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Indonesian Criminal Justice System for Human Rights Perpetrators in Indonesia

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This study examines conceptually and thoroughly examines the International Criminal Justice System to be applied in the Indonesian Criminal Justice System which examines and prosecutes perpetrators of human rights crimes in Indonesia. This research is empirical law research, the study that sees the law as reality which covers social reality, cultural reality and others. This study examines conceptually and thoroughly the International Criminal Justice System for application in the Indonesian Criminal Justice System which examines and prosecutes perpetrators of human rights crimes in Indonesia. (1) Crime aggression where the definition of crime has not been formulated can be tried in the established Ad Hoc International Criminal Tribunal and the Ad Hoc Human Rights Court, (2) The Principles of the International Criminal Justice System-ICC can be applied in the Indonesian criminal justice system, including the crime of aggression, especially the application of procedural law and decision-making through the method of legal discovery. (3) Perpetrators of war crimes and crime aggression may be subject to criminal liability in Indonesia, even though the jurisdiction of the Indonesian Human Rights Court covers only serious crimes of genocide and human rights violations. This criminal prosecution can be done through the Ad Hoc Human Rights Court. The originality of the research can be accounted for by the researchers. So far, the researchers have not found any paper or research on the topic above.

Keywords: *Criminal Justice System, Human Rights Perpetrators, Indonesia.*

Introduction

Violation of human rights is one of the oldest forms of crime since people live together and interact with each other.. Even the history of human life from time to time shows the increasingly serious impact on the safety of life and civilisation of mankind due to the modus operandi involving the state and the increasingly sophisticated military equipment. The more

sophisticated technology of these destructive weapon makes it easier to do acts that cause unnecessary suffering to humans, including mass destruction and destruction of civilisation. Their properties are also not an exeption. Thus, the concept of war and other armed conflicts becomes unlimited only to conquer the opponent, but it has come to annihilate the opponent. More ironically, weapons of destruction are not only owned by the state alone, but also controlled by non-state armed groups. Inter-state disputes, states with armed groups disputes or inter-armed groups disputes that cause wars, combat, or other types of armed contacts have the potential to lead to excessive violations of human rights.

Interspersed with other peace agreements, such as the Locarno Pact of 1925 where France, Germany and Belgium pledged together to run non-aggressive politics, the Kellogg Briand Pact of 1928 in which the signatory countries (France, USA and others) abolished the war as a national political instrument and pledged to seek peaceful dispute resolution (Nussabaum, A., 1970). The provisions of the law of war which were directly influenced by the principle of humanity, which animated the Geneva Convention of 1864, were prohibitions on the use of certain weapons (Kusumaatmadja, M., 1949). Then the principle of humanity in war was embraced in the Den Haag Convention of 1899, the Den Haag Convention of 1907 and the Geneva Convention of 1949 along with the Additional Protocol I & II of 1977.

The protection and enforcement of the principle of humanity in situations of international and non-international armed conflict began to take its form seriously after the end of the Second World War by prosecuting and punishing perpetrators of war crimes, including crimes against peace and crimes against humanity through a special judicial institution. The International Military Tribunal (IMT) was established in Nuremberg and the International Military Tribunal for the Far East (IMTFE) in Tokyo was established to judge and sentence the perpetrators of crimes against peace and humanity during the war. Subsequently, the International Criminal Tribunal for the Former Yugoslavia (ICTY) was established in Den Haag and the International Criminal Tribunal for Rwanda (ICTR) in Arusha was established to try and sentence anyone who was guilty of crimes against humanity in situations of armed conflict in the area of those countries. This is crucial, because if there is no net creation of value, the other companies involved in the set of activities won't participate. Second, a business model captures value from a portion of those activities for the firm developing and operating it. This is equally critical, for a company that cannot earn a profit from some portion of its activities cannot sustain those activities over time (Hutahayan and Wahyono, 2019).

The Rome Statute of 1998 came into force on July 1, 2002, specifically, after the 60th day following the 60th nation ratification on April 11, 2002 in accordance with the purposes of Article 126 of the statute. On that date, 66 states had ratified the statute along with the 60th state. The Statute stipulated that the criminal jurisdiction of the ICC was a grave crime

against humanity which, due to its nature and situation, was split into four types of crime. Thus, three of the four types of universal humanity crimes were sequentially formulated in Articles 6.7 and Article 8 of the statute. On the other hand, the formulation of aggression crime awaited the interval of seven years since the enactment of the statute, namely: July 1, 2002, in which the effective entry of this statute as referred to in Article 5 paragraph 2 referred to Article 121 on Amendment and Article 123 of the Statute on Review of Statutes. This statute became effective from July 1, 2002 as having been eligible for ratification of 60 countries. It meant that as of July 1, 2009, each signatory country may file an amendment of the statute related to the Agitation Crime Delict Proposal. Proposals shall be submitted to the Secretary-General of the United Nations (as per Article 121 of the statute). The proposed in I shall be discussed and decided in the Assembly of the Contracting States or in the Special Review Conference (in accordance with Article 121 of the statute. The court shall make a decision based on a majority vote of two thirds of the participants of the session. However, until now the court has not held a review conference to adopt a provision that defines the definition and specific conditions of aggression. Therefore, how the court can carry out law enforcement against crimes of aggression that have been affirmed as part of the jurisdiction of the court but the formulation of the crime has not been determined becomes a legal matter. A latent variable can be modelled with reflective or formative indicators. The latent variable data with the formative indicator model is in the form of principal component scores while the latent variable data with the reflective indicator model is in the form of factor scores (Hutahayan, 2019).

Setting the types of crimes against humanity in different articles is crucial for the adoption of appropriate laws according to the type of crime. However, one case can be related to more than one type of human rights violation. For example, the crime of genocide and crimes against humanity that occurred in the Serbian-Bosnian-Herzegovina war, but the nature and situation of war crimes were more prominent and former President Radovan Karadzic and Rebell Mladic's Armed Forces in Bosnian Serbs were submitted as war criminals in the presence of the Ad Hoc Tribunal for the former Yugoslavian state based in Den Haag and were prosecuted in violation of the Geneva Convention of 1949 on the protection of war victims. Also, former President of the Federal Republic of Yugoslavia, Slobodan Milosevic was filed to the same Ad Hoc Tribunal with 66 alleged crimes against humanity that were committed during the wars in Croatia, Bosnia and Kosovo. The increasingly higher competition, in which there are more and more manufacturers involved in fulfilling the needs and desires of customers, causes every company to put orientation on customer satisfaction as a primary goal (Solimun, & Fernandes, 2018).

It is clear that the proper application of the law (jurisdiction) is critical both in the Ad Hoc Tribunal, the Permanent International Criminal Court (ICC), as well as the Ad Hoc Court and National Permanent Court of countries. If it is conducted in a wrong way, guilty offenders

can be released from the threat of punishment. However, there are still many parties who do not want to be called as war perpetrators - another name for war criminals - although the nature of the crimes against humanity that involve the concerned parties occur in situations of armed conflict, either between national army troops against organised armed groups or between organised armed groups. Lecturers are human resources that have a very central role in all activities in college and have a stake in the framework of character building of students to deal with the reality of a life filled with competitiveness (Indarti, 2017).

The formulation of war crimes in Article 8 of the ICC refers to the Geneva Convention of August 12, 1949 which consists of four conventions which is jointly called as the Geneva Convention of 1949 on the Protection of War Victims, also known as the Red Cross Geneva Convention of 1949 (Kusumaatmadja, M.). The Unitary State of the Republic of Indonesia (NKRI) has ratified the entire Geneva Convention of 1949 pursuant to Law Number 59 of 1958 dated September 10, 1958 on the Participation of the Unitary State of the Republic of Indonesia in all Geneva Conventions dated August 12, 1949, published in the State Gazette Number 109, 1958 and Explanation Memory in State Gazette Supplement Number 1644. Actually, NKRI was not a participant of the diplomatic conference that gave birth to the Geneva Convention of 1949. However, through participatory statements dated September 30, 1958, Indonesia became a party to the Geneva Convention of 1949. This sort of participation is one way of binding oneself to an international agreement or convention known in international law (Yudha ,B. and Ardhiwisastra, 2000). Thus, Indonesia should ratify the Rome Statute of 1998. Moreover, it has been ratified by more than 60 countries on April 11, 2002 and it has been effective from July 1, 2002. Methodologists have developed mediation analysis techniques for a broad range of substantive applications (Solimun and Fernandes, 2017).

It is a serious question whether the existence of a truth and reconciliation commission is inconsistent with the universal spirit of the Rome Statute of 1998 to prosecute, try and punish the perpetrators of serious crimes against humanity. At the same time, it can be a denial of the principle of individual criminal responsibility that limits the practice of impunity that has been held so far. This commission may be intended to be limited to certain cases of certain internal human rights violations within the country concerning the integrity of the nation and NKRI. The settlement through this commission is more political, but it can undermine international belief in the seriousness of Indonesia's willingness and ability to prosecute the perpetrators of serious crimes against humanity. The proportion of independent commissioners is used to measure corporate governance because the existence of an independent board of directors is needed to encourage the implementation of good corporate governance principles and practices in the company (Purbawangsa, 2019).

The Rome Statute of 1998 has been effective and institutionally it has completed all its organs which consist of: the Board of Directors, the Appeals Division, the Justice Division and the Pre-Judiciary Division, the Prosecutor's Office and the Registrar's Office (Article 34 of the Statute). These organs are filled by judges, clerks, staff with judicial and non-judicial duties and authorities like administration according to their respective positions. The Prosecutor's Office is an organ separate from the court. All are raptured, sworn or pledged. They carry out their duties on a full-time independent basis. The number of judges is 18, which were secretly elected by ballot at a special meeting of the Assembly of States, comprising representatives of states' parties signing the Rome Conference of 1998. The participating states or other final stage signatories may be observers but they have the right to nominate a candidate of judge for each election. All elected judges must be citisens of the statutory country of the statutory body who meet the prescribed qualifications, and no one has the same nationality as any other elected judge (Art. 36 jo Article 112 of the Statute).

In the preamble of the Rome Statute of 1998, it was reminded that it is the duty and responsibility of each country to exercise its criminal jurisdiction over international crimes. It is emphasised that an international criminal tribunal established in accordance with this Statute should be a complement to national criminal jurisdiction. The same is also affirmed in Article 1 of the Statute, that the ICC jurisdiction of persons committing serious crimes of international concern will be complementary to the jurisdiction of national criminal law in accordance with this Statute.

As Indonesia participated in the Geneva Convention of August 12, 1949 on the Protection of War Victims through a consolidated statement dated September 10, 1958, pursuant to Law No. 59 of 1958, while the ICC war crimes jurisdiction refers to the Geneva Convention of 1949, it is reasonable to ratify the Rome Statute of 1998. Moreover, some parts of Indonesia are often vulnerable to violent conflicts involving organised armed conflicts, both visible and invisible. Meanwhile, the jurisdiction of the Permanent Human Rights Court and the Ad Hoc Human Rights Tribunal in accordance with Law Number 26 of 2000 does not include criminal jurisdiction of war crimes. It does not cover all ICC criminal jurisdictions.

In order to enforce ICC criminal jurisdiction in Indonesia, it is necessary to adopt the Rome Statute of 1998 into the Indonesian criminal law system, specifically to align or adjust some articles of Law No. 26 Year 2000, including the expansion of the criminal jurisdiction of the Permanent Human Rights Court and the Ad Hoc Human Rights Court which also include war crimes and the possibility of abolishing truth and reconciliation commissions.

It also requires an autonomous or independent human rights court, regardless of the general judicial environment to avoid semi-permanent operationalisation with a judicial system of judges and ad hoc judges. The autonomous permanent human rights court is authorised to

establish an Ad Hoc Court on an urgent basis, so that its formation is no longer necessary through a Presidential Decree on a convoluted and time-consuming DPR proposal. Because humanitarian crimes are so vast and complex with their universal and transnational characteristics, it is necessary for judges with special knowledge to function in permanent human rights courts as well as in the Ad Hoc Court.

Indonesia has established the Ad Hoc Human Rights Courts, namely: The Ad Hoc Tribunal that examines and prosecutes gross human rights violations in Timor-Timor (Tim-Tim) with former Timor-Timor Police Chief, Brigadier General (Pol) Timbul Silaen as the defendant. There is also an Ad Hoc Human Rights Court for former Provincial Governor of Tim-Tim, Abilio Soares. The defendants were filed by the Ad Hoc General Prosecutor from the Attorney General's Office.

However, there was an objection from the Secretary-General of the United Nations, Kofi Annan to the consideration of the panel of judges of the Ad Hoc Human Rights Court of the Republic of Indonesia, stating that there was fraud in UNAMET in 1999 which also influenced widespread violence. The strong reaction was accompanied by an offer of the Ad Hoc International Tribunal at the request of the Indonesian government for the case. This needs to be one of the main considerations in formulating a decision making format and procedural law or a specific criminal justice system within the human rights court in Indonesia that does not conflict with the ICC and Ad Hoc Tribunal standards. Moreover, ICC is the result of "thinking" from dozens of graduate experts from various regions and legal systems in the world.

The objection and offer of the establishment of the Ad Hoc International Human Rights Tribunal presented by the Secretary General of the United Nations above encourages the serious concern of Indonesia to apply the principles of the Indonesian human rights criminal justice system in accordance with the international criminal justice system to demand criminal responsibility for perpetrators of human rights crimes in Indonesia.

From the background above, the purpose of this research was to conceptually and thoroughly examine the International Criminal Justice System to be applied in the Indonesian Criminal Justice System which examines and prosecutes perpetrators of human rights crimes in Indonesia.

The study of law enforcement against human rights crimes, especially against the crime of unconfirmed aggression is the first study of this kind that has ever been conducted. Therefore, the originality/authenticity of the research can be accounted for by the researchers. So far, the researchers have not found any paper and research on the topic above. There are several papers and research results on gross violations of human rights as

stipulated in the Rome Statute and the Republic of Indonesia Law No.26 Year 2000, however, it is not related to law enforcement against crimes aggression as a human rights crime that has not received the formulation of the offense.

Several previous studies were used as references in this research separately, such as the Criminal Justice System by Anderson, V. and Ichiho, R. (2017); Newbury-Birch, D., et al. (2016); Newbury-Birch, D., et al. (2015); Tupman, B. (2015); Jacobson, J., et al. (2017); Human Rights Perpetrators by Caswell, M. and Punzalan, R.L. (2016); Hossain, M.S. (2017); Li, Y. and McKernan, J. (2016); McPhail, K., et al. (2016); Siddiqui, J. and Uddin, S. (2016); Indonesia by Hasan, T., et al. (2016); Phan, Q.T., Tryono, p. and Rosalina, T. (2012); Ramadhan, A.P. (2013); Rusmin, R. and Brown, A.M. (2008); Suratno, T. (2012); Walker, D. (1996); The originality for this paper shows the comprehensively Criminal Justice System, Human Rights Perpetrators, Indonesia in Indonesia.

Research Methodology

This research is empirical law research, a study that sees the law as reality which covers social reality, cultural reality and others. In other words, this study examines law in action, the world of empirical study is das sein (what is the reality). This study examines conceptually and thoroughly the International Criminal Justice System for application in the Indonesian Criminal Justice System which examines and prosecutes perpetrators of human rights crimes in Indonesia.

The Development of the Concept of Human Crime

Through the history of the development of international law, we know about the development of crimes against humanity and its principles of law enforcement from time to time. International law can be reviewed in a broad and narrow sense. In a broad sense, international law is seen as the law of nations. It means that international law is very old, as old as the age of the presence of human life in the unity of nations that generally live in the form of royal governments of many centuries in the past. On the other hand, International Law in the strict sense is seen as the law governing the relationship between the state, and it has only been lived for a few hundred years. Later in its development, international law in this narrow sense is known as modern international law.

Modern international law was born together with the establishment of a new international society in which the main subject is a national-state. The birth of these national countries was marked by the signing of the West Phalia agreement, an agreement to end the Thirty Years War in Europe in 1618-1648. In those days, governmental entities in the form of an independent and sovereign state emerged, irrespective of the intervention of other

governmental powers that wanted to colonise them. Their independence and sovereignty was based on nationality which had the right to self-determination.

Thus, the West Phalia Peace Accord acted as one of the milestones of the growth of modern international law, along with the Congress of Vienna and the Versailles Peace Treaty. In fact, almost all writers on international law have argued that the development of International Law as the law between modern countries as it is known today began in the sixteenth century before the seventeenth century in Europe. However, it is inseparable from, and in many ways has the connection with, international law in the broad sense as a forerunner of international law that has existed and grown long before.

The peace treaty as a milestone in international law above proves the truth that the development and establishment of international law is inseparable from the history of war itself, even the history of war itself is as old as the history of mankind. Therefore, the seeds of international law have been sown in the lives of nations for a long time.

As Mochtar Kusumaatmadja argued, according to A. Gentili, the development of modern international law as a stand-alone legal system began with writings on the laws of war. In addition, Jean Pictet stated that it was a sad fact that during the 3400 years of written history, mankind has only known 250 years of peace.

Human Rights Criminal Judicial System of The Republic of Indonesia:

General Judicial Procedural Law

The existing criminal judicial system in Indonesia is regulated in Law Number 8 of 1981 concerning the Book of Criminal Procedure Law which came into force in its enactment on December 31, 1981 in the State Gazette of the Republic of Indonesia of 1981 Number 76.
The applicable criminal procedure law is the updated Indonesian Regulation or known as *Het Herziene Inlandsch Reglement*, which is abbreviated as H.I.R (Staatsblad Year 1941 Number 44). By Law Number 1 Drt. Year 1951, there was a unification of criminal procedure law consisting of criminal procedure law for *landraad* and *raad van justitie*. The division of this criminal procedure law was a consequence of the Dutch East Indies colonial rule that differentiated the judiciary of the *Bumiputera* people and the judiciary of the European class (including the Foreign Orient) as retained in the old Indonesian Regulation (Staatsblad Year 1848 Number 16).Then, it was changed to the updated Indonesian Regulation (RIB).

Furthermore, since the updated Indonesian Regulation (RIB) was deemed to have not guaranteed the protection of human rights and the dignity of a human being who should be protected in a legal state such as Indonesia, a new criminal procedure law shall be formulated

as provided in the Indonesian Criminal procedure Code (KUHAP) which is now prevailing by placing a guarantee of fundamental human rights protection (humanism) as its foundation. If examined carefully, according to the opinion of the researchers, KUHAP is sufficient to accommodate the basic ideas of the modern criminal justice system because:

a) There is a division of authority at all stages of mutual "interdependence" in terms of interrelated, harmonious and balanced support according to the roles of each police institution, prosecutor's office (section 4 to 15), courts (77 to 88) and institutions corrections (article 22, article 278 and article 280 verses 2 to 282) as the main pillar of the criminal justice system.
b) There is a clear arrangement and it considers human rights as aspect of preliminary investigations (article 102 to 105), full investigations (article 106 to 136), prosecutions (article 137 to 144), court hearings (article 145 to 232), arrests, detention, searches, seizures, inspection of letters (article 16 to 49), suspects and accused (article 50 to 68), provision of legal aid (article69 to 74 of the Criminal procedure Code), pretrial proceedings (article 77 to 83 of the Criminal procedure Code), appeals, appeals to highest court and review of court decision (article 233 to 269), and the execution of judgments (article 270 to 276 jo Article 277 to 283) .
c) It is open to allow for the evolution of crime or the emergence of new types of crime as a result of the increasingly sophisticated and unpredictable development of society, science and technology. In such cases, the KUHAP places itself as a legion of generali (general rules) of the law regulating new types of crimes that require special handling as lex specialis. The principle of "lex specialis derogat legi generali" (the special rule of excluding general rules") allows the Criminal Procedure Code to be "flexible" to be open to renewal due to the changes and developments of the times. The application of this principle is made possible by article 284 paragraph 2 of KUHAP and article 103 of theas “provisions of the parent” of KUHAP. The mention of the “provisions of the parent” by the researchers here is because without the Criminal Code, then the Criminal Procedure Code does not need to be exist.

Nevertheless, there are still weaknesses that need to be refined. As Romli Atmasasmita illustrated, as follows:

a. At the stage of investigation by a single police investigator, there is still no need for the presence of an advocate or legal counsel to assist the suspect to be stopped and examined his/her personal identity. Or subject to other acts (article 5, paragraph 1 sub a, and b). In fact, at that time, the investigator's actions had touched a person's personal independence.
b. The Criminal Procedure Code only regulates the motivation of arrest without mentioning the general reasons for the validity of an arrest.
c. Pretrial as a new institution in the criminal justice system in Indonesia has the authority

to decide whether or not to arrest, detain, terminate the investigation or terminate the prosecution and loss and/or rehabilitation for a person whose criminal matters are terminated at the level of investigation or prosecution (article 77 of the Criminal Procedure Code) has no authority whatsoever against the actions of investigators at the stage of inquiry. In fact, the act of inquiry has touched the independence, dignity and dignity of someone who is the basic rights of everyone.

Procedural Law of Human Rights Special Court

As it is known, the application of the lex specialis derogat legi generali principle (the special rule of excluding general rules) in relation to the criminal procedure law as part of the criminal justice system is made possible by article 284 paragraph 2 of the Criminal Procedure Code and Article 103 of the Criminal Code.

In article 284 paragraph 2 of KUHAP, it was affirmed that:

(1) Within two years following the promulgation of this law, all cases shall be enforced by the provisions of this law, with the temporary exception of the special provisions of criminal proceedings as referred to in certain laws, until there are amendments and or declared as invalid.

In relation to the affirmation of Article 284 of KUHAP and Article 103 of the Criminal Code above, the criminal law is divided into general criminal law and special criminal law, which by Andi Hamzah is more likely to use the term of general and special criminal legislation. General criminal legislation is the Criminal Code and all the laws that amend, add to the Criminal Code as Law Number 1 Year 1946, Law Number 73 Year 1958, Law (Prp) Number 18 of 1960 and others.

Special criminal legislation is criminal legislation outside the Criminal Code and relating to the Criminal Code, which may be further divided into:

a. Special criminal legislation such as economy, subversion, corruption, immigration and others.
b. Non-criminal sanctions of criminal sanction (such as Scholten with government criminal law), such as labour, atoms, archives, agrarian, narcotics, tera laws and others.

The flexibility of KUHAP through article 284 and KUHP through article 103 to the fast and complex changes and developments of the age causes more and more legislation to regulate the offenses outside the Criminal Code.

For this matter, Andi Hamzah gives reasons why more and more offenses are scattered outside the Criminal Code, namely due to:

a. The existence of rapid social change so that the changes need to be accompanied and followed by the rules of law, and also with criminal sanctions. The law here has functioned as "social engineering" and "social control".
b. Modern life is increasingly complex, so in addition to the existence of the rule of law (criminal) in the form of durable unification (KUHP), it also requires temporary penal rules.
c. Many of the laws of civil law, and especially state administration, need to be linked to criminal sanctions to oversee the rules to be obeyed. This is evident in the rules relating to labour, agrarian, forestry, banking, trade, industry, agriculture, marriage, electoral, fisheries, communications, maritime, cooperative and so on.

In addition, there is a close relationship between the changing social life and the rapidly changing laws, as Friedman explains that the law is a mirror of society. Rapid social change also means rapid legal change. Major changes in social relations and in the economy almost certainly result in legal changes. The legal system has been a key player in the dramatic progress of society and the American economy over the years.

Therefore, based on the explanation above, the criminal procedure law applied in the human rights court in Indonesia is as regulated in Law No.26 of 2000 on Human Rights Court.

If examined carefully, according to the opinion of the researchers, the criminal law contained in Law No.26 of 2000 is sufficient to meet the main elements of a minimal human rights criminal system needed because:

a. There are arrangements on KOMNAS HAM as an investigating agency (article 18 to 20), the Attorney General which can appoint an Ad Hoc Prosecutor as an investigation and prosecution agency (article 21 to 25), Permanent Judges and Ad Hoc Judges as a court institution (article 27 to 31), arrests (article 11), detentions (article 12), scope of jurisdictional authority (article 4 to 9). The Ad Hoc Human Rights Tribunal as a judicial institution against human rights cases that occurred before Law No.26 Year 2000 was enacted (article 43 and article 44), Judicial Review (article 31 toarticle 33).
b. The provision of article 10 provides access to the Criminal Procedure Code to supplement any criminal justice system that is not regulated in Law No.26 of 2000, such as the role of police institutions and public institutions which are the two main pillars of a criminal justice system in addition to the prosecutor's and judiciary institutions. It also regulates the rights of suspects & the accused, legal aid and execution of decision.

There are two judicial institutions that are co-organised in Law No.26 of 2000 with the same procedural law, namely:

a. Human Rights Court (permanent)
b. The Ad Hoc Human Rights Court.

In Article 1, paragraph 3, the definition of the Human Rights Court, hereinafter referred to as the Human Rights Court, is a special court against gross violations of human rights. The Ad Hoc Human Rights Court is not given a definition. It is only through the meaning of article 43 that the Ad Hoc Human Rights Court is only authorised to try cases of gross human rights violations at certain locus and tempos delicti that occurred before the enactment of Law No.26 Year 2000, and its establishment through the Presidential Decree on the proposal of Parliament. But the examination and legal efforts are the same as those applied to the human rights court.

Thus, the Human Rights Court is a permanent human rights court institution, as well as the ICC. The Ad Hoc Human Rights Court is an incidental human rights court, such as the Nuremberg Tribunal and the Tokyodan Ad Hoc Human Rights Court of Yugoslavia and Rwanda, only on an international scale.

The most fundamental difference between the two is the Human Rights Court (permanent) applies sharply to the principle of legality. In contrast, the Ad Hoc Human Rights Court has retroactively enforced the principle. According to the researchers' opinion, the enactment of these two different principles brings with them different legal consequences with respect to criminal jurisdiction:

In the Human Rights Court (permanent), because of the legality principle, the jurisdictions include only genocide crimes and crimes against humanity as set forth in Article 7, Article 8 and Article 9. It does not include war crimes and aggression that become ICC criminal jurisdictions.

In the Ad Hoc Human Rights Court, there are two possibilities:

a. In a limited sense, following article 44, the jurisdictions of the Ad Hoc Human Rights Court cover only crimes of genocide and crimes against humanity under article 7, article 8 and article 9. It does not include the war crimes and aggression that become ICC criminal jurisdictions.
b. In a broader sense, following retroactive principle, it means it does not follow Law No.26 Year 2000 and the jurisdictions of the Ad Hoc Human Rights Court in addition to crimes of genocide and crimes against humanity may also include war crimes and aggression

that occurred prior to the enactment of Law No.26 Year 2000. Thus, with the retroactive principle, the jurisdictions of the Ad Hoc Human Rights Court can be not limited to only two types of grave human rights violations in Law No.26 Year 2000, but may extend to the jurisdictions of war crimes and aggression which are also the jurisdictions of the ICC.

Then in Indonesian national instruments, the formulation of human rights violations can be found in:

1. UUD 1945 (1945 Constitution) & the Amendment, particularly Article 5 paragraph (1), Article 20 paragraph (1), Article 26, Article 27, Article 28, Article 29, Article 30, Article 31, Article 33 Paragraph (1) & Paragraph (3) , and Article 34.

2. MPR RI (People's Consultative Assembly of the Republic of Indonesia) Decree No. XVII/MPR/1998 on Human Rights

3. RI Law No.39 Year 1999 on Human Rights

4. Law of RI No.26 of 2000 on Human Rights Court

5. Laws of the Republic of Indonesia on Ratification of International Conventions related to Human Rights

On the other hand, the criteria for determining the failure of the national criminal justice institution or system (as a whole or substantially) addressing gross human rights violations are:

1) No national criminal justice institution and system can handle the case;
2) Existing national criminal justice institutions and systems are unwilling to search for suspects, or witnesses or evidence;
3) National criminal justice institutions and systems conduct judicial proceedings that deliberately protect perpetrators of crimes (suspects/defendants) from the threat of punishment;
4) National criminal justice institutions and systems are not capable of conducting fair and appropriate criminal justice processes, such as: independent, impartial, a priori, discrimination, disregard for the rights of suspects/defendants or victims, and forms of "denial of justice".

The authority to determine whether or not the above criteria apply is held by UN Security Council as the institution authorised to form an ad hoc international tribunal. In contrast to the ICC, the one which determines whether genuinely, unwillingness, and the inability of national criminal justice institutions and systems deal with cases of gross human rights violations is the ICC itself. This is closely linked to the ICC's admissibility principle in article 17 of the ICC Statute.

In this case, according to Muladi, national criminal justice institutions are often unwilling or unable to do, either because they have to try their own citizens who sometimes have very high positions or because of the collapse of the judiciary just like what happened in Rwanda. As is known, the term "tribunal" is used for ad hoc international criminal tribunals, on the other hand, "court" is used for the ICC which is permanent.

Law of The Republic of Indonesia No 26 Year 2000

The establishment of the Human Rights Court.

Although the State of Indonesia is not a party to the UN Convention which decides the Rome Statute of 1998, it has only been within the last 2 (two) years that Indonesia has anticipated it by passing the Law of the Republic of Indonesia Number 26 Year 2000 on the Human Rights Court. Based on this law, the Human Rights Court was established. The Human Rights Court was formed with various considerations, including:

a. to protect, respect, and preserve the human rights as a universal and fundamental right by nature that is inherent in human beings, therefore it cannot be ignored, diminished, or deprived by anyone.
b. human rights are a set of rights attached to the nature and existence of human beings as creatures of God Almighty and is a gift that must be respected, upheld and protected by the state, law, government, and everyone for the honour and protection of human dignity.
c. as the embodiment of the State of Indonesia in participating in the maintenance of world peace and guarantees the implementation, protection, legal certainty, justice and feelings of security to everyone, individuals and communities, of human rights,
d. as the embodiment of the responsibility of the Indonesian nation as a member of the United Nations.
e. gross violations of human rights are "extraordinary crimes" and have broad impacts both at the national and international levels and are not criminal acts set forth in the Criminal Code as well as causing both material and immaterial harm resulting in feelings of insecurity both to individuals and society, therefore, it needs to be immediately restored in realising the rule of law to achieve peace, order, justice and prosperity for all Indonesian people.
f. law enforcement through human rights court is conducted on human rights listed in:
    a) UUD 1945 (The 1945 Constitution),
    b) Universal Declaration of Human Rights,
    c) MPR-RI (People's Consultative Assembly of the Republic of Indonesia) Decree No. XVII/MPR/1998 on Human Rights,
    d) Law No.39 Year 1999 on Human Rights.
g. The enforcement of this law is carried out in accordance with the philosophy contained in

Pancasila and the 1945 Constitution and the principles of international law.

h. constitutes a special court for gross violations of human rights. This particularity is apparent in its preliminary investigation, full investigation, prosecution and examination,
i. Ad Hoc examines and prosecutes gross human rights violations of the past before the enactment of Law No.26 of 2000,
j. Ad Hoc implements a limited retroactive principle only for serious crimes against humanity,
k. The Ad Hoc Human Rights Court is established as required under a Presidential Decree on the proposal of the House of Representatives to try such gross human rights violations in the past,
l. the use of retroactive principle with this law is made possible by Article 28J Paragraph (2) of the 1945 Constitution which states:

"In implementing the rights and freedoms of each person shall be subject to the restrictions laid down by law with the sole intent of ensuring the recognition and respect of the rights and freedoms of others and to satisfy fair demands in accordance with moral judgment, religious values, security, and public order in a democratic society ".

m. may not conflict with the Pancasila philosophy and the 1945 Constitution and the integrity of the Unitary State of the Republic of Indonesia.

Criminal Jurisdiction of Human Rights Court.

Although the Law of the Republic of Indonesia No.26 of 2000 emphasised various considerations of the need for law enforcement of human rights violations in the widest sense, this law also narrows the criminal jurisdiction of the human rights court which only covers genocide crimes and crimes against humanity as affirmed in Article 4 jo. Article 7 of Law No.26 of 2000. Later, in the explanation section of article 7, it is affirmed that the crimes of genocide and crimes against humanity in this provision are in accordance with the "Rome Statute of the International Criminal Court" (art. 6 and 7).

Article 4 emphasises the type of crime that becomes the principal jurisdiction of the case:

Article 4
The Human Rights Court has the duty and authority to examine and decide the cases of gross violations of human rights.

Furthermore, Article 8 formulates crime offense of genocide, as follows:

Article 8
The crime of genocide as referred to in Article 7 letter a shall be any act committed with the intent to destroy all or part of a group of peoples, races, ethnic groups, religious groups by:

a. *killing group members;*
b. *causing severe physical and mental distress to group members;*
c. *creating a living condition of the group that will result in physical destruction either in whole or in part;*
d. *imposing measures aimed at preventing births within the group; or*
e. *forcibly transferring children from certain groups to other groups.*

The formulation of a crime of human rights violation in the form of crimes against humanity is described in Article 9 of Law No.26 of 2000, as follows:

Article 9
Crimes against humanity as referred to in Article 7 letter b shall be an act committed as part of a widespread or systematic attack that it knows that such attacks are directed against civilians in the form of:

a. *murder;*
b. *destruction;*
c. *slavery;*
d. *forced eviction or displacement;*
e. *deprivation of liberty or other arbitrary deprivation of physical liberty in violation of the fundamental principles of international law;*
f. *torture;*
g. *rape, sexual slavery, forced prostitution, forced pregnancy, sterilisation or forced sterilisation or other forms of equivalent sexual violence;*
h. *persecution of a particular group or association based on political, racial, national, ethnic, cultural, religious, or gender equations. other grounds that have been universally recognised as being prohibited under international law;*
i. *enforced disappearances; or*
j. *the crime of apartheid;*

Likewise, even in respect of criminal jurisdiction in the Rome Statute, the criminal jurisdiction of the Republic of Indonesia Law No.26 of 2000 is narrower or limited only to crimes of genocide and crimes against humanity as provided in Article 6 and Article 7 of the Rome Statute of 1998. The other types of human rights violations, namely war crimes and aggressive abuses was provided in Article 5 jo. Article 5, paragraph 2 jo. Article 8 of the Rome Statute of 1998 is not stipulated in The Republic of Indonesia Law No.26 of 2000.

Conclusion and Suggestion

Some conclusions for this research are as follows; (1) Crime Aggression that its definition of crime has not been formulated can be tried in the established Ad Hoc International Criminal Tribunal and the Ad Hoc Human Rights Court, (2) The Principles of the International Criminal Justice System-ICC can be applied in the Indonesian criminal justice system, including the crime of aggression, especially the application of procedural law and decision-making through the method of legal discovery: The interpretation and construction of legal law in the state of legal vacuum. (3) Perpetrators of war crimes and crime aggression may be subject to criminal liability in Indonesia, even though the jurisdiction of the Indonesian Human Rights Court covers only serious crimes of genocide and human rights violations. This criminal prosecution can be done through the Ad Hoc Human Rights Court.

Suggestions on this research are as follows: (1) Indonesia should ratify the Rome Statute of 1998, and then adjust the provisions of the Rome Statute of 1998 into Indonesia's national legislation so that Indonesia can effectively fulfil its international obligations to enforce the law on human rights crimes in Indonesia. (2) Indonesia should pioneer the formulation of the definition of aggressive crime as a form of willingness and sincerity of Indonesia to enforce law enforcement of human rights crimes effectively so as to encourage other countries and ICC to fulfil its international obligations to formulate the same definition.

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