constitution. For a newly established Constitutional Court to do so is a difficult position to take. Nevertheless, the majority decision was split 5:4.

At present, the implications of the Bali decision are unclear. It is clear, however, that Constitutional Court decisions have binding force and accordingly appeals from the Jakarta Trials on the retrospectivity issue should reach the Court soon. Until one of these appeals is heard, the impact of this decision on the Jakarta Trials cannot be authoritatively resolved. Yet it seems unlikely that the Constitutional Court will reverse its decision on retrospective prosecution in relation to the Jakarta Trials.

The Jakarta Trials, monitored by JSMP, have widely been considered a travesty of justice. In JSMP's view, the Indonesian Government was more intent on conducting show trials to appease the international community rather than bringing the most senior perpetrators to justice. Only one of those convicted, former Governor Abilio Soares, is serving his sentence. He is of Timorese ethnicity and although convicted of crimes against humanity, he is widely viewed as a scapegoat for senior Indonesian military commanders. In other cases it appears the prosecution were not intent on securing a conviction. Now those who were convicted have a strong argument that their convictions should be quashed.

JSMP does not criticise the retrospective prosecution of alleged perpetrators of crimes against humanity as this a fundamental international legal principle that brings war criminals to justice. However, given the potential unconstitutionality of the Jakarta Trials, the unacceptability of this process can no longer be in doubt. Although the trials were a justifiable instance of retrospective prosecution, the

failure to resolve constitutional uncertainty is just one more flaw in a process that should now be considered a whitewash.

It should be noted, however, that trial judges rejected arguments raised by defence lawyers based on retrospectivity. The judges held that general human rights provisions in the Constitution overrode the specific prohibition against retrospective prosecution. Now the Constitutional Court has overruled this position and deemed retrospective prosecution unconstitutional. It remains to be seen whether the same principle will be applied for the Jakarta trials. If so, it will be the final injustice dealt to the hundreds of thousands of East Timorese victims.

What will it take for the UN to act? There have been constant calls, from within East Timor and throughout the international community for the establishment of a Commission of Experts to analyse both the Jakarta Trials and the serious crimes process in Dili. The establishment of this Commission provides hope that justice will be served sometime in the future. Yet the Secretary-General remains indecisive. The prospect of the Jakarta Trials being deemed unconstitutional and the few convictions being overturned should not be ignored. The UN needs to act to ensure there is high-level scrutiny of what appears at present to be a mockery of international criminal law.

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