The Application of International Standards for Fair Trial for Prosecution of Gross Violations of Human Rights in the Indonesian Criminal Proceedings

Heribertus Jaka Triyana *

Contents

Abstract

This article critically analyses whether the existing laws appropriately adopt the standards for fair trial for prosecution of gross violation of human rights in Indonesia. Relevant jurisprudences from the East Timor Ad Hoc Tribunal will be used as the primary legal sources while secondary sources obtained from journal and newspapers, and from doctrines delivered by legal experts and by lawyers will be used as complementary to it.

* Lecturer of International Law, Faculty of Law, Gadjah Mada University (Chair Person of the Responsibility to Protect Division, The Gadjah Mada University Center for Peace and Conflict Resolution)

It has two significances. First, the application of them tests Indonesian readiness and its ability in avoiding the unwilling and unable criteria for an effective implementation of them. Second, it has become a form of everyday politics broadening political discussion into a more Indonesian context and perspective. At the end, both of them will contribute as legal rationales for the development of the Indonesian criminal justice system in the future.

This article concludes that they have not been adopted them comprehensively in terms of its substantive as well as its procedural laws. Inappropriateness to prove beyond reasonable doubts the elements of criminality is the main weakness in its substantive law. Meanwhile, lack of transparent assessment and accessibility to information directed to the victims and to the witness make it ineffective. Consequently, impunity emerged as an imminent product of this failure and accountability and legitimacy are still far away from reality. Thus, adjustment to them is the only way to improve these weaknesses.

I. Introduction

Statements that "Indonesia has failed to bring accountability and to end impunity for those who are responsible for gross violations of human rights, and to bring justice and/or remedy for the victims in the East Timor case" are still fresh and have become hot issues since many of the perpetrators had been released from the charges[1] and from the prison from committing crimes against humanity in the East Timor case. Furthermore, despite the Indonesian Ad Hoc Tribunal for East Timor (the Tribunal hereinafter) has not been in session anymore and the Commission for Reception, Truth and Reconciliation in East Timor concluded its mandate on October 31st, 2005, legal incapacity to enforce the international human rights law standards for a fair trial for example determined by the Commission on Human Rights Resolution 2001/70[2] becomes loudly criticized by

[1] For example Jose Abilio Soares, case register; Nomor Perkara: 01/PID HAM/Ad Hoc/PN JKT PST; former governor of East Timor, was found guilty and sentenced to jail for 3 years imprisonment; Herman Sedyono, case register; and Timbul Silaen, case register, nomor Perkara 02/PID HAM/Ad Hoc/PN JKT PST; Both of them were acquitted due to inappropriate evidence; judgment on 15 August 2008.

[2] United nations High Commissioner for Human Rights Resolution 2001/70, 78th Meeting, 25 April 2001, <http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.RES.2001>.

practitioners, academicians and the victims[3]. In an extreme belief, it proves that the existing laws, i.e. the Law Number 26 of 2000 regarding the Human Rights Tribunal, the Law Number 8 of 1981 regarding the Indonesian Criminal Code (*Kitab Undang-Undang Hukum Acara Pidana (KUHAP)* and the Law Number 31 of 1997 regarding the Indonesian Martial Criminal Code (*Undang-Undang tentang Peradilan Militer (KUHPM)* have not to some extent performed impartially, independently and competently for prosecution of gross violations of human rights. These critics have firmly accepted as legal rationales for the aforementioned statements and debates[4].

This essay aims to critically examine incapacity of the Indonesian legal proceeding in adopting the international human rights law standards for a fair trial for the prosecution of gross violations of human rights. So, recommendations for better adoption mechanisms and for better implementation of them are placed as the mains outcomes of this essay. They are important as legal consideration before ratifying the Rome Statute of the International Criminal Court (the ICC)[5] this year. In this regard, Indonesia shall have effective implementing legislations based on international standards for fair trial standards for prosecution of gross violations of human rights in order to avoid the unwilling and the unable criteria of the ICC in its domestic jurisdiction which are identified as the main problems for the effective implementation of the ICC in relation to a national court[6]. To reach this aim, this paper is divided into three main parts; *first*, legal analysis of their implementation in the Indonesian Criminal Proceedings the East Timor Ad Hoc Tribunal; *second,* analysis of possible recommendations for the adoption of them in the Indonesian criminal proceedings; and *lastly*, the relation of the Indonesian criminal proceedings and the ICC for adoption of the international human rights standards for fair trial for prosecution of gross violations of human rights.

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[3] Komnas HAM, Report of the Human Rights Commission in 1999, produced by KOMNAS HAM; compared with Dunn, James, *Crimes against Humanity in East Timor, January to October 1999: Their Nature and Causes*, (14 February 2001), <http:www.etan.org/news/2001a/dunn1.htm, visited on 1 October 2002>, pp. 10-15.

[4] Elsham Press Release, "Pemerintah Indonesia Harus Bekerjasama Menanggapi Dakwaan Unit Kejahatan Serius Dewan Keamanan PBB", Press Release, February 27, 2003.

[5] Opened for signature 17 July 1998, 37 ILM 999.

[6] Thomas Graditzky, Thomas, "Individual Criminal Responsibility for Violations of International Humanitarian Law in Internal Armed Conflicts", *International Review of the Red Cross* (No. 322. March 1998), pp. 29-56.

II. The International Human Rights Standards for Fair Trial for Prosecution of Gross Violations of Human Rights in Indonesia

The right to a fair trial; i.e. impartial, independent and competent tribunal or court is a basic human right which is endorsed by major international human rights conventions[7], declarations[8] and other international human rights standards[9]. In simple terms, this right has become a customary international law and it has been accepted as a general principle of law binding to all states for prosecution of gross violations of human rights[10]. Consequently, every States has the obligation to bring accountability, to end impunity for those who are responsible for committing them, and to bring justice and/or remedy for the victims.

Those international instruments oblige Party States to take certain measures with regards to the provisions contained therein whether by creating domestic legislations or

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[7] See Article 14 (1) of the *International Covenant on Civil and Political Rights 1966,* entered into force 23 March 1976, 993 UNTS 171, 1966 UNJYB 193; 1977 UKTS 6; Articles 2 and 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination 1966*, entered into forces 4 January 1969, 660 UNTS 195; 1969 UKTS 77; and Articles 2 and 15 *of the Convention on the Political Rights of Women*, 31 March 1953, entered into force 7 July 1954, 193 UNTS 136, 27 USTS 1909, TIAS 8289.

[8] For examples Article 10 of the Universal Declaration of Human Rights 1948,United Nations General Assembly, 10 December 1948, GA Res 217A, UNGAOR, 3rd Sess, Pt. I, Resolutions, at 71, UN Doc. A/810 (1948) states that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him and Article 3 of *the Declaration on the Elimination of Violence against Women 1993*; 20 December 1993, GA Res. 48/104, UNGAOR, 48 Sess, Supp. No. 49 at 217, UN Doc. A/RES/48/104 (1994), 33 ILM 1049 (1994) states that women are entitled to equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. These rights include, *inter alia*: (d) the rights to equal protection under the law.

[9] Part B of *the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights 1984*, UN Doc. E/CN.4/1984/4 (28 September 1984) 7 HRQ 3 (1985; United Nations Standard Minimum Rules for the Administration of Juvenille Justice and Rule of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia.

[10] *Amnesty International Fair Trials Manual*, <http://www.amnesty.org/ailib/intcam/fairtrial/indxftm.htm>, 10, visited on 14 October 2008.

by implementing other effective implementation[11]. But the most important obligation is that they have to ensure that all individuals enjoy it when they are dealing with criminal proceedings[12]. Furthermore, for more effective implementation, they impose a duty to Party States to investigate and to prosecute perpetrators of gross violations of human rights such as crimes against humanity and genocide within their jurisdictions effectively[13]. State practice have given some jurisprudence for effective implementation

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[11] Human Rights Committee, General Comment 3, Article 2, para 1, *Implementation at the national level* (Thirteenth session, 1981), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HR1/GEN/1/Rev.1 at 4 (1994); General Comment, above n 10; Article 1 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms 1954*, 4 November 1950, entered into force 3 September 1953; 213 UNTS 221; ETS 5, 1 EYB 316; Article 3 and 4 *Convention Relating to the Status of Refugees* 1951, 28 July 1951, entered into force 22 April 1954, 189 UNTS 150; 1954 ATS 5; 1961 NZTS 2; *Preamble of the Convention on the Political Rights of Women*, above n 6; Principle 7 of the *Declaration on the Granting of Independence to Colonial Countries and Peoples 1960*, UNGA, 14 December 1960, GA Res 1514, UNGAOR, 15th Sess, Supp No. 16, UN. Docs. A/4684 (1961); Part I *European Social Charter 1961*, 18 October 1961, entered into forces 26 February 1965, 529 UNTS 89, ETS 35, 9 EYB 247; Article 2 of the *International Convention on the Elimination of All Forms of Racial Discrimination 1966*, above n 6; Article 2 of the *International Covenant on Economic, Social and Cultural Rights 1966*, entered into force 3 January 1976; 993 UNTS 3; 1966 UNJYB 170; Article 2 of the *International Covenant on Civil and Political Rights 1966,* above n 6; see the *American Convention on Human Rights 1969*, entered into force 18 july 1978, 1114 UNTS 123; OASTS No. 36, 9 ILM 673; Article 2 of the *Convention on the Elimination of All Forms of Discrimination against Women 1979*, entered into forces 3 September 1981, 1249 UNTS 13, 1989 UKTS 2, 19 ILM 33; See *African Charter on Human and Peoples' Rights 1981* (Banjul Charter), entered into forces 21 October 1986, 21 ILM 59 (1982); Article 4 of the *Declaration of the Elimination of All Forms of Intolerance and of Discrimination based on Religion and Belief 1981*, UNGA, GA Res 36/55, UNGAOR 36th Sess, Supp. No. 51, UN Doc. A/36/51 (1981), 21 ILM 205 (1982); see *the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights 1984*, UN Doc. E/CN.4/1984/4 (28 September 1984) 7 HRQ 3 (1985); *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 1988*, OASTS No. 69, 28 ILM (1989); see Convention *Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment 1984*, entered into force 26 June 1987, GA Res 39/46, UNGAOR, 39th Sess, Supp. No. 51, UN Doc. A/39/51 (1985), 23 ILM 1027; *Inter-American Convention to Prevent and Punish Torture 1985*, entered into forces 28 February 1987, OASTS No. 67, OAS Doc. OEA/SER. P, AG/DOC 2023/85, 25 ILM 519 (1986); *International Convention on the Suppression and Punishment of the Crime of Apartheid,* 30 November 1973*,* GA Res. 3068 (XXVII) (1973), 1015 UNTS 246, 28 UNGAOR Supp(No. 30), UN. Doc. A/Res/3068 (1973), 13 ILM 50 (1974).

[12] General Comment 3, ibidem.

[13] The penal sanction for violation of human rights are found in many domestic legislations, such as in *Filartiga v Pena Irala,* (1980) 630 F.2d 876 (2nd Cir) in Stephens, Beth and Ratner, Micheal. *International Human Rights Litigation in US Courts*. 1996). p. 10 applying the Alien Claim Torture Act (28 USC ss 1350 (1988). This act was also used to give punishment for Lieutenant General Jhony Lumanintang on 1 April 2001, the United States Federal Court House decided that Lieutenant General Jhonny Lumintang

such as in the *Committee of United States Citizens v. Reagen* case in America[14], in the *Nulyarimma v Thompson* case[15], in the *Thorpe v Kennett*[16] case in Australia, and in the *Desire Bouterse case*[17] in the Netherlands.

Those instruments require that criminal proceedings for prosecutions of gross violations require national legislations and their enforcement mechanisms in criminal proceedings (substance and procedure) fulfill several criteria: (1). they have to be established by law for ensuring the proper administration of justice; (2). the jurisdiction of the criminal tribunal shall not violate the guarantees of non-discrimination and equality; (3). the judges shall be independent of the executive and other authorities in deciding the case; (4). the judges shall also be competent and impartial; (5). the procedures during pre trial and at the trial conform to the minimum procedural guarantees of fair trial set out in international standards; (6). the results were in conformity with the international standards, such as abolishment of death penalty and proper management for imprisonment[18].

Indonesia has gone some way to halting all violations of international human rights law. This is by means of enacting effective penal sanctions based on international standards for fair trial on persons committing or ordering human rights abuses to be committed, searching for persons alleged to have committed, or these have ordered to be

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was guilty for crimes against humanity in East Timor after the referendum. This decision is similar to the previous decision to Major General Sintong Panjaitan who found guilty for the Santa Cruz tragedy in 1991, Forum Keadilan, "Vonis dari Negeri Orang" (No. 1, 8 April 2001), p. 68; The notion remedy means that where there is a right, there is a remedy which is used to make human rights abuse claims, see Holmes, Stephen, and R. Sunstaein, Cass R. "The Cost of Rights: Why Liberty Depends on Taxes", in Steiner and Alston. *International Human Rights in Context Law Politics Morals*. 2nd ed. 2000. p. 260. In Indonesia, the term of remedy means that the government has to give compensation, restitution and rehabilitation according to Article 35 of the Act 26/2000 *concerning Human Rights Tribunal*.

[14] *Committee of United States Citizens Living in Nicaragua v. Ronald Wilson Reagen* 859 F.2d 929, 273 U.S. District Columbia 266, No. 87-5053.

[15] (1999) 165 ALR 621, 631 (Wilcox J), 638 (Whitlam J).

[16] (1999) VSC 442 (Unreported, Supreme Court of Victoria, Warren J, 15 November 1999).

[17] der Oije, Pita Schimmelpennick van and Freeland, Steven. "Universal Jurisdiction in the Netherlands- the Rights Approach but the wrong case? Boutarse and the 'December Murders'" *Australian Journal of Human Rights. Vol. 7, No. 2, December 2001.* p. 89.

[18] Human Rights Committee, General comment 13, Article 14, para 3 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 14 (1994), University of Minnesota Human Rights Library, <http://www1.umn.edu/humanrts-/gencomm/hrcom13.htm>, visited on Mach 15th, 2008.

committed, taking measures for the suppression of gross violation of human rights, providing accountability of trials, providing appropriate legislation relating to remedy for the victims and persons of miscarriage of justice, and making mutual assistance among states on criminal matters either in peace or armed conflict situations[19]. Finally, Indonesia also has policies to ensure international human rights law, such as the enquiry procedure, and cooperation with the United Nations, such as making special reports of violence against women, and the application of the Torture convention for prevention of gross human rights violations[20].

The function of the national courts in dealing with the implementation and enforcement of human rights obligations is related to the rule of law determined in each national constitution[21]. The concept of rule of law of a state reflects that its constitution recognizes the supremacy of law, equality before the law, and human rights, because in practical terms, 'a constitution may be understood as an authoritative charter, or a solemn covenant, between the government and its people'[22].

It means that Indonesia has fulfilled its international obligation to implement international human rights for fair trial standards in terms of its national legislations and its implementation. In its criminal proceedings, the Indonesian courts have a role to create, to guarantee and to enforce enjoyment of human rights for individuals within the Indonesian jurisdiction. Besides this, the Indonesian Courts can use those human rights

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[19] Article 8 of the Act 39 of 1999 relating to Human Rights; compared with Article 49 of the *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* Opened for signature on 12 August 1949, 6 UST 3114, TIAS No. 3362, 75 UNTS 31, Article 50 of the *Convention for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of the Armed Forces at Sea,* opened for signature on 12 August 1949, 6 UST 2317, TIAS No. 3363, 75 UNTS 85, Article 129 of the *Convention Relative to the Protection to the Prisoner of War,* Opened for signature on 12 August 1949, 6 UST 3316, TIAS No. 3364, 75 UNTS 135 and Article 146 of the *Convention Relative to the Protection of Civilian Persons in Time of War,* Opened for signature on 12 August 1949, 6 UST 3317, TIAS No. 3365, 75 UNTS 287, ratified Indonesia by Act 59 of 1958; see International Committee of the Red Cross, *The Geneva Conventions of August 12, 1949* (1949), 44-5, 70-1, 132-3, 212-3; see Article 89, Protocol I Additional to Geneva Convention, Opened for signature December 1977, 16 ILM 1391, Kewley, Gretchen. *Humanitarian Law in Armed Conflict*, Australian Red Cross. p. 54.

[20] Steiner and Alston, above note 13. p. 204.

[21] Steiner and Alston, ibidem. pp. 988-91.

[22] Steiner and Alston, Ibidem, p. 989; Budiharjo, Miriam. *Demokrasi di Indonesia: Demokrasi Parlementer dan Demokrasi Pancasila*, (1994) (Indonesian Democracy: Parliamentary Democracy and Pancasila Democracy); Davidson, Scott. *Hak Asasi Manusia*. 1994.

legislations as legal bases to bring accountability for the perpetrators of human rights abuses; i.e. to prosecute, to punish or to give remedies for the victims normatively.

However, jurisprudence from the East Timor Tribunal during the pre trial for implementation of the international human rights standard has been in question since there was indication for discrimination. In this phase, the concept of equality before the law articulates that the law as a system is not discriminatory based on reasonable and objective criteria; i.e. race, color, sex, language, religion, political or other opinion, national or social origin[23]. In fact, the establishment of the Tribunal does not reflect elements of competent, independent and impartial Tribunal since it was established by the legislative body or by the House of Representative. Dominancy from political interests defeated all the aforementioned requirements. The Presidential Decree Number 96 of 1999 as the legal base for the establishment of the Tribunal did not perform effectively because it gave limited jurisdiction; i.e. limited *tempus* and *locus delicti* for just two months (April and September 1999), and only for crimes committed in Liquicia, Dili and Suai districts[24]. As a result, the Presidential Decree abolished the systematic causes of crimes against humanity in East Timor because it only gave authority to investigate and to prosecute immediate and intermediate causes only. It means that this Decree hinders criminal proceedings for obtaining evidence.

According to the Law Number 26 of 2000, at the pre trial proceedings, the prompt standard for investigation of fair trial means that criminal proceeding must be started and have to be completed within a reasonable time, e.g. reasonable time or undue delay[25] has been violated systematically due to complex criminal proceeding institutionalization among the General Attorney, the Indonesian Human Rights Council and by the House of

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[23] See Articles 2 (1) and 26 of the ICCPR; *Broeks v. the Netherlands*, (172/1984), Human Rights Committee, 9 April 1987, 2 Sel. Dec.196; *Zwaan-de Vries v. the Netherlands*, (182/1984), Human Rights Committee, 9 April 1987, 2 Sel. Dec. 209 and see *Amnesty International Fair Trials Manual*, <http://www.amnesty.org/ailib/intcam/fairtrial-/indxftm_b.htm>, 10, visited on 14 October 2002, p. 2.

[24] Article 2 of the Presidential Decree, The Establishment of the East Timor ad hoc Human Rights Tribunal, entered into force on 1 August 2001, State Gazette 111 of 2001.

[25] See Article 14 (3) the ICCPR; Article 7 (1) of the *African Charter on Human and Peoples' Rights 1981* (Banjul Charter), entered into forces 21 October 1986, 21 ILM 59 (1982); Article 8 (1) the *American Convention on Human Rights 1969*, entered into force 18 july 1978, 1114 UNTS 123; OASTS No. 36, 9 ILM 673; Article 21 (4) (c) of the Yugoslavia Statute; Article 20 (4) (c) of the Rwanda Tribunal and Article 67 (1) (c) of the Rome Statute.

Representatives. First, the Indonesian Human Rights Council is the only institution which has the investigation authority on gross violations on human rights in Indonesia by conducting the *pro justicia* procedure; i.e. arrest, doing letter of investigation, confiscation, checking house, yard, and hearing expertise[26]. However, there is no remedy process and remedy for persons of miscarriage of justice during this pre investigation conducted by the National Human Rights Council determined by the Law Number 26 of 2000.

In the Indonesian criminal proceedings during pre trial stage, the normative instruments (system) contribute to the creation of complicity among the investigatory bodies[27]. In this case, the prosecution of gross violations of human rights such as crimes against humanity needs the accusatorial system approach[28] but the Law Number 26 of 200 adopts the inquisitorial system as applied in the East Timor case. Therefore, the system itself contributes to inappropriate standards of fair criminal proceedings and prompt means for conducting criminal investigation. The standard of prompt means for the criminal proceeding did not apply due to the existence of complicated investigatory bodies based on the Indonesian legal procedures. It results to the lack of evidence to prove beyond reasonable doubts for commission of crimes against humanity committed by military perpetrators but it gives clear and acceptable evidence for civilian perpetrators[29].

At the trial phase, the international standards for fair trial will determine the material truth for the case before the tribunal. Therefore, unbiased roles of the judges, juries or those who are involved in this process must be kept without any interference, restriction, inducement, pressure or threat from any quarters[30]. Moreover, decisions about legal facts

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[26] Article 19 g, Act 26 of 2000.

[27] Research from Faculty of Law Gadjah Mada University in cooperation with USAID concerning *"The Legal Implication of the Separation between Indonesian Armed Forces and Police*", November-December 2000.

[28] Legacy from *Prosecutor v. Tadic* in ICTY, Judgment on Allegations of Contempt Against Prior Councel, Milan Vujin, Case No. IT-94-1-A-R77, 31 January 2000 (Shahabudeen, Cassese, Nieto-Navia, Mumba and Hunt, JJ); see Ackerman, John E and Eugene O'Sullivan, Eugene. *Practice and Procedure of the International Criminal Tribunal for the Former Yugoslavia*, 2000. p. 111.

[29] Report of the Human Rights Commission in 1999, produced by KOMNAS HAM; compared with Dunn. *Crimes against Humanity in East Timor, January to October 1999: Their Nature and Causes*. 14 February 2001. <http:www.etan.org/news/2001a/dunn1.htm>, visited on 1 October 2008, pp. 10-15.

[30] See Principle 2 of the basic Principles on the Independence of the Judiciary; supported by *Kartunnen v.*

must be based on evidence or equality of arms; i.e. the rights to call and to examine witness. They must be in accordance to the applicable laws, and the right to trial without undue delay should be applied as a minimum standard at the trial[31]. Although, they are as a minimum standard, the right to a fair trial is broader than the individual guarantee, and relies on the entire conduct of the trial[32].

Individual criminal responsibility for gross violations of human rights is a general principle of law that reflects the accountability from the perpetrators to the victims, justice and truth based on legal considerations[33]. Under the Law Number 26 of 2000, individual criminal responsibility incurs to persons who commit, order to commit, aid or abet gross violations of human rights[34]. Moreover, civilians (bureaucracy and police) and military commanders have the command responsibility based on *mens rea* element if they ignore the information concerning the crimes, and do not try to stop the crimes happen in their territories[35]. In the Abilio Soares, Herman Sedyono and Timbul Silaen cases, they were prosecuted by the application of command responsibility. The remaining question is why they were only prosecuted by the application of command responsibility and ignored other possibilities of such as aiding or abetting for the commission of crimes against humanity? This question reveals the lack of competent

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Finland (387/1989) 23 October 1992, Report of the Human Rights Committee, Volume II, (A/48/40), 1993, 120; Collins v. Jamaica, (240/1987), 1 November 1991, Report of the Human Rights committee, (A/47/40), 1992, 232 para 8.4, quoted from *Amnesty International Fair Trials Manual*, http://www.amnesty.org/ailib/intcam/fairtrial/indxftm_b.htm, 4 and Pinochet 2, *Regina v. Bow Street Metropolitan Stipendiary Magistrates Court and Others, ex parte Pinochet Ugarte (No.2),* [1999] 1 All England Law Reports 577 (reviewed due to bias decision from Lord Hoffman).

[31] Article 10 of the Universal Declaration of Human Rights 1948; Article 14 (1) of the ICCPR; Article 6 (1) of the European Convention on Human Rights; Article 20 (1) of the Yogoslavia Statute; Article 19 (1) of the Rwanda Statute and Article 64 (2) and 67 (1) of the Rome Statute.

[32] Human Rights General Comment, para 5, above n 10 and the Advisory Opinion of the Inter-American Court of Human Rights, OC-11/90, *Exceptions to the Exhaustion of Domestic Remedies*, 10 August 1990, Annual Report of the Inter-American Court, 1990, OAS/Ser L/V/III.23 Doc. 12, rev. 1991, 44, para 24.

[33] Nino, Santiago Nino. *Radical Evil on Trial*. 1996; Malamud-Goti, Jaime. *Game Without End: State Terror and The Politics of Justice*. 1996; Minov, Marta, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, 1998; Kirchheimer, Otto, *Political Justice: The Use Legal Procedure for Political Ends*. 1961; Shklar, Judith. *Legalism: Law, Morals and Political Trials*. 1986; Teitel, Ruti G. *Transnational Justice*. 2000. pp. 69-70 and Oszkar Jaszi, Lewis. *Against the Tyrant: The Tradition and Theory of Tyrannicide*. 1957.

[34] Articles 38-41 of the Act 26 of 2000.

[35] Article 42, ibidem.

and appropriate procedure for obtaining evidence in the Law Number 26 of 2000.

The criminalization for crimes against humanity in Article 7 uses the Rome Statute approach which uses the accusatorial system[36]. Thus, the criminal proceedings must be approached by the accusatorial system, particularly in obtaining evidence and witness. The inquisitorial system was applied pursuant to Article 184 of the Indonesian Criminal Procedure which determines that legal evidence are limited to witness, testimony from experts, letter, direction and accused testimony during the investigation and in the trial process. In addition, witnesses will be accepted as legal evidence if they give their testimonies only before the Tribunal[37]. The weakness applying the inquisitorial system was on the limitation for witness to testify, and limitation of standard of evidence which violated the equality of arms principle[38].

It is argued that the use of the accusatorial system is more flexible to obtain the materiel truth for crimes against humanity than in the inquisitorial system[39]. In *Prosecutor v. Kupreskic*[40], *Prosecutor v. Kvocka et.al*[41], and *Prosecutor v. Delalic et.al.*[42], the ICTY took flexible approach to obtain materiel truth by using records, film, cassette, interview with victims and perpetrators, and did cross examination in each of

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[36] The memory of explanation of the Act 26/2000 states that genocide and crimes against humanity in this Act are those determined in the Rome Statute.

[37] Article 185 KUHAP.

[38] The European Courts Judgment in the Case of Ofrer and Hopfinger, Nos. 524/59 and 617/59, 19 December 1960, Yearbook 6, 680 and 696; European Court, Foucher case, 25 EH RR 234, 247; and ELSAM, Lembaga Studi dan Advokasi Masyarakat, a NGO on human rights movement in Indonesia, press release in Kompas Cyber Media, <http://www.kompas. com/utama/news/0207/04/07485.html>, visited on 11 October 2002.

[39] One of a good examples for the application of accusatorial system is given by Kirby J in *Commissioner, Federal Police v Propend Finance Pty Ltd,* (1997) 188 CLR 501. He pointed out that the adversarial system is based on the assumption that if each side presents its case in the strongest light the Court will be best able to determine the truth; Law Reform Commission of Western Australia, *Consultation Draft: The role of the Legal Profession in Civil and Criminal Proceeding*, Project No. 92 (1998) gives more accurate approach of accusatorial systems as a system that is integrated with various arrangements, concerning legal education, professional structure, the selection and training judges and the mode of legal reasoning; and see rule of procedure of the presentation of evidence especially for crimes against humanity in ICTY Statute, Rule 85 (presentation of evidence).

[40] Decision on Order of Presentation of Evidence, Case IT-95-16-T, 21 January 1999.

[41] Oral Decision on Having the Accused Testimony Prior to Calling of the First Prosecution Witness, Case IT-98-30-T, 28 February 2000.

[42] Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, Case IT-96-21-T, 19 August 1998.

the stages.

It can be summed up that the Indonesian legal incapacity to prosecute perpetrators of gross violations of human is mainly caused by the lack of applying the commonly accepted fair trial standards for contemporary international criminal proceeding for fair trial at the pre and in the trial phases.

III. Possible Adjustment to the Indonesian Criminal Proceedings for Prosecution of Gross Violations of Human Rights According to the International Standards for Fair Trial

Due to the previous indications on legal incapacity in the Indonesian criminal proceedings for prosecution of gross violations of human rights, there are two proposals for effective application of the fair trial standards namely short and long terms reforms. They are outlined below.

First, the short term adjustment highlights the necessity that the international standards recognize the rights for everyone convicted of a criminal offence to have the conviction and sentence reviewed by a higher tribunal[43] as Abilio has appealed, there must be immediate reforms in the following aspects: (1) changing the State Legislation Number 2 of 2002 relating to the Protection for Witness and Victims for gross violations of human rights by making clear provision relating to the terms of security apparatus, burdening the financial cost for the protection to the State, and shifting the request for the protection from security apparatus to the law enforcement apparatus; (2) directly appointing judges for the Appeal Tribunal who must be different from the previous trial to keep independent opinion and judgment selected by the Indonesian Supreme Court (Mahkamah Agung) based on international standard criteria; (3) amending the Presidential Decree No.96/2001 relating to the ad hoc Tribunal jurisdiction by broadening the scope of *tempus* and *locus delicti* for crimes against humanity in East

[43] Article 14 (5) of the ICCPR; Article 8 (2)(h) of the American Convention; Article 24 of the ICTY; Article

Timor and by revealing the systematic causes[44]; (4) improving the administration of the Appeal ad hoc Tribunal to ensure the right of public hearing not only to the appellant but also to the public, and providing appropriate information relating to the schedules, venues and basic documents for the appeal proceedings; and (5) using facts and evidence from several East Timor proceedings, such as the Los Palos case relating to crimes against humanity which had been decided by the East Timor court in the Appeal proceedings.

While this short adjustment is being conducted, long terms proposal is worthy to be proposed as follow: (1) reviewing Act 26 of the 2000. This reform must be taken particularly on the system; i.e. by adopting the adversary system in its proceeding, abolishing double investigation process by joining the investigation conducted by Komnas HAM and the Prosecutor, abolishing the House of Representatives and Executive authority relating to their involvement in the gross violations of human rights criminal proceedings, changing the system of the judge selection conducted by the Indonesian Supreme Court, and abolishing the death penalty by applying contemporary accepted punishment for gross violations of human rights; (2) finishing the Indonesian criminal proceedings draft which has been tried to be codified since 1973 by acknowledging the first review mentioned above; (3) improving national legislations on criminal proceeding by adopting the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights which have been ratified by Indonesia. This will give benefits to strengthen the Indonesian legal system relating to the law enforcement of the international human rights law; (4), ratifying the Rome Statute, particularly to abolish dichotomy in the prosecution for gross violations of human rights whether committed in peace or armed conflict situations, and generally to bear international obligation to end impunity in Indonesian territory; and (5) improving and continuing the effective training of judges, prosecutors, investigators and defense lawyers.

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23 of the ICTR and Article 81 (b) of the Rome Statute and Article 7 (a) of the African Charter.

[44] Elsam Press Release, above note 4. p. 146.

IV. Future Legal Relationship between the Indonesian Criminal Proceedings for Prosecution of Gross Violations of Human Rights and the ICC

Although Indonesia has not ratified the Rome Statute, its contents are intentionally absorbed by the Law Number 26 of 2000 for the determination of the elements of criminality between crimes against humanity and genocide. Imbalance determination of their elements creates obstacles for implementation of fair trial standards for prosecution of gross violations of human rights in Indonesia as experienced by the Tribunal especially to prove beyond reasonable doubts for the elements of crimes against humanity in the Indonesian criminal proceedings.

Those obstacles have to be minimized or vanished in the future for the application if Indonesia really ratifies the Rome Statute which recognizes the primacy of national court by applying the adversary system. This challenge will pose as the biggest problem whether Indonesia will change its inquisitorial system into adversarial system in its criminal proceedings[45]. This condition is a main challenge for Indonesia which plans to ratify it this year unless the aforementioned proposals will be endorsed before ratifying it.

Here, the bottom line is that ICC recognizes the primacy of a national court to prosecute persons who committed gross violations of human rights. The primacy means that a state, Indonesia, has established its criminal proceedings in accordance to the international for fair trial standards to prosecute perpetrator of gross violations of human rights particularly genocide, crimes against humanity and war crimes[46].

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[45] Bantekas, Ilia and Susan, Nash. *International Criminal Law.* 3rd Edition. Routledge Cavendish. 2007. p. 535.

[46] Coalition for the International Criminal Court, US and the ICC,< http://www.iccnow.org/?mod=usaicc>, accessed on 23 February, 2008.

V. Conclusion

Based upon the Indonesian jurisprudence in the ad hoc Tribunal, ignorance based on political considerations to internal barriers in the existing criminal proceedings and unwillingness to apply international standards for fair trials create legal setback in the Indonesian legal system for effective prosecution of gross violations of human rights. Consequently, impunity, absence for remedy to the victims and possible remedy for person of miscarriage of justice emerge as a product for the failure to enforce them that still exist in the Indonesian criminal proceedings. To answer the skepticism and ignorance, the government and the legislator have to make at least two political decisions as mentioned above for the reforms in the Indonesian criminal proceedings. By doing so, the Indonesian criminal justice system can be strengthened based on the principle of rule of law especially to implement international human rights law standard for fair trial especially for the implementation of the Rome Statute of the ICC that will be ratified shortly in the future.

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