

Mechanism for Settlement of Gross Human Rights Violations

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Abstract

This study is entitled Mechanism for Settlement of Serious Human Rights Violations, with the aim of knowing and analyzing the mechanism for settlement of serious human rights violations and its obstacles. The legal research method used is the normative legal research method which emphasizes more on literature studies with primary legal materials, secondary legal materials and tertiary legal materials, using qualitative analysis. The results of this study reveal that the settlement of serious human rights violations can be carried out through the court mechanism and the truth and reconciliation commission mechanism. The obstacles in resolving serious human rights violations are more related to the substance. The mechanism for resolving serious human rights violations is not effective because it adopts the principle of retroactive and no expiration. In addition, the substance of determining the implementation of the human rights court is not effective, thus hampering the further examination process.

1. Introduction

After the end of World War II, it was an initial momentum for the development of Human Rights (HAM) internationally. This was marked by the establishment of the United Nations (UN) in 1945, and the declaration of the Universal Declaration of Human Rights (UDHR) which was later referred to as UDHR by the UN in 1948. The declaration of UDHR by the UN had an influence on the protection of human rights where many countries adopted the provisions regulated in the UDHR. The development of UDHR received international commitment from countries in the world when the World Conference on Human Rights was held in Vienna in 1993, known as the Vienna Conference.

The Republic of Indonesia as an independent country has formulated human rights based on the foundation of the state and the nation's outlook on life, namely Pancasila. The values of the nation's outlook on life are derived from the cultural values of the Indonesian nation. This is stated in the Opening of the 1945 Constitution in the first paragraph, which states: "That in fact independence is the right of all nations, and therefore colonialism in the world must be abolished because it is not in

accordance with humanity and justice."

The development of human rights in Indonesia is actually stated in the 1945 Constitution, but has not been stated transparently. After the change of government, the People's Consultative Assembly (MPR) has stipulated the Decree of the MPR RI Number XVII/MPR/1998 concerning Human Rights, then Law Number 39 of 1999 concerning Human Rights (HAM) was enacted.

The 1945 Constitution (UUD 1945) has undergone several amendments, the last of which was the fourth amendment. In the second amendment to the 1945 Constitution in 2000, the regulation of human rights was stated in detail and firmly in Chapter X A in Article 28A - J.

Law enforcement against serious human rights violations is regulated in the Rome Statute of 1998, which was declared effective since July 1, 2002, namely when the Statute was ratified by 60 countries. The Rome Statute of 1998 became the basis for the establishment of the International Criminal Court (ICC) which is a Permanent International Criminal Court. The ICC was established by the United Nations (UN) in relation to the maintenance of international peace and security.

The Republic of Indonesia as a member of the UN must comply with the rules imposed by the UN. Therefore, in relation to the resolution of human rights violations, Law Number 39 of 1999 concerning Human Rights has been enacted in the State Gazette of the Republic of Indonesia in 1999 Number 165. This was then followed up by the enactment of Law Number 26 of 2000 concerning the Human Rights Court in the State Gazette of the Republic of Indonesia in 2000 Number 208, replacing the Government Regulation in Lieu of Law Number 1 of 1999, because it does not adopt retroactive measures to reveal past crimes.

Human rights are rights that humans have simply because they are human. Humans have them not because they are given to them by or based on their dignity as humans. In this sense, even though everyone is born with different skin colors, genders, languages, cultures and citizenships, they still have these rights. This is the universal nature of these rights. In addition to being universal, these rights cannot be revoked. This means that no matter how bad a person's behavior or how evil a human being is, he will not stop being human, because he still has these rights. In other words, these rights are inherent in him as a human being. The idea of human rights comes from the theory of natural rights. The natural theory of natural law begins with the theory of natural law. Natural law, if traced back to ancient times with Stoic philosophy to modern times through the natural law writings of Saint Thomas Aquinas, which are based on the Thomistic view that posits natural law as part of God's perfect law and can be known through the use of human reason.¹

According to C. de Rover, 1988, human rights violations are defined as a violation of the State's obligations arising from international human rights instruments. The State's violation of its obligations can be carried out either by its own actions (acts of commission) or by its own negligence (acts of omission). In another formulation, human rights violations are actions or negligence of a State against norms

¹ Jack Donnely. (2003). *Universal Human Rights in Theory and Practice*, Cornell University Press, Ithaca and London, h.. 7-21. Jaga Maurice Cranton, (1973). *What are Human Right?* Taplinger, New York, h. 70.

that have not been criminalized by national law but are internationally recognized human rights norms.² In the formulation above, it can be seen that the responsible party is the state, not an individual or other legal entity. So the point of emphasis in human rights violations is state responsibility. The concept of state responsibility in international law is usually understood as "responsibility arising from violations of international law by a state.

In relation to international human rights law, the meaning of state responsibility shifts to "responsibility arising from violations of the obligation to protect and respect human rights by the state". The obligation in question is an obligation arising from international human rights treaties or from international customary law, especially customary international law norms that have a *jus cogens* nature.

The formulation of human rights violations above is not identical to "the most serious international crimes". Although international crimes such as genocide, crimes against humanity, aggression, terrorism, and war crimes can be called "human rights violations", they cannot simply be equated with human rights violations because the responsibilities are very different. In the most serious international crimes, the individual is responsible, not the state, while in human rights violations, the state is responsible.

It has been generally accepted that the state not only has an obligation to respect internationally recognized human rights, but also an obligation to ensure the implementation of these rights within its jurisdiction. This obligation also implies explicitly that the state is obliged to take preventive measures to prevent violations from occurring. If the state takes adequate measures or does not take any preventive measures at all against human rights violations, then the state must be held accountable. This state's responsibility is to the entire international community (*erga omnes*), not to the injured states as known in international law. The human rights violations described above are different from the most serious international crimes, such as crimes against humanity, aggression, terrorism and war crimes. The responsibility for these crimes is different because the person responsible is the individual and not the state.

The term (terminology) of gross human rights violations, as it is known today, is translated from various terms originating from English. These terms include: "gross violation of human rights", "grave violations of human rights", "massive violations of human rights", "systemic violations of human rights", "serious human rights violation", "violations of human rights norms of more serious nature", which are terms that emphasize the word "serious". These terms are all serious and serious violations and are used to distinguish them from ordinary violations or minor violations.³ The International Criminal Court (ICC) for the term gross human rights violations uses the term "the most serious crimes of concern to the international community as a whole", which means that only certain serious crimes that violate the fundamental values of the international community as a whole, which are a threat to world peace, security

² Suparman Marzuki. (2012). *Pengadilan HAM di Indonesia*, Penerbit Erlangga, Jakarta, h. 38.

³ Nur Asmarani. (2015), Disertasi, *Konsep Restorative Justice Dalam Penyelesaian Pelanggaran Hak Hak Asasi Manusia Yang Berat Di Papua*, Universitas Hasanuddin, Makassar, h. 71-72.

and welfare, as crimes that fall under the jurisdiction of the ICC. The crimes that fall under the jurisdiction of the ICC as mentioned in Article 5 include the crime of genocide, crimes against humanity, war crimes and the crimes of agreement.

According to the universal view of human rights, human rights violations can be categorized into three forms, namely:

- a. Violation by Action, human rights violations that occur due to the actions or actions of a person or group of people, whether intentional or not.
- b. Violation by Omission, human rights violations occur because a person/group of people allow human rights violations or crimes or criminal acts/violations of the law to occur.
- c. Human rights violations in terms of the substance of laws and regulations (Legislative Violence), a type of human rights violation that refers to the substance of laws that do not yet contain principles and regulations that are oriented towards human rights.

In Indonesia, the term serious human rights violations is contained in Article 104 paragraph (1) of Law of the Republic of Indonesia Number 39 of 1999 concerning Human Rights, which states: To try serious human rights violations, a Human Rights Court is established within the General Court. Furthermore, in the Republic of Indonesia Law Number 26 of 2000 concerning Human Rights Courts, the term serious human rights violations includes the crime of genocide and crimes against humanity.

As stated above, gross human rights violations according to Article 7 of Law Number 26 of 2000 include only two types of crimes, namely genocide and crimes against humanity. The crime of genocide is any human act committed with the intention of destroying or exterminating all or part of a national group, race, ethnic group, religious group, by:

- a) Killing members of the group, group members are meant to be one or more members of the group;
- b) Causing severe physical or mental suffering to members of the group;
- c) Creating living conditions for the group that result in physical destruction in whole or in part;
- d) Imposing actions aimed at preventing births within the group; or
- e) Forcibly transferring children from other groups.

Meanwhile, crimes against humanity as referred to in Article 9 of Law Number 26 of 2000, are one of the acts committed as part of a widespread and systematic attack that is known to be directed directly at the civilian population, in the form of:

- a. Murder;
- b. Annihilation;
- c. Slavery;
- d. Forced expulsion or transfer of residents;
- e. Deprivation of liberty or other arbitrary deprivation of physical liberty which violates (the principles of) the basic provisions of international law;
- f. Torture;
- g. Rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization or sterilization or other equivalent forms of sexual violence;
- h. Persecution of a particular group or association based on similarities in political

- views, race, nationality, ethnicity, culture, religion, gender or other reasons that have been universally recognized as prohibited according to international law;
- i. Enforced disappearance of people; or
 - j. The crime of apartheid.

In the explanation of Article 9 of the Human Rights Court Law, what is meant by "attacks aimed directly at civilians" is a series of acts committed against civilians as a continuation of the policies of the authorities or policies related to organizations. Murder is intended as stated in Article 340 of the Criminal Code. What is meant by "extermination" includes acts that cause suffering that are carried out intentionally, including acts that hinder the supply of food and medicine that can cause extermination of part of the population.

Slavery in this case includes human trafficking, especially the trafficking of women and children. Meanwhile, the act of "expulsion or forced transfer of population" is the forced transfer of people by means of expulsion or other coercive actions from the area where they legally reside, without reasons permitted by international law. "Torture" is intended to be intentionally and unlawfully causing severe pain or suffering, either physical or mental, to a prisoner or someone under supervision.

Then "enforced disappearance", namely the arrest, detention or abduction of a person by or with the authority, support or approval of the state or organizational policy, followed by a refusal to acknowledge the deprivation of liberty and to provide information about the fate or whereabouts of the person, with the intention of removing from legal protection for a long period of time. "The crime of apartheid" is an inhumane act with the same nature as the characteristics mentioned in Article 8 of Law Number 26 of 2000 which is carried out in the context of an institutional regime of oppression and dominance by a racial group over another racial group or groups and is carried out with the intention of maintaining that regime.

The existence of Law Number 26 of 2000 as a law to resolve serious human rights violations, also applies the principle of retroactive in addition to the principle of legality. The principle of retroactive is applied to serious human rights violations before the enactment of Law Number 26 of 2000, while serious human rights violations that occurred after the enactment of Law Number 26 of 2000 are resolved through the Human Rights Court. The resolution of serious human rights violations before the enactment of the Human Rights Court Law is carried out through the Human Rights Court or the resolution is carried out by the Truth and Reconciliation Commission.

The resolution of serious human rights violations is also stated in Law Number 21 of 2001 concerning Special Autonomy for Papua Province. Papua in its considerations mandates that: Papuan society as God's creation and part of civilized humanity, upholds Human Rights, religious values, democracy, law, and cultural values that live in customary law communities, and has the right to enjoy the results of development fairly. Furthermore, in terms of law enforcement and respect for human rights in Papua, it contains the spirit of problem solving and reconciliation, including the establishment of the Truth and Reconciliation Commission. The establishment of this commission is intended to resolve various problems that occurred in the past with the aim of strengthening the unity and integrity of Indonesia in Papua Province. Based



on the description above, it is important to conduct research on the mechanism for resolving serious human rights violations.

2. Research Method

The legal research method used is the normative legal research method which emphasizes more on literature studies with primary legal materials, secondary legal materials and tertiary legal materials, using qualitative analysis.⁴

3. Results and Discussion

Mechanism for Resolving Serious Human Rights Violations Through the Courts

The Human Rights Court Law, although its existence is a political pressure and an international obligation, the presence of this law is a form of manifestation of protection of human rights which are basic rights that are inherently inherent in humans, especially in Indonesia.

The purpose of making Law Number 26 of 2000 is to maintain world peace; guarantee the implementation of human rights; and provide protection, certainty, justice and feelings of individuals or society. In addition, it has a practical goal, namely to resolve serious human rights violations because (extra ordinary crimes) and have a wide impact, at the national and international levels. Cases tried in the Human Rights Court are not criminal acts regulated in the Criminal Code, but rather acts that cause victims and very large losses, and result in feelings of insecurity, both for individuals and society. Therefore, the situation must be immediately restored for the supremacy of law to achieve peace, order, tranquility, justice, and welfare for all Indonesian people.

There are several important principles in Law Number 26 of 2000 concerning the Human Rights Court, namely:

- a. Only try serious human rights violations. (Article 4). The Human Rights Court was established only to try serious human rights violations, namely Genocide and crimes against humanity. Meanwhile, crimes against Human Rights that are classified as minor are tried in the District Court or Military Court according to the legal status of the accused.
- b. Universal Crimes (Article 5). The Human Rights Court has the authority to examine and decide cases of serious human rights violations committed outside the territorial boundaries of the Republic of Indonesia by Indonesian citizens.
- c. Genocide and crimes against humanity. (Article 7). Serious human rights violations according to Law Number 26 of 2000 only concern the crimes of genocide and crimes against humanity.
- d. Attorney General as Investigator and Public Prosecutor. In cases of human rights violations, the Attorney General acts as Investigator (Article 11) and acts as Public Prosecutor (Article 23).
- e. National Human Rights Commission as Investigator (Article 18). For serious human rights violations, the investigation is carried out by the National Human Rights Commission.

⁴ Ronny Haniatjo Soemitro, (1990). *Metode Penelitian Hukum dan Jurumetri*, PT Ghalia Indonesia, Jakarta, h. 97-98.

- f. Ad Hoc Officials. In the Human Rights Court, there are Ad Hoc Investigators (Article 18 paragraph (2), Ad Hoc Investigators (Article 21 paragraph (3), Ad Hoc Public Prosecutors (Article 23 paragraph (2) and Ad Hoc Judges (Article 27 paragraph (2).
- g. Examination of Appeals and Cassation is limited (Article 32). The time limit for examination of appeals and cassation is limited to a maximum of 90 (ninety) days.
- h. Protection of victims and witnesses (Article 34). In cases of serious human rights violations, victims and witnesses are protected by law enforcement officers and security forces.
- i. There is Compensation, Restitution and Rehabilitation of Victims (Article 35). Victims of serious human rights violations can be given Compensation, Restitution and Rehabilitation.
- j. Threat of increased punishment. In serious human rights violations which constitute acts of genocide, the punishment is in the form of the death penalty, life imprisonment, a maximum imprisonment of 25 (twenty five) years, and a maximum imprisonment of short 10 years. (Article 36) Meanwhile, for crimes against humanity in the form of murder; extermination; forced expulsion or transfer of residents; and torture; punishable by a maximum sentence of 25 (twenty five) years and a minimum of 10 (ten) years. (Article 37) Crimes against humanity in the form of slavery are punishable by imprisonment for a maximum of 15 (fifteen) years and a minimum of 5 (five) years. (Article 38) Crimes against humanity in the form of torture are punishable by a maximum of 15 (fifteen) years and a minimum of 5 (five) years. (Article 39) Crimes against humanity in the form of rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization or sterilization or other equivalent forms of sexual violence; persecution of a particular group or association based on political, racial, national, ethnic, cultural, religious, gender or other reasons which have been universally recognized as prohibited under international law, is punishable by a maximum of 20 (twenty) years and at least 10 (ten) years. (Article 40)
- k. Responsibility of Superior Commanders (Article 42). In cases of serious human rights violations, there is a Commander's responsibility or for serious human rights violations committed by subordinates.
- l. Retroactive (Article 43). Serious human rights violations committed before the enactment of Law Number 26 of 2000 are tried by the Ad Hoc Human Rights Court, which is formed upon the proposal of the People's Representative Council of the Republic of Indonesia and stipulated by Presidential Decree on a case-by-case basis. Regarding the establishment of the Ad Hoc Human Rights Court, through the Constitutional Court decision (June 2015) there is a phrase stating that the establishment of the Ad Hoc Human Rights Court is carried out by Presidential Decree, without a proposal from the DPR.
- m. No statute of limitations. There is no statute of limitations for serious human rights violations. Therefore, it can be processed in human rights courts at any time.

Serious human rights violation cases that have been examined and decided at the Ad Hoc Human Rights Court, namely the East Timor case, the Tanjung Priuk case which were both tried at the Human Rights Court in Jakarta and the Abepura case which was tried at the Human Rights Court in Makassar. The East Timor serious

human rights violation case after the 1999 opinion and was only processed 2 (two) years after it occurred, namely around 2001, and was tried in 2002, while the Tanjung Priuk case in 1984 was legally processed or tried in 2003 after approximately 19 (nineteen) years after it occurred. The Tanjung Priuk case was legally processed based on Presidential Decree Number 53 of 2001 which was updated by Presidential Decree 26 of 2001 which is one package with the East Timor case. The legal process for both cases, although carried out over a long period of time, because Law Number 26 of 2000 adheres to the principle of retroactive and there is no statute of limitations, the legal process for the two cases of serious human rights violations can be carried out. Although the verdicts of both courts on the East Timor case and the Tanjung Priuk case have received much criticism.

In the East Timor gross human rights violation case, the prosecutor's demands were on average 10 years in prison, and only 4 people had different demands, namely Liliek Koeshadianto was charged with 10 years and 5 months in prison, Sugito was charged with 10 years and 3 months in prison, Sujarwo was charged with 10 years and 5 months in prison and G.M. Timbul Silaen was charged with 10 years and 5 months in prison.

Regarding the prosecutor's demands which were on average 10 years in prison, if we look at the criminal provisions in Article 36 and Article 37 where the minimum sentence imposed is 10 years in prison, then the prosecutor's criminal demands are the lowest because they are the shortest criminal threat.

The verdict of the Ad Hoc Human Rights Court, almost all were acquitted except for Abilio Jose Osario Soares who was sentenced to 3 years in prison, Adam Damiri who was sentenced to 3 years in prison, M. Noer Muis who was sentenced to 5 years in prison, Eurico Guterres who was sentenced to 10 years in prison, Soejarwo who was sentenced to 5 years in prison. All criminal verdicts imposed were sentences below the minimum penalty.

Then at the appeal level, the High Court upheld the verdict of the Ad Hoc Human Rights Court at the District Court on behalf of the defendant Abilio Jose Osario Soares with a prison sentence of 3 years. Meanwhile, the defendants Adam Damiri and M. Noer Muis were acquitted by the High Court, while the defendant Eurico Guterres was sentenced by the High Court with a prison sentence of 5 years.

At the cassation level, the Supreme Court decided almost all by not accepting the cassation request from the Public Prosecutor, and only 1 (one) case was rejected and upheld the first-level prison sentence of 3 (three) years imprisonment for the defendant Abilio Jose Osario Soares. Meanwhile, the defendant Eurico Guterres was sentenced to 10 (ten) years imprisonment.

Furthermore, in the judicial review attempt carried out by the defendant on behalf of Abilio Jose Osario Soares, he was acquitted by the Supreme Court on November 4, 2004, while Eurico Guterres was acquitted in the Judicial Review by the Supreme Court on March 14, 2008. Serious human rights violations in the Tanjung Priuk case, which involved 14 (fourteen) people who were eventually acquitted. If we look closely, the gross human rights violations in the Tanjung Priuk case were

demanded by the prosecutor for an average of 10 (ten) years in prison, except for Pranowo who was demanded 5 (five) years in prison.

The decision of the Ad Hoc Human Rights Court for the defendant named Sutrisno Mascung was sentenced to 3 (three) years in prison, while the other 8 defendants were sentenced to 2 (two) years in prison and 4 (four) people were acquitted.

At the High Court level, all defendants were acquitted by the panel of judges. Likewise, at the cassation level, the Supreme Court ruled 'inadmissible', which means that the reasons for the cassation submitted by the public prosecutor were not accepted.

Previously, the East Timor case and the Tanjung Priuk case were gross human rights violations that occurred before the enactment of Law Number 26 of 2000, but were examined and tried using the Human Rights Court Law which adheres to retroactive and has no statute of limitations. This means that serious human rights violations that occurred before the enactment of the Human Rights Court law can be examined and tried, even though the establishment of the Ad Hoc Human Rights Court was carried out with the recommendation and approval of the President.

Next, the serious human rights violations known as the Abepura case involving civilians and security forces in Abepura. The serious human rights violations in the Abepura case involved 2 (two) defendants, namely Johni Wainal Usman and Daud Sihombing, who in the Human Rights Court's decision were both declared not proven (acquitted/vrijspraak). In this writing, the Human Rights Court's decision with the defendant Johny Wainal Usman will be discussed as follows: Decision of the Supreme Court of the Republic of Indonesia Number 01.K / Pid.HAM.AD.HOC / 2006. Indictment and Prosecutor's Demands:

First, the defendant Johny Wainal Usman as the Commander of the Papua Police Mobile Brigade Unit or as a superior did not exercise proper and correct control over his subordinates who were under his authority and effective control, where the defendant knew or consciously ignored information that clearly showed that his subordinates were committing or had just committed a serious human rights violation in the form of murder. That the act of murder was carried out as part of a widespread or systematic attack, knowing that the attack was aimed directly at the civilian population, and the Defendant did not take appropriate and necessary action within the scope of his authority to prevent or stop the act or hand over the perpetrator to the authorized officials for investigation, inquiry and prosecution, namely that the Defendant as a superior had the power to control his subordinates effectively.

Second, that the Defendant as a Superior did not exercise proper and correct control over his subordinates who were under his authority and effective control, where the Defendant knew or consciously ignored information that clearly indicated that his subordinates were committing serious Human Rights violations, namely in the form of persecution of a certain group or association based on political, racial, national, ethnic, cultural, religious, gender or other reasons that have been

universally recognized as prohibited under international law.

That the act of persecution was carried out as part of a widespread and systematic attack, which he knew was aimed directly at the civilian population, and the Defendant did not take the appropriate action required within the scope of his authority to prevent or stop the act or hand over the perpetrators to authorized officials for investigation, prosecution and prosecution. The Defendant as a Superior had the power to control his subordinates effectively, but in carrying out the pursuit and blocking operation against people suspected of being the perpetrators of the attack on the Abepura Police Station.

Judge's Decision. The decision of the judge of the Human Rights Court No. 01 / Pid.HAM / Abepura / 2004 / PN. Mks. dated September 8, 2005, stated that Johny Wainal Usman was not legally and convincingly proven guilty of committing a serious human rights violation as charged in the first and second indictments, thus acquitting the Defendant from these charges (*vrijspraak*) and restoring the defendant's rights in terms of his ability, position, dignity and honor. Regarding the decision of the panel of judges of the Human Rights Court No. 01 / Pid.HAM / Abepura / 2004 / PN. Mks. On September 8, 2005, which acquitted the Defendant from the first and second charges (*vrijpraak*), the Ad Hoc Public Prosecutor filed a cassation Number 40 / Pid / 2005 / PN.Mks dated September 21, 2005. The cassation minutes dated September 30, 2005 from the Ad Hoc Public Prosecutor as the Applicant for the Cassation were received at the Human Rights Court's clerk's office on October 4, 2005.

Obstacles in resolving serious human rights violations through court mechanisms.

After linking the principles in Law Number 26 of 2000 concerning the Human Rights Court as previously described with the cases that have been tried, there are weaknesses in the law, including:

- a) Procedure for the formation of the Ad Hoc Human Rights Court. According to Article 43 of Law Number 26 of 2000 concerning the Human Rights Court, it states: paragraph (1) Serious human rights violations that occurred before the enactment of this Law, are examined and decided by the Ad Hoc Human Rights Court. Paragraph (2) The Ad Hoc Human Rights Court as referred to in paragraph (1) is formed upon the proposal of the People's Representative Council of the Republic of Indonesia based on certain events with a Presidential Decree. In this case, it begins with the results of an investigation by the National Human Rights Commission (KOMNAS HAM) into alleged serious human rights violations which are then followed up by the Attorney General as investigator and prosecutor of alleged serious human rights violations. Based on the results of the Komnas HAM investigation and the Attorney General's investigation, the DPR-RI then provides a "recommendation" to the President to issue a Presidential Decree (*Kepres*) concerning the formation of the Ad Hoc Human Rights Court. Based on the recommendation of the DPR, the President then issued Presidential Decree Number 53 of 2001 dated April 23, 2001, then updated with Presidential Decree Number 96 of 2001 dated August 1, 2001, concerning the establishment of an Ad Hoc Human Rights Court for the East Timor and Tanjung Priuk gross human rights violation cases. The change in the presidential decree was because Presidential Decree Number 53 of 2001 was unclear about the *tempus* and *locus*

delicti.⁵ As intended by the Explanation of Article 43 paragraph 2 of Law Number 26 of 2000, namely: "In the event that the People's Representative Council of the Republic of Indonesia proposes the establishment of an Ad Hoc Human Rights Court, the People's Representative Council of the Republic of Indonesia shall base it on the allegation that there has been a gross violation of human rights which is limited by a certain locus delicti and tempus delicti which occurred before the enactment of this Law. Meanwhile, since the enactment of Law Number 26 of 2000 concerning the Human Rights Court, there have been 9 (nine) incidents which are suspected of being gross human rights violations and which have been examined and decided by the Ad Hoc Human Rights Court, there are 3 (three) cases, namely the East Timor case, the Tanjung Priuk case and the Abepura case. Meanwhile, there are 6 (six) cases which have not been examined, namely the May riots (1998), the Trisakti incident (1998), the Semanggi I incident (1998), the Semanggi II incident (1999), the Wassior incident (2001-2002) and the Wamena incident (2003). The investigation into the above events was conducted by Komnas HAM by forming an ad hoc team in accordance with the provisions of Article 18 paragraph (2) of Law Number 26 of 2000 concerning the Human Rights Court, the Commission for Investigation of Human Rights Violations (KPP HAM) and since 2003 with the name "Ad Hoc Investigation Team" (Tim Ad Hoc). The investigation by the Ad Hoc Team covers only 1 (one) event in this case KPP HAM Tanjung Priuk (1984), KPP HAM East Timor (1999), KPP HAM Abepura and the Ad Hoc Team for the May Riots (1998). The investigation was conducted for more than one event (in this case KPP HAM Trisakti (1998), Semanggi (1998) and Semanggi (1999). The Ad Hoc Team that conducted the investigation into the Wassior incident (2001-2002) and the Wamena incident (2003). If the results of the investigation have been completed, then the investigator (Komnas HAM) is of the opinion that there is sufficient initial evidence, then the results of the investigation conclusion are submitted to the investigator and no later than 7 (seven) days after the completion of the investigation conclusion have been submitted to the Investigator. If the investigator is of the opinion that the results of the investigation are incomplete, the investigator must immediately return them to the investigator accompanied by instructions for completion and within 30 (thirty days) the investigator must immediately complete the deficiencies. The results of the investigation into the 6 (six) incidents that have not been further examined, if viewed in the provisions of Article 22 of Law Number 26 of 2000, that the investigation must be completed no later than 90 (ninety) days (paragraph (1) then can be extended for 90 (ninety) days by the Chairman of the Human Rights Court according to his jurisdiction (paragraph (2), and if not yet completed the investigation can be extended again for 60 (sixty) days by the Chairman of the Human Rights Court in his jurisdiction. Regarding the results of the investigation by Komnas HAM on 6 (six) incidents that have been handed over to the Investigator which until now have been stopped or are unclear, this is due to the provisions of Article 22 Number 26 of 2000, that the extension of the investigation is requested to the Chairman of the Human Rights Court.

⁵ According to Article 2 of Presidential Decree Number 53 of 2001, it states: "The Human Rights Court has the authority to examine and decide on cases of gross human rights violations that occurred in East Timor after the 1999 referendum and that occurred in Tanjung Priuk in 1984, in Binsar Gultom, Gross Human Rights Violations in a State of Emergency in Indonesia, p. 255.

Meanwhile, the formation of the Human Rights Court after the results of the investigation and inquiry have been completed. This means that cases of serious human rights violations have stopped at the Attorney General's Office, because the Human Rights Court has not / has not been formed because the formation was carried out by Presidential Decree. Based on Article 43 paragraph (2) of Law Number 26 of 2000, the Ad Hoc Human Rights Court is formed upon the proposal of the Indonesian House of Representatives based on certain incidents with a Presidential Decree. Therefore, the DPR bases it on the suspicion that it has occurred which is limited to the locus and tempus delicti. Meanwhile, the appointment of Ad Hoc Judges is carried out by the President upon the proposal of the Chief Justice of the Supreme Court, while career Judges to be appointed as career Judges are sufficient with a Supreme Court Decree, because previously they had been appointed as Judges by Presidential Decree. The appointment of Ad Hoc judges to the Ad Hoc Human Rights Court is for a period of 5 (five) years and can be reappointed for 1 (one) term of office. Regarding the establishment of the Ad Hoc Human Rights Court, the Panel of Judges of the Constitutional Court has decided on case Number 18/PUU-V/2007 dated 21 February 2008 concerning the application for Judicial Review against Law Number 26 of 2000 concerning the Human Rights Court, especially Article 42 paragraph (2) submitted by Eurico Guterres. The Constitutional Court's decision has eliminated the authority of the DPR in determining whether or not there have been serious human rights violations as a requirement for the establishment of the Ad Hoc Human Rights Court as regulated in Article 43 paragraph (2) of Law Number 26 of 2000 concerning the Human Rights Court, and the DPR only has the authority to propose the establishment of the Ad Hoc Human Rights Court.

- b) No Limitation. In Article 46 of Law Number 26 of 2000 concerning the Human Rights Court: "For serious human rights violations as referred to in this Law, the provisions regarding the statute of limitations do not apply". This provision shows that every case of serious human rights violations can be examined and tried at any time. This means that it can be investigated by the National Human Rights Commission at any time, then investigated by the Attorney General, but must first obtain a recommendation from the DPR to obtain a Presidential Decree on the establishment of a human rights court for the incident being investigated. The provisions of Article 46 of Law Number 26 of 2000 concerning the Human Rights Court seem vague and unclear and are full of politics. Therefore, for serious human rights violations that occurred before this law was enacted, it is better to resolve them by re-establishing the Truth and Reconciliation Commission (KKR) or something similar.
- c) Retroactive. As previously explained, serious human rights violations that occurred before the enactment of the Human Rights Court Law are examined and decided by the Ad Hoc Human Rights Court, at the suggestion of the DPR based on certain events with a Presidential Decree. The provisions of Article 43 of Law Number 26 of 2000 concerning the Human Rights Court are ineffective. Because cases of serious human rights violations have been investigated by the National Human Rights Commission and have been handed over to the Attorney General, there has been no progress or they have simply stalled. Moreover, in cases that occurred after the enactment of Law Number 26 of 2000 concerning the Human Rights Court, such as the Wassior case (2001-2002) and the Wamena case in 2003. Meanwhile, only the Abepura case has been examined and decided at the

Human Rights Court in Makassar.

- d) Compensation and Restitution. Law enforcement in the field of human rights, including the provision of Compensation, Restitution and Rehabilitation, has never been realized because the provision of compensation, restitution and rehabilitation can be carried out if there has been a court decision that has permanent legal force. Compensation is compensation given by the state, because the perpetrator is unable to provide full compensation for the losses that are his responsibility. While Restitution is compensation given to the victim or his family by the perpetrator or a third party. Restitution can be in the form of returning property; payment of compensation for loss or suffering; or reimbursement for certain actions. Rehabilitation is the restoration of one's original position, such as honor, good name, position, or other rights. This occurs because the provision of compensation, restitution and rehabilitation can be implemented if there has been a permanent human rights court decision. This means that when the first instance court decision includes compensation in its decision but if the Defendant files a legal action and then acquits the Defendant, the compensation stated in the first instance court decision cannot be realized.

4. Conclusion

Based on the description and discussions above, it can be concluded that the resolution of gross human rights violations through the human rights court mechanism is distinguished between gross human rights violations in the past and gross human rights violations after the enactment of the Human Rights Court Law. Gross human rights violations in the past in Indonesia that have been processed in court are the East Timor case and the Tanjung Priuk case, while the case resolved by the Ad Hoc (permanent) Human Rights Court is the Abepura case. Meanwhile, the mechanism for resolving gross human rights violations is ineffective because it adheres to the principle of retroactive and no statute of limitations. In addition, the substance of determining the implementation of the Human Rights Court is ineffective, thus hampering the further examination process.

Based on the conclusion above, the author's suggestion is that the resolution of gross human rights violations or gross human rights violations in the past needs to be encouraged by changing the substance regarding the establishment of a human rights court. Likewise, the establishment of a KKR in Papua needs to be encouraged because it already has a legal basis for its establishment, especially the establishment of a KKR outside the court to resolve gross human rights violations in the past. The provision of compensation such as compensation or restitution to victims and their families and the Papuan community should be in the form of physical or non-physical development priorities.

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