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QUESTIONING THE EFFECTIVENESS OF THE HUMAN RIGHTS COURT IN INDONESIA*

- Tri Sulistyowati**

Abstract

Human Rights is very important issue in every countries. The state's duty is to protect the rights and freedoms of citizens. One form of that protection is the establishment of Human Rights Court which established by Act No.26 of 2000. Since its inception in 2000, the performance of the Human Rights Court has yet to conform to societal expectations. Many cases of Human Rights violation that occurred in Indonesia cannot be submitted to the Human Rights Court because of some flaws in the regulation of the Human Rights Court itself. Some problems that lead the operation of the Human Rights Court is less effective are the absence of the principle of minimum sentencing provisions in Act No.26 of 2000, and the absence of specific procedural law which can be used as a guide to prosecute and adjudicate the cases of gross violation of Human Rights. The specific formulation of what is gross Human Rights violation in article 7, 8, and 9 of Act No.26 of 2000 has limited the space for the judge to prosecute war crime cases. According to that article, gross violations of Human Rights consist only of crimes against humanity and genocide. Therefore, in the future to ensure and protect the rights of victims of gross Human Rights violations, then Act No.26 of 2000 need to be revised, thereby allowing the courts run more effectively.

A. Introduction

Human rights mean a set of rights bestowed by God Almighty in the essence and being of humans as creations of God which must be respected, held in the

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Part Four: Presenters' Presentation

highest esteem and protected by the state, law, Government, and all people in order to protect human dignity and worth.¹ Human rights are universal, so that respect for and enforcement of human rights is a very important issue in every country. The enforcement and protection of human rights in Indonesia reached a very significant progress with the enactment of Indonesian Act No.26 of 2000 on Human Rights Court on November 23, 2000.

Human Rights Court is the court dealing specifically with gross violations of human rights. The court is specially said, because of the name has already led to the terms of a particular court, and the court's authority is also prosecute the special crimes. To handle cases of genocide and crimes against humanity, which is an extraordinary crime cannot be handled by the regular criminal justice system. The settings based on specific nature of the crime that are extraordinary characteristics that require regulation and mechanisms that are very specific. In some respects, the provisions contained in Indonesian Act No.26 of 2000 refer to the provision in the Statute Rome.

The Human Rights Courts were established due to international pressure on Indonesia as a result of gross violations of human rights committed in the lead up to the independence of Timor Leste (East Timor). In 2000-2001 there was much hope that the Human Rights Courts could be used to seriously combat old patterns of impunity for human rights violations. Most observers, both Indonesian and international, agree that this has not proved to be the case.

Since its creation in 2000, the performance of Indonesian Human Rights Court has not been in accordance with the expectations of society. Many cases of severe human rights violations, especially those that occurred prior to 2000 not successfully resolved by the Indonesian human rights court. As a result, people no longer trust the human rights court. Therefore it is necessary for the assessment, if the presence of the human rights court is quite effective to resolve cases on human rights violations in Indonesia.

According to law, there are three possible legal forums where serious violations of human rights can be prosecuted and tried in Indonesia. They are:

- (i) Courts of General Jurisdiction, applying the Indonesian Penal Code, if the offences are tried as ordinary crimes;
- (ii) Human Rights Courts established under Law 26/2000, if the offences are classified as crimes against humanity or genocide as defined for the

1 Article 1 point 1 Indonesian Act No. 39 of 1999

purposes of that law; and,
(iii) Military courts, applying the Penal Code and the Military Penal Code, if the offences are assessed as having been committed by a member of the armed forces on duty.

B. The Establishment Of Human Rights Court In Indonesia

According to the Note of Indonesian Act No.26 of 2000, stated that human rights are listed in the Constitution of Republic of Indonesia 1945. The Universal Declaration of Human Rights, and Indonesian Act No. 39 of 1999 must be implemented with full sense of responsibility in accordance with the philosophy contained in Pancasila and the Constitution of Republic Indonesia 1945, as well as the principles of international law. The next starting point of the development of the law, both in terms of national interest as well as of international importance, then to solve the problem of gross violations of human rights and to restore peace and security in Indonesia, it is needed to establish the human rights court, which is a special court for cases of violations of human rights. Laws on human rights court is expected to protect human rights, both for individuals and society, and provide the basis for enforcement, rule of law, justice, and a sense of security for the individual and society against the violations of human rights.

The Human Rights Court were established due to international pressure on Indonesia as a result of gross violations of human rights committed in the lead up to the independence of Timor Leste (East Timor). Human Rights Court established by serious consideration, among which due to violations of human rights is an extraordinary crime and widespread impact, both at the national and international level and it is not a criminal offense set forth in the book of criminal law and cause harm, either material or immaterial, which resulted in feeling of insecurity; both to individuals and society, that needs to be restored in the realization of the rule of law to achieve peace, order, justice and prosperity for all the people of Indonesia. In addition, the human rights cases required investigation measures, investigation, prosecution, and specially examination. The establish of Human Rights Court is also accelerated by the insistence of the United-Nation-High Commission in 1999, as a result of the alleged violation of human rights in East Timor during 1999 polls. That insistence had pushed the government of Indonesia under President Habibie to issued Perpu No.1 of 1999. Indonesian government chose to establish a Human Rights Court to solve the

violation of human rights that occurred in East Timor, both before and after the polls 1999. The formal reasons put forward by Indonesian government² made the United Nations approved the convening of domestic human rights court. The formal reasons is a known principle in international law, namely national remedies proposed officially by the Indonesian government to reject the proposal for the establishment of international tribunal special for East Timor. In addition, there is no remedies exhausted condition that occurs to push for an international tribunal. By the substitute for government regulation legislation (Perppu), the Indonesian government wants to show to the international community that Indonesian government takes seriously to establish a domestic human rights court.

According to the rules of the legislation, Perppu is made by the President then proposed to the plenary session of parliament for approval, so it can be enacted into law. This Perppu unfortunately was rejected by the parliament, so that the president put forward a bill back of human rights court. On November 20, 2000 finally the human rights court was establish by Act No. 26 of 2000.

C. The Performance Of Human Rights Court In Indonesia

The Human Rights Court established by the Act No. 26 of 2000. The Court governs jurisdiction over cases of severe human rights violations, both before and after the enactment of Indonesian Act No.26 of 2000. The case of severe human rights violations that occurred before the Act No.26 of 2000 passed, then the settlement will be carried out by an Ad Hoc Human Rights Court, which established by a Presidential Decree after obtaining recommendation from the legislature. The first Ad Hoc Human Rights tribunal established by Presidential Decree No.96 of 2001 to handle the case of Tanjung Priok and East Timor. The establishment of an Ad Hoc Human Rights tribunal has a significant importance in the context of the promotion and protection of human rights in Indonesia.

According to the Article 1 point 3 Act No.26 of 2000, Human Rights Court is a court dealing specifically with gross violations of human rights. Article 7 stated that gross violations of human rights include:

- a. the crime of genocide
- b. crimes against humanity

The crime of genocide as referred to in Article 7, is any action intended to

2 during the period of Abdurrahman Wahid as a President of RI

destroy or exterminate in whole or in part a national group, race, ethnic group, or religious group, by:

1. killing members of the group;
2. causing serious bodily or mental harm to members of a group;
3. creating conditions of life that would lead to the physical extermination of the group in whole or in part;
4. imposing measures intended to prevent births within a group; or
5. forcibly transferring children of a particular group to another group.

Crimes against humanity as referred to in Article 7 section b include any action perpetrated as a part of a broad or systematic direct attack on civilians, in the form of:

1. Killing
2. Extermination
3. Enslavement
4. Enforced eviction or movement of civilians
5. Arbitrary appropriation of the independence or other physical freedoms in contravention of international law
6. Torture
7. Rape, sexual enslavement, enforced prostitution, enforced pregnancy, enforced sterilization, or other similar forms of sexual assault
8. Terrorization of a particular group or association based on political views, race, nationality, ethnic origin, culture, religion, sex or any other basis, regarded universally as contravening international law
9. Enforced disappearance of a person
10. Crime of apartheid

Since its establishment on November 2000, among of some cases of gross violations of human rights, the Court heard only 3 cases: East Timor, Tanjung Priok, and Abepura. Among three of cases which heard in an ad hoc Human Rights Courts, none of the defendants were actually sentenced to imprisonment. But Eurico Gueteres in case of East Timor who had undergone imprisonment for 2 years before finally acquitted after judicial review. While 17 other defendants acquitted on appeal and cassation. In the case of Tanjung Priok, among 14 persons accused of human rights violation, all of them are acquitted after an appeal and some of them acquitted after the cassation.

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Likewise in case of Abepura, all defendants are acquitted and there is no defendants sentenced in imprisonment.

Meanwhile, in the case of the other human rights violations, which has obtained the recommendation of the National Commission on Human Rights as a gross violations of human rights, such as Riot on Mei 1998, Trisakti Mei 1998, Semanggi I November 1998, Semanggi II September 1999, abductions and enforced disappearances 1997/1998, Talangsari, Lampung, February 1989, Wasior 2001 and Wamena 2003, has not yet to be tried in Human rights Court, because no decision from parliament stating that such cases are gross violations of human rights.

Many obstacles that lead to Ad Hoc Human Rights Court has not immediately established. Among them is the presence of parliamentary approval in determining whether a case can be classified as gross violations of human rights or not. The parliament is a political institution that used to take a political decision. As a result of that condition, the case of human rights violation that have been recommended by the National Commission on Human Rights until now still unfinished.

As well as to cases of gross violations of human rights that occurred after the presence of Act No.26 of 2000, such as Wasior case, Wamena, Mesuji, etc was also not brought to human rights course. After 13 years since the court was established, Indonesian Human Rights Court heard only 3 cases. Therefore it is very reasonable if the presence of human rights court in Indonesia needs to be reviewed.

Apparently, during 13 years, the performance of Indonesian human rights court had not achieved encouraging results. There are many cases that cannot be resolved, such as the case Trisakti, Semanggi I, Semanggi II, abduction of activist in 1997/1998, Talangsari Lampung case, Waisor Wamena case, etc. The most of unsolved cases are matters of human rights violation should be tried by an ad hoc human rights court. This was due to the formation of an ad hoc human rights court need a long procedure, as it requires prior approval from parliament, before established by a presidential decree. Whereas the process in parliament is a political process which of course is filled with political interests.

D. - An Ad Hoc Human Rights Court

According to the Article 43, Human Rights Court has the authority to investigate the case of human rights violation that occurred before the Human Rights Court

was established. Article 43 stated:

- “ 1. Gross violations of human rights occurring prior to the coming into force of this Act shall be heard and ruled on by an Ad Hoc Human Rights Court.
2. An Ad Hoc Human Rights Court as referred to in clause (1) shall be formed on the recommendation of the House of Representatives of the Republic of Indonesia for particular incidents upon the issue of a Presidential Decree
3. An Ad Hoc Human Rights Court as referred to in clause (1) is within the context of a Court of General Jurisdiction.”

The parliament as the party that proposed the establishment of an ad hoc tribunal of gross violations of human rights based the proposal on allegations of gross violations of human rights are limited to certain locus delicti and tempus delicti that occurred before enactment of Act No.26 of 2000. The provisions of the several stages for holding of an Ad Hoc tribunal human rights court on gross violations of human rights is different from ordinary tribunal of human rights court. The terms of the convening of an Ad Hoc Human Rights Court are:

- a. Allegation of gross violations of human rights based on investigation by National Commission on Human Rights
- b. The results of the investigation of the Attorney General
- c. The recommendations from parliaments to government to propose an Ad Hoc Human Rights Court in certain locus delicti and tempus delicti
- d. Presidential Decree to establish an Ad Hoc Human Rights Court

The provisions of Article 43 does not set out clearly explain how the procedure or mechanism of the court after the investigation of National Commission on Human Rights. Based on the experience of an Ad Hoc Human Rights Court for East Timor case, then the mechanism are:

- a. The National Commission on Human Rights investigate the allegations of gross violations of human rights, and the results submitted to the Attorney General
- b. The Attorney General conduct the investigation
- c. The results of the investigation submitted to the president
- d. President sent a letter to parliament
- e. The parliament issued the recommendation regarding the occurrence of gross violations of human rights and the need to establish an Ad Hoc Human Rights Court
- f. President issued a presidential decree
- g. An Ad Hoc Human Rights Court formed.

E. Settlement Mechanism Of Gross Violations Human Rights In Indonesian Human Rights Court

The Human Rights Court does not have a special procedural law, so far as not provided in the Act no.26 of 2000, it will be used as the procedural law in the Criminal Procedure Code. According to article 18 of Act No.26 of 2000, inquiries into cases of gross violations of human rights shall be conducted by the National Commission on Human Rights. The National Commission on Human Rights is authorized:

- a. To conduct inquiry into an examination of incidents occurring in society, which based on their nature of scope, can reasonably be suspected of constituting gross violations of human rights.
- b. To receive reports or complaints from individuals or groups concerning the incidence of gross violations of human rights, and to pursue statements and evidence.
- c. To call on complainants, victims, or subjects of a complaint to request and hear their statements
- d. To call on witnesses to request and hear their witness
- e. To review and gather statements from the location of the incident and other locations as deemed necessary
- f. To call on relevant parties to give written statements or to submit necessary authenticated documents
- g. On the order of investigator to: examine of letters, undertake search and seizure, examine houses, yards, buildings. And other places that certain parties occupy or own, dispatch specialist pertinent to the investigation.³

The inquirer shall inform the investigator upon initiating an inquiry into an incident suspected of constituting a gross violation of human rights. Should the National Commission on Human Rights consider there is sufficient preliminary evidence that a gross violation of human rights has occurred, a summary of the findings of the inquiry shall be submitted to the investigator. No later than 7 (seven) working days following the submission of the summary findings of inquiry, the National Commission on Human Rights shall submit the inquiry findings in full to the investigator. In the event that the investigator considers the inquiry findings insufficient, the inquirer shall immediately re-submit the

3 See article 18-19, Act No.26 of 2000

inquiry findings to the investigator accompanied by guidelines for their completion, and within 30 (days) of receiving the inquiry findings, the investigator is required to consummate these insufficiencies.⁴

The investigation of cases of gross violation of human rights shall be undertaken by Attorney General, which is excludes authority to receive reports or complaint. The Attorney General may appoint an ad hoc investigator, which may be a government agency and/or a public constituent. Prosecution of cases of gross violations of human rights shall be conducted by the Attorney General, and must be completed within no more than 90 days from the date of receipt of the investigation findings are received and declared complete by investigator, and may be extended for a period nor exceeding 90 (ninety) days by the Chief Justice of the Human Rughts Court in accordance with his or her judicial scope. In the event that the time periode elapses before the investigation is complete, the investigation may be extended for a period of no more than 60 (sixty) days by the Chief Justice of the Human Rights Court in accordance with his or her judicial scope. If the time period (240 days) insufficient evidence is obtained from the investigation findings, a writ to terminate the investigation must be issued by the Attorney General. Once a writ to terminate an investigation is issued, an investigation may be re opened only if additional proof and evidence for prosecution exists which supplements the investigation findings. In the event that termination of an investigation is not accepted by a victim or his/her family, the victim or his/her family by blood or married to the third degree, has the right to submit a pre trial request to the Chief Justice of Human Rights Court in accordance with his or her judicial scope and in accordance with prevailing legislation.⁵

According to Article 23, prosecution of cases of gross violations of human rights shall be conducted by the Attorney General. The Attorney General may appoint an ad hoc public prosecutor, who may be a member of the gpvernment and/or a public constituent. The prosecution must be completed within no more than 70 (seventy) days from the date of receipt of the investigations findings. The National Commission on Human Rights may at anytime request a written statement from the Attorney General concerning the progress of the investigation and prosecution of a case of gross violations of human rights.

4 Article 20, Act No.26 of 2000

5 Article 21-22, Act No.26 of 2000

Hearing of cases of gross violation of human rights shall be conducted by a Human Rights Court judges' panel of 5 (five) persons, comprising 2 (two) judges from the relevant Human Rights Court and 3 (three) ad hoc judges. The Panel of Judges shall be chaired by a judge from the relevant Human Rights Court. An Ad Hoc Judges shall be appointed and dismissed by the President as Head of State upon the recommendation of Chief Justice of the Supreme Court. Cases of gross violations of human rights shall be heard and ruled on by a Human Rights Court within a period of no more than 180 days from the date of the case being brought before the High Court.

Article 33 stated, in the even of request for appeal to the Supreme Court, a case of gross violation of human rights must be heard and ruled on within a period of no more than 90 (ninety) days from the date of the case being brought before the Supreme Court. Hearings of cases shall be conducted by a judges' panel of 5 (five) persons, comprising 2 (two) Supreme Court judges and 3 (three) ad hoc judges.

F. Weaknesses Of Indonesian Act No. 26 Of 2000

In related to the existence of a human rights court, there are some shortages of setting in the law, which relates to:

- a. the definition of gross violations of human rights,
- b. procedural law is used, and
- c. the preparation on human rights court infrastructure.
- d. regulation
- e. restrictions on the duties and authority of National Commission on Human Rights that can only conduct investigations into the cases of human rights violations as stipulated in article 18, 19, 20, so that in practice it is often that an investigation by National Commission on Human Rights was rejected by Attorney General.

The fifth issue will certainly lead to constraint which will have implications on the process of inspection, verification, and the verdict in court.

According to the definition of serious human rights violations are not explained in depth about what is meant by "widespread", "systematic", and "intention". The obscurity of the third formulation would be a serious problem, because it will cause problems of interpretation by judges, which in turn will have implications in evidentiary phase, which of course will affect sentencing offenders. The problem of errors in the translation of the definition of crimes

against humanity, namely the word "directed" should be interpreted as "directed".⁶ This error in translation raises the implication that the only actors on the ground that can be subject to this provision, while the boss or commander who makes the policy not covered in this article.

In addition, the provisions in article 7 and 9 only recognizes the severe human rights violations as violations in the field of civil and political rights, while the social, economic, and cultural rights not be categorized as violations of human rights. Whereas Indonesian government has ratified the international covenant on economic, through Act No. 11 of 2005.

In terms of jurisdiction, in order for an offence to be tried by the Human Rights Courts, the crime alleged must be either genocide or crimes against humanity (Act No. 26 of 2000, articles 4 & 7). Many serious violations of human rights, including torture, extrajudicial killing or enforced disappearance, do not in themselves meet this requirement and so do not fall within the jurisdiction of the Human Rights Courts.

While Act No. 26 of 2000 was generally intended as a vehicle to incorporate some serious international crimes into Indonesian Law, and although article 7 of Act No. 26 of 2000 makes explicit reference to the Rome Statute of the International Criminal Court, there are some significant definitional differences between the two, in particular with regards to "gross violations of human rights". Some of the important differences are as follows.

- a. Article 8 of Act No. 26 of 2000, dealing with genocide, does not include the ancillary crimes of complicity, attempt, incitement and conspiracy.
- b. Article 9, dealing with crimes against humanity, is to be read together with the General Provisions of Act No. 26 of 2000, which contain definitions of these crimes. While these definitions are broadly similar to the definitions of crimes contained in the Rome Statute and the "Elements of Crimes" elaborated pursuant to the Statute, there are some unfortunate gaps. One of these is the lack of a general inclusive provision similar to article 7(1)(k), covering "acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health".
- c. Article 9 of Act No. 26 of 2000 inserts the word "direct" into the definition of crimes against humanity; i.e., acts perpetrated as part of a widespread and

6 *Dalam bahasa Indonesia, directed diterjemahkan sebagai "ditujukan secara langsung", seharusnya diterjemahkan sebagai "ditujukan"*

systematic direct attack. International law knows no requirement that the attack be "direct".

- d. Article 42 of Act No. 26 of 2000, on superior responsibility for the crimes referred to in articles 8 or 9, contains (at least in the English translation), some significant variations from the text of the corresponding provision in article 28 of the Rome Statute. Article 42(1) provides that a military commander or person acting as a military commander "may" be held responsible, while article 28 uses the mandatory form "shall". Representatives of both the Supreme Court and the Attorney General's Office have confirmed that the word used in the Indonesian text is "may". Further, in relation to Article 42(2), the Human Rights Court has, in the jurisprudence arising from the East Timor cases, interpreted the word 'subordinates' as indicating that it is necessary to establish that a person was exercising de jure authority over the person or persons perpetrating the violations. At international law, it is well established that de jure responsibility may be indicative but is not conclusive of responsibility. The test to be satisfied is whether a superior, be the de jure or de facto responsible for the actions of others below him in the chain of command, had effective control over the persons committing the violations

Mechanism of justice in the court of human rights does not have its own procedural law, but rather use the provisions of criminal law procedure. Whereas criminal law procedure is not designed to prosecute cases of serious human rights violations that the legal nature of the event more special. In this case, the rules contained in the criminal law is not in accordance with international legal standards in adjudicating cases human rights violation such as those used in international justice, the court of Nuremberg, Tokyo, Rwanda, and Yugoslavia. The difficulties encountered related problem such evidence. In the criminal law procedure is known that there are 5 (five) kinds of evidence.⁷ The five provisions of this evidence of course would be difficult to be used to prove the three elements of serious human rights violation which include "widespread", "systematic", and "intention". The international experience in the trial of cases of serious human rights violations actually use the tools of evidence which cannot be used in the criminal law procedure, such are copy of document, newspaper clippings, article, and opinions related to the case.

7 According to Criminal Procedure Code (KUHP), 5 (five) evidences are witnesses testimony, expert testimony, letters, instructions/guidance, testimony of defendant.

There are several problems which related to the existence of an Ad Hoc Human Rights Court. The enactment of retroactive principle in the ad hoc human rights tribunal, by some is considered to be a violation of principle of legality in criminal law. Controversy over the retroactive application of this principle suggests that there are two conflicting perspective regarding the retroactive principle application in human rights cases. The first view suggest that application of retroactive against the principle of legality, while the other, which is followed by government of Indonesia argued that principle of legality can be unfulfilled by international law. For example The Nuremberg and Tokyo Tribunal also applied the retroactive principle.

The problems of infrastructure related to the establishment of Ad Hoc Human Rights Court, recruitment the judges, appointment of public prosecutors, and regulations relating to the witness protection and redress to victims. Ad Hoc Human Rights Court of East Timor case was established using two presidential decrees.⁸ This suggests the existence of complicated process and restrict the jurisdiction of human rights violations that may perform investigations. The recruitment process of the judge does not take place transparently, both career judges and non career judges. In addition, there is no criteria other than technical criteria.

G. Conclusions

Human Rights Court is the court dealing specifically with gross violations of human rights. The Human Rights Court established by Act No. 26 of 2000. The Human Rights Court were established due to international pressure on Indonesia as a result of gross violations of human rights committed in the lead up to the independence of Timor Leste (East-Timor). The Human Rights Court governing jurisdiction over cases of severe human rights violations, both before and after the passage of Indonesian Act No.26 of 2000. Human Rights Court has the task and authority to hear and rule on cases of gross violations of human rights, including the cases of human rights perpetrated by an Indonesian citizen outside the territorial boundaries of the Republic of Indonesia.

Gross Violations of Human Rights, include the crime of genocide and crimes against humanity. The forms of gross violations of human rights including crime of genocide and crimes against humanity are defined limitedly in article 8 and 9

8 Presidential Decree No.53/2001 and Presidential Decree No.96/2001

of Act No.26 of 2000. Gross violations of human rights occurring before 2000, prior to the coming into force of Act No.26 of 2000 shall be heard and ruled on by an Ad hoc Human Rights Court. An ad hoc human rights court shall be formed on the recommendation of the House of Representatives of the Republic of Indonesia for particular incidents upon the issue of a presidential decree.

Since it was established on November 2000, among of some cases of gross violations of human rights , the Indonesian Human Rights Court heard only 3 cases: East Timor, Tanjung Priok, and Abepura. Whereas many cases of gross violations of human rights that have obtained the National Commission Human Rights recommendation, such as cases Riot on Mei 1998, Trisakti Mei 1998, Semanggi I November 1998, Semanggi II September 1999, Abductions and enforced disappearances 1997/1998, Talangsari, Lampung, February 1989, Wasior 2001, and Wamena 2003. With reference to the performance of Indonesian Human Rights Court to settle the cases of gross violation of human rights during 23 years after its establishment, it can be said that the presence of the Human Rights Court in Indonesia is not effective.

Some weaknesses of Act No.26 of 200 are the definition of gross violations of human rights were limited, the lack of coordination between the National Commission of Human Rights and Parliament (in case of an Ad Hoc Human Rights Court), the role of parliament in determining the formation of an ad hoc human rights court, controversy of retroactive principle, difficulty to prove the elements of the crime, and no special procedural law to conduct the Human Rights Court.

In order to make the Human Rights Court in Indonesia more effectively, it need some changes and improvement measures, including Revision of legislation, government's good will, and community participation. Coordination between National Commission on Human Rights and the Office of the Prosecutor also needs to be improved. There has been a consistent tendency on the part of the Prosecutors' Office to blame the quality of the inquiry for problems encountered during investigation or at trial. Some of the criticisms may be justified, but a more constructive approach could lead to regular dialogue and exchange of opinions between the two institutions.

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Rome Statute

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Abstract

Human Rights is very important issue in every countries. The state's duty is to protect the rights and freedoms of citizens. One form of that protection is the establishment of Human Rights Court which established by Act No.26 of 2000. Since its inception in 2000, the performance of the Human Rights Court has yet to conform to societal expectations. Many cases of Human Rights violation that occurred in Indonesia cannot be submitted to the Human Rights Court because of some flaws in the regulation of the Human Rights Court itself. Some problems that lead the operation of the Human Rights Court is less effective are the absence of the principle of minimum sentencing provisions in Act No.26 of 2000, and the absence of specific procedural law which can be used as a guide to prosecute and adjudicate the cases of gross violation of Human Rights. The specific formulation of what is gross Human Rights violation in article 7, 8, and 9 of Act No.26 of 2000 has limited the space for the judge to prosecute war crime cases. According to that article, gross violations of Human Rights consist only of crimes against humanity and genocide. Therefore, in the future to ensure and protect the rights of victims of gross Human Rights violations, then Act No.26 of 2000 need to be revised, thereby allowing the courts run more effectively.

10 Introduction

Human rights mean a set of rights bestowed by God Almighty in the essence and being of humans as creations of God which must be respected, held in the

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The Human Rights Courts were established due to international pressure on Indonesia as a result of gross violations of human rights committed in the lead up to the independence of Timor Leste (East Timor). In 2000-2001 there was much hope that the Human Rights Courts could be used to seriously combat old patterns of impunity for human rights violations. Most observers, both Indonesian and international, agree that this has not proved to be the case.

Since its creation in 2000, the performance of Indonesian Human Rights Court has not been in accordance with the expectations of society. Many cases of severe human rights violations, especially those that occurred prior to 2000 not successfully resolved by the Indonesian human rights court. As a result, people no longer trust the human rights court. Therefore it is necessary for the assessment, if the presence of the human rights court is quite effective to resolve cases on human rights violations in Indonesia.

According to law, there are three possible legal forums where serious violations of human rights can be prosecuted and tried in Indonesia. They are:

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(iii) Military courts, applying the Penal Code and the Military Penal Code, if the offences are assessed as having been committed by a member of the armed forces on duty.

B. The Establishment Of Human Rights Court In Indonesia

According to the Note of Indonesian Act No.26 of 2000, stated that human rights are listed in the Constitution of Republic of Indonesia 1945. The Universal Declaration of Human Rights, and Indonesian Act No. 39 of 1999 must be implemented with full sense of responsibility in accordance with the philosophy contained in Pancasila and the Constitution of Republic Indonesia 1945, as well as the principles of international law. The next starting point of the development of the law, both in terms of national interest as well as of international importance, then to solve the problem of gross violations of human rights and to restore peace and security in Indonesia, it is needed to establish the human rights court, which is a special court for cases of violations of human rights. Laws on human rights court is expected to protect human rights, both for individuals and society, and provide the basis for enforcement, rule of law, justice, and a sense of security for the individual and society against the violations of human rights.

The Human Rights Court were established due to international pressure on Indonesia as a result of gross violations of human rights committed in the lead up to the independence of Timor Leste (East Timor). Human Rights Court established by serious consideration, among which due to violations of human rights is an extraordinary crime and widespread impact, both at the national and international level and it is not a criminal offense set forth in the book of criminal law and cause harm, either material or immaterial, which resulted in feeling of insecurity; both to individuals and society, that needs to be restored in the realization of the rule of law to achieve peace, order, justice and prosperity for all the people of Indonesia. In addition, the human rights cases required investigation measures, investigation, prosecution, and specially examination. The establish of Human Rights Court is also accelerated by the insistence of the United-Nation High Commission in 1999, as a result of the alleged violation of human rights in East Timor during 1999 polls. That insistence had pushed the government of Indonesia under President Habibie to issued Perpu No.1 of 1999. Indonesian government chose to establish a Human Rights Court to solve the

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violation of human rights that occurred in East Timor, both before and after the polls 1999. The formal reasons put forward by Indonesian government² made the United Nations approved the convening of domestic human rights court. The formal reasons is a known principle in international law, namely national remedies proposed officially by the Indonesian government to reject the proposal for the establishment of international tribunal special for East Timor. In addition, there is no remedies exhausted condition that occurs to push for an international tribunal. By the substitute for government regulation legislation (Perppu), the Indonesian government wants to show to the international community that Indonesian government takes seriously to establish a domestic human rights court.

According to the rules of the legislation, Perppu is made by the President then proposed to the plenary session of parliament for approval, so it can be enacted into law. This Perppu unfortunately was rejected by the parliament, so that the president put forward a bill back of human rights⁴ court. On November 20, 2000 finally the human rights court was establish by Act No. 26 of 2000.

C. The Performance Of Human Rights Court In Indonesia

The Human Right⁵ Court established by the Act No. 26 of 2000. The Court governs jurisdiction over cases of severe human rights violations, both before⁵ and after the enactment of Indonesian Act No.26 of 2000. The case of severe human rights violations that occurred before the⁸ Act No.26 of 2000 passed, then the settlement will be carried out by an Ad Hoc Human Rights Court, which established by a Presidential Decree after obtaining recommendation from the legislature. The first Ad Hoc Human Rights tribunal established by Presidential Decree No.96 of 2001 to handle the case of Tanjung Priok and East Timor. The establishment of an Ad Hoc Human Rights tribunal has a significant importance in the context of the promotion and protection of human rights in Indonesia.

According to the Article 1 point 3 Act No.26 of 2000, Human Rights Court is a court dealing specifically with gross violations of human rights. Article 7 stated that gross violations of human rights include:

- a. the crime of genocide
- b. crimes against humanity

The crime of genocide as referred to in Article 7, is any action intended to

2 during the period of Abdurrahman Wahid as a President of RI

destroy or exterminate in whole or in part a national group, race, ethnic group, or religious group, by:

1. killing members of the group;
2. causing serious bodily or mental harm to members of a group;
3. creating conditions of life that would lead to the physical extermination of the group in whole or in part;
4. imposing measures intended to prevent births within a group; or
- 4 forcibly transferring children of a particular group to another group.

Crimes against humanity as referred to in Article 7 section b include any action perpetrated as a part of a broad or systematic direct attack on civilians, in the form of:

1. Killing
2. Extermination
3. Enslavement
4. Enforced eviction or movement of civilians
5. Arbitrary appropriation of the independence or other physical freedoms in contravention of international law
6. Torture
7. Rape, sexual enslavement, enforced prostitution, enforced pregnancy, enforced sterilization, or other similar forms of sexual assault
9. Terrorization of a particular group or association based on political views, race, nationality, ethnic origin, culture, religion, sex or any other basis, regarded universally as contravening international law
10. Enforced disappearance of a person
11. Crime of apartheid

Since its establishment on November 2000, among of some cases of gross violations of human rights, the Court heard only 3 cases: East Timor, Tanjung Priok, and Abepura. Among three of cases which heard in an ad hoc Human Rights Courts, none of the defendants were actually sentenced to imprisonment. But Eurico Gueteres in case of East Timor who had undergone imprisonment for 2 years before finally acquitted after judicial review. While 17 other defendants acquitted on appeal and cassation. In the case of Tanjung Priok, among 14 persons accused of human rights violation, all of them are acquitted after an appeal and some of them acquitted after the cassation.

Part Four: Presenters' Presentation

Likewise in case of Abepura, all defendants are acquitted and there is no defendants sentenced in imprisonment.

Meanwhile, in the case of the other human rights violations, which has obtained the recommendation of the National Commission on Human Rights as a gross violations of human rights, such as Riot on Mei 1998, Trisakti Mei 1998, Semanggi I November 1998, Semanggi II September 1999, abductions and enforced disappearances 1997/1998, Talangsari, Lampung, February 1989, Wasior 2001 and Wamena 2003, has not yet to be tried in Human rights Court, because no decision from parliament stating that such cases are gross violations of human rights.

Many obstacles that lead to Ad Hoc Human Rights Court has not immediately established. Among them is the presence of parliamentary approval in determining whether a case can be classified as gross violations of human rights or not. The parliament is a political institution that used to take a political decision. As a result of that condition, the case of human rights violation that have been recommended by the National Commission on Human Rights until now still unfinished.

As well as to cases of gross violations of human rights that occurred after the presence of Act No.26 of 2000, such as Wasior case, Wamena, Mesuji, etc was also not brought to human rights course. After 13 years since the court was established, Indonesian Human Rights Court heard only 3 cases. Therefore it is very reasonable if the presence of human rights court in Indonesia needs to be reviewed.

Apparently, during 13 years, the performance of Indonesian human rights court had not achieved encouraging results. There are many cases that cannot be resolved, such as the case Trisakti, Semanggi I, Semanggi II, abduction of activist in 1997/1998, Talangsari Lampung case, Waisor Wamena case, etc. The most of unsolved cases are matters of human rights violation should be tried by an ad hoc human rights court. This was due to the formation of an ad hoc human rights court need a long procedure, as it requires prior approval from parliament, before established by a presidential decree. Whereas the process in parliament is a political process which of course is filled with political interests.

12 D. - An Ad Hoc Human Rights Court

According to the Article 43, Human Rights Court has the authority to investigate the case of human rights violation that occurred before the Human Rights Court

was established. Article 43 stated:

- “ 1. Gross violations of human rights occurring prior to the coming into force of this Act shall be heard and ruled on by an Ad Hoc Human Rights Court.
2. An Ad Hoc Human Rights Court as referred to in clause (1) shall be formed on the recommendation of the House of Representatives of the Republic of Indonesia for particular incidents upon the issue of a Presidential Decree
3. An Ad Hoc Human Rights Court as referred to in clause (1) is within the context of a Court of General Jurisdiction.”

The parliament as the party that proposed the establishment of an ad hoc tribunal of gross violations of human rights based the proposal on allegations of gross violations of human rights are limited to certain locus delicti and tempus delicti that occurred before enactment of Act No.26 of 2000. The provisions of the several stages for holding of an Ad Hoc tribunal human rights court on gross violations of human rights is different from ordinary tribunal of human rights court. The terms of the convening of an Ad Hoc Human Rights Court are:

- a. Allegation of gross violations of human rights based on investigation by National Commission on Human Rights
- b. The results of the investigation of the Attorney General
- c. The recommendations from parliaments to government to propose an Ad Hoc Human Rights Court in certain locus delicti and tempus delicti
- d. Presidential Decree to establish an Ad Hoc Human Rights Court

The provisions of Article 43 does not set out clearly explain how the procedure or mechanism of the court after the investigation of National Commission on Human Rights. Based on the experience of an Ad Hoc Human Rights Court for East Timor case, then the mechanism are:

- a. The National Commission on Human Rights investigate the allegations of gross violations of human rights, and the results submitted to the Attorney General
- b. The Attorney General conduct the investigation
- c. The results of the investigation submitted to the president
- d. President sent a letter to parliament
- e. The parliament issued the recommendation regarding the occurrence of gross violations of human rights and the need to establish an Ad Hoc Human Rights Court
- f. President issued a presidential decree
- g. An Ad Hoc Human Rights Court formed.

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E. **4** Settlement Mechanism Of Gross Violations Human Rights In Indonesian Human Rights Court

The Human Rights Court does not have a special procedural law, so far as not **4** provided in the Act no.26 of 2000, it will be used as the procedural law in the Criminal Procedure Code. According to article 18 of Act No.26 of 2000, inquiries into cases of gross violations of human rights shall be conducted by the National Commission on Human Rights. The National Commission on Human Rights is authorized:

- a. To conduct inquiry into an examination of incidents occurring in society, which based on their nature of scope, can reasonably be suspected of constituting gross violations of human rights.
- b. To receive reports or complaints from individuals or groups concerning the incidence of gross violations of human rights, and to pursue statements and evidence.
- c. To call on complainants, victims, or subjects of a complaint to request and hear their statements
- d. To call on witnesses to request and hear their witness
- e. To review and gather statements from the location of the incident and other locations as deemed necessary
- f. To call on relevant parties to give written statements or to submit necessary authenticated documents
- g. On the order of investigator to: examine of letters, undertake search and seizure, examine houses, yards, buildings. And other places that certain parties occupy or own, dispatch specialist pertinent to the investigation.³

The inquirer shall inform the investigator upon initiating an inquiry into an incident suspected of constituting a gross violation of human rights. Should the National Commission on Human Rights consider there is sufficient preliminary evidence that a gross violation of human rights has occurred, a summary of the findings of the inquiry shall be submitted to the investigator. No later than 7 (seven) working days following the submission of the summary findings of inquiry, the National Commission on Human Rights shall submit the inquiry findings in full to the investigator. In the event that the investigator considers the inquiry findings insufficient, the inquirer shall immediately re-submit the

³ See article 18-19, Act No.26 of 2000

³ inquiry findings to the investigator accompanied by guidelines for their completion, and within 30 (days) of receiving the inquiry findings, the investigator is required to ¹ consummate these insufficiencies.⁴

The investigation of ¹² cases of gross violation ¹ human rights shall be undertaken by ¹ Attorney General, which is excludes authority to receive reports or complaint. ⁹ The Attorney General may appoint an ad hoc ⁹ investigator, which may be a government agency and/or a public constituent. Prosecution of cases of ⁸ gross violations of human rights shall be conducted by the Attorney General, and must be completed within no more than 90 days from the date of receipt of the investigation findings are received and declared complete by investigator, and may be extended for a period nor exceeding 90 (ninety) days by the Chief Justice of the Human Rughts Court in accordance with his or her judicial scope. In the event that the time periode elapses before the investigation is complete, the investigation may be extended for a period of no more than 60 (sixty) days by the Chief Justice of the Human Rights Court in accordance with his or her judicial scope. If the time period (240 days) insufficient evidence is obtained from the investigation findings, a writ to terminate the investigation must be issued by the Attorney General. Once a writ to terminate an investigation is issued, an investigation may be re opened only if additional proof and evidence for prosecution exists which supplements the investigation findings. In the event that termination of an investigation is not accepted by a victim or his/her family, the victim or his/her family by blood or married to the third degree, has the right to submit a pre trial request to the Chief Justice of Human Rights Court in accordance with his or her judicial scope and in accordance with prevailing legislation.⁵

According to Article 23, prosecution of cases of gross ¹ violations of human rights shall be conducted by the Attorney General. The Attorney General may appoint an ad hoc ⁸ public prosec¹tor, who may be a member of the gvernment and/or a public constituent. The prosecution must be completed within no more than 70 (seventy) days from the date of receipt of the investigation⁹ findings. The National Commission on Human Rights may at anytime request a written statement from the Attorney General concerning the progress of the investigation and prosecution of a case of gross violations of human rights.

4 Article 20, Act No.26 of 2000

5 Article 21-22, Act No.26 of 2000

Part Four: Presenters' Presentation

Hearing of cases of gross violation of human rights shall be conducted by a Human Rights Court judges' panel of 5 (five) persons, comprising 2 (two) judges from the relevant Human Rights Court and 3 (three) ad hoc judges. The Panel of Judges shall be chaired by a judge from the relevant Human Rights Court. An Ad Hoc Judges shall be appointed and dismissed by the President as Head of State upon the recommendation of Chief Justice of the Supreme Court. Cases of gross violations of human rights shall be heard and ruled on by a Human Rights Court within a period of no more than 180 days from the date of the case being brought before the High Court.

Article 33 stated, in the even of request for appeal to the Supreme Court, a case of gross violation of human rights must be heard and ruled on within a period of no more than 90 (ninety) days from the date of the case being brought before the Supreme Court. Hearings of cases shall be conducted by a judges' panel of 5 (five) persons, comprising 2 (two) Supreme Court judges and 3 (three) ad hoc judges.

F. Weaknesses Of Indonesian Act No. 26 Of 2000

In related to the existence of a human rights court, there are some shortages of setting in the law, which relates to:

- a. the definition of gross violations of human rights,
- b. procedural law is used, and
- c. the preparation on human rights court infrastructure.
- d. regulation
- e. restrictions on the duties and authority of **National Commission on Human Rights** that can only **conduct investigations into the cases of human rights violations as stipulated in** article 18, 19, 20, so that in practice it is often that an investigation by National Commission on Human Rights was rejected by Attorney General.

The fifth issue will certainly lead to constraint which will have implications on the **process** of inspection, verification, and the verdict in court.

According to the **definition of serious human rights** violations are not explained in depth about what is meant by "widespread", "systematic", and "intention". The obscurity of the third formulation would be a serious problem, because it will cause problems of interpretation by judges, which in turn will have implications in evidentiary phase, which of course will affect sentencing offenders. The problem of errors in the translation of the definition of crimes

against humanity, namely the word "directed" should be interpreted as "directed".⁶ This error in translation raises the implication that the only actors on the ground that can be subject to this provision, while the boss or commander who makes the policy not covered in this article.

In addition, the provisions in article 7 and 9 only recognizes the severe human rights violations as violations in the field of civil and political rights, while the social, economic, and cultural rights not be categorized as violations of human rights. Whereas Indonesian government has ratified the international covenant on economic, through Act No. 11 of 2005.

In terms of jurisdiction, in order for an offence to be tried by the Human Rights Courts, the crime alleged must be either genocide or crimes against humanity (Act No.26 of 2000, articles 4 & 7). Many serious violations of human rights, including torture, extrajudicial killing or enforced disappearance, do not in themselves meet this requirement and so do not fall within the jurisdiction of the Human Rights Courts.

While Act No.26 of 2000 was generally intended as a vehicle to incorporate some serious international crimes into Indonesian Law, and although article 7 of Act No. 26 of 2000 makes explicit reference to the Rome Statute of the International Criminal Court, there are some significant definitional differences between the two, in particular with regards to "gross violations of human rights". Some of the important differences are as follows.

- a. Article 8 of Act No. 26 of 2000, dealing with genocide, does not include the ancillary crimes of complicity, attempt, incitement and conspiracy.
- b. Article 9, dealing with crimes against humanity, is to be read together with the General Provisions of Act No. 26 of 2000, which contain definitions of these crimes. While these definitions are broadly similar to the definitions of crimes contained in the Rome Statute and the "Elements of Crimes" elaborated pursuant to the Statute, there are some unfortunate gaps. One of these is the lack of a general inclusive provision similar to article 7(1)(k), covering "acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health".
- c. Article 9 of Act No. 26 of 2000 inserts the word "direct" into the definition of crimes against humanity; i.e., acts perpetrated as part of a widespread and

6 Dalam bahasa Indonesia, *directed* diterjemahkan sebagai "ditujukan secara langsung", seharusnya diterjemahkan sebagai "ditujukan"

systematic direct attack. International law knows no requirement that the attack be "direct".

- d. Article 42 of Act No. 26 of 2000, on superior responsibility for the crimes referred to in articles 8 or 9, contains (at least in the English translation), some significant variations from the text of the corresponding provision in article 28 of the Rome Statute. Article 42(1) provides that a military commander or person acting as a military commander "may" be held responsible, while article 28 uses the mandatory form "shall". Representatives of both the Supreme Court and the Attorney General's Office have confirmed that the word used in the Indonesian text is "may". Further, in relation to Article 42(2), the Human Rights Court has, in the jurisprudence arising from the East Timor cases, interpreted the word 'subordinates' as indicating that it is necessary to establish that a person was exercising *de jure* authority over the person or persons perpetrating the violations. At international law, it is well established that *de jure* responsibility may be indicative but is not conclusive of responsibility. The test to be satisfied is whether a superior, be the *de jure* or *de facto* responsible for the actions of others below him in the chain of command, had effective control over the persons committing the violations

Mechanism of justice in the court of human rights does not have its own procedural law, but rather use the provisions of criminal law procedure. Whereas criminal law procedure is not designed to prosecute cases of serious human rights violations that the legal nature of the event more special. In this case, the rules contained in the criminal law is not in accordance with international legal standards in adjudicating cases human rights violation such as those used in international justice, the court of Nuremberg, Tokyo, Rwanda, and Yugoslavia. The difficulties encountered related problem such evidence. In the criminal law procedure is known that there are 5 (five) kinds of evidence.⁷ The five provisions of this evidence of course would be difficult to be used to prove the three elements of serious human rights violation which include "widespread", "systematic", and "intention". The international experience in the trial of cases of serious human rights violations actually use the tools of evidence which cannot be used in the criminal law procedure, such are copy of document, newspaper clippings, article, and opinions related to the case.

7 According to Criminal Procedure Code (KUHP), 5 (five) evidences are witnesses testimony, expert testimony, letters, instructions/ guidance, testimony of defendant.

There are several problems which related to the existence of an Ad Hoc Human Rights Court. The enactment of retroactive principle in the ad hoc human rights tribunal, by some is considered to be a violation of principle of legality in criminal law. Controversy over the retroactive application of this principle suggests that there are two conflicting perspective regarding the retroactive principle application in human rights cases. The first view suggest that application of retroactive against the principle of legality, while the other, which is followed by government of Indonesia argued that principle of legality can be unfulfilled by international law. For example The Nuremberg and Tokyo Tribunal also applied the retroactive principle.

The problems of infrastructure related to the establishment of Ad Hoc Human Rights Court, recruitment the judges, appointment of public prosecutors, and regulations relating to the witness protection and redress to victims. Ad Hoc Human Rights Court of East Timor case was established using two presidential decrees.⁸ This suggests the existence of complicated process and restrict the jurisdiction of human rights violations that may perform investigations. The recruitment process of the judge does not take place transparently, both career judges and non career judges. In addition, there is no criteria other than technical criteria.

G. Conclusions

Human Rights Court is the court dealing specifically with gross violations of human rights. The Human Rights Court established by Act No. 26 of 2000. The Human Rights Court were established due to international pressure on Indonesia as a result of gross violations of human rights committed in the lead up to the independence of Timor Leste (East Timor). The Human Rights Court governing jurisdiction over cases of severe human rights violations, both before and after the passage of Indonesian Act No.26 of 2000. Human Rights Court has the task and authority to hear and rule on cases of gross violations of human rights, including the cases of human rights perpetrated by an Indonesian citizen outside the territorial boundaries of the Republic of Indonesia.

Gross Violations of Human Rights, include the crime of genocide and crimes against humanity. The forms of gross violations of human rights including crime of genocide and crimes against humanity are defined limitedly in article 8 and 9

8 Presidential Decree No.53/2001 and Presidential Decree No.96/2001

of Act No.26 of 2000. Gross violations of human rights occurring before 2000, prior to the coming into force of Act No.26 of 2000 shall be heard and ruled on by an Ad hoc Human Rights Court. An ad hoc human rights court shall be formed on the recommendation of the House of Representatives of the Republic of Indonesia for particular incidents upon the issue of a presidential decree.

Since it was established on November 2000, among of some cases of gross violations of human rights , the Indonesian Human Rights Court heard only 3 cases: East Timor, Tanjung Priok, and Abepura. Whereas many cases of gross violations of human rights that have obtained the National Commission Human Rights recommendation, such as cases Riot on Mei 1998, Trisakti Mei 1998, Semanggi I November 1998, Semanggi II September 1999, Abductions and enforced disappearances 1997/1998, Talangsari, Lampung, February 1989, Wasior 2001, and Wamena 2003. With reference to the performance of Indonesian Human Rights Court to settle the cases of gross violation of human rights during 23 years after its establishment, it can be said that the presence of the Human Rights Court in Indonesia is not effective.

Some weaknesses of Act No.26 of 200 are the definition of gross violations of human rights were limited, the lack of coordination between the National Commission of Human Rights and Parliament (in case of an Ad Hoc Human Rights Court), the role of parliament in determining the formation of an ad hoc human rights court, controversy of retroactive principle, difficulty to prove the elements of the crime, and no special procedural law to conduct the Human Rights Court.

In order to make the Human Rights Court in Indonesia more effectively, it need some changes and improvement measures, including Revision of legislation, government's good will, and community participation. Coordination between National Commission on Human Rights and the Office of the Prosecutor also needs to be improved. There has been a consistent tendency on the part of the Prosecutors' Office to blame the quality of the inquiry for problems encountered during investigation or at trial. Some of the criticisms may be justified, but a more constructive approach could lead to regular dialogue and exchange of opinions between the two institutions.

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Appendix

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