SKRIPSI

HYBRID TRIBUNAL (PENGADILAN CAMPURAN) SEBAGAI METODE PENYELESAIAN KASUS KEJAHATAN INTERNASIONAL

Oleh

DANIL RAMADANI TAWADDUDE
NIM B 111 06 310

UNIVERSITAS HASANUDDIN
FAKULTAS HUKUM
BAGIAN HUKUM INTERNASIONAL
MAKASSAR

2010

HALAMAN JUDUL

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SKRIPSI

Diajukan Sebagai Tugas Akhir dalam Rangka Penyelesaian Studi Sarjana
Dalam Bagian Hukum Internasional
Program Studi Ilmu Hukum

FAKULTAS HUKUM
UNIVERSITAS HASANUDIN
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PENGESAHAN SKRIPSI
(SKRIPSI)

HYBRID TRIBUNAL (PENGADILAN CAMPURAN) SEBAGAI METODE PENYELESAIAN KASUS KEJAHATAN INTERNASIONAL

Disusun dan diajukan oleh:

DANIL RAMADANI TAWADDUDE
NIM.B 111 06 310

telah dipertahankan di hadapan panitia ujian skripsi yang dibentuk dalam rangka penyelesaian studi sarjana Program Studi Ilmu Hukum Bagian Hukum Internasional Fakultas Hukum Universitas Hasanuddin
Pada hari jumat, 06 agustus 2010
Dan Dinyatakan Lulus

Panitia Ujian

Ketua

Dr. Judhariksawan, S.H.,M.H.
NIP.132 240 056

Sekertaris

Maskun, S.H., LL.M.
NIP. 19761129 199903 1005

A.n Dekan
Pembantu Dekan I

Prof. Dr. Muh. Guntur, S.H.,M.H.
NIP. 19650108 199002 1001

PERSETUJUAN PEMBIMBING

Dengan ini menerangkan bahwa skripsi dari :

Nama	:	Danil Ramadani Tawaddude
No. Pokok	:	B 1 I 1 06 310
Bagian	:	Hukum Internasional
Judul Skripsi	:	*Hybrid Tribunal* (Pengadilan Campuran) Sebagai Metode Penyelesaian Kasus Kejahatan Internasional

Telah diperiksa dan disetujui untuk diajukan pada ujian Skripsi.

Makassar, Juli 2010

PEMBIMBING I	PEMBIMBING II
Dr.Judhariksawan,S.H.,M.H.	**Maskun,S.H.,LL.M.**
NIP. 132 240 056	NIP. 19761129 199903 1005

PERSETUJUAN MENEMPUH UJIAN SKRIPSI

Diterangkan bahwa skripsi mahasiswa

Nama	: **DANIL RAMADHANI TAWADDUDE**
Nomor Induk	: B111 06 310
Bagian	: **Hukum Internasional**
Judul Skripsi	: **Hybrid Tribunal (Pengadilan Campuran) sebagai Metode Penyelesaian Kasus Kejahatan Internasional**

Memenuhi syarat untuk diajukan dalam ujian skripsi sebagai ujian akhir Program Studi.

Makassar, Juli 2010

a.n. Dekan
Pembantu Dekan I,

Prof. Dr. Muh. Guntur, S.H., .M.H.
NIP. 19650108199002100l

ABSTRAK

DANIL RAMADANI TAWADDUDE (B III 06 310), *Hybrid Tribunal* Sebagai Metode Penyelesaian Kasus Kejahatan Internasional. Di bawah bimbingan **Dr. Judhariksawan, S.H., M.H**, selaku Pembimbing I dan **Maskun, S.H., LL.M.** selaku Pembimbing II.

Penelitian ini bertujuan untuk mengetahui tentang penerapan *hybrid tribunal* dalam penyelesaian kasus kejahatan internasional, serta mengetahui sejauh mana keuntungan dari penggunaan *hybrid tribunal* sebagai metode penyelesaian kejahatan internasional.

Penelitian ini mengambil lokasi penelitian di Makassar dan DKI Jakarta yang tentunya terkait dengan sumber data yang dikumpulkan berupa data primer dan data sekunder. Pengumpulan data dilakukan dengan teknik wawancara dan juga analisis data sekunder.

Dari hasil penelitian disimpulkan bahwa Penerapan *hybrid tribunal* bersifat kasuistis yang bergantung pada situasi dalam tiap kasus. Secara garis besar, dapat dikatakan bahwa pengadilan campuran dibentuk dengan dua bentuk, yaitu melalui permintaan dari negara tempat kejadian perkara yang diteruskan dalam bentuk perjanjian dan dengan membentuk regulasi atau peraturan yang dibuat oleh perwakilan dari PBB (*Transitional Administration)* yang ada dalam negara tersebut. Hukum yang digunakan pun merupakan hukum campuran antara hukum nasional negara tersebut dengan hukum internasional yang berlaku. Berbeda dengan pengadilan internasional lainnya, pengadilan campuran memiliki anggaran yang berasal dari bantuan atau donor dari beberapa negara, anggaran dari perwakilan PBB di negara tersebut, dan dari negara tempat kejadian perkara itu sendiri dan pengadilan campuran selain dengan biaya yang murah dengan proses yang lebih mudah akibat dari lokasi pengadilan yang berada di tempat kejadian perkara, ada beberapa keuntungan lain yang dapat diperoleh. Kentungan tersebut antara lain peningkatan profesionalisme dari personel lokal dan meningkatkan kapasitas dan kekuatan hukum dari pengadilan tersebut. Ditambah lagi fleksibilitas dari pengadilan ini menyebabkan pengadilan ini menjadi opsi yang patut untuk diperhitungkan.

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Penulis

Danil Ramadani Tawaddude

DAFTAR ISI

BAB I

PENDAHULUAN

A. Latar Belakang

Perkembangan peradilan dan pengadilan internasional tidak terlepas dari pemahaman atas hukum pidana internasional, yang merupakan hukum yang banyak berkaitan dengan pengaturan tentang kejahatan internasional. Dengan demikian, sebenarnya dapat dikatakan bahwa hukum pidana internasional mencakup dua aspek pemahaman. Aspek pemahaman pertama merupakan hukum yang melindungi korban konflik bersenjata (*International humanitarian law*) dan di pihak lain merupakan aspek internasional terhadap hukum pidana nasional negara.

Pemikiran mengenai mengadili indlvidu yang telah melakukan kejahatan dan kekejaman dalam konflik perang telah dikenal lama bahkan sejak zaman Yunani Kuno. Kodifikasi penting dalam bentuk perjanjian internasional yang mengatur hukum perang dirumuskan pada tahun 1889 dan 1907, yaitu Konvensi Den Haag yang menegaskan betapa pentingnya perlindungan terhadap penduduk sipil, kehidupan manusia, hak milik pribadi, hak dan kehormatan keluarga serta keyakinan agama. Penduduk sipil (*non combatant*) maupun pihak yang berperang (*combatant*) tetap harus mendapatkan perlindungan atas dasar asas-asas hukum internasional yang berlaku sebagai kebiasaan di masyarakat beradab, hukum kemanusiaan dan hati nurani.

Perkembangan untuk merumuskan kejahatan perang yang memungkinkan para pelakunya untuk dituntut semakin melembaga setelah Perang Dunia I. Hal ini berdasarkan Perjanjian Versailles 1919 Pasal 228 yang menyatakan bahwa[1]:

> *Pemerintah Jerman mengakui hak dari pihak sekutu dan kekuasaan-kekuasaan terkaitnya untuk menuntut orang-orang yang dituduh melakukan tindakan pelanggaran hukum dam kebiasaan perang ke tribunal militer (pengadilan setempat).*

Meskipun begitu, masih banyak penentangan yang berkisar pada berlakunya *ex post facto justice* yang dianggap oleh delegasi Amerika Serikat sebagai *a question of morality, not law*[2]. Peradilan terhadap tentara Jerman yang dituduh melakukan *war crimes*, yang kemudian diserahkan kepada Pengadilan Jerman cenderung lebih bersifat peradilan administratif dari angkatan darat Jerman. Hal yang menyedihkan adalah ketika Belanda menolak untuk mengekstradisi Kaisar Jerman Kaiser Wilhelm II dengan alasan bahwa kejahatan yang dianggap sebagai kejahatan utama terhadap moralitas internasional yang didakwakan bersifat politis dan tidak dipidana menurut hukum Belanda[3].

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[1] P. Burgess, 2007, *Hukum Pidana Internasional*, ELSAM, Jakarta, hal.235.

[2] *Ex post facto justice* atau biasa disebut dengan *rectroactive legal justice*, adalah pemberlakuan surut suatu undang-undang terhadap tindak pidana. Amerika memandang bahwa hal ini dilakukan agar tidak membiarkan atau melepaskan pelaku yang melakukan tindak pidana sebelum tanggal berlakunya undang-undang. Lihat, Muladi, 2003, *Peradilan Hak Asasi Manusia Dalam Konteks Nasional dan Internasional*, Jakarta, hal. 3. Lihat juga, http://www.duhalme.org/LegalDictionary.

[3] Muladi, *Ibid*,

Sekalipun harus diakui bahwa usaha permulaan untuk membentuk pengadilan pidana internasional sebagai *supranational court* gagal, namun hal ini menumbuhkan dedikasi yang kuat dari para sarjana hukum internasional untuk menindaklanjuti cita-cita tersebut melalui berbagai pertemuan dan perjanjian internasional. Penuntutan secara aktual atas dasar Konvensi Den Haag baru terjadi pada saat digelarnya Mahkamah Militer Internasional di Nuremberg dan Tokyo setelah Perang Dunia II. Peradilan Nuremberg yang dimulai pada bulan November tahun 1945 dan berakhir pada bulan September 1946 dengan penuntutan terhadap 22 terdakwa yang 11 di antaranya dipidana mati, mempunyai kedudukan sangat penting, karena telah menciptakan landasan hukum pidana internasional saat ini. Misalnya saja keberadaan Konvensi Jenewa 1949 dikodifikasikan dengan menggunakan berbagai hukum kebiasaan internasional yang dijadikan acuan dalam Pengadilan Nuremberg dan seterusnya dalam kasus-kasus supranasional[4].

Persoalan tentang keberadaan pengadilan supranasional semula bahkan sampai saat ini banyak diperdebatkan sehubungan dengan Doktrin Kedaulatan Negara dan Immunitas Negara (*Doctrine of State Sovereignity or State Immunity*) yang membentengi suatu perbuatan negara terhadap langkah hukum dari negara lain. Wilayah negara merupakan landasan utama untuk menentukan jurisdiksi kriminal.

[4] Ibid,hal. 4.

Alasan primer masyarakat internasional untuk memaksakan rezim hukum pidana internasional untuk menuntut dan memidana pelaku kekejaman yang dilakukan dalam wilayah suatu negara berdaulat adalah karena kekejaman tersebut seringkali diperintahkan dan bahkan diampuni oleh orang-orang yang berkuasa yang kebal secara *de jure* dan/atau *de facto* dari tuntutan pidana di bawah sistem hukum domestik.

Keberadaan berbagai pengadilan supranasional harus diakui mempunyai tujuan yang bersifat luas. Tujuan-tujuan tersebut antara lain adalah usaha untuk mengakhiri praktek *impunity* dan mekanisme untuk mengakhiri konflik di suatu bangsa, mengambil alih seandainya pengadilan nasional tidak mau atau tidak mampu atau tidak berdaya, berusaha untuk memberikan perlindungan dan restorasi terhadap korban melalui restitusi, kompensasi dan rehabilitasi; serta pemeliharan perdamaian[5].

Data empiris menunjukkan bahwa Mahkamah Militer Internasional (IMT) Nuremberg yang dibentuk setelah Perang Dunia II untuk mengadili tokoh-tokoh NAZI telah menciptakan konsep , *crimes against humanity* dan menyingkirkan imunitas kedaulatan, di samping menerapkan *retroactive Justice* yang kontroversial. 89 dari 182 terdakwa berhasil dipidana. Selanjutnya Mahkamah Militer Internasional di Tokyo (IMTFE) yang mengadili tokoh-tokoh penjahat perang Jepang

[5] Ibid,

seusai Perang Dunia II, telah mengadili 28 terdakwa; ICTY yang dibentuk oleh Perserikatan Bangsa-Bangsa (PBB) pada tahun 1993, telah mengadili 79 orang; ICTR yang juga dibentuk oleh PBB telah mengadili 70 orang, termasuk Jean Kambanda, mantan Perdana Menteri Rwanda.

Khusus mengenai keberadaan Mahkamah Pidana Internasional (*International Criminal Court*) dimensi tujuan tambahannya adalah melengkapi hubungan dalam sistem hukum internasional yang sampai terbentuknya ICC didominasi oleh Mahkamah Internasional (*International Court of Justice*) dengan negara sebagai pihak yang berperkara, sedangkan ICC menerapkan *'individual responsibility'*. Sebagai pengadilan permanen ICC juga berusaha memperbaiki kekurangan dan kelemahan dari pengadilan *ad hoc* yang sering dituduh menerapkan keadilan selektif dengan *tempos* (waktu kejadian perkara) dan *locus delicti* (tempat kejadian perkara). ICC diharapkan menjadi warisan moral (*moral legacy*) bagi mereka yang mendambakan sistem peradilan pidana internasional yang permanen, efektif dan secara politik tidak mengenal kompromi.

Selain itu, kesungguhan masyarakat internasional dalam penegakan hukum pidana internasional atau hukum kejahatan internasional terbukti dengan banyaknya negara-negara yang meratifikasi Statuta Roma sebagai dasar penegakan hukum internasional. Bukan hanya itu, dengan semakin pesatnya

perkembangan hukum internasional banyak tercipta alternatif-alternatif penyelesaian kasus kejahatan internasional. Salah satunya adalah dengan menggunakan *Hybrid Tribunal* (Pengadilan Campuran).

Hybrid Tribunal merupakan metode penyelesaian kasus internasional dengan melakukan penggabungan hukum internasional dengan hukum nasional. Proses *hybrid tribunal* ini pun menggunakan kombinasi hakim nasional dan juga hakim internasional yang duduk saling berdampingan untuk mengadili para pelaku seperti yang terjadi pada Sierra Leone. Metode pengadilan ini sebagai alternatif penyelesaian kasus kejahatan internasional dinilai masih tergolong baru. Pertama kali digunakan terhadap para pelaku *Killing Field* di Kamboja. Kemudian juga diberlakukan terhadap kasus di Sierra Leone dan di Dili, Timor Timur. Penggunaan metode ini dirasakan oleh para pihak sebagai jalan terbaik dalam penegakan hukum baik secara internasional maupun secara nasional. Penggunaan metode ini mengingat penegakan hukum harus dilakukan dengan tanpa kompromi dan juga demi mengurangi pengaruh politik yang dapat membebaskan pelaku kejahatan dikarenakan oleh perlindungan dari hukum nasionalnya.

B. Rumusan Masalah

Rumusan masalah yang diangkat dalam penulisan ilmiah ini adalah sebagai berikut:

1. Bagaimanakah penerapan *hybrid tribunal* dalam penyelesaian kasus kejahatan internasional?
2. Apakah keuntungan dari penggunaan hybrid tribunal sebagai metode penyelesaian kejahatan internasional?

C. Tujuan Penulisan

Tujuan dari penelitian ini adalah sebagai berikut:

1. Untuk mengetahui penerapan *hybrid tribunal* dalam penyelesaian kasus kejahatan internasional.
2. Untuk mengetahui sejauh mana keuntungan dari penggunaan hybrid tribunal sebagai metode penyelesaian kejahatan internasional.

D. Manfaat Penelitian

Kegunaan penelitian dalam penulisan ini antara lain:

1. Secara Akademis/Teoritis

   Diharapkan penulisan ini dapat memberikan sumbangsi pemikiran dalam membangun dan mengembangkan hukum internasional khususnya di bidang hukum pidana internasional.

2. Secara Praktis

   Dapat memberikan masukan bagi pemerintah dan penegak hukum dalam upaya penyelesaian kasus-kasus kejahatan internasional.

BAB II

TINJAUAN PUSTAKA

A. Istilah dan Defenisi Hukum Pidana Internasional

Istilah hukum pidana internasional atau *International Criminal Law* atau *Internationale Strafprocessrecht* semula diperkenalkan dan dikembangkan oleh pakar-pakar hukum internasional dari Eropa daratan seperti: Friederich Meili pada tahun 1910 (Swiss); George Schwarzenberger pada tahun 1950 (Jerman); Gerhard Meuller pada tahun 1965 (Jerman); J.P. Francois pada tahun 1967; Rolling pada tahun 1979 (Belanda); Van Bemmelen pada tahun 1979 (Belanda); kemudian diikuti oleh para pakar hukum dari Amerika Serikat seperti Edmund Wise pada tahun 1965 dan Cherif Bassiouni pada tahun 1986 (Amerika Serikat).

Pengembangan hukum pidana internasional sebagai salah satu cabang ilmu hukum dimulai oleh pekerjaan Gerhard O.W. Mueller dan Edmund M. Wise yang telah menyusun suatu karya tulis *International Criminal Law* dalam rangka proyek penulisan di bawah judul, *Comparative Criminal Law Project* dari Universitas New York. Pekerjaan ini kemudian dilanjutkan oleh Bassiouni dan V. Nanda (1986) yang telah menulis sebuah karya tulis *A Teratise on International Criminal Law* pada tahun 1973[6].

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[6] Romli Atmasasmita, 2003, *Pengantar Hukum Pidana Internasional*, PT. Refika Aditama, Bandung, hal. 19.

Kehadiran cabang ilmu hukum baru ini, telah memperoleh reaksi dari pakar hukum internasional. Ada pun diantara para pendapat, komentar, dan kritik tentang kehadiran disiplin hukum yang baru ini, penulis mengetengahkan pendapat Rolling, seorang pakar hukum internasional Belanda. Rolling, selain membedakan antara *national criminal law* dan *international criminal law*, juga membedakan antara kedua pengertian tersebut dengan istilah *supranational criminal law*. Menurut Rolling, *National Criminal Law* atau hukum pidana nasional adalah, *"the Criminal law which has developed within the national legal order and which is founded on a national source of law"* (hukum pidana nasional adalah hukum pidana yang berkembang di dalam kerangka orde peraturan perundang-undangan nasional dan dilandaskan pada sumber hukum nasional)[7].

International criminal law atau hukum pidana intenasional adalah *"the law which determines what national criminal law will apply offences actually committed if they contain an international element"* (hukum pidana internasional adalah hukum yang menentukan hukum pidana nasional yang akan diterapkan terhadap kejahatan-kejahatan yang nyata-nyata telah dilakukan bila terdapat unsur-unsur internasional di dalamnya). *Supranational criminal law* atau hukum pidana supranasional atau *"the criminal law of the greater community which comprises state and people-means the criminal law standards that have*

[7] *Ibid,hal. 20.*

been developed in that greater community" (hukum pidana dan masyarakat yang lebih luas besar yang terdiri dari negara dan rakyat berarti standar hukum pidana yang telah berkembang di dalam kumpulan masyarakat tersebut). Selanjutnya, Rolling menegaskan bahwa sekalipun ketiga tipe hukum pidana tersebut harus dibedakan, ketiga-tiganya tidak dapat dipisahkan. Ketiganya sangat berkaitan erat dan tergantung satu sama lain, menyatu dan saling beradaptasi[8].

George Schwarzenberger memberi enam pengertian terhadap hukum pidana internasional. Pengertian yang pertama dari hukum pidana internasional adalah hukum pidana internasional memiliki lingkup kejahatan-kejahatan yang melanggar kepentingan masyarakat intenasional, akan tetapi kewenangan melaksanakan penangkapan, penahanan dan peradilan atas pelaku-pelakunya diserahkan sepenuhnya kepada yurisdiksi kriminil negara yang berkepentingan dalam batas-batas territorial negara tersebut. Pengertian yang kedua dari hukum pidana internasional adalah menyangkut kejadian-kejadian dimana suatu negara yang terikat pada hukum internasional berkewajiban memperhatikan sanksi-sanksi atas tindakan perorangan sebagaimana ditetapkan di dalam hukum pidana nasionalnya. Kewajiban-kewajiban ini dapat terjadi dan berasal dari perjanjian-perjanjian internasional (*treaties*) atau dari kewajiban-kewajiban negara yang diatur di dalam hukum kebiasaan internasional. Blackstone dalam

[8] Ibid,

bukunya, *Commentaries on the laws of England* mengungkapkan apa yang disebutkan dengan *offences against the law of nation* termasuk ke dalam kejahatan ini, pertama-tama Blackstone menyebutnya, *piracy;* kemudian ia menyebut, *violation of safe-conduct,* dan *infringement of the rights of ambassadors*[9].

Pengertian yang ketiga dari hukum pidana internasional ini adalah ketentuan-ketentuan di dalam hukum internasional yang memberikan kewenangan atas negara nasional untuk mengambil tindakan atas tindak pidana tertentu dalam batas yurisdiksi kriminilnya dan memberikan kewenangan pula pada negara nasional untuk menerapkan yurisdiksi kriminil di luar batas teritorialnya terhadap tindak pidana tertentu, sesuai dengan ketentuan-ketentuan di dalam hukum internasional. Tindak pidana tertentu menurut hukum internasional ini adalah *piracy* dan *war crimes.*

Pengertian yang keempat dari hukum pidana internasional adalah ketentuan-ketentuan di dalam hukum pidana nasional yang dianggap sesuai dengan tuntutan kepentingan masyarakat internasional. Di dalam pengertian yang keempat ini, hukum pidana internasional dimaksud adalah hukum pidana nasional yang secara minimal dapat memuat ketentuan-ketentuan yang melindungi hak untuk hidup, kemerdekaan, dan hak kepemilikan dari warganya atau warga negara asing. Apabila hukum pidana nasional tidak memuat ketentuan-

[9] Ibid,hal. 23.

ketentuan hukum di atas, maka hukum pidana nasional tersebut belum memenuhi standar sebagai hukum bangsa yang beradab.

Pengertian hukum pidana internasional yang kelima adalah semua aktivitas atau kegiatan penegakan hukum pidana nasional yang memerlukan kerja sama antar negara, baik yang bersifat bilateral maupun multilateral. Pengertian yang kelima ini berkaitan dengan pengertian hukum pidana yang pertama, yaitu hukum pidana internasional dalam arti lingkup territorial hukum pidana nasional. Ini merupakan konsekuensi logis dari pengertian pertama yang telah diuraikan di awal. Pengertian hukum pidana internasional yang keenam adalah objek pembahasan dari hukum pidana internasional yang telah ditetapkan oleh Perserikatan Bangsa-Bangsa (PBB) sebagai kejahatan internasional. Dalam pengertian yang keenam ini, dipersoalkan pula sejauh mana hukum internasional sudah mengakui adanya *international crimes,* dengan konsekuensinya yaitu negara dapat menjadi subjek hukum pidana internasional dan dimintakan pertanggungjawaban pidananya.

Edward M. Wise[10], menyatakan bahwa hukum pidana internasional dalam pengertian yang paling luas meliputi tiga topik. Pertama, kekuasaan mengadili dari pengadilan negara tertentu terhadap kasus-kasus yang melibatkan unsur asing. Hal ini terkait

[10] Shinta Agustina, 2006, *Hukum pidana Internasional,* Andalas University Press, Padang, hal. 14-15

yurisdiksi tindak pidana internasional, pengakuan putusan pengadilan asing, dan kerja sama antar negara dalam menanggulangi tindak pidana internasional. Kedua, prinsip-prinsip hukum publik internasional yang menetapkan kewajiban pada negara-negara dalam hukum pidana atau hukum acara pidana nasional negara yang bersangkutan. Kewajiban tersebut antara lain adalah kewajiban untuk menghormati hak-hak asasi seorang tersangka atau hak untuk menuntut dan menjatuhi pidana terhadap pelaku tindak pidana internasional. Ketiga, mengenai arti sesungguhnya dan keutuhan pengertian hukum pidana internasional termasuk instrument penegakan hukumnya. Tercakup dalam hal ini adalah pembentukan mahkamah pidana internasional.

Cherif Bassiouni[11] menyatakan bahwa, hukum pidana internasional adalah perpaduan dari dua disiplin hukum yang berbeda, agar dapat saling melengkapi, yaitu aspek-aspek pidana dari hukum internasional dan aspek-aspek internasional dari hukum pidana. Masih menurut Bassiouni, hukum pidana internasional adalah disiplin hukum dan memiliki hubungan fungsional diantaranya. Komponen hukum pidana internasional antara lain adalah hukum internasional, hukum pidana nasional, perbandingan hukum pidana, dan prosedur serta hukum hak asasi manusia internasional dan regional.

[11] Eddy O.S. Hiariej, 2009, *Pengantar Hukum Pidana Internasional, Erlangga*, Jakarta, hal. 8.

Pandangan Van Bemmelen[12] mengenai pengertian hukum pidana internasional adalah sebagai berikut:

> *"Dalam hukum pidana nasional juga diatur batas berlakunya di dunia internasional. Peraturan ini kita namakan hukum pidana internasional yang dapat diatur baik dengan undang-undang ataupun dengan perjanjian. Di samping itu terutama setelah Perang Dunia II dirasakan kebutuhan noram yang dapat berlaku sekaligus untuk beberapa negara. Norma ini dapat kita namakan supranasional. Untuk hukum pidana supranasional yang sebenarnya, beberapa negara tidak boleh tidak harus setuju satu sama lain tentang perbuatan yang diancam dengan pidana dalam hubungan internasional dan yang seharusnya disidik oleh polisi supranasional, yang harus dituntut oleh penuntut umum supranasional yang harus diadili oleh hakim supransional. Akhirnya, pelaksanaan keputusan pengadilan harus pula terletak di tangan instansi supranasional. Akan tetapi, tujuan ini masih lama dapat dicapai"*

Bertitik tolak pada pendapat Van Bemmelen di atas, Romli Atmasasmita[13] mengemukakan hal-hal sebagai berikut:

1. Pengertian mengenai hukum pidana internasional diartikan sebagai ketentuan di dalam hukum pidana nasional yang mengatur tentang batas berlakunya hukum pidana nasional tersebut
2. Bagi Van Bemmelen, perbedaan antara hukum pidana supransional dan hukum pidana internasional terletak pada eksistentsi lembaga-lembaga supransional seperti: polisi, jaksa dan hakim, serta pengadilan tersendiri (*supra-institution*)
3. Defenisi hukum pidana internasional menurut Van Bemmelen ini merupakan ciri pandangan yang diakui dalam doktrin pada

[12] Romli Atmasasmita,*Op.Cit.* hal. 31.

[13] Ibid,

kalangan pakar hukum di Eropa daratan pada abad ke-19. Jika dibandingkan dengan pengertian hukum pidana internasional menurut Schwarzenberger, maka defenisi Van Bemmelen termasuk dalam pengertian pertama, yaitu hukum pidana internasional dalam konteks lingkup berlakunya hukum pidana nasional dalam batas territorial (pengertian batas dapat diartikan secara sempit atau secara luas)

Antonio Cassese[14], mendefenisikan hukum pidana internasional sebagai bagian dari aturan-aturan internasional mengenai larangan-larangan kejahatan internasional dan kewajiban negara melakukan penuntutan dan hukuman beberapa kejahatan.

B. Beberapa Macam Tindak Pidana Internasional

Tindak pidana internasional atau *international crimes*, baik menurut perjanjian-perjanjian internasional maupun di dalam hukum kebiasaan internasional, sampai saat ini belum ada ketentuan yang jelas. Hal tersebut disebabkan adanya perdebatan seputar penetapan peristilahannya yang dapat berdampak luas, dalam hal substansi maupun subjeknya[15].

Sudah sejak abad ke-18, masyarakat bangsa-bangsa mengenal dan mengakui kejahatan perompak di laut sebagai kejahatan

[14] Antoni Cassese, 2003, *International Criminal Law*, Oxford Universty Press, hal. 141.
[15] Romli Atmasasmita,*op.cit*, hal.35

internasional yang dikenal sebagai *piracy de jure gentium*[16]. Kejahatan tersebut dianggap sangat merugikan kesejahteraan bangsa-bangsa pada saat itu dan dianggap sebagai musuh bangsa-bangsa. Kemudian ditetapkan sebagai kejahatan internasional karena merupakan satu-satunya tindak kriminal murni.

Defenisi tentang tindak pidana internasional atau kejahatan internasional (*international crimes*) menurut Bassiouni[17] sebagai berikut:

> *"Tindak pidana internasional adalah setiap tindakan yang telah ditetapkan di dalam konvensi-konvensi multilateral dan yang telah diratifikasi oleh negara-negara peserta, sekalipun di dalamnya terkandung salah satu dari kesepuluh karakteristik pidana"*

Kemudian, Bassiouni menjelaskan tentang kesepuluh karakteristik yang dimaksudkan, yaitu:

1. *Explicit recognition of proscribed conduct as constituting an international crime or a crime under international law.* (pengakuan secara eksplisit atas tindakan-tindakan yang dipandang sebagai kejahatan berdasarkan hukum internasional).
2. *Implicit recognition of the penal nature of the act by establishing a duty to prohibit, prevent, prosecute, punish or*

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[16] Istilah *Piracy de jure gentium* merupakan istilah yang dipergunakan pada Zaman Romawi Kuno terhadap para pembajak laut yang dianggap sebagai pelaku kejahatan, mengancam bangsa Romawi yang saat itu menggunakan hukum yang disebut dengan *Jure Gentium* atau hukum nasional terhadap negara kekuasaan Romawi. Lihat, Eddy O.S. Hiariej, *Op.Cit.* hal. 49.

[17] Romli Atmasasmita, *Op.Cit*,hal. 37.

the like (pengakuan secara implisit atas sifat-sifat pidana dari tindakan-tindakan tertentu dengan menetapkan suatu kewajiban untuk menghukum, mencegah, menuntut, menjatuhi hukuman atau pidananya).

3. *Criminalization of the proscribed conduct* (kriminalisasi atas tindakan-tindakan tertentu).
4. *Duty or right to prosecute* (kewajiban atau hak untuk menuntut).
5. *Duty or right to punish the proscribed conduct.* (kewajiban atau hak untuk memidana tindakan tertentu).
6. *Duty or right to extradite* (kewajiban atau hak untuk mengekstradisi).
7. *Duty or right to cooperate in prosecution, punishment, including judicial assistance in penal proceeding.* (kewajiban atau hak untuk bekerjasama di dalam proses pemidanaan).
8. *Establishment of a criminal jurisdiction basis* (penetapan suatu dasar-dasar yurisdiksi kriminil).
9. *Reference to the establishment of an international court* (referensi pembentukan suatu pengadilan internasional).
10. *Elimination of the defense of superiors orders* (penghapusan alasan-alasan perintah atasan).

Dilihat dari perkembangan dan asal-usul tindak pidana internasional ini, maka eksistensi tindak pidana internasional dapat dibedakan dalam[16]:

1. Tindak pidana internasional yang berasal dari kebiasaan yang berkembang di dalam praktik hukum internasional.
2. Tindak pidana internasional yang berasal dari konvensi-konvensi internasional.
3. Tindak pidana internaisonal yang lahir dari sejarah perkembangan konvensi mengenai hak asasi manusia.

Tindak pidana internasional yang berasal dari kebiasaan hukum internasional adalah tindak pidana pembajakan atau *piracy*, kejahatan perang atau *war crimes*, dan tindak pidana perbudakan atau *Slavery*. Tindak pidana internasional yang berasal dari konvensi-konvensi internasional ini secara historis dibedakan antara tindak pidana internasional yang ditetapkan di dalam satu konvensi saja dan tindak pidana internasional yang ditetapkan oleh banyak konvensi.

Tindak pidana internasional yang lahir dari sejarah perkembangan konvensi mengenai hak asasi manusia merupakan konsekuensi logis akibat Perang Dunia II yang meliputi bukan hanya korban-korban perang mereka yang termasuk *combatant*, melainkan juga korban penduduk sipil (*non-combatant*) yang seharusnya dilindungi dalam suatu peperangan. Salah satu tindak pidana internasional ini ialah

[16] *Ibid*, hal. 40.

crimes of genocide sesuai dengan Deklarasi Perserikatan Bangsa-Bangsa (PBB) Tanggal 11 Desember yang menetapkan genosida sebagai kejahatan menurut hukum internasional[19].

Penetapan tindak pidana internasional atau *International crimes* itu diperkuat dalam Piagam Mahkamah Militer Internasional di Nuremberg atau *the International Military Tribunal* yang dibentuk segera setelah Perang Dunia II terakhir (1946). Mahkamah ini ditetapkan oleh negara pemenang Perang Dunia II (Amerika Serikat, Inggris, Prancis, serta Rusia) dan memiliki yurisdiksi atas tiga golongan kejahatan:

1. *Crimes against peace* atau kejahatan atas perdamaian, yang diartikan termasuk persiapan-persiapan atau pernyataan perang agresi.
2. *War crimes* atau kejahatan perang atau pelanggaran atas hukum-hukum tradisional dan kebiasaan dalam peperangan.
3. *Crimes against humanity* yakni segala bentuk kekejaman terhadap penduduk sipil selama peperangan berlangsung.

Dalam naskah rancangan ketiga Undang-Undang Pidana Internasional atau *the International Criminal Code* Tahun 1954, telah ditetapkan 13 kejahatan yang dapat dijatuhi pidana berdasarkan hukum internasional sebagai kejahatan terhadap perdamaian dan keamanan seluruh umat manusia. Ketiga belas tindak pidana ini adalah sebagai berikut:

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[19] *Ibid,*

1. Tindakan persiapan untuk agresi dan tindakan agresi.
2. Persiapan penggunaan kekuatan bersenjata terhadap negara lain.
3. Mengorganisasi atau memberikan dukungan persenjataan yang ditujukan untuk memasuki wilayah suatu negara.
4. Memberikan dukungan untuk dilakukan tindakan terorisme di negara asing.
5. Setiap pelanggaran atas perjanjian pemabatasan senjata yang telah disetujui.
6. Aneksasi wilayah asing.
7. *Genocide* (genosida).
8. Pelanggaran atas kebiasaan dan hukum perang.
9. Setiap pemufakatan, pembujukan, dan percobaan untuk melakukan tindak pidana tersebut pada butir 8 di atas.
10. *Piracy* (Pembajakan).
11. *Slavery* (Perbudakan).
12. Apartheid.
13. *Threat and use of force against internationally protected persons.*

Dalam naskah rancangan Undang-Undang Pidana Internasional atau *The International Criminal Code* Tahun 1979 yang disusun oleh *The international Association of penal law*, telah dimasukkan jenis tindak pidana lainnya, seperti: lalu lintas perdagangan narkotika illegal

(*illicit drug trafficking*), pemalsuan mata uang (*counterfeiting*), keikutsertaan di dalam perdagangan budak, penyuapan (*bribery*), dan pengambilan harta karun negara tanpa izin.

Berdasarkan internasionalisasi kejahatan dan karakterisktik kejahatan internasional, dalam konteks hukum pidana internasional, kejahatan internasional memiliki hirarki atau tingkatan. Sampai dengan tahun 2003 atas dasar 281 konvensi internasional sejak tahun 1812, ada 28 kategori kejahatan internasional. 28 kejahatan internasional tersebut adalah[20]:

1. *Aggression.*
2. *Genocide.*
3. *Crimes against humanity.*
4. *War crimes.*
5. *Unlawful possession or use or emplacement of weapons.*
6. *Theft of nuclear materials.*
7. *Mercenarism.*
8. *Apartheid.*
9. *Slavery and slave-related practices.*
10. *Torture and other forms of cruel, inhuman, or degrading treatment.*
11. *Unlawful human experimentation.*
12. *Piracy.*

[20] Eddy O.S. Hiariej, *Op.Cit.*Hal. 55.

13. *Aircraft hijacking and unlawful acts against international air safety.*
14. *Unlawful acts against the safety of maritime navigation and the safety of platforms on high seas.*
15. *Threat and use of force against internationally protected persons.*
16. *Crimes against United Nations and assiociated personel.*
17. *Taking of civilian hostages.*
18. *Unlawful use of the mail.*
19. *Attacks with explosives.*
20. *Financing of terrorism.*
21. *Unlawful traffic in drugs and related drug offenses.*
22. *Organized crime.*
23. *Destruction and/or theft of national treasures.*
24. *Unlawful acts against certain internationally protected elements of the environment.*
25. *International traffic in obsence materials.*
26. *Falsification and counterfeiting.*
27. *Unlawful interference with submarine cables.*
28. *Bribery of foreign public officials.*

Berdasarkan 28 kategori kejahatan internasional tersebut, M. Cherif Bassiouni[21] membagi tingkatan kejahatan interasional menjadi

[21] *Ibid*,Hal. 56

tiga. Pertama, kejahatan internasional yang disebut sebagai *international crimes* adalah bagian dari *jus cogens*[22]. Tipikal dan karakter dari international crimes berkaitan dengan perdamaian dan keamanan manusia serta nilai-nilai kemanusiaan yang fundamental. Terdapat sebelas kejahatan yang menempati hirarki teratas sebagai *international crime*, yakni:

1. *Aggression.*
2. *Genocide.*
3. *Crimes against humanity.*
4. *War crimes*
5. *Unlawful possession or use or emplacement of weapons.*
6. *Theft of nuclear materials.*
7. *Mercenarism.*
8. *Apartheid.*
9. *Slavery and slave-related practices.*
10. *Torture and other forms of cruel, inhuman, or degrading treatment.*
11. *Unlawful human experimentation.*

Kedua, kejahatan internasional yang disebut sebagai *international delicts.* Tipikal dan karakter *international delicts* berkaitan dengan kepentingan internasional yang dilindungi meliputi lebih dari satu negara atau korban dan kerugian yang timbul berasal dari satu negara.

[22] *Jus Cogens* adalah hukum pemaksa yang tertinggi dan harus ditaati oleh bangsa-bangsa beradab di dunia sebagai prinsip dasar umum dalam hukum internasional yang berkaitan dengan moral. Lihat, Eddy O.S. Hiariej, *Ibid,* hal. 50.

Ada tiga belas kejahatan internasional yang termasuk dalam *international delicts*, yaitu:

1. *Piracy.*
2. *Aircraft hijacking and unlawful acts against international air safety.*
3. *Unlawful acts against the safety of maritime navigation and safety of platforms on the high seas.*
4. *Threat and use of force against internationally protected person.*
5. *Crimes against United Nations and associated personnel.*
6. *Taking of civilian hostages.*
7. *Unlawful use of the mail.*
8. *Attacks with explosive.*
9. *Financing of terrorism.*
10. *Unlawful traffic in drugs and related drug offenses.*
11. *Organized crime*
12. *Destruction and/or theht of national treasures.*
13. *Unlawful acts against certain internationally protected elements of the environment.*

Ketiga, kejahatan internasional yang disebut dengan istilah *international infraction*. Dalam hukum pidana internasional secara normatif, *international infraction* tidak termasuk dalam kategori

international crime dan *international delicts*. Kejahatan yang tercakup dalam *international Infraction* hanya ada empat, yaitu:

1. *International traffic in obsence materials.*
2. *Falsification and counterfeiting.*
3. *Unlawful interference with submarine cable.*
4. *Bribery of foreign public official.*

Bila kita melihat dari pandangan Bassiouni, tampak bahwa sifat dan karakter masing-masing kejahatan tidak berkolerasi positif dengan penegakan hukum pidana internasional itu sendiri. Dari sebelas (11) kejahatan yang dikategorikan sebagai *international crimes* yang menempati hirarki teratas dalam kejahatan internasional, hanya empat kejahatan yang menjadi yurisdiksi Mahkamah Pidana Internasional, yakni:

1. Genosida

Istilah genosida terdiri dari dua kata yakni *geno* dan *cide*. *Geno* atau *genos* berasal dari bahasa Yunani Kuno yang berarti ras, bangsa, dan etnis. Sedangkan, *cide*, *caedere*, atau *cidium* berasal dari bahasa latin yang berarti membunuh. Secara harfiah, genosida dapat diartikan pembunuhan ras. Istilah ini diperkenalkan oleh Raphael Lemkin pada tahun 1944. Seorang Yahudi kelahiran Polandia yang berimigrasi ke Amerika pada tahun 1930, dalam bukunya *Axis Rule In Occupied Europe* yang sama juga dapat berasal dari istilah *ethocide*, terdiri dari kata

Yunani *Ethos* yang berarti bangsa dan kata latin *Cide* yang berarti pembunuhan[23]. Oleh Lemkin, genosida didefinisikan secara lengkap sebagai:

> *As intentional coordinated plan of different actions aiming at the destruction of essential foundation of the life of national groups with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and economic axistence, of national groups and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups,.... The actions involved are directed agaist individuals, not in their individual capacity, but as members of the national group*[24]

Selanjutnya istilah genosida ini didefinisikan dalam *Convention on the Prevention and Punishment of the Crime of Genocide* yang diterima oleh Resolusi Majelis Umum PBB 260A (III), 9 Desember 1948. Dalam Pasal 1 konvensi tersebut dinyatakan bahwa genosida yang dilakukan pada waktu damai atau pada waktu perang adalah kejahatan menurut hukum internasional *(...genocide, whether commited in time of peace or in time of war, is a crime under international law...)*. Sedangkan pengertian genosida dirumuskan secara lengkap dalam pasal 2:

> *Dalam konvensi ini, genosida diartikan sebagai perbuatan-perbuatan berikut, yang dilakukan dengan tujuan merusak begitu saja, keseluruhan atau pun sebagian, suatu kelompok bangsa, etnis, rasial, atau agama seperti:*
>
> *a. Membunuh para anggota kelompok*
> *b. Menyebabkan luka-luka pada tubuh atau mental para anggota kelompok.*

---

[23] Antonio Cessese, 1993, *Human Rights in a Changing World*, Edisi Indonesia, *Hak-Hak Asasi Manusia di Dunia yang Berubah*, diterjemahkan oleh A.Rahman Zainuddin, Cetakan Pertama, Yayasan Obor Indonesia, Jakarta, hal. 99

[24] Eddy, O.S. Hiariej, *Op.Cit*. hal. 59.

c. *Dengan sengaja menimbulkan pada kelompok itu kondisi hidup yang menyebabkan kerusakan fisiknya secara keseluruhan ataupun sebagian.*
d. *Mengenakan upaya-upaya yang dimaksudkan untuk mencegah kelahiran di dalam kelompok itu.*
e. *Dengan paksa mengalihkan anak-anak suatu kelompok ke kelompok lain*[25]

Sementara Pasal 3 Konvensi menyebutkan bahwa perbuatan-perbuatan yang dapat dihukum adalah genosida, persengkokolan untuk melakukan genosida (*conspiracy to commit genoscide)*, hasutan langsung dan di depan umum untuk melakukan genosida (*direct and public incitement to commit genocide*), mencoba melakukan genosida (*attempt to commit genocide*), dan keterlibatan dalam genosida (*complicity in genocide*). Dengan kata lain, pemufakatan jahat, percobaan dan penyertaan melakukan genosida, dihukum sebagaimana melakukan genosida.

2. Kejahatan Terhadap Kemanusiaan

Istilah kejahatan terhadap kemanusiaan pertama kali dikenal dalam deklarasi bersama antar Perancis, Inggris, dan Rusia pada Tanggal 24 Mei 1915. Deklarasi bersama ini ditujukan untuk mengutuk tindakan Turki atas kekejaman yang dilakukannya selama perang terhadap populasi Armenia di Turki. Oleh deklarasi

[25] *Ibid*,hal. 60.

itu, pembantaian terhadap populasi Armenia dikenal dengan istilah *"crimes against civilization and humanity"*.

Defenisi lebih rinci terhadap istilah "*crimes against humanity*" dapat ditemukan dalam Piagam London yang melahirkan *Nuremberg Trial*. Dalam pasal 6 (c) *London Charter of the International Military Tribunal* secara lengkap dinyatakan[26]:

> *Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts ccommited against any civilian population, before and during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, wether or not in violation of the domestic law of the country where perpetrated*

Demikian pula dalam *Charter of the International Military Tribunal For the Far East* yang membentuk *Tokyo Tribunal*. Defenisi kejahatan terhadap kemanusiaan terdapat dalam Pasal 5 (c) lengkapnya berbunyi[27]:

> *Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts commited against any civilian population, before or during the war; or presecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, wether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulationor execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.*

[26] *Ibid*,hal. 61.
[27] *Ibid*,

Istilah kejahatan terhadap kemanusiaan dalam konvensi mengenai ketidakberlakuan pembatasan aturan hukum untuk kejahatan perang dan kejahatan terhadap kemanusiaan, Resolusi Majelis Umum PBB 2391 (XXIII), 26 November 1968 tercantum dalam Pasal 1 (b). secara eksplisit dalam pasal tersebut dikatakan:

> *Kejahatan-kejahatan kemanusiaan apakah dilakukan dalam waktu perang atau dalam waktu damai seperti yang didefinisikan dalam piagam tribunal militer internasional, Nuremberg, 8 Agustus 1945 dan yang dikuatkan dengan resolusi-resolusi Majelis Umum Perserikatan Bangsa-Bangsa, 3 (1) 13 Februari 1946 dan 95 (1) 11 Desember 1946 pengusiran dengan bersenjata, atau pendudukan dan perbuatan-perbuatan tidak manusiawi, yang diakibatkan dari apartheid, dan kejahatan genosida, seperti yang didefinisikan dalam konvensi 1948 tentang pencegahan dan penghukuman terhadap kejahatan genosida, sekalipun perbuatan-perbuatan tersebut tidak merupakan kejahatan terhadap hukum domestik dari negara tempat kejahatan-kejahatan itu dilakukan.*

Istilah kejahatan terhadap kemanusiaan telah digunakan di dalam proses peradilan bagi penjahat perang bahkan menjadikannya sebagai bagian dari yurisdiksinya oleh Mahkamah Militer Internasional di Nuremberg tahun 1946 dan Mahkamah Militer Internasional di Tokyo tahun 1948, dan menjadi wacana akademik di lingkar kajian hukum internasional dewasa ini, walaupun sempat tenggelam untuk beberapa saat dari isu dunia internasional. Namun, peristiwa perang yang terjadi diantara dasawarsa 70-an (tujuh puluhan) sampai 90-an (Sembilan

puluhan) berhasil memunculkan kembali wacana kejahatan terhadap kemanusiaan ke dalam lingkar publik.

Secara konfrehensif dirumuskan dalam Statuta Roma yang dimaksud dengan kejahatan terhadap kemanusiaan adalah setiap tindakan berikut ini apabila dilakukan sebagai bagian dari upaya penyerangan yang sistematis atau menyebar luas yang diarahkan terhadap salah satu kelompok sipil, berupa[28]:

1. Pembunuhan (*murder*).
2. Pembasmian (*extermination*).
3. Perbudakan (*enslavement/slavery*).
4. Pengusiran atau pemindahan secara paksa atas penduduk (*deportation or forcible transfer of population*).
5. Penahanan atau penghukuman yang berupa pengurangan kebebasan yang merupakan pelanggaran atas kaidah hukum yang fundamental (*detention or deprivation of liberty in violation of fundamental legal norms*).
6. Penyiksaan (*torture*).
7. Pemeriksaan atau penyalahgunaan seksual lainnya atau pemaksaan untuk melakukan prostitusi (*rape or other sexual abuse or enforced prostitution*).

[28] I wayan Patiana, 2003, Hukum Pidana Internasional dan Ekstradisi,Yrama Widya,Bandung,24-26

8. Penyiksaan atau penganiayaan yang dilakukan terhadap kelompok manusia berdasarkan alasan politik, ras, kebangsaan, etnis, budaya, atau agama, atau gender atau alasan-alasan lain yang serupa (*presecution against any identifieable group or collectivity on political, racial, national, ethnic, cultural or religious or gender or other similar grounds*).
9. Penculikan/penghilangan secara paksa atas seorang individu (*enforced disappearance of persons*).
10. Kejahatan apartheid.
11. Tindakan-tindakan lainnya yang tidak berperikemanusiaan atau tindakan-tindakan yang memiliki ciri-ciri serupa yang mengakibatkan penderitaan yang berat atau kerusakan yang serius terhadap badan, mental, atau kesehatan fisik (*other inhumane acts of similar character causing great suffering or serious injury to body or mental or physical health*).

3. Agresi

Dalam hal mencapai tujuan Perserikatan Bangsa-Bangsa (PBB) khususnya Dewan Keamanan yang bertanggung jawab untuk menentukan adanya suatu tindakan agresi (Pasal 39), untuk memberi reaksi yang konsisten dan lebih tepat. Namun, walau PBB telah menekankan pentingnya masalah kejahatan terhadap

perdamaian sejak Perang Dunia II, masih ada hambatan besar ketika akan menuntut secara perseorangan. Hal ini dikarenakan oleh:

a. *Defenisi dari agresi itu sendiri untuk menuntut pejabat-pejabat pemerintahan masih sukar dipahami.*
b. *Karena perang-perang yang ada biasanya direncanakan oleh banyak orang dalam birokrasi suatu negara, sulit untuk menarik garis kesalahan dari pihak-pihak yang terlibat.*
c. *Kasus-kasus kriminal dapat mencakup muatan fakta yang kompleks dan bersifat poilitis, yang tidak sesuai pengadilan.*[29]

Maka melakukan pendefinisian tentang agresi sangatlah penting. Olehnya itu pada tahun 1974 Majelis Umum PBB telah menyelesaikan proyek 20 tahunnya untuk mendefinisikan tentang kejahatan agresi. Kemudian dengan perumusan definisi kejahatan agresi ini, selanjutnya menjadi acuan PBB khususnya Dewan Keamanan dalam menentukan suatu peristiwa tergolong sebagai kejahatan internasional, bahwa kejahatan agresi adalah:

> *Penggunaan angkatan bersenjata oleh suatu negara melawan negara lain, tanpa berdasarkan alasan untuk mempertahankan diri ataupun pengecualian lain yang dapat diterima secara hukum serta yang bertentangan dengan piagam PBB*[30]

Inti dari tindakan agresi tersebut memicu dua kata kunci penggunaan kekuatan secara legal yang disebut dalam piagam:

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[29] Ratner, Steven R., 1999, *Crimes Against Peace, Crimes of War Project*,http//www.pjtv.or.id/crimesofwar-book/crimes against peace.htm., hal. 32. (28 April 2010)

[30] Steven R.,Ratner, 1999, *Agression*. Crimes of War Project.http//www.pjtv.or.id/crimesofwar-book/aggression.htm., hal. 33. (28 April 2010)

a. Pertahanan diri individu maupun kolektif.

b. Pengerahan kekuatan yang disetujui sendiri oleh PBB.

Kejahatan agresi ini sering disebut sebagai kejahatan terhadap perdamaian, yang dalam Piagam Mahkamah Militer Internasional di Nurmberg tahun 1945 memasukkan kejahatan terhadap perdamaian (Pasal 6 (a)), bersama-sama dengan kejahatan perang dan kejahatan terhadap kemanusiaan, sebagai yurisdiksi pengadilan dalam mengadili penjahat Perang Dunia II. Dalam Piagam IMT Nuremberg tersebut mendefinisikan kejahatan agresi sebagai:

> *Perencanaan, persiapan, inisiasi atau pelaksanaan perang agresi, atau peperangan yang melanggar perjanjian internasional, persetujuan atau jaminan, atau keikutsertaan dalam suatu konspirasi untuk melakukannya.*

Kejahatan agresi ini juga menjadi kewenangan oleh Mahkamah Pidana Internasional (ICC) yang disebutkan dalam Pasal 5 Ayat 1 Huruf d, bersama-sama dengan kejahatan genosida, kejahatan terhadap kemanusiaan dan kejahatan perang. Namun, mahkamah tidak dapat menerapkan yurisdiksinya atas agresi sampai suatu ketentuan disahkan yang mendefinisikan kejahatan dan menetapkan kondisi-kondisi dimana mahkamah menjalankan yurisdiksi berkenaan dengan kejahatan agresi ini (Pasal ayat 2).

4. Kejahatan Perang

Tuntutan internasional prihal kejahatan perang pertama kali dilakukan terhadap Peter von Hagenbach di Breisach, Jerman pada tahun 1474. Hagenbach diadili di Austria oleh 28 hakim dari persekutuan Negara Kerajaan Suci Roma dan dinyatakan bersalah atas pembunuhan, pemerkosaan, sumpah palsu, dan kejahatan lain yang melawan hukum Tuhan dan manusia pada saat dia melakukan pendudukan militer. Dalam persidangan internasional tersebut, kesatriaan Hagenbach dilucuti dan dijatuhi hukuman mati. Selama perang dunia pertama berlangsung, banyak terjadi kejahatan perang antara lain yang dilakukan oleh Jerman ketika menginvasi Belgia. Jerman melakukan deportasi Warga Belgia untuk dijadikan budak selama perang berlangsung.

Sebenarnya, pembatasan terhadap konflik bersenjata sudah diusahakan oleh Prajurit Cina terkenal yang bernama Sun Tzu pada abad ke-6 sebelum masehi. Bangsa Yunani kuno termasuk bangsa yang pertama memandang larangan-larangan dalam konflik bersenjata sebagai hukum. Namun, keberadaan istilah kejahatan perang itu sendiri terdapat dalam Manu, Kitab Hukum Hindu, sekitar 200 tahun sebelum masehi.

Pengertian kejahatan perang dalam *London charter* termuat dalam Pasal 6 (b) yang secara tegas menyatakan:

> *War crimes: namely, violation of the laws or customs of war. Such violations shall include, but not to be limited to, murder,*

ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity[31]

Sementara dalam *Chater of The Internationally Military Tribunal For Far East*, istilah kejahatan perang tercantum dalam Pasal 5 (b) yang dengan singkat menyebutkan, *"conventional war crimes: namely, violations, of the laws or costums of war"*

C. Penegakan Hukum Pidana Internasional

Secara teori penegakan hukum pidana internasional dibagi menjadi *Direct Enforcement System* (Penegakan Hukum Secara Langsung) dan *Indirect Enforcement System* (Penegakan Hukum Secara Tidak Lagsung).

1. *Direct Enforcement System*

Direct Enforcement System adalah penegakan hukum pidana internasional oleh mahkamah pidana internasional. Dalam sejarah perkembangan hukum pidana internasional, *Direct Enforcement System* yang dilakukan terhadap para pelaku kejahatan internasional bersifat *ad-hoc*, kendatipun dunia telah memiliki Mahkamah Pidana Internasional yang lahir berdasarkan Statuta

[31] Eddy O.S. Hiariej, Op.Cit, hal 63.

Roma. Adapun pengadilan-pengadilan internasional yang pernah berdiri adalah sebagai berikut[32]:

a. Pengadilan Nuremberg.

Pada dekade 1930-an, depresi besar terjadi secara global karena di semua benua terdapat koloni barat yang mengantarkan Eropa ke Perang Dunia II dan Asia-Afrika ke perjuangan kemerdekaan. Pada dekade itu pula terjadi Perang Pasifik yang membawa pendudukan militer Jepang di Asia Tenggara, sementara *chaos* di Eropa sebagai akibat Perang Dunia I telah melahirkan gerakan-gerakan populis dan depresi yang menumbuhkan leninisme, fasisme, diktator, dan militerisme. Ekses dari depresi tersebut telah menimbulkan kekejaman, kekerasan, dan keberingasan terhadap umat manusia, baik yang dilakukan oleh individu, sekelompok orang, maupun negara[33].

Jerman di bawah kepemimpinan Adolf Hitler memulai kancah Perang Dunia Kedua dengan menganeksasi Polandia pada September 1939 dan sepanjang Perang Dunia Kedua, bahkan jauh sebelumnya, Hilter telah melakukan genosida terhadap bangsa Yahudi hampir di seluruh daratan Eropa, demikian pula terhadap Bangsa Rusia. Pada tanggal 22 Juni 1941, tatkala Hitler mengesampingkan perjanjian yang pernah dibuatnya dengan

[32] *Ibid*, hal, 69.
[33] Ibid,hal. 74.

Stalin, pasukan NAZI Jerman melakukan Operasi Barbosa dengan menyerang Rusia secara total. Dalam penyerangan tersebut ribuan tersebut ribuan warga sipil dipaksa menjadi budak atau digunakan sebagai "hewan percobaan" dalam eksperimen-eksperimen kedokteran. Jutaan warga Soviet, laki-laki, wanita, dan anak-anak dibunuh oleh regu tembak, dimusnahkan dalam kamar gas dan dipanggang di kamp konsentrasi maut NAZI bersama jutaan warga Yahudi Eropa, para intelektual, dan kaum Marxis[34].

Hampir dalam waktu yang bersamaan, ketika Perang Dunia Kedua berlangsung hampir separuh waktu, beberapa negara di Eropa telah mempersiapkan aturan untuk menuntut para pelaku genosida dan kejahatan internasional lainnya. Dalam bulan Oktober 1943, Majelis Internasional London telah berhasil menyusun draf konvensi berdasarkan berdasarkan hukum nasional sejauh mungkin untuk mengadili kejahatan perang dalam yurisdiksinya. Selanjutnya sekutu dalam Deklarasi Moskow November 1943 menyepakati bahwa kejahatan perang yang berskala kecil akan diadili dan dihukum di negara-negara dimana mereka melakukan kejahatan, sementara kejahatan perang berskala besar dan pelanggaran yang tidak memiliki lokasi gografis tentu akan diperiksa dan diadili oleh suatu keputusan bersama pemerintah sekutu. Pada tanggal 8 Agustus 1945, sekutu menandatangani

[34] Ibid, hal. 74.

perjanjian London yang mengadopsi Piagam Pengadilan Militer Internasional[35].

The Agreement For The Presecution And Punishment Of Major War Criminal Of The European Axis And Establishing The Charter Of The International Military Tribunal ditandatangani oleh empat negara, masing-masing Inggris, Perancis, Uni Soviet, dan Amerika Serikat. *Nuremberg Charter* yang juga dikenal sebagai *London Charter* terdiri dari 30 pasal. Yurisdiksi Mahkamah diatur dalam Pasal 6 *Nuremberg Charter* yang menyangkut tiga jenis kejahatan yaitu kejahatan terhadap perdamaian, kejahatan perang, dan kejahatan terhadap kemanusiaan. Hal terpenting lainnya dalam Pasal 6 tersebut adalah mengenai tanggung jawab individu. Dengan demikian, seseorang tidak dapat lagi berdalih bahwa perbuatan yang ia lakukan adalah untuk kepentingan atau atas perintah negara.

Demikian pula dalam Pasal 7 *Nuremberg charter* secara tegas menyatakan:

> *The official position of defendants, whether as heads of the state or responsible officials in government department, shall not be considered as freeing them from responsibility or mitigating punishment*[36]

Sedangkan dalam Pasal 8 secara eksplisit menyebutkan:

> *The fact that the defendant acted pursuant to order of his government of a superior shall not free from his responsibility,*

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[35] Ibid,

[36] Ibid,hal. 75.

but maybe considered in mitigation of punishment if the tribunal determines that justice so requires[37]

Berdasarkan kedua pasal tersebut, kedudukan resmi pelaku tidak dapat dijadikan alasan untuk menghindarkan diri dari tanggung jawab. Selain itu juga kejahatan yang dilakukan atas perintah pemerintah atau atasan, tidak dapat terlepas dari tanggung jawab dan hanya dijadikan dasar untuk mengurangi hukuman.

Mahkamah Nuremberg terdiri dari empat orang hakim ditambah dengan empat hakim pengganti berasal dari keempat negara yang menyusun Statuta Mahkamah. Mereka adalah Francis Biddle dari Amerika dengan John Parker sebagai hakim pengganti, Lord Justice Geoffrrey Lawrence dari Inggris dengan Justice Norman Birkit sebagai pengganti. Dari Perancis Prof. Donnediu de Vabres sebagai hakim dengan Judge R. Falco sebagai hakim pengganti. Sedangkan dari Uni Soviet I.T. Niktchenko sebagai hakim, dengan hakim pengganti A.F. Volchof. Dari keempat hakim tersebut, Lawrence ditunjuk sebagai ketua mahkamah dengan tiga orang hakim lainnya sebagai anggota. Pada awalnya, Mahkamah Nuremberg memeriksa 24 orang terdakwa, namun secara keseluruhan terdakwa yang diadili sebanyak 99 orang. Pengadilan secara *in absentia* dilakukan terhadap 22 terdakwa, 19 orang di

[37] Ibid,

antaranya dijatuhi hukuman, dengan pidana mati terhadap 12 orang[38].

Yang menarik perhatian dari Mahkamah Militer Internasional Nuremberg ini adalah pengesampingan asas legalitas dalam pengertian hukum yang diberlakukan surut terhadap kejahatan yang dilakukan sebelum aturan hukum itu ada. Bahkan dakwaan jaksa terhadap beberapa penjahat perang NAZI Jerman adalah mengenai genosida, sementara terminologi genosida itu sendiri tidak tercantum dalam statuta. Istilah genosida atau *genocide* ini pertama kali diutarakan oleh Lemkin dan diusulkan olehnya dalam tuntutan Amerika saat pengadilan tersebut. Genosida olehnya diartikan sebagai "*...is a crime under international, includes a number of acts commited with intent to destroy, in whole or in part, a national, ethnical, racial or religious groups, as such...*"[39]

Para terdakwa memberi argumentasi bahwa Mahkamah Nuremberg telah melanggar suatu prinsip hukum yang sangat fundamental, baik dalam internasional dalam maupun hukum nasional yang diakui oleh bangsa-bangsa beradab di dunia. Prinsip tersebut adalah "*Nullum crimen sine lege, nulla poena sine lege*". Menanggapi argumentasi tersebut, Mahkamah Nuremberg menjawab dengan menunjuk dua konvensi Den Haag dan "1928 Kellog-Briand Pact" atas dasar *crime against peace*. Mahkamah

[38] Ibid,hal.76
[39] Ibid,

juga mengemukakan bahwa prinsip *Nullum crimen sine lege, nulla poena sine lege* tidak merupakan suatu pembatasan kedaulatan, tapi secara umum merupakan suatu asas keadilan. Hal tersebut dinyatakan oleh hakim Perancis, H. Donnediu de Vabres dan selanjutnya ia mengatakan bahwa memidana dengan melanggar asas legalitas memang tidak adil, tetapi tidak menghukum orang yang bersalah karena kejahatan yang dilakukannya lebih tidak adil.

Dari argumentasi yang dikemukakan oleh para terdakwa bahwa Mahkamah Nuremberg melanggar prinsip *Nullum crimen sine lege, nulla poena sine lege* tampak ketidakkonsistenan Jerman dalam pelaksanaan asas legalitas. Dikatakan demikian, sebab pertama, Jerman dalam dua dekade 1920-an dan 1930-an menghapus larangan analogi bahkan asas legalitas tidak dipertimbangkan bila membahayakan keamanan nasional. Pada tahun 1933, Jerman memperkenalkan *"Lex van der Lubble"*. Marines van de Lubbe adalah seorang Belanda yang dianggap sebagai kaki tangan komunis dan membakar Reichtstag di Berlin pada tanggal 27 Februari 1933. Pemerintah NAZI Jerman kemudian mengeluarkan undang-undang baru yang meninggalkan larangan analogi dan memberlakukan surut undang-undang itu agar peristiwa itu dapat diadili dengan undang-undang tersebut. Kedua, pada tahun 1946, Gustaf Radbruch mengemukakan formula baru di Jerman sebagai negara demokratik modern yang kemudian

dikenal dengan istilah *"Radbruch's formula"*. Dikatakan olehnya bahwa hukum positif dianggap sebagai lawan dari keadilan dan tidak diterapkan. Jika ada ketidakkonsistenan antara undang-undang dan keadilan, maka yang lebih didahulukan adalah keadilan. Formula ini telah diterima secara luas dalam literatur Jerman.[40]

b. Pengadilan Tokyo.

Kejahatan yang dilakukan oleh negara terhadap perdamaian dan kemanusiaan tidak hanya dilakukan oleh Jerman dan Italia di daratan Eropa dan Afrika, namun hal yang sama juga dilakukan oleh Jepang di wilayah Asia. Pasca-Perang Dunia Kedua, pada tanggal 19 Januari 1946 dibentuklah Mahkamah Tokyo dengan nama resmi *International Military Tribunal for the Far East.*

Ada perbedaan prinsip antara pembentukan Mahkamah Nuremberg dengan Mahkamah Tokyo. Mahkamah Nuremberg dibentuk atas dasar *treaty* yang disusun oleh keempat negara yang mewakili negara-negara sekutu, sedangkan Mahkamah Tokyo dibentuk berdasarkan Proklamasi Komandan Tertinggi Pasukan Sekutu di Timur Jauh, Jenderal Douglas Mac Arthur. Dalam Pasal 1 Proklamasi Jenderal Douglas Mac Arthur dikatakan:

> *There shall be established an international military tribunal for the far east for the trial of those persons charged individually,*

[40] Ibid,hal. 77.

or as members of organization, or in both capacities, with offfence which incdluddes crimes against peace.[41]

Selanjutnya Amerika menyusun piagam Mahkamah Tokyo yang mengacu pada Piagam Nuremberg. Seperti Mahkamah Nuremberg, jurisdiksi Mahkamah Tokyo juga terhadap tiga jenis kejahatan, masing-masing kejahatan terhadap perdamaian, kejahatan perang, dan kejahatan terhadap kemanusiaan yang rumusannya sama persis kecuali rumusan kejahatan perang. Dalam Piagam Mahkamah Tokyo, kejahatan perang dirumuskan sebagai kejahatan perang konvensional yang diartikan sebagai pelanggaran terhadap hukum dan kebiasaan perang tanpa penjelasan lebih lanjut.

Sama halnya dengan Mahkamah Nuremberg, Mahkamah Tokyo juga menuai keberatan dengan dasar bahwa ketentuan-ketentuan dalam piagam tersebut adalah perundang-undangan *ex post facto* dan oleh karena itu tidak sah. Mahkamah menolak keberatan tersebut dengan menyatakan bahwa hukum dari piagam tersebut bersifat mutlak dan mengikat terhadap pengadilan dan menyatakan dukungan total terhadap pemikiran Nuremberg. Bahkan perbedaan pendapat yang menyatakan piagam tersebut melanggar prinsip *nullum crimen sine lege* membatasi penggunaannya terhadap keberadaan kejahatan yang dituduhkan

[41] Ibid,hal. 78.

dan bukan terhadap pengadilan yang menjangkau peristiwa yang dilakukan sebelum perbuatannya.

Kritik lain juga disampaikan oleh salah seorang hakim dalam Mahkamah Tokyo, yaitu hakim India, Rahabinod Pal yang selain mempersoalkan *prinsip nullum crimen sine lege*, juga mengkritik secara keras dasar hukum atas opini mayoritas, terutama mengenai ketidakabsahan perang dan bentuk tanggung jawab individu terhadap tindakan negara. Akan tetapi hakim lainnya dari Belanda yaitu, B.V.A. Roling berpendapat bahwa prinsip *nullum crimen sine lege* bukanlah suat prinsip keadilan melainkan sebuah kebijakan negara dari kesewenang-wenangan pengadilan. Pelarangan hukum *ex post facto* adalah sebuah ekspresi kebijakan poilitik yang tidak terlalu digunakan dalam hubungan internasional. Pelarangan ini boleh jika keadaan mengharuskan untuk diabaikan oleh pemegang kekuasaan dalam perang kemerdekaan.

Sementara itu negara sekutu lainnya Belanda, menggunakan Deklarasi Moskow, November 1943 untuk mengeluarkan *Besluit Buitengewone Strafrecht* (BBS) atau Ketetapan Hukum Pidana Luar Biasa pada tanggal 22 Desember 1943 yang menetapkan Pasal 1 ayat (1) Kitab Undang-undang Hukum Pidana (KUHP)-asas legalitas- tidak berlaku bagi kejahatan-kejahatan yang dilakukan selama perang dunia berlangsung. Dengan kata lain, asas legalitas tidak diberlakukan terhadap Ketetapan London atau Piagam

Nuremberg. Bahkan pemerintah Hindia Belanda dalam pengasingannya di Australia mengeluarkan *Brisbane Ordonantie* 1945 mengenai penerapan delik terhadap keamanan negara. Tujuannya adalah melakukan pemidanaan terhadap pihak yang secara politis mengalami kekalahan perang, yaitu bala tentara Jepang beserta para kolaboratornya.

c. Pengadilan Pidana Internasional Untuk Bekas Negara Yugoslavia (*International Criminal Tribunal for the Former Yugoslavia (ICTY)*)

Berbeda dari Mahkamah Internasional yang merupakan suatu peradilan tetap, organ hukum utama PBB, ICTY adalah mahkamah yang didirikan oleh suatu keputusan Dewan Keamanan PBB yang bertindak di bawah Bab VII Piagam berkenan dengan pemeliharaan perdamaian dan kemanan internasional. Demikianlah melalui Resolusi Dewan Keamanan No. 827 tanggal 25 Mei 1993, PBB membentuk *The International Tribunal for the Former Yugoslavia (ICTY)* untuk mengadili kasus-kasus yang melibatkan pelanggaran-pelanggaran berat hukum humaniter di wilayah bekas Yugoslavia. Sesuai mandatnya, yurisdiksi mahkamah terbatas baik dari segi waktu maupun gografis. Mahkamah tidak dapat mengadili kejahatan-kejahatan yang terjadi sebelum tahun 1991 atau kejahatan-kejahatan yang telah terjadi atau terjadi di luar wilayah negara bekas Yugoslavia. Yurisdiksi mahkamah meliputi

komponen-komponen dasar hukum humaniter internasional, yaitu pelanggaran-pelanggaran berat terhadap konvensi-konvensi Jenewa 1949, pelanggaran terhadap kemanusiaan, dan tindakan-tindakan genosida.

Mahkamah mempunyai 16 hakim tetap yang dipilih oleh majelis umum PBB untuk masa jabatan 4 tahun. Dua dari hakim-hakim tersebut dipilih oleh Sekertaris Jenderal PBB. Mahkamah diketuai oleh Mr. Theodor Meron asal Amerika Serikat yang dipilih pada tanggal 14 Maret 2000 bersama dengan hakim-hakim lainnya. Di samping itu, melalui Resolusi Dewan Keamanan No. 1329 dibentuk pula kelompok hakim-hakim *ad litem* sebanyak 27 orang oleh majelis umum untuk masa jabatan 4 tahun mengingat beratnya tugas yang dilaksanakan oleh mahkamah.

Tidak seperti Mahkamah Nuremberg, ICTY tidak dapat memeriksa perkara secara *in absensia*. Jika pengadilan tidak mampu menghadirkan terdakwa, maka penuntut dapat mempresentasikan kasusnya ke majelis pemeriksa. Berdasarkan bukti yang ada, selanjutnya majelis akan menentukan ada atau tidaknya dasar yang rasional untuk mempercayai bahwa terdakwa melakukan kejahatan dan dapat mengeluarkan jaminan penahanan internasional yang diberikan kepada semua negara. Prosedur ini dapat dipandang sebagai *quasi-in absensia*. Sampai sekarang ini, jumlah terdakwa yang telah diperiksa adalah sebanyak 35 orang

dengan 32 orang di antaranya dijatuhi hukuman pidana, sedangkan tiga lainnya dibebaskan[42].

Demikianlah pembentukan mahkamah ini telah merupakan sumbangan yang sangat berarti bagi pemajuan dan perlindungan hak-hak asasi dan pengukuhan hukum humaniter internasional dan sekaligus mengingatkan kepada para pelanggar berat Hak Asasi Manusia (HAM) yang akan datang bahwa mereka tidak akan bebas begitu saja dan akan ada mahkamah pidana internasional yang akan menuntut dan mengadili mereka.

d. Pengadilan Pidana Internasional Untuk Rwanda (*International Criminal Tribunal for Rwanda (ICTR)*)

Kekerasan yang membinasakan Rwanda sejak awal 1994 menyebabkan Dewan Keamanan PBB mengeluarkan sejumlah resolusi yang memberi peringatan telah terjadinya pelanggaran hukum humaniter internasional dan menentukan bahwa konflik tersebut telah menimbulkan ancaman terhadap perdamaian dan keamanan internasional. Berdasarkan Resolusi Dewan Keamanan PBB Nomor 995 tanggal 8 November 1994 dibentuklah *International Criminal Tribunal for Rwanda (ICTR)* yang berlokasi di Arusha, Tanzania[43]. ICTR bertujuan untuk menuntut dan mengadili orang-orang yang bertanggung jawab atas terjadinya genosida dan

[42] Ibid,hal. 81.

[43] Boer Mauna, 2005, *Hukum Internasional: Pengertian, Peranan, dan Fungsi Dalamm Era Dinamika Global*, Edisi Kedua, Alumni, Bandung, hal.285.

kejahatan-kejahatan berat lain yang melanggar hukum humaniter internasional di Rwanda atau oleh orang-orang Rwanda di negara-negara tetangga, khususnya yang dilakukan oleh ekstrimis Suku Hutu sejak 1 Januari sampai dengan 31 Desember 1994.

Mahkamah pada mulanya mempunyai enam hakim tetap yang dipilih oleh Majelis Umum PBB pada bulan Mei 1995. Selanjutnya melalui Resolusi Dewan Keamanan No. 1165 (1998) memutuskan untuk membentuk *Trial Chamber* ketiga dengan menambah tiga hakim lagi sehingga sembilan. Kemudian, melalui Resolusi Dewan Kemanan No. 1329 (2000) ditambah lagi dua hakim sehingga menjadi sebelas. Mahkamah diketuai oleh Mr. Eric Mose asal Norwegia. Disamping hakim-hakim tetap ini Dewan Keamanan melalui Resolusi No. 1431 (2002) membentuk pula kelompok hakim-hakim *ad litem* sebanyak delapan belas orang yang dipilih oleh Majelis Umum.

Melalui Statuta ICTR inilah secara tegas-tegas dirumuskan bahwa *crimes against humanity* tidak ada kaitannya dengan konflik bersenjata (*war crimes*). Jadi bisa terjadi di masa perang atau masa damai (*no nexus with and armed conflict*). Adapun persamaan dan perbedaan antara ICTY dan ICTR adalah sebagai berikut: Pertama, baik ICTY maupun ICTR keduanya dibentuk oleh Dewan Keamanan PBB. Kedua, ICTR maupun ICTY merupakan *subsidiary*

organs Dewan Keamanan. Ketiga, baik ICTY maupun ICTR memiliki struktur yang sama[44].

Sementara perbedaan antara ICTY dan ICTR adalah sebagai berikut: pertama, ICTY memiliki yurisdiksi terhadap kejahatan baik dalam *international armed conflict* maupun *internal armed conflict*, sedangkan ICTR memiliki jurisdiksi hanya terhadap kejahatan yang dilakukan dalam *internal armed conflict*. Kedua, ICTY memiliki yurisdiksi terhadap kejahatan terhadap kemanusiaan hanya apabila dilakukan di dalam suatu konflik bersenjata, sedangkan ICTR mempunyai yurisdiksi terhadap kejahatan terhadap kemanusiaan hanya apabila dilakukan *on national, political, ethnics, racial, or other religion ground*. Dengan demikian, hal ini dilakukan dengan sengaja untuk melakukan diskriminasi. Ketiga, ICTY mempunyai yurisdkisi terhadap kejahatan yang dilakukan di wilayah "bekas Yugoslavia" sejak 1991, sedangkan ICTR memiliki Yurisdiksi terhadap kejahatan yang dilakukan di Rwanda atau negara-negara tetangga Rwanda. Keempat, prosedur beracara ICTY mengikuti *common law* system, sedangkan ICTR mengikuti campuran antara *common law* dan *civil law system*[45]. Jumlah terdakwa yang diperiksa dalam ICTR sebanyak 16 orang dan 1 orang di antaranya diputus bebas sedang yang lain dijatuhi pidana dengan jumlah

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[44] Mappasessu, 2005, *Perbandingan Yurisdiksi Antara International Criminaal Tribunal for the Former Yugoslavia (ICTY) dan International Criminal Tribunal for Rwanda (ICTR)*,skripsi, sarjana hukum, Fakultas Hukum Universitas Hasanuddin, hal. 62-65.

[45] Ibid,

b. Maureen Harding Clark (Irlandia).

c. Fatoumata Dembele Dairra (Mali).

d. Adrian Fulford (Inggris).

e. Karl T. Hudson Phillips (Trinidad &Tobago).

f. Hans Peter Kaul (Jerman).

g. Philipe Kirsch (Kanda).

h. Erkki Korula (Finlandia).

i. Akua Kuenychia (Ghana).

j. Elizabeth Odio Benito (Costa Rica).

k. Gheorghios M. Pikis (Siprus).

l. Navanethem Pillay (Afrika Selatan).

m. Mauro Politi (Italia).

n. Sylvia H. de Figueiredo Steiner (Brazil).

o. Anita Usacka (Latvia)[47].

Yurisdiksi Mahkamah Pidana Internasional meliputi kejahatan agresi, kejahatan genosida, kejahatan terhadap kemanusiaan dan kejahatan perang.

Prinsip-prinsip dasar yang dianut dalam Statuta Roma adalah sebagai berikut:

a. Komplementer, yaitu jika terjadi kejahatan yang menjadi yurisdiksi Mahkamah Pidana Internasional, maka pengadilan terhadap pelaku kejahatan terlebih dahulu

[47] Ibid,hal. 71.

diserahkan kepada hukum nasional negara dimana kejahatan tersebut dilakukan. Apabila negara tersebut tidak mau (*unwilling*) atau tidak dapat mengadili pelaku kejahatan tersebut (*unable*), maka pengadilan terhadap pelaku dilakukan oleh Mahkamah Pidana Internasional.

b. Asas legalitas berlaku secara absolut dan tidak dimungkinkan penyimpangan terhadapnya selama menyangkut kejahatan-kejahatan yang menjadi yurisdiksi Mahkamah Pidana Internasional. Tidak hanya larangan hukum berlaku surut atau prinsip non-rektroaktif, larangan terhadap analogi juga termaktub secara eksplisit dalam Statuta Roma. Bahkan, dalam hal terdapat keraguan atau perubahan aturan maka harus diterapkan aturan yang meringankan orang yang sedang disidik, dituntut, atau diadili berdasarkan Statuta Roma.

c. *Ne bis in idem*, yang berarti seseorang tidak dapat dituntut lebih dari satu kali di depan pengadilan dengan perkara yang sama. Akan tetapi dalam Statuta Roma, asas *ne bis in idem* ini tidak berlaku mutlak. Artinya, asas tersebut dapat dikesampingkan jika pengadilan nasional yang mengadili pelaku kejahatan tersebut tidak berjalan *fair* atau bermaksud untuk membebaskan pelaku dari segala tuntutan.

d. Prinsip pertanggungjawaban pribadi sebagaimana yang dianut dalam hukum pidana. Seseorang yang melakukan suatu tindak pidana dalam wilayah yurisdiksi Mahkamah bertanggung jawab secara pribadi dan dapat dihukum sesuai statuta. Prinsip ini merupakan pencerminan bahwa yang dituntut dan dihukum adalah individu dan bukan negara[48].

2. *Indirect Enforcement System*

Penegakan hukum pidana internasional secara tidak langsung atau *Indirect Enforcement System* adalah penegakan hukum pidana internasional melalui hukum pidana nasional masing-masing negara dimana tempat kejahatan tersebut terjadi. Dalam konteks Indonesia *Indirect Enforcement System* pernah dilakukan dalam mengadili kasus pelanggaran Hak Asasi Manusia Berat (Pelanggaran HAM berat) pasca jajak pendapat di Timor Timur. Menurut hukum nasional Indonesia, pelanggaran HAM berat hanya meliputi dua kejahatan, yakni genosida dan kejahatan terhadap kemanusiaan[49].

[48] Boer Mauna, Op.Cit. Hal. 297-301.
[49] Eddy O.S. Hiariej, *Op.Cit*, Hal.83

D. Hubungan Hukum Internasional dan Hukum Nasional

Persoalan mengenai hubungan hukum internasional dan hukum nasional selalu menjadi bagian yang menarik. Persoalan yang mendasar dalam dalam topik ini adalah pertanyaan apakah hukum internasional dan hukum nasional merupakan satu sistem hukum yang sama atau keduanya merupakan dua sistem hukum yang berbeda dan terpisah. Ada dua teori berkenaan dengan hubungan antara hukum internasional dan hukum nasional, yaitu teori monisme dan teori dualisme. Masing-masing teori tentunya mempunyai argumentasi yang cukup kuat dan didukung pula oleh para ahli hukum internasional yang ternama.

1. Monisme

Menurut paham monisme, semua hukum merupakan satu kesatuan dan karena itu hukum internasional dan hukum nasional hanyalah merupakan dua aspek dari satu sistem hukum yang universal. Oleh karena itu, dapat terjadi hubungan hierarki antara hukum internasional dengan hukum nasional. Artinya, terdapat kemungkinan mana yang lebih tinggi posisinya, apakah hukum internasional ataukah hukum nasional. Persoalan hierarki ini disebut dengan "primat"[50]. Menurut teori monisme dengan primat hukum nasional, hukum nasional mempunyai kedudukan yang lebih

[50] Fadillah Agus, 2007, *Pengantar Hukum Internasional dan Hukum Humaniter Internasional, ELSAM, Jakarta, hal. 32*

tinggi dari hukum internasional. Sedangkan menurut teori monisme dengan primat hukum internasional, hukum internasional mempunyai posisi yang lebih tinggi dari hukum nasional[51].

Menurut pandangan monisme dengan primat hukum nasional, hukum internasional merupakan kelanjutan dari hukum nasional. Dengan demikian, maka hukum internasional bersumber dari hukum nasional. Adapun hal yang mendasari pandangan monisme dengan primat hukum nasional ini adalah konsep kedaulatan mutlak, dimana menurut konsep ini segala sesuatunya berasal dari kedaulatan negara. Menurut pandangan ini tidak ada organisasi yang kedudukannya lebih tinggi dari negara, dan bahwa hukum internasional terbentuk berdasarkan perjanjian yang dibuat antar negara diperoleh dari kewenangan yang diatur oleh konstitusi negara.

Sedangkan menurut pandangan monisme dengan primat hukum internasional, hukum internasional merupakan konstitusi umum atau konstitusi universal yang mendelegasikan wewenang kepada setiap negara untuk mengatur perundang-undangan nasionalnya. Hal ini berarti bahwa hukum nasional bersumber dari hukum intersional. Salah seorang ahli yang menganut pandangan monisme dengan primat hukum internasional adalah Mochtar Kusumaatmadja yang mengatakan dalam bukunya bahwa *"hukum*

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[51] *Ibid.*

nasional itu tunduk pada hukum internasional mau tidak mau harus kita terima kalau kita mengakui adanya hukum internasional."[52]

2. Dualisme

Adapun pandangan dualisme berpendapat bahwa hukum nasional dan hukum internasional adalah dua sistem hukum yang berbeda dan terpisah satu sama lainnya. Setidaknya ada tiga perbedaan antara hukum nasional dengan hukum internasional, yaitu[53]:

1. Sumbernya, hukum nasional bersumber dari kebiasaan yang tumbuh dan berkembang di dalam negara yang bersangkutan, sedangkan hukum hukum internasional bersumber dari kebiasaan yang terjadi antar negara
2. Hubungan yang diatur, hukum nasional mengatur hubungan antar individu dan antara individu dengan negara, sedangkan hukum internasional mengatur hubungan antar negara
3. Isinya. Hukum nasional adalah hukum dari penguasa yang berdaulat untuk warga negaranya dengan sanksi yang tegas, sedangkan hukum internasional adalah hukum yang berlaku di antara negara yang berdaulat sehingga

[52] Ibid,

[53] *Ibid,* hal. 33.

sanksinya tidak bisa setegas dan sekonkret hukum nasional.

Anzilotti mengatakan bahwa sistem hukum internasional dan hukum nasional masing-masing dilandasi prinsip dasar yang berbeda, hukum internasional dilandasi prinsip dasar *Pacta Sun Servanda* (kekuatan hukum mengikat hanya pada para pihak yang meratifikasi perjanjian), sedangkan nasional dilandasi prinsip dasar bahwa peraturan perundang-undangan harus ditaati[54]. Konsekuensi dari pandangan dualisme ini adalah bahwa suatu norma hukum internasional harus ditransformasikan terlebih dahulu sebelum diberlakukan ke dalam hukum nasional. Dengan kata lain, bahwa perjanjian internasional yang telah diratifikasi oleh negara tidak dapat langsung diberlakukan di negara tersebut sampai dengan dibentuknya hukum yang mentransformasikan kaidah-kaidah hukum internasional tersebut ke dalam sistem hukum nasional. Namun, perbedaan antara hukum nasional dan hukum internasional tidak lebih dari perbedaan bentuk hukum. Perbedaan itu tidak menyangkut isi dan tujuannya. Hukum internasional dan hukum nasional sama-sama mengatur hak dan kewajiban subyek hukumnya. Hukum internasional dan hukum nasional sama-sama bertujuan menciptakan ketertiban dan keadilan.

[54] Alma Manuputy, dkk, 2008, *Hukum Internasional,* Recht-ta, Depok, hal. 156.

Terlepas dari pandangan atau ajaran mana yang benar, pada saat ini dapat dikatakan bahwa tidak mungkin lagi bagi negara di dunia untuk mengingkari atau menolak keberadaan dan pemberlakuan kaidah-kaidah hukum internasional. Hal ini merupakan konsekuensi logis dari perkembangan kehidupan masyarakat internasional yang telah melewati lintas negara. Untuk hal-hal yang sudah dalam lingkup lintas negara ini, maka yang berlaku adalah ketentuan-ketentuan hukum internasional. Selain itu, adanya rasa saling membutuhkan antara hukum internasional dengan hukum nasional menjadikan kedua hukum ini saling terkait satu sama lain. Beberapa peranan dan fungsi yang dapat dimainkan oleh hukum internasional dalam menunjang penerapan hukum nasional antara lain adalah sebagai berikut[55]:

1. Hukum internasional berfungsi menjembatani penerapan hukum nasional negara-negara.
2. Hukum internasional dibutuhkan oleh hukum nasional agar para subyek hukum nasional dari dua negara atau lebih dapat mengadakan hubungan hukum internasional
3. Hukum internasional dibutuhkan oleh hukum nasional sebab dapat berfungsi sebagai sarana untuk mengharmonisasikan berbagai hukum nasional mengenai suatu masalah tertentu.
4. Hukum internasional dibutuhkan oleh hukum nasional, sebab hukum internasional dapat menjadi masukan bagi hukum

[55] *Ibid,* hal.188-190

nasional berkenaan dengan suatu masalah yang pengaturannya terlebih dahulu muncul di dalam hukum internasional.

Dalam konteks interaksi masyarakat internasional yang telah melintasi wilayah negara, maka perlu dikembangkan suatu bentuk kerjasama internasional dengan keterlibatan para pihak baik negara maupun individu untuk menghormati dan menaati ketentuan hukum nasional dan hukum internasional secara bersamaan. Hukum nasional dan hukum internasional juga dikembangkan untuk mengakomodasi dan memfasilitasi kerjasama internasional sehingga tujuan perdamaian dan kemakmuran bersama seluruh umat manusia dapat tercapai. Meskipun, pengaturan kejahatan-kejahatan internasional sebagai substansi hukum pidana internasional dalam hukum pidana nasional masing-masing negara bukanlah suatu kewajiban, tetapi lebih pada kebutuhan dalam tata pergaulan internasional[56]. Dukungan hukum nasional terhadap keberlakuan hukum internasional sangatlah penting dikarenakan oleh titik lemah dari hukum internasional itu sendiri adalah pada penerpannya yang disebabkan oleh struktur masyarakat internasional yang tidak memiliki badan supranasional[57].

Hubungan hukum pidana internasional dan hukum pidana nasional adalah hubungan yang bersifat komplementer antara satu dengan yang lain dan memiliki arti penting dalam rangka penegakan hukum pidana itu sendiri. Hal ini terlihat jelas dengan banyaknya asas

[56] Eddy O.S.Hiarrej,*Op.Cit*,hal.18
[57] Alma Manuputy, *Op.Cit*, hal.191

dalam hukum pidana nasional yang diadopsi sebagai asas-asas dalam hukum pidana internasional. Dalam ketentuan Kitab Undang-Undang Hukum Pidana (KUHP) di semua negara, khususnya berkaitan dengan asas berlakunya hukum pidana menurut tempat, yang dicakup bukanlah sekadar teritorial negara tersebut, tetapi juga tempat-tempat tertentu yang dianggap sebagai perluasan territorial, kendatipun berada di wilayah negara lain. Demikian pula sebaliknya, tindakan-tindakan yang dikualifikasikan sebagai kejahatan internasional oleh hukum pidana internasional kemudian diadopsi ke dalam ketentuan-ketentuan dalam hukum pidana nasional dengan tujuan agar kejahatan tersebut tidak terjadi di negaranya.

E. Beberapa Kasus Kejahatan Internasional

1. Timor Timur

Sepeninggal Portugis dari Timor Timur (Timtim) setelah mengalami revolusi yang menjatuhkan rezim Salazar pada tahun 1974, rakyat Timor Timur diberikan hak untuk menentukan masa depannya sendiri. Pada tanggal 27 Juli 1975, Undang-undang Portugal No.7 Tahun 1975 menetapkan penyelenggaraan pemilihan umum di Timor Portugis untuk membentuk suatu majelis rakyat pada tahun 1976. Majelis rakyat ini kemudian akan membentuk pemerintahan baru dan Portugal sedianya akan menyerahkan

kekuasaannya kepada negara Timor (Timur) yang baru pada bulan Oktober 1978[58].

Sekitar masa ketika ditinggalkan Portugis, terdapat tiga partai politik yang terdiri dari UDT (Uni Demokratik Timor) yang menganjurkan suatu proses otonomi progresif di bawah Portugis; ASDT (Perhimpunan Sosial Demokrat Timor) yang kemudian menjadi FRETILIN (Front Revolusioner untuk Kemerdekaan Timor Timur) yang memperjuangkan kemerdekaan penuh bagi Timor Timur. FRETILIN merupakan partai yang paling radikal dan berkecenderungan kiri diantara tiga partai yang ada dan juga merupakan kelompok yang paling dominan. Yang terakhir adalah APODETI (Persatuan Rakyat Demokratik Timor) yang menganjurkan agar Timor Timur berintegrasi dengan Indonesia. Awal 1975, dua partai utama, UDT dan FRETILIN membentuk sebuah koalisi untuk kemerdekaan dan kemudian menyelenggarakan pemilihan nasional[59].

Hasil pemilihan yang diselenggarakan pada bulan Februari dan Maret 1975, dua partai pro-kemerdekaan memenangkan pemilihan. 90% penduduk Timtim mendukung dua kelompok ini dan memperlihatkan kegairahan berupa ungkapan politik bebas dan kemerdekaan dengan rapat-rapat umum di Dili dan daerah-daerah

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[58] Komisi Kebenaran dan Persahabatan, 2010, *Per Memoriam Ad Spem:Laporan Akhir Komisi Kebenaran dan Pershabatan Indonesia-Timor-Leste,* ELSAM, Jakarta, Hal.50.

[59] *Ibid,*

pedalaman. Sementara APODETI tidak mendapatkan dukungan dari rakyat Timor Timur sekalipun mendapat bantuan keuangan dari Jakarta yang telah membentuk suatu komando khusus pada tahun 174, yakni Operasi Komodo, yang dirancang untuk mendestabilisasikan Timtim demi proyek integrasinya ke Indonesia[60].

APODETI sebagai sekutu Indonesia kemudian membujuk UDT untuk memisahkan diri dari persekutuan mereka sebelumnya dengan FRETILIN. Keberhasilan Indonesia membujuk UDT terbukti dengan munculnya gerakan anti-FRETILIN dan menciptakan ketidakstabilan. FRETILIN yang secara *de facto* adalah pemegang kekuasaan selanjutnya dikudeta oleh UDT yang sebelumnya telah diprovokasi, mengakibatkan terjadinya perang saudara antara FRETILIN dengan UDT. Perang ini kemudian dimenangkan oleh FRETILIN. Indonesia kemudian menjadikan alasan dan dasar untuk dan di dalam melakukan penyerbuan dengan dalih untuk memulihkan ketertiban[61].

Karena usaha untuk memprovokasi dan suatu alasan untuk campur tangan sebagai akibat dari konflik internal mengalami kegagalan, maka para jenderal mengalihkan operasi ke suatu pemecahan militer yang lebih terbuka. Militer Indonesia pun menggelar operasi rahasia dengan menyusup ke wilayah Timtim melalui perbatasan Timor Barat untuk melakukan aksi kekacauan

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[60] Erikson H.Gultom, 2006, *Kompetensi Mahkamah Pidana Internasional dan Peradilan Kejahatan Terhadap Kemanusiaan di Timor Timur*, PT.Tatanusa, Jakarta, Hal.167.

[61] *Ibid*

dengan harapan dengan kekalutan dan kekacauan semacam ini akan membenarkan penyerbuan, meskipun juga mendapat perlawanan yang gigih dari pemerintah *de facto* FRETILIN.

FRETILIN yang kemudian terdesak akibat dari intervensi campur tangan Indonesia dan penolakan Portugis untuk kembali dengan program dekolonisasinya memproklamasikan berdirinya Republik Demokrasi Timor Timur pada tanggal 28 November 1975. Hal ini dilakukan dengan harapan dapat memperoleh akses bantuan internasional guna menghentikan agresi Indonesia. Sebagai balasan atas tindakan FRETILIN tersebut, Indonesia membuat Deklarasi Balibo (dalam dokumen selanjutnya disebut Deklarasi Ba-libo) yang berisikan permintaan bantuan kepada pemerintah Indonesia untuk campur tangan di Timtim. Dokumen ini ditandatangani oleh anggota dari UDT dan APODETI atas ancaman pihak Indonesia. Sesuai skenario kemudian penyerbuan terang-terangan tersebut dilancarkan pagi-pagi buta pada 7 Desember 1975. Mereka menyerbu pasukan FRETILIN yang berada di gunung-gunung yang menyebabkan ladang rakyat Timtim mengalami kerusakan dan berakibat perlawanan menjadi sangat sukar dan semakin tidak seimbang. Akhirnya dalam kurung waktu 1977-1978 militer Timtim dapat dilumpuhkan.

Pada tataran internasional, di dalam resolusi Majelis Umum Perserikatan Bangsa-Bangsa (PBB), Indonesia dengan keras

diserukan dan diminta untuk menarik mundur pasukan-pasukannya dari wilayah ini untuk memungkinkan terselenggarannya pelaksanaan penentuan nasib sendiri. Hal ini tidak ditaati oleh Indonesia karena rendahnya perhatian negara-negara pemain utama di dalam komunitas internasional seperti Amerika Serikat yang menekan Dewan Keamanan untuk menolak mengutuk pendudukan yang dilakukan oleh militer Indonesia. Pada bulan Juli 1976, dengan mengabaikan keprihatinan dan tuntutan PBB dan internasional, Soeharto selaku Presiden Indonesia mengumumkan Timor Timur sebagai Provinsi ke-27 Republik Indonesia. Akan tetapi hal ini tidak diakui oleh PBB dan menetapkan Kasus Timtim tetap dalam agenda internasional[62]. Rangkaian kejahatan terhadap kemanusiaan yang terjadi di Timor Timur kemudian di bagi menjadi dua, yaitu:

1. Masa sebelum referendum 1999

Dari awal intervensi militer Indonesia terdapat banyak laporan pelanggaran HAM berat. Dalam seminggu setelah invasi Dili ratusan warga ibu kota, hampir semuanya penduduk sipil dieksekusi kilat. Pembunuhan-pembunuhan ini sebagian berlangsung dalam bentuk eksekusi massal. Eksekusi massal di Liquica, Maubara, Aileu dan daerah sekitar dekat Bobonaro dilaporkan sebanyak 60.000 orang Timor telah mati dalam tahun

[62] PBB melalui Resolusi Majelis Umum No.31/53 Tanggal 1 Desember 1976 menolak integrasi dan menyerukan diadakannya pelaksanaan hak penentuan nasib melalui cara-cara yang diakui oleh hukum internasional. Lihat, Komisi Kebenaran dan Persahabatan, Op.Cit, hal. 53.

setelah invasi dan sebanyak 200.000 dalam empat tahun selanjutnya, tentunya juga karena penyakit dan kelaparan sebagai akibat langsung dan tidak dari invasi militer Indonesia[63].

Sekarang pada umumnya disetujui dan diyakini bahwa sekurang-kurangnya 200.000 orang telah terbunuh pada tahun-tahun awal pendudukan Indonesia. Mengingat bahwa pasukan Timtim paling banyak hanya berkekuatan 20.000 orang, maka jelas bahwa sebagian besar yang tewas dan meninggal adalah orang-orang sipil. Hal ini merupakan suatu kebijakan sistematis yang diperhitungkan dan dirancang oleh pihak Indonesia untuk membuat Timtim bertekuk lutut.

Rutinitas eksekusi kilat terus berlanjut dalam dasawarsa 1980-an dan 1990-an. Diantaranya yang diketahui paling parah adalah pembantaian Cravas pada tahun 1983, dengan lebih dari 1.000 orang Timtim dibunuh oleh pasukan TNI (Tentara Nasional Indonesia) dan pembantaian Santa Cruz di tahun 1991 yang dilaporkan memangsa nyawa lebih dari 200 orang Timtim dalam satu peristiwa di perkuburan Santa Cruz. Ada pun laporan-laporan yang terus-menerus mengenai penyiksaan dan serangan seksual yang banyak mendapat perhatian di dalam laporan tahunan *Amnesty International* dan juga *Human Rights Watch*[64].

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[63] Erikson H.Gultom, *Op.cit*, hal.171

[64] *Ibid*,

2. Masa sekitar referendum 1999

Pada bulan Januari 1999, Presiden Indonesia selanjutnya, B.J.Habibie memberi opsi pada rakyat untuk memilih antara otonomi dan kemerdekaan. Ketentuan plebisit kemudian disepakati pada tanggal 5 Mei di New York dengan UNAMET (*United Nation Misson in East Timor*) sebagai pengawas dari pelaksanaan plebisit ini. Dalam kurung waktu sebelum diadakannya jajak pendapat telah dilakukan rentetan teror dan kejahatan terhadap kemanusiaan di Timor Timur. Ini dilakukan dengan maksud untuk menakut-nakuti penduduk agar mereka memilih opsi integrasi dengan Indonesia, dimana mereka ditekan secara intens dan diharuskan untuk memilih opsi tersebut. Kekerasan terhadap kemanusiaan semakin marak pada awal 1999 dan sangat menguat pada bulan April ketika dilancarkan Operasi Sapu Jagad.

Pada tanggal 22 September 1999 Komisi Nasional Hak Asasi Manusia (Komnas HAM) menggunakan otoritasnya di bawah peraturan pemerintah yang dikeluarkan dengan cepat guna membentuk suatu tim khusus, yakni Komisi Penyelidik Pelanggaran HAM Timor Timur (KPP HAM Timtim), untuk menginvestigasi pelanggaran HAM di wilayah tersebut. Dalam laporannya kemudian KPP HAM menyatakan bahwa telah terjadi pelanggaran berat terhadap HAM yang dilakukan secara terencana, sistematis, serta

dalam skala yang luas dan besar berupa pembunuhan massal, penyiksaan dan penganiyaan, penghilangan paksa, kekerasan terhadap perempuan dan anak (termasuk perkosaan dan perbudakan seksual), pengungsian paksa, pembumihangusan dan perusakan harta benda yang kesemuanya ini merupakan kejahatan terhadap kemanusiaan[65]. Kejahatan terhadap kemanusiaan ini mengakibatkan kesengsaraan pada rakyat Timor Timur hingga datangnya bantuan kemanusiaan dan keamanan lingkungan rumah mereka yang dijamin oleh kedatangan pasukan INTERFET (*International Force East Timor*)[66].

2. Kamboja

Rakyat Kamboja telah menderita selama konflik bersenjata yang terjadi selama beberapa tahun. Pertama adalah konflik kemerdekaan pada tahun 1954, kemudian genosida pada rezim Khmer Merah oleh Pol Pot di tahun 1975 hingga 1979, dan invasi Vietnam yang mengubah konflik dari tahun 1979 sampai 1999. Saat Khmer Merah memasuki wilayah Ibu Kota Phnom Penh April 1975, mereka mendeportasi sekitar dua juta orang menuju ke pedesaan untuk

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[65] Komisi Kebenaran dan Persahabatan, *Op.Cit*, hal.340-341. Untuk masalah tindak pidana terhadap gender seperti pelecehan seksual dapat juga dilihat dalam *Report From the UN Special Rapporteur on Violence Against Women, Its Causes And Consequence* oleh Radhika Coomaraswamy,20 November- 4 Desember 1998,hal.71-72.

[66] Eilen Skinnder, 2007, *Experience and Lessons From "Hybrid" Tribunal: Sierra Leone, East Timor, And Cambodia*, hal.6. diakses pada tanggal 12 Juli 2010 melalui situs internet yang beralamat di http://www.iccir.law.ubc.ca/Site%20Map/ICC/ExperiencesfromInternationalSpecialCourts.pdf

kemudian menjadi pekerja paksa, disiksa dan mati[67]. Pembantaian diperkirakan mencapai 1,7 juta orang, terhitung mulai dari tahun 1975 hingga 1979 atau setidak-tidaknya seperlima dari total populasi yang berjumlah tujuh juta jiwa[68].

Di masa Vietnam mengusir Khmer Merah dan Pol Pot ketika perang dingin, banyak negara seperti Amerika Serikat dan China mendukung rezim Pol Pot dan menentang usaha untuk membawa mereka di hadapan pengadilan. Khmer Merah menduduki posisi di PBB selama 14 tahun. Pol Pot meninggal dalam tidurnya di dekat perbatasan Thailand tahun 1998. Di tahun 1988, negoasiasi internasional terhadap Kamboja berjalan dengan lambat. Barulah pada tahun 1991 lahir sebuah rekomendasi berupa Resolusi yang berkenaan dengan genosida oleh *United Nation Sub-Commission on Human Rights*. Perjanjian Paris (*Paris Agreement*) kemudian ditanda tangani di tahun 1991 yang kemundian mendirikan *United Nation Transitional Authority in Cambodia* (UNTAC). Tidak ada rekomendasi yang berkaitan dengan Konvensi Genosida dalam perjanjian ini, kecuali mengizinkan Khmer Merah untuk kembali ke Phom Penh. Akan tetapi Khmer Merah memilih mengabaikan Perjanjian Paris, dan pada tahun 1994 Dewan Perwakilan Kamboja tidak lagi memberikan

[67] Selain itu, tindakan seperti pembunuhan, pembersihan partai dan pembersihan terhadap orang dalam institusi dan keagamaan dilakukan dalam kurun waktu 1979. Lihat, Steven R. Ratner & Jason S. Abraham, 2008, *Melampaui Warisan Nuremberg Pertanggungjawaban Untuk Kejahatan Terhadap Hak Asasi Manusia dalam Hukum Internasional,*

[68] Eilen Skinnder, Op.Cit, hal.14.

perlindungan hukum terhadap Khmer Merah. Tahun 1996 dan 1997 pemimpin Khmer Merah dan anggotanya kemudian beralih kepada pemerintah yang berakhir pada pengampunan kepada mereka[69].

3.Kosovo

Slobodan Milosevic menjadi pemimpin dari Partai Komunis Serbia pada tahun 1987 dan terpilih menjadi presiden Serbia pada tahun 1989 dengan ajaran nasionalis kuat yang menguasai Kosovo. Pada Juni 1989 dan pada perayaan ke-600 dari Perang Kosovo, Milosevic mengadakan rapat umum di dekat Pristina utnuk merayakan penguasaan Serbia atas Kosovo, sebuah proses yang telah dia rencanakan setahun sebelumnya. Milosevic berbicara tentang kemenangan perang yang diraih dan yang akan datang, usaha pertamanya untuk menggabungkan kekuasaan atas Yugoslavia dan meliputi minoritas Serbia menjadi Serbia yang besar. Pada pokoknya, dia menggembar-gemborkan kemunduran status otonom dari Kosovo. Selama tahun 1990-an[70].

Penguasa Serbia memerintah Kosovo dengan penindasan serta penyiksaan. Deskriminasi menyebar dan banyak dari bangsa Albania yang kehilangan pekerjaannya. Pemimpin dari Bangsa Albania pun kehilangan kekuasaan di tahun 1989 yang pada awalnya ditentang

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[69] *Ibid,*

[70] Tom Perrielo dan Marieke Wierda, 2006, *LESSONS FROM THE DEPLOYMENT OF INTERNATIONAL JUDGES AND PROSECUTORS IN KOSOVO,* hal.4. diakses terakhir pada tanggal 12 Juli 2010 melalui situs internet di www.ictj.org/static/Prosecutions/Kosovo.study.pdf.

dengan mengatur pemerintahan parallel sebagai pembuangan. Akan tetapi, bangsa Kosovo-Albania yang lainnya kemudian membentuk *Kosovo Liberation Army* (KLA), dan saat musim panas di tahun 1998, bentrokan antara KLA dengan pemerintah Serbia menjadi konflik bersenjata. Angkatan bersenjata Serbia secara berulang merespon serangan kecil dari KLA dengan menyerang penduduk sipil yang diduga mendukung pemberontakan melalui peluncuran angkatan bersenjata yang berlebihan. Pemerintah yang menyerang penduduk sipil, secara sistematis menghancurkan kota, dan memaksa ratusan ribu orang kehilangan tempat tinggal. Sebagai balasan, penduduk sipil Serbia menjadi koraban dari penculikan, pemukulan, dan pembunuhan di tangan angkatan bersenjata Albania seperti KLA, yang juga menarget etnik Albania yang bergabung dengan Serbia.

Untuk delapan bulan pertama di tahun 1998, konflik internal bersenjata antara pemerintah dan KLA menghasilkan 2.000 kematian penduduk Albania. Pertempuran di bulan Oktober berada di bawah pengawasan *Organization for Security and Co-operation in Europe* (OSCE), tetapi insiden kekerasan tetap terjadi. Kemudian pada 15 Januari 1999, Militer Serbia menyerang desa Racak, membunuh 45 orang. *Human Rights Watch* melaporkan bahwa walaupun penyerangan diprovokasi oleh serangan tiba-tiba dari KLA tiga hari sebelumnya terhadap Polisi Serbia, Pemerintah Serbia merespon dengan menembak penduduk sipil, menyiksa tahanan, dan

melaksanakan sejumlah eksekusi. Setelah pembantaian di Racal, komunitas internasional meningkatkan tekanannya pada Serbia.

Pembicaraan pada bulan Februari dan Maret di Rambouillet gagal untuk memutuskan status Kosovo melalui diplomasi. Kemudian, Militer Serbia pun mengadakan pemusnahan dan pembersihan terhadap penduduk sipil, membunuh dalam jumlah yang besar dan menyebabkan pengusiran secara besar-besaran yang memaksa 850.000 penduduk Kosovo-Albania meninggalkan Kosovo. 24 Maret, NATO memulai serangan udaranya melawan Militer Serbia selama 11 minggu. Selama pemboman terjadi, pembersihan etnis berlanjut. Tanggal 27 Mei 1999, di tengah pertempuran dan kegagalan dari anggota diplomatik, penuntut dari *International Tribunal for the Former Yugoslavia* (ICTY), Justice Louise Arbour, mengumumkan dakwaan kepada Slobodan Milosevic dan yang lainnya atas tuntutan berkenaan dengan kejahatan terhadap kemanusiaan dan pelanggaran terhadap hukum perang. Dakwaan ditujukan terhadap kekerasan yang terjadi di Kosovo dari Januari hingga akhir Mei 1999.

Serangan udara NATO berakhir dengan perjanjian untuk menarik tentara Serbia dan polisi dari Kosovo dalam 11 hari. Pada 10 Juni 1999, sehari setelah penundaan serangan udara, Dewan Keamanan PBB mengeluarkan Resolusi Nomor 1244 (1999), yang mendirikan *United Nation Mission in Kosovo* (UNMIK) dan menjadikan Kosovo dalam perlindungan PBB. Dengan semangat dari Ramboillet

dan dalam kekhawatiran internasional tentang pemberian bantuan untuk menentukan nasib sendiri, Resolusi 1244 menunda pertanyaan mengenai status Kosovo dengan menetapkan kembali perbatasan dari Republik Federal Yugoslavia (FRY) dan menciptakan otonomi substansial serta penentuan nasib sendiri Kosovo.

Pada bulan Juni 1999, enam tahun setelah pendirian ICTY, UNMIK menyadari bahwa pengadilan hanya mampu mengadili mereka yang paling bertanggung jawab untuk kekejaman yang terjadi di Bekas Yugoslavia. Oleh karena itu, UNMIK menyelenggarakan investigasi dan penuntutan terhadap mereka yang melakukan kejahatan terhadap kemanusiaan, kejahatan perang, dan kejahatan serius lainnya selama perang sipil yang berada di luar jurisdiksi ICTY[71]. Pengadilan nasional kurang memiliki kapasitas yang kurang dengan independensi yang kurang untuk menyelenggarakan pengadilannya sendiri. Banyak dari infrastruktur termasuk bangunan pengadilan, perpustakaan hukum, dan perlengkapan telah hancur selama perang. Ditambah lagi, pengacara nasional yang kurang berpengalaman, sebagaimana sebagian besar dari hakim dan pengacara telah melarikan diri, sementara dari Albania telah dihalangi dari masalah kehakiman selama bertahun-tahun. Di tengah ketidakcukupan infrastrukrur, tahanan yang menunggu pengadilan di

[71] Lindsey Raub, *Op.Cit*, Hal.1026.

penjara yang sesak, rasa frustasi dari proses pengadilan yang tertunda, mengantarkan pada kekerasan etnik.

Untuk mengakhiri krisis yang memuncak terhadap pertanggungjawaban dan keadilan, UNMIK mengeluarkan beberapa peraturan yang mengizinkan hakim luar untuk duduk berdampingan dengan hakim domestik di dalam pengadilan Kosovo dan membolehkan pengacara luar untuk bermitra dengan pengacara nasional untuk menuntut dan membela dalam kasus tersebut. Pengadilan Kosovo memperoleh kewenangannya melalui peraturan UNMIK. Dalam hal menjaga sifat campuran dari institusi ini, aturan hukum dilaksanakan dengan menggabungkan hukum internasional dan juga nasional, dengan syarat sepanjang hukum nasional tersebut tidak bertentangan dengan hukum hak asasi manusia internasional. Sebagian besar dari hukum yang dilaksanakan dalam pengadilan Kosovo diperoleh dari hukum nasional Yugoslavia. Di bawah aturan UNMIK 2000/64, *the Special Representative of the Secretary-General (SRSG)* memiliki kewenangan untuk meminta penuntut umum, terdakwa, atau penasehat hukum, menunjuk penuntut umum internasional, hakim, atau majelis hakim terdiri dari tiga orang yang setidak-tidaknya dua diantaranya adalah hakim internasional, melahirkan pengadilan yang disebut dengan *Regulation 64 Panels.*

Hakim internasional dan penuntut umum internasional dibayar oleh PBB berdasarkan skala gaji professional, sementara keuangan

dari panel internasional dan penuntutan dibagi antara anggaran UNMIK dan anggaran Konsolidasi Kosovo. Pada Juni 2002, pengadilan ini telah mengadakan 17 pengadilan untuk kasus kejahatan perang, dan pada bulan Oktober 2002 sejumlah hakim internasional dan penuntut umum telah berpartisipasi dalam sembilan puluh proses pengadilan. September 2005, 27 hakim internasional dan penuntut umum telah terlibat dalam enam puluh kasus berturut-turut.

4.Sierra Leone

Setelah 153 tahun di bawah pemerintahan kolonial, Sierra Leone merdeka di tahun 1961. Tiga dekade pertama kemerdekaan diwarnai dengan sejumlah perebutan kekuasaan militer dan di kontrol oleh satu partai, korupsi dan politisi yang memperkaya diri. Tahun 1991, perang sipil pecah di antara sejumlah fraksi dan dari tahun 1991 sampai dengan 2002. Empat penguasa yang berbeda memegang kekuasaan. Konflik bersenjata di Sierra Leone telah menjalar hingga sampai pada penduduk sipil, lewat penggunaan tentara anak dan eksploitasi *Blood Diamond* (Berlian Merah)[72].

Setelah beberapa usaha oleh komunitas internasional untuk negosiasi, *Lome Peace Accord* (Perjanjian Damai Lome) ditanda tangani pada bulan Juli 1999. Lome diberikan jaminan dari tuntutan

[72] Eileen Skinnider, *Op.Cit*, hal.11.

atas kekerasan terhadap Hak Asasi Manusia dan hukum humaniter. PBB kemudian mendirikan misi penjaga perdamaian (*Peacekeeping Mission*) pada tahun 1999 dengan mandat untuk mengawasi pelaksanaan dari *Lome Peace Accord* dan mengawasi genjatan senjata serta demobilisasi pemberontakan. Akan tetapi semuanya hancur pada tahun 2000. Situasi ini mengantarkan pada intervensi militer ECOWAS, penyebaran sejumlah besar pasukan operasional penjaga perdamaian seperti halnya keterlibatan dari angkatan bersenjata dari Inggris (*United Kingdom*) di Sierra Leone. Akhirnya, pemilihan dilaksanakan pada bulan Maret 2001.

Semenjak tahun 1991, kota Sierra Leone telah menderita akibat perang, teror dan lebihnya lagi, tidak hentinya krisis kemanusiaan yang meninggalkan kebinasaan. Perang telah mengekang produksi pertanian secara drastis, memotong pendapatan pemerintah dari hasil tambang dan kerusakan atas ratusan sekolah, fasilitas kesehatan, serta fasilitas administrasi, pengusiran paksa telah mempengaruhi lebih dari setengah dari populasi sekitar 4,5 juta penduduk, antara 20.000 dan 75.000 penduduk telah terbunuh dan ribuan termutilasi. Terlepas dari itu, kesulitan mendapatkan pendidikan di saat perang dan hancurnya pusat pendidikan telah mengakibatkan krisis di kota tersebut[73].

[73] Lihat, www.afrol.com/News/sil007_civil_war.htm. Diakses terakhir pada tanggal 12 Juli 2010.

Pada 23 Maret 1991, sekitar 100 pejuang yang menamakan dirinya *Revolutionary United Front* (RUF) menyeberangi perbatasan dari Liberia menuju Sierra Leone. RUF yang dipimpin oleh Foday Sankoh dan menurut beberapa dibelakangi oleh Charles Taylor, kemudian jenderal dan juga presiden Liberia. Diketahui bahwa Taylor sebagai pendukung finansial RUF meminta untuk mengambil alih akses dari *Blood Diamond* di Sierra Leone serta mengacaukan kota. Adapula yang mengatakan bahwa mereka dimotivasi oleh gerakan ECOMOG Nigeria (Pengawas Komunitas Ekonomi di Afrika Barat) yang menyerang RUF pada tahun 1990, dan menghalangi klaim mereka atas Monrovia. Pada tahun 1990 Taylor mengumumkan bahwa "Sierra Leone akan merasaka pahitnya peperangan."[74]

RUF diikuti oleh sebagian besar dari orang Liberia dan sejumlah penduduk dari Burkinabes. Sebagai group yang menyeberangi wilayah selatan, mengakibatkan penggulingan atas Joseph Momoh, dan mengangkat Steven sebagai presiden. Massa RUF yang gagal mendapatkan dukungan, mungkin dikarenakan oleh kekejamannya atas teror, yang telah dicirikan dengan kekejaman sistematik terhadap penduduk sipil serta perekrutan tentara secara paksa. Samaran atas revolusi yang terkenal ini menjadi lebih tidak berlaku lagi ketika sekelompok militer dari anak muda memimpin serangan tiba-tiba pada April 1992 dan mendirikan *National Provisional Ruling Council*

[74] Elleen Skinnider, *Op.Cit*, hal.5.

(NPRC), yang dipimpin oleh Kapten Strasser yang berumur 27 tahun. Tindakan ini mendapat dukungan dari RUF dengan menamakan tindakan tersebut sebagai *raison d'etre*, untuk menggulingkan perdebatan pemerintah.

Dalam dekade berikutnya, Sierra Leone terbagi menjadi beberapa fraksi, yang masing-masing melaksanakan kejahatan perang secara sistematis. NPRC menghalangi RUF untuk mencapai Freetown, akan tetapi gagal dan kalah di sebagian wilayah kota termasuk daerah pertambangan. Peperangan jarang menjadi sesuatu yang besar atau pergerakan tentara secara tradisional, akan tetapi lebih kepada pengendalian terhadap perdagangan antar desa, yang menghasilkan penindasan hak asasi manusia terhadap penduduk sipil secara massal. Di beberapa peristiwa, orang-orang berperan sebagai tentara memerangi pemberontakan di saat siang, dan menjarah mereka di saat malam. Fenomena ini menjadi cukup umum untuk menjadikan *Sobel* (gabungan antara tentara dan pemberontak) sebagai hal yang biasa. NPRC menyewa tentara bayaran dari luar, dengan bantuan milisi, untuk melemahkan kekuatan militer RUF.

Di tahun 1996, kota tersebut telah memulai pemilihan multi partai, tetapi peristiwa tersebut ditandai dengan kekerasan yang brutal untuk menghalangi terjadinya pemilihan. Partai yang ditunggangi oleh Ahmed Tejan Kabbah kemudian menang dan menjadikannya presiden. November 1996, Kabbah dan RUF menandatangani

Persetujuan Damai Abidjan (*Abidjan Peace Accord*). Akan tetapi, kekerasan kembali terjadi segera setelah setahun perjanjian tersebut berakhir. Mei 1997, Kabbah digulingkan dalam pecahnya petugas militer yang membebaskan Kopral Paul Koroma (yang sebelumnya dipenjara dalam usaha kudeta), dan mengangkatnya sebagai pemimpin yang baru, serta membuatnya membentuk *Armed Force Revolutionary Council* (AFRC). Setelah bertahun-tahun dengan adanya perbedaan yang tidak jelas antara tentara dan pemberontak, AFRC menjalin hubungan yang dekat dengan RUF, dan tindakan pertama Koroma adalah mengundang RUF untuk datang ke Freetown dan ikut dalam pemerintahannya.

Rezim baru ini tidaklah popular di tengah masyarakat, dan komunitas internasional tidak mengakuinya. Februari 1998, kombinasi antara tentara ECOMOG Nigeria dan tentara sipil membangun kembali kekuatan pemerintahan Kabbah di wilayah barat, meskipun banyak kota masih berada di tangan pemberontak. Pemerintah membentuk milisi yang berasal dari komunitas pemburu tradisional menjadi *Civilian Defence Force* (CDF), di bawah pimpinan Kepala Sam Hinga Norman. Di saat CDF melakukan beberapa tindakan kekerasan dibanding RUF dengan bentuk berupa kekerasan seksual, *Human Rights Watch* dan kelompok lain mendokumentasikan tindakan kekerasan yang meningkat di berbagai fraksi saat perang berlanjut. Peperangan menjadi tidak tertahankan lagi saat tahun 1998,

namun Januari 1999 pemberontak dan mantan tentara yang dipimpin oleh AFRC, kembali ke kota Freetown dalam *Operation No Living Thing* yang menjadi satu dari minggu paling berdarah dalam satu dekade. Perang ini meninggalkan 5.000 kematian dan banyak kota yang rusak. Invasi ini dipukul mundur oleh tentara Nigerian ECOMOG, sebagai balasan dengan juga melakukan kekejaman. Setelah enam bulan peperangan di seluruh kota, semua fraksi sepakat membuat perjanjian damai di Lome, Togo, pada bulan Juli 1999.

Perjanjian Damai Lome (*Lome Peace Agreement*) melahirkan beberapa kontroversi. Beberapa menyebutnya sebagai kegagalan diplomasi dengan membiarkan Charles Taylor untuk mengendalikan perdamaian dan menambah hubungan dekatnya terhadap RUF. Pendapat lain mengatakan, ini hanyalah satu-satunya pilihan di saat keputusasaan[75]. Setidak-tidaknya, akhir perjanjian masuk pada amnesti terhadap semua pejuang dari semua fraksi dari segala bentuk kejahatan, sebagaimana perjanjian pembagian kekuatan yang memberikan kewenangan kepada Foday Sankoh dalam mengatur pertambangan dan juga sumber daya alam lainnya. Perjanjian tersebut juga menyebutkan bahwa seluruh tentara Nigeria meninggalkan Sierra Leone, walaupun begitu mereka menemukan kunci penghalang untuk keuntungan RUF.

[75] *Ibid*, hal.7.

Dalam beberapa hari setelah tentara ECOMOG pergi pada Mei 2000, RUF mengambil 500 sandera dari penjaga perdamaian dan menyita persenjataan mereka. Beberapa minggu kemudian, pemberontakan mendekati Freetown, dan 800 pasukan Inggris diperintahkan untuk mengevakuasi penduduk dan mengamankan sebagian wilayah bagian barat. Pasukan Inggris berhasil menyelamatkan sandera, dan yang terakhir dilepaskan pada bulan Agustus. Bulan Mei 2000 menandakan kembalinya konflik kecil di kota, yang bertahan hingga akhirnya gencatan senjata terjadi pada bulan November, tapi kekejaman terhadap kemanusiaan tetap berlanjut. RUF mengontrol sebagian besar kota, termasuk wilayah strategis berlian, dan memiliki markas besar mereka di Makeni, kurang dari 200 kilometer dari Freetown.

Akan tetapi, musim panas 2000, *United Nation Mission in Sierra Leone* (UNAMSIL) telah didirikan, dan menjadi pasukan penjaga perdamaian terbesar di dunia dengan 17.500 personel yang memiliki anggaran mencapai 700 juta dolar per tahun. Madat dari UNAMSIL termasuk pelucutan senjata, demobilisasi, dan reintegrasi (DDR). Pada pertengahan 2001, program DDR-UNAMSIL telah memproses lebih dari 45.000 tentara, dan pada Januari perang resmi diumumkan di atas perintah untuk upacara pembakaran senjata *(Waepon-Burning)*. Empat bulan kemudian, kota menjadi damai dan relatif adil dalam pemilihan dengan SLPP Kabbah mendapatkan 70%

suara, sementara APC memenangkan 20% suara. Pada awal tahun 2006 Sierra Leone tidak sepenuhnya stabil. Sejumlah besar dari mantan tentara anak muda tetap berdaya dan tanpa kesempatan ekonomi sementara menjadi lebih termiliterisasi, serta SLPP menunjukkan beberapa tanda korupsi dan juga pemerintahan tanpa etnik (*non-ethnic governance*). Dan sebagai hasilnya, investasi luar negeri tetap kurang di Sierra Leone[76].

[76] *Ibid,*

BAB III

METODE PENELITIAN

A. Lokasi Penelitian

Penulis memilih lokasi penelitian di perpustakaan dan kantor yang ada di wilayah Kota Makassar Provinsi Sulawesi Selatan dan DKI Jakarta, yaitu:

1. Perpustakaan Fakultas Hukum Universitas Hasanuddin Makassar
2. Perpustakaan Pusat Universitas Hasanuddin Makassar
3. Perpustakaan Kementerian Luar Negeri di Jakarta
4. Lembaga Swadaya Masyarakat ELSAM di Jakarta

B. Jenis dan Sumber Data

Data pendukung dalam penelitian ilmiah yang penulis lakukan adalah data primer dan data sekunder. Data primer adalah data yang diperoleh atau dikumpulkan oleh penulis dalam proses penelitian melalui proses wawancara, dan data sekunder yaitu data yang diperoleh atau dikumpulkan oleh penulis dalam proses penelitian melalui cara penulusuran literatur atau kepustakaan, dokumen-dokumen, serta arsip-arsip yang ada kaitannya dengan masalah yang akan dibahas melalui studi kepustakaan dan studi melalui media *online*.

C. Teknik Pengumpulan Data

Penulis mengumpulkan data-data melalui penggabungan data yang diperoleh berdasarkan *field research* (penelitian lapangan) untuk memperoleh data primer yang penulis dapat melalui penelitian secara langsung di lokasi penelitian penulis. Ada pun yang kedua berdasarkan *library research* (penelitian kepustakaan) untuk memperoleh data sekunder berupa buku-buku ilmiah, ketentuan-ketentuan internasional seperti perjanjian internasional, majalah, surat kabar, serta bahan-bahan tertulis lainnya yang berkaitan dengan penelitian ini.

D. Analisis Data

Data yang diperoleh atau dikumpulkan dalam penelitian ini baik data primer maupun data sekunder merupakan data yang sifatnya kualitatif. Oleh karena itu, teknik analisis data yang digunakan adalah analisis kualitatif, yaitu proses pengolahan data yang dianggap cukup dianalisis secara deduktif dengan berlandaskan kepada dasar-dasar pengetahuan umum kemudian meneliti persoalan yang bersifat khusus. Dari adanya analisis inilah kemudian ditarik suatu kesimpulan.

BAB IV

PEMBAHASAN

A. Penerapan *Hybrid Tribunal* Dalam Penyelesaian Kasus Kejahatan Internasional

Hybrid tribunal (pengadilan campuran) sebagai metode penyelesaian kasus kejahatan internasional menjadi harapan yang sangat bagi dunia internasional. Pengadilan campuran ini memiliki kerakterisktik dengan menggabungkan komponen antara hukum nasional suatu negara dengan hukum internasional. Pengadilan ini pun dianggap sebagai metode untuk menghindari proses dari pengadilan nasional dan juga pengadilan internasional seperti ICTR, ICTY, dan juga ICC. Model pengadilan campuran ini merupakan usaha untuk menggabungkan antara kekuatan dari pengadilan ad-hoc dengan keuntungan dari penuntutan domestik.

Pengadilan campuran ini pun juga diaggap sebagai pencampuran dari kebaikan dua dunia, pengadilan nasional dengan tuntutan internasional atas kejahatan internasional, serta untuk menutupi kekurangan dari dua dunia yang terpisah ini. Pada daerah tempat konflik terjadi, pengadilan nasional diperkirakan kurang memiliki kekuasaan dan kemandirian dalam melakukan prosesnya. Sementara, pengadilan

internasional sendiri kurang dapat dipercaya[77]. Hal ini dikarenakan tempat yang digunakan sebagai pengadilan *(Trials area)* berada jauh dari tempat kejadian perkara, sehingga kunci dari pengadilan yaitu pihak penuntut tidak familiar dengan konflik yang terjadi. Konsekuensinya adalah manfaat dari pengadilan internasional malah tidak bisa dirasakan oleh masyarakat daerah tempat kejadian perkara tersebut.

Selain itu, ketidak mampuan pengadilan nasional untuk melakukan proses peradilan dikarenakan oleh infrastruktur dan juga sumber daya yang ada di sana telah hancur diakibatkan oleh konflik yang telah terjadi. Sedangkan, untuk membentuk suatu pengadilan internasional diperlukan persetujuan dari semua anggota Dewan Keamanan PBB, padahal belum tentu semua anggota tersebut setuju dengan berbagai macam alasan. Begitu pula anggaran yang dibutuhkan untuk mengadakan pengadilan internasional sangat besar, yaitu sekitar USD 250 Juta per tahun, atau sekitar 15% dari anggaran biaya operasional PBB[78]. Hal ini dikarenakan oleh tempat yang menjadi lokasi pengadilan internasional yang jauh dari daerah konflik membutuhkan biaya yang amat besar untuk memanggil saksi, mendatangkan hakim, penuntut, pembela, staff pengadilan, serta tenaga ahli. Pembiayaan yang sangat besar atas pengadilan-pengadilan internasional ini pun ternyata kurang mendatangkan hasil yang memuaskan bagi dunia internasional karena jumlah penuntutan yang

[77] Sarah M.H.Nouwen, *Hybrid Court: the Hybrid Category of a New Type of International Crimes Court*, hal.191. Lihat, www.utrechtlawreview.org/publish/articles/000033/article.pdf. diakses terakhir pada tanggal 21 Juli 2010.

[78] Patrick Burgess, *Op.Cit*, hal. 243.

sedikit pada awal tahun pekerjaannya. Untuk membentuk sebuah pengadilan yang benar-benar baru memerlukan sejumlah besar "pekerjaan awal" dan biaya, sehingga pada tahun-tahun pertama operasional dari pengadilan ini tidak memiliki hasil yang sangat banyak.

Dalam beberapa literatur dan artikel, pengadilan yang menggabungkan antara dua dunia berbeda ini ada yang menyebutnya *'hybrid (criminal) courts, 'mixed courts/tribunals', 'internationalized (criminal) courts, 'mixed domestic-international tribunals, hybrid domestic-international courts, 'semi-internationalized criminal courts, 'internationalized domestic courts, internationalized domestic tribunals* atau *mixed international/national institutions.* Beberapa bentuk dari pengadilan campuran tersebut dapat dilihat dari pengadilan yang terdapat di Timor Timur, Kamboja, Kosovo, dan Sierra Leone. Berikut adalah penjabaran dari beberapa pengadilan tersebut.

1. *Special Panels of the Dili District Court (SPSC)* di Timor Timur

Pada bulan Oktober 1999, atas dasar Resolusi Dewan Keamanan PBB Nomor 1272 mendirikan UNTAET (*United Nation Transitional Administration in East Timor*) yang dalam resolusi tersebut memberikan kewenangan kepada UNTAET untuk mendirikan pemerintahan yang efektif, membantu pembentukan badan sosial dan sipil, memastikan penyerahan dan koordinasi bantuan kemanusiaan, bantuan dalam rehabilitasi kehumaniteran, bantuan dalam proses rehabilitasi dan pembangunan, membantu

dalam pembentukan pemerintahan yang mandiri, membantu dalam membentuk kondisi yang kondusif[79].

Untuk menciptakan keadaan yang stabil dalam wilayah Timor Timur, UNTAET mendirikan suatu mekanisme pengadilan yang disebut dengan *Special Panels of the Dili District Court* (SPSC) pada bulan Juni 2000 berdasarkan Regulasi 2000/15. Pengadilan ini memiliki jurisdiksi eksklusif untuk mengadili "kejahatan serius", seperti genosida, kejahatan perang, dan kejahatan terhadap kemanusiaan yang terjadi dalam kurun waktu 1 Januari sampai dengan 25 Oktober 1999. Pertolongan dari komunitas internasional ini sangat penting dikarenakan oleh sebagian besar dari infrastruktur telah hancur saat terjadi kekerasan serta melemahnya pengadilan. Begitu pula dengan sejumlah pengacara terlatih yang berasal dari Timor Timur telah dimiliki oleh Indonesia selama rezim Soeharto.

Struktur dari SPSC oleh UNTAET memasukkan dua hakim internasional dan satu hakim dari Timor Timur yang ditempatkan pada dalam sistem hukum nasional yang baru bagi Timor Timur. Bentuk pengadilannya pun serupa dengan pengadilan negeri. Substantsi hukum yang dterapkan juga campuran antara hukum nasional dan hukum internasional dengan sedikit modifikasi

[79] Lindsey Raub, 2009, *Positioning Hybrid Tribunals in International Criminal Justice*,hal.1029, diakses pada tanggal 12 Juli 2010 melalui situs internet yang beralamat di https://www.law.nyu.edu/...International.../ecm_pro_064132.pdf.

menggabungkan ketentuan dari Statuta Roma dari *International Criminal Court* (ICC) yang mengacu pada pengertian genosida, kejahatan terhadap kemanusiaan, dan kejahatan yang lain, serta konvensi internsional yang lain, norma, dan yurisprudensi, seperti hukum Indonesia, yang tidak diatur dalam Statuta Roma. Tanggung jawab penuntutan diberikan kepada Jaksa Penuntut dari Unit Kejahatan Serius yang berada di bawah Penuntut Umum Timor Timur[80]. Tapi, UNTAET tidak mendirikan unit pembelaan hingga September 2002, saat diselesaikannya ketentuan pembelaan yang memadai barulah didirikan Unit Pengacara Pembela. Dari tahun 2000 hingga 2005, SPSC menyelesaikan 55 pengadilan yang melibatkan 87 terdakwa. 84 diantaranya bersalah dan tiga bebas, meskipun satu diantaranya dinyatakan bersalah dalam sidang banding.

2. *Extraordinary Chamber in the Courts of Cambodia* di Kamboja

Pada juli 1997, permohonan pendirian pengadilan internasional kepada PBB dihaturkan oleh Perdana Menteri Hun Sen dan Pangeran Norodom Ranariddh untuk mengadili Khmer Merah. Permohonan ini dilakukan melihat tidak cukup memadainya keahlian untuk mengurus prosedur yang sangat penting dan menyelesaikan kejahatan yang mengkhawatirkan semua orang di

[80] *Ibid*,hal. 1030.

dunia. Hal ini melahirrkan resolusi pada tahun 1998 untuk menghukum perbuatan genosida oleh Khmer Merah. Kemudian pada tahun 1998-1999 PBB mengirimkan tim ahli untuk memeriksa dan menyelidiki bukti-bukti di lapangan. Akan tetapi ini tidak dapat diterima oleh pemerintah Kamboja. Untuk menghindari kebuntuan dalam proses negosiasi, negara lain mencoba untuk mengadakan kompromi, seperti Pemerintah Amerika Serikat menyarankan formula yang memberikan mayoritas kepada hakim Kamboja, dan membiarkan setidaknya satu hakim internasional untuk keperluan pengambilan keputusan.

Juli 2001, Majelis Perwakilan Kamboja dan senatnya membuat suatu undang-undang dan mendirikan *Extraordinary Chamber in the Courts of Cambodia for the Presecution of Crimes Commited During the Period of Democratic Cambodia*. Akan tetapi hukum yang diciptakan tidak memuaskan bagi PBB yang mengakhiri negosiasi di bulan Februari 2002. Pada Juni 2002, Pemerintah Kamboja kembali meminta pertolongan kepada PBB. Pada Desember 2002, Majelis Umum membuat resolusi yang meminta Sekertaris Jenderal untuk kembali berbicara dengan pihak Kamboja. Maret 2003, akhirnya terdapat perjanjian berkenaan dengan mekanisme pengadilan yang ditanda tangani oleh PBB dan Pemerintah Kamboja. Perjanjian ini secara rinci mengenai struktur dari pengadilan Kamboja ini.

Extraordinary Chamber ini terdiri dari pra-pengadilan dan pengadilan negeri yang terdiri atas lima hakim, tiga hakim dari Kamboja dan satu diantaranya bertindak sebagai ketua pengadilan dan pengadilan tingkat tinggi yang terdiri atas tujuh hakim dengan empat hakim dari Kamboja yang salah satunya bertindak sebagai ketua pengadilan. Jurisdiksi dari pengadilan ini menuntut pemimpin senior dari Khmer Merah dan mereka yang paling bertanggung jawab atas kejahatan berdasarkan hukum pidana Kamboja, hukum humaniter dan hukum kebiasaan internasional, serta konvensi internasional yang diakui oleh Kamboja[81]. Jurisdiksi pengadilan ini terbatas dalam kurun waktu antara 17 April 1975 dan Januari 1979.

Sampai saat ini pengadilan yang mengadili orang-orang yang bertanggung jawab atas *killing field* di Kamboja masih berlangsung. Tokoh Khmer Merah yang sedang dan akan diadili antara lain adalah Kaing Guek Eav, Nuon Chea, dan Khieu Samphan. Pol Pot sebagai pemimpin tertinggi Khmer Merah telah meninggal pada tahun 1998. Demikian pula Son Sen yang tewas dibunuh pada tahun 1997 dan Leng Sary yang diberi amnesti oleh pemerintah Kamboja pada tahun 1996. Nuon Chea ditahan dan dan dihadapkan ke pengadilan pada tanggal 21 September 2007. Chea didakwa menyiksa dan membunuh warga sipil, termasuk warga

[81] Lihat, *AGREEMENT BETWEEN THE UNITED NATIONS AND THE ROYAL GOVERNMENT OF CAMBODIA CONCERNING THE PROSECUTION UNDER CAMBODIAN LAW OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA,*

sipil, termasuk membunuh biksu dan etnis Vietnam. Chea diancam pidana seumur hidup. Pada tanggal 8 Februari 2008, Chea kemudian dihadapkan di pengadilan. Sedangkan Kaing Guek Eav alias Duch, Kepala Penjara Khmer Merah dihadapkan di pengadilan pada tanggal 21 November 2007. Sementara Khieu Samphan yang sedang menunggu giliran untuk diadili menderita *stroke* dan tidak diizinkan berobat keluar dari Kamboja[82]

3. *Regulation 64 Panels* di Kosovo

Pada bulan Juni 1999, enam tahun setelah pendirian ICTY, UNMIK menyadari bahwa pengadilan hanya mampu mengadili mereka yang paling bertanggung jawab untuk kekejaman yang terjadi di Bekas Yugoslavia. Oleh karena itu, UNMIK menyelenggarakan investigasi dan penuntutan terhadap mereka yang melakukan kejahatan terhadap kemanusiaan, kejahatan perang, dan kejahatan serius lainnya selama perang sipil yang berada di luar jurisdiksi ICTY[83]. Pengadilan nasional kurang memiliki kapasitas yang kurang dengan independensi yang kurang untuk menyelenggarakan pengadilannya sendiri. Banyak dari infrastruktur termasuk bangunan pengadilan, perpustakaan hukum, dan perlengkapan telah hancur selama perang. Ditambah lagi,

[82] Eddy O.S. Hiariej, *Op.Cit*,hal.87.

[83] Lindsey Raub, *Op.Cit*, Hal.1026.

pengacara nasional yang kurang berpengalaman, sebagaimana sebagian besar dari hakim dan pengacara telah melarikan diri, sementara dari Albania telah dihalangi dari masalah kehakiman selama bertahun-tahun. Di tengah ketidakcukupan infrastrukrur, tahanan yang menunggu pengadilan di penjara yang sesak, rasa frustasi dari proses pengadilan yang tertunda, mengantarkan pada kekerasan etnik.

Untuk mengakhiri krisis yang memuncak terhadap pertanggungjawaban dan keadilan, UNMIK mengeluarkan beberapa peraturan yang mengizinkan hakim luar untuk duduk berdampingan dengan hakim domestik di dalam pengadilan Kosovo dan membolehkan pengacara luar untuk bermitra dengan pengacara nasional untuk menuntut dan membela dalam kasus tersebut. Pengadilan Kosovo memperoleh kewenangannya melalui peraturan UNMIK. Dalam hal menjaga sifat campuran dari institusi ini, aturan hukum dilaksanakan dengan menggabungkan hukum internasional dan juga nasional, dengan syarat sepanjang hukum nasional tersebut tidak bertentangan dengan hukum hak asasi manusia internasional. Sebagian besar dari hukum yang dilaksanakan dalam pengadilan Kosovo diperoleh dari hukum nasional Yugoslavia. Di bawah aturan UNMIK 2000/64, *the Special Representative of the Secretary-General (SRSG)* memiliki kewenangan untuk meminta penuntut umum, terdakwa, atau

penasehat hukum, menunjuk penuntut umum internasional, hakim, atau majelis hakim terdiri dari tiga orang yang setidak-tidaknya dua diantaranya adalah hakim internasional, melahirkan pengadilan yang disebut dengan *Regulation 64 Panels*.

Hakim internasional dan penuntut umum internasional dibayar oleh PBB berdasarkan skala gaji professional, sementara keuangan dari panel internasional dan penuntutan dibagi antara anggaran UNMIK dan anggaran Konsolidasi Kosovo. Pada Juni 2002, pengadilan ini telah mengadakan 17 pengadilan untuk kasus kejahatan perang, dan pada bulan Oktober 2002 sejumlah hakim internasional dan penuntut umum telah berpartisipasi dalam sembilan puluh proses pengadilan. September 2005, 27 hakim internasional dan penuntut umum telah terlibat dalam enam puluh kasus berturut-turut.

4. *Special Court for Sierra Leone* (*SCSL*) di Sierra Leone

Special Court for Sierra Leone (*SCSL*) didirikan pada 16 Januari 2002, atas permintaan dari pemerintah Sierra Leone setelah akhir dari perang sipil. Mengikuti permohonan bantuan internasional dari pemerintah, Dewan Keamanan meminta Sekertaris Jenderal untuk menegosiasikan perjanjian dengan pemerintah untuk membentuk pengadilan istimewa yang mandiri intuk menuntut mereka yang paling bertanggung jawab atas kejahatan terhadap kemanusiaan, kejahatan perang, dan kejahatan

serius terhadap hukum humaniter internasional. Januari 2002, negosiasi ini menghasilkan pembentukan pengadilan istimewa. Komitmen pemerintah Sierra Leone untuk memastikan keadilan dan sikap mendukung dari pemerintah menjadi sangat penting dalam pembentukan pengadilan istimewa.

SCSL terdiri atas dua pengadilan negeri *(Trial Chamber)* dan Pengadilan Tinggi *(Appeals Chamber)*. Setiap pengadilan terdiri atas tiga hakim, dengan satu hakim yang dipilih oleh pemerintah Sierra Leone. Namun pada kenyataannya, hanya ada satu hakim yang berada di pengadilan negeri, begitu pula di Sierra Leone. Tim penuntut seluruhnya berasal dari luar, sementara pembela terdiri dari orang luar dan orang Sierra Leone sendiri. Pengadilan diatur oleh staf dari orang Sierra Leone.

SCSL yang berdasarkan perjanjian memiliki mandat selama tiga tahun untuk mengadili mereka yang paling bertanggung jawab terhadap pelanggaran hukum humaniter internasional dan hukum Sierra Leone yang ada di sana setelah November 1996. Meskipun jumlah kasus yang ditangani oleh pengadilan ini tidak banyak dan memiliki fokus yang lebih besar, pengadilan pertama baru dilaksanakan hingga dua tahun dan di bulan Desember 2007 Dewan Keamanan memperpanjang mandat pengadilan hingga 30 September 2008. Dalam percobaan menuntut mantas Presiden Liberia Charles Taylor, dalam rangka menyediakan dana dan

bantuan militer kepada pemberontak Sierra Leone untuk mengendalikan Sierra Leone dan akses pertambangan berliannya, pengadilan telah melampaui kemampuannya, dan Komite Managemen Pengadilan telah sepakat untuk menyelesaikan peninjauan kembali anggaran yang dialokasikan dari 1 Juli 2008 hingga 30 Juni 2010, saat pengadilan bermaksud untuk menyelesaikan pekerjaannya[84].

Melihat dari beberapa bentuk pengadilan campuran yang di terapkan di atas, dalam proses pembentukan *hybrid tribunal* sendiri ternyata tidaklah sama antara satu kasus dengan kasus yang lain. Dengan kata lain, pembentukan dari pengadilan campuran ini bersifat kasuistis (tergantung dari kasus kejahatan yang terjadi). Tapi secara umum dapat dibedakan menjadi dua, yaitu berdasarkan permintaan dari negara tempat kejadian perkara tersebut terjadi dan melalui keterlibatan PBB yang berada di dalam negara tempat kejadian perkara tersebut[85].

Pembentukan dari *Extraordinary Chamber in the Courts of Cambodia* (ECCC) berasal dari permintaan dari Perdana Menteri Hun Sen dan Pangeran Norodom Ranariddh yang meminta bantuan kepada PBB untuk menciptakan sebuah pengadilan untuk menghukum mereka yang paling bertanggung jawab atas kejahatan di bawah bendera Khmer

[84] Ibid, hal.1034

[85] Betty Yolanda, wawancara, ELSAM, Jakarta, 2 Juli 2010.

Merah. Akan tetapi, pemerintah Kamboja juga tidak menginginkan adanya pengadilan internasional dan bersikeras untuk membuat pengadilan nasional yang dirasakan oleh Hun Sen sendiri sebagai pilihan yang tepat bagi rakyat Kamboja.

Dewan Keamanan PBB juga tidak memiliki keinginan untuk membentuknya, karena dewan merasa hal tersebut akan ditentang oleh China. Hal tersebut membuat Sekertaris Jenderal PBB bersama dengan pemerintah Kamboja sepakat untuk membentuk pengadilan campuran. Pada tahun 1999, atas permintaan dari Majelis Umum, Sekertaris Jenderal pun membentuk tim ahli untuk membahas mengenai hakim Kamboja yang akan menangani kasus-kasus tersebut. Akan tetapi hal itu tidak disetujui oleh tim ahli dengan alasan bahwa sangat sulit untuk menemukan hakim yang memiliki kualifikasi yang cukup serta terbukti independen[86].

Keberadaan pemerintah dalam pengadilan tersebut ditakutkan akan mengurangi independensi dari pengadilan, dan hal itu pun terbukti dengan adanya permintaan bantuan oleh perdana menteri untuk mengadili mereka yang paling bertanggung jawab atas kejahatan tersebut dikarenakan oleh tidak cukupnya sumber daya dan pengalaman Kamboja atas hal ini. Hanya dalam waktu empat tahun, di tahun 2005, pengadilan campuran pun lahir. Mengingat laporan dan permintaan dari tim ahli untuk membentuk sebuah pengadilan internasional, mengakibatkan negosiasi yang amat sengit antara pemerintah Kamboja dengan PBB. Pemerintah

[86] Sarah M.H.Nouwen, *Op.Cit*, hal.194.

Kamboja memaksa untuk mendominasi pengadilan yang akan dibentuk, sementara pihak PBB menginginkan adanya pengaruh internasional terhadap pengadilan untuk menjamin standar internasional dari pengadilan tersebut. Hal ini dikarenakan oleh ketakutan pihak PBB akan independensi dari pengadilan serta kekhawatiran akan amnesti dan kekerasan terhadap hak dari terdakwa.

Tanpa adanya perjanjian yang ditanda tangani oleh para pihak, undang-undang tentang *Extraordinary Chambers in the Courts of Cambodia* di resmikan pada Agustus 2001. Struktur serta hukum yang berlaku didominasi oleh Kamboja. Februari 2002, PBB menarik diri dari negosiasi dikarenakan oleh tidak adanya jaminan dari pemerintah Kamboja untuk membentuk pengadilan yang mandiri, tidak memihak, dan objektif. Akan tetapi, atas paksaan dari Majelis Umum, negosiasi dilanjutkan dan perjanjian yang menyediakan jaminan internasional atas pengadilan tersebut akhirnya ditanda tangani pada Juni 2003. Ratifikasi undang-undang dan perjanjian yang membawahi *Extraordinary Chamber* ditanda tangani pada Oktober 2004.

Begitu pula dengan Sierra Leone yang meminta bantuan kepada PBB untuk mengadili mereka yang bertanggung jawab atas kejahatan selama perang. Berbeda dengan *Extraordinary Chamber* yang membutuhkan waktu yang lama, pembentukan *Special Panel* dirasakan cukup singkat. Permintaan bantuan oleh Sierra Leone dilakukan pada saat situasi di sana masih dalam agenda dari Dewan Keamanan. Perjanjian

damai pun masih baru dan rentan. PBB pun sangat terlibat dalam situasi ini dengan tentaranya yang masih ada di sana. Dewan Keamanan kemudian meminta kepada Sekertaris Jenderal PBB untuk menegosiasikan perjanjian dengan pemerintah Sierra Leone untuk membentuk *Special Court* yang independen. Perjanjian pun baru diratifikasi pada bulan Maret 2002 setelah dana pembentukan *Special Court* terkumpul[87].

Sementara di Kosovo dan Timor Timur, keterlibatan dari PBB sangatlah besar. Kewenangan atas daerah ini diberikan kepada Sekertaris Jenderal untuk mengurusi dua daerah yang hancur akibat perang. Untuk itu, Sekertaris Jenderal PBB membentuk sebuah tim untuk memastikan pembangunan kedua daerah bekas perang. UNMIK (*United Nation Mission in Kosovo*) dibentuk untuk mengurusi Kosovo, sementara di Timor Timur dibentuklah UNTAET (*United Nation Transitional Administration on East Timor*). Kedua bertanggung jawab atas segala aspek pemerintahan termasuk administrasi hukum. Menghadapi kekosongan dalam hukum, keduanya membentuk peraturan-peraturan baik secara struktur, prosedural, beserta substansial dari hukum di daerah tersebut.

Di Timor Timur, sistem pengadilan pidana dibangun mulai dari awal. Infrastruktur hancur serta tidak ada orang Timor Timur yang

[87] Pemerintah melakukan kompromi dengan Dewan Keamanan untuk tidak mendatangani perjanijan karena tidak adanya kecukupan dana. Kebutuhan dana untuk membentuk Special Court ini mencapai USD 89 Juta. Lihat, http://sites.google.com/site/internationalcriminallaw/Home/26-hybridity-the-best-of-both-worlds. diakses terakhir pada tanggal 12 Juli 2010.

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berpengalaman dalam hukum. Semuanya itu diisi oleh orang-orang Indonesia. Pembentukan tim investigasi pun dimulai untuk menyelidiki kejahatan-kejahatan yang telah terjadi di Timor Timur dengan hasil rekomendasi untuk membentuk suatu pengadilan internasional yang mengadili kejahatan atas kemanusiaan dan pelanggaran terhadap hukum perang yang terjadi sejak tahun 1999. Indonesia pun memberikan kesempatan untuk melakukan hal tersebut. Ketidakinginan dunia internasional untuk membentuk pengadilan internasional membuat UNTAET membentuk *Special Departement for Serious Crime* bersama kantor penuntut umum yang berada di bawah *Deputy Prosecutor for Serious Crime*. Pengadilan pun dibentuk dengan jurisdiksi di bawah hukum nasional dan hukum internasional tanpa batasan waktu jurisdiksi.

Di Kosovo tidak ada ketetapan spesifik mengenai penuntutan terhadap kejahatan serius. Hanya saja, perbedaan paling penting antara ketiga kasus sebelumnya adalah adanya pengadilan internasional yang telah memiliki jurisdiksi atas kasus tersebut. Akan tetapi, Penuntut mengatakan bahwa ICTY hanya mampu menuntut kejahatan yang paling serius yang terjadi di Kosovo[88]. Pengadilan istimewa atas perang dan kejahatan etnis pernah dipertimbangkan, namun tidak pernah terlaksana. Pengampunan atas kejahatan internasional bukanlah satu-satunya masalah. Pengacara kebangsaan Serbia pun tidak ingin bekerja sama dengan pengacara berkebangsaan Albania yang sebelumnya dilarang

[88] Sarah M.H. Nouwen, *Op.Cit*, hal. 197.

masuk dalam wilayah hukum, menjadi tidak berpengalaman dan kelihatannya memihak. Untuk itu, UNMIK mengeluarkan aturan mengenai kemungkinan untuk memasukkan hakim internasional serta penuntut ke dalam pengadilan yang mulanya berada di Mitrovica, dan berlanjut di seluruh pengadilan negeri di Kosovo. Karena masalah akan kemandirian dari pengadilan, maka aturan 2000/64 pun lahir. Dari aturan ini kemudian terbentuk pihak penuntut, dan hakim internasional dalam sebuah pengadilan yang disebut dengan *Regulation 64 Panels*. Pilihan atas pengadilan ini tidak terbatas pada kejahatan serius yang spesifik atau kasus criminal. Pengadilan ini dimulai pada 9 Maret 2005 sebagai perpanjangan dari ICTY. Dewan Keamanan memutuskan agar ICTY menyelesaikan tugasnya pada tahun 2008 dan segala kegiatannya pada tahun 2010, serta merekomendasi untuk mentransfer tugasnya yang elum selesai kepada jurisdiksi nasional.

Mengenai hukum yang digunakan (*applicable law*) dalam pengadilan-pengadilan tersebut adalah gabungan antara hukum nasional negara tempat kejadian perkara dengan aturan hukum internasional yang ada[89]. Dalam pembentukan pengadilan campuran di Sierra Leone, Kamboja dan Timor Timur, ketiganya menggabungkan antara hukum internasional dan hukum nasional. *Extraordinary Chambers* memiliki kewenangan untuk mengadili di bawah tiga tindak pidana yang di atur dalam Kitab Undang-Undang Hukum Pidana Kamboja (*Penal Code of*

[89] Betty Yolanda, wawancara, ELSAM, Jakarta, 2 Juli 2010

Cambodia) tahun 1956 (pembunuhan, penyiksaan dan penganiyaan religious) dan juga hukum internasional mengenai genosida, kejahatan terhadap kemanusiaan, pelanggaran terhadap Konvensi Jenewa, perusakan terhadap bangunan bersejarah, dan kejahatan terhadap orang yang dilindungi oleh dunia internasional[90]. Begitu pun dengan *Special Court of Sierra Leone* yang mengadili pelanggaran terhadap Pasal 3 Konvensi Jenewa dan Protokol tambahan II serta kekerasan serius lainnya dalam hukum humaniter internasional, serta tindak pidana yang berada di bawah aturan hukum pidana Sierra Leone[91]. Terlebih pada pengadilan di Timor Timur yang mengambil jurisdiksi yang lebih luas diantara yang lainnya. Dengan mengadopsi hukum yang berada dalam jurisdiksi Statuta Roma dan Hukum internasional terhadap tindak pidana penyiksaan selain hukum pidana Timor Timur.

Berbeda dengan pengadilan internasional lainnya seperti ICTY, ICTR, dan ICC, pengadilan campuran tidak memiliki anggaran yang tetap dari dunia internasional. Akan tetapi, biaya anggaran dari pengadilan ini berasal dari kontribusi atau sumbangan dari negara-negara pendonor. Tidak seperti ICC yang mendapatkan dana dari negara-negara anggota yang meratifikasi Statuta Roma dan ICTY serta ICTR yang mendapatkan dana dari anggaran PBB, anggaran yang diperoleh pengadilan campuran berasal dari anggaran perwakilan administrasi transisional yang ada di

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[90] Lihat, *LAW ON THE ESTABLISHMENT OF EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA FOR THE PROSECUTION OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRACTIC KAMPUCHEA*, Pasal 3 sampai dengan Pasal 8

[91] Lihat, *STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE*, Pasal 2 sampai dengan Pasal 5

negara tempat kejadian perkara itu, selain negara itu sendiri dan negara-negara pendonor[92]. *Extraordinary Chamber* yang terdapat di Kamboja mendapatkan anggaran dari beberapa negara pendonor seperti Australia, Uni Eropa, India, Jerman, serta negara lainnya.

Dari apa yang dijelaskan di atas, dapat disimpulkan bahwa penerapan *hybrid tribunal* bersifat kasuistis yang bergantung pada situasi dalam tiap kasus. Secara garis besar, dapat dikatakan bahwa pengadilan campuran dibentuk dengan dua bentuk, yaitu melalui permintaan dari negara tempat kejadian perkara yang diteruskan dalam bentuk perjanjian dan dengan membentuk regulasi atau peraturan yang dibuat oleh perwakilan dari PBB *(Transitional Administration)* yang ada dalam negara tersebut. Hukum yang digunakan pun merupakan hukum campuran antara hukum nasional negara tersebut dengan hukum internasional yang berlaku. Berbeda dengan pengadilan internasional lainnya, pengadilan campuran memiliki anggaran yang berasal dari bantuan atau donor dari beberapa negara, anggaran dari perwakilan PBB di negara tersebut, dan dari negara tempat kejadian perkara itu sendiri.

[92] Betty Yolanda, wawancara, ELSAM, Jakarta, 2 Juli 2010

B. Keuntungan Penggunaan *Hybrid Tribunal* dalam Menyelesaikan Kasus Kejahatan Internasional

Ada beberapa keuntungan yang dapat diberikan dengan penggunaan pengadilan campuran itu sendiri. Yang pertama, personel hukum nasional yang familiar dengan bahasa dan kebiasaan, membuat mereka menjadi faktor pendukung dari pengadilan ini yang tidak dimiliki oleh personel internasional[93]. Personel nasional pun menjadi sumber yang berharga dalam menjelaskan sistem pengadilan nasional kepada personel internasional. Yang kedua, pengadilan campuran dapat meningkatkan kapasitas dan kekuatan hukum dari lembaga nasional dengan mengadakan training kepada personel nasional. Keuntungan ini disebut dengan "efek tumpah" yang menghasilkan tenaga yang professional setelah tugas dari pengadilan ini selesai[94].

Ketiga adalah sifatnya fleksibel. Setiap pengadilan (setidaknya dalam teori) memiliki kesempatan untuk belajar dari pendahulunya dan menggabungkan keberhasilan mereka sementara menghindari kegagalan mereka. Pemerintah setempat dengan komunitas internasional bekerja sama dan berdampingan dalam menyelesaikan kasus kejahatan yang ada. Meskipun terjadi beberapa pertentangan antara pemerintah setempat dengan komunitas internasional (umumnya diwakili oleh PBB), pada akhirnya mampu membuat pemerintah setempat mendapatkan keinginannya sebagai korban, sementara komunitas internasional

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[93] Ibid,

[94] Lindsey Raub,*Op.Cit*, Hal.1041

mendapatkan jaminan atas peradilan yang sesuai dengan standar internasional. Keikutsertaan para personel nasional dalam pengadilan ini pun menciptakan semangat bahwa hal ini adalah mekanisme nasional dan bukan sesuatu yang diciptakan oleh dan bagi pihak asing. Selain itu, dengan pengadilan ini dapat memenuhi hak para korban untuk mendapatkan pertanggungjawaban dan memfasilitasi penyembuhan nasional dan pesan yang jelas kepada mereka bahwa tidak aka nada pengampunan atas bentuk kejahatan yang serupa yang dilakukan di masa yang akan datang, dan membangun kredibilitas dan dukungan atas hukum di bawah rezim baru[95].

Keberadaan pengadilan yang berada di lokasi kejadian perkara membuat proses peradilan semakin mudah. Hal ini dikarenakan oleh saksi-saksi dan alat-alat bukti yang terdapat di lokasi kejadian perkara dapat diperoleh dengan mudah. Begitupun dengan biaya peradilan yang lebih murah dibandingkan dengan pengadilan-pengadilan internasional lainnya yang membutuhkan dana yang sangat besar. Pengadilan-pengadilan internasional yang membutuhkan dana yang cukup besar, sekitar 15% (USD 250 Juta) dari keseluruhan anggaran operasional PBB, menjadikan pilihan untuk membentuk pengadilan campuran lebih baik dengan anggaran yang lebih murah (pengadilan Kamboja menghabiskan USD 38.675.148 untuk awal peradilannya)[96].

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[95] Patrick Burgess, *Op.Cit*, hal. 243.

[96] Lihat, www.wcl.american.edu/hrbrief/15/3skillbeck.pdf. diakses terakhir pada tanggal 21 Juli 2010

Jadi, dapat dikatakan bahwa pengadilan campuran ini selain dengan biaya yang murah dengan proses yang lebih mudah akibat dari lokasi pengadilan yang berada di tempat kejadian perkara, ada beberapa keuntungan lain yang dapat diperoleh. Kentungan tersebut antara lain peningkatan profesionalisme dari personel nasional dan meningkatkan kapasitas dan kekuatan hukum dari pengadilan tersebut. Ditambah lagi fleksibilitas dari pengadilan ini menyebabkan pengadilan ini menjadi opsi yang patut untuk diperhitungkan.

C. Tantangan Terhadap *Hybrid Tribunal*

Meskipun dengan beberapa keuntungan yang dimiliki oleh pengadilan campuran ini, masih terdapat kekurangan-kekurangan yang membayangi pengadilan campuran ini. yang pertama adalah kepemilikan dari pengadilan tersebut dan pengakuan dari pengadilan oleh pihak-pihak yang berkepentingan. Dengan adanya para pihak baik internasional maupun nasional yang saling duduk berdampingan untuk menyelesaikan suatu kasus kejahatan intenasional memang dapat dikatakan baik untuk kedua dunia tersebut. Namun, di balik itu semua, masing-masing pihak memiliki kepentingan mereka masing-masing yang dibawa dalam satu pengadilan yang sama. Dengan adanya kepentingan antara dua pihak yang saling berbenturan mengakibatkan hilangnya kepemilikan atas pengadilan campuran *(the ownership of the courts)*. Pengadilan tidak dapat dimiliki oleh dua kepentingan yang berbeda atau akan

mengakibatkan kehancuran atas pengadilan tersebut[97]. Dengan adanya kepentingan dunia internasional yang berhadapan dengan kepentingan nasional suatu negara dalam sebuah pengadilan, bisa saja salah satu pihak lepas tangan apabila terjadi suatu masalah terhadap pengadilan tersebut. Dengan kata lain, pengadilan tersebut rawan terhadap aksi lepas tangan dari salah satu pihak apabila kepentingan mereka tidak dapat terpenuhi.

Pengakuan terhadap pengadilan campuran ini pun menjadi masalah yang cukup besar. Tanpa adanya pengakuan dari para pihak yang terlibat atau yang memiliki kepentingan atas pengadilan tersebut akan cenderung menyulitkan proses pengadilan berjalan dengan baik. Seperti yang terjadi pada pengadilan campuran di Dili Timor Timur yang hanya mampu mengadili orang-orang kecil saja tanpa memiliki kemampuan untuk mengadili orang-orang yang paling bertanggung jawab atas kejahatan yang terjadi pada masa rezim Soeharto dahulu. Tidak adanya pengakuan pemerintah Indonesia terhadap pengadilan yang dibentuk oleh UNTAET untuk mengadili para jenderal yang paling bertanggung jawab atas kejahatan pada masa itu menyebabkan para jenderal termasuk Wiranto tidak dapat untuk diadili. Indonesia menyatakan bahwa Wiranto terbebas dari hukuman karena terbukti tidak bersalah atas peristiwa yang terjadi di Timor Timur dan tidak bisa lagi diadili dengan

[97] Betty Yolnda, wawancara, ELSAM, Jakarta, 02 Juli 2010.

tuntutan yang sama atas dasar *Ne bis in idem* (tidak dapat diadili atas dakwaan yang sama).

Permasalahan mengenai kerjasama pengamanan terhadap terdakwa, saksi, barang bukti, dan investigasi menjadi kekhawatiran yang cukup serius. Bila tidak ada kerjasama yang baik, maka tindakan pengamanan ini akan menjadi sulit dan bahkan mustahil. Sebagai contoh, dakwaan terhadap Charles Taylor pada tahun 2003 baru dapat dilakukan pada tahun 2006 setelah Nigeria menyerahkan Taylor kepada *Special Court* . Nigeria telah menyetujui untuk memberikan suaka kepada Taylor sebagai bagian dari perjanjian yang menyingkirkan Taylor dari kekuasaan dan mengakhiri perang saudara di Liberia yang membunuh 200.000 jiwa.

Permasalahan finansial pun menjadi masalah yang lumayan serius dalam pengadilan ini. meskipun memiliki keuntungan dengan biaya pengadilan yang murah, pengadilan campuran memiliki kelemahan dengan kurang sumber dana yang menjadi fondasi dari pengadilan tersebut. Dengan pengadilan yang tidak memiliki dana yang cukup dapat mengakibatkan pengadilan tersebut mengalami kegagalan untuk sesuai dengan standar internasional. Dalam perkembangan SCSL, pembentukan komite manejemen yang menangani masalah anggaran dapat meningkatkan kekeliruan atau kelalaian. Tapi dengan adanya permohonan kontribusi kepada negara pendonor, beberapa tindakan finansial dari pemerintahan nasional juga telah condong menghasilkan anggaran yang cukup parah atas institusi tersebut. Pada SCSL, tidaklah

terlalu keliru, tapi dalam kenyataannya kemudian pelaksanaan pengadilan tersebut mengeluarkan biaya yang lebih dari yang mampu diantisipasi oleh pemerintah, sehingga mengakibatkan kekurangan dana. Sementara pada tahun 2007, *Extraordinary Chamber* menerima bantuan dana pertama dari pihak perusahaan Microsoft Singapura. Bantuan ini dibarengi dengan negosiasi bersama *Bill and Melinda Gates Foundation* yang memperhatikan masalah yang terjadi di Kamboja. Mereka pun menginginkan pengadilan yang bebas dari intervensi dan korupsi. Dengan kata lain, pengadilan campuran yang mandiri dan independen memerlukan biaya yang memadai untuk melaksanakan kewajibannya sebagai institusi hukum dalam wilayah tersebut.

BAB V

PENUTUP

A. Kesimpulan

Dari hasil penelitian dan berdasarkan pembahasan yang ada di atas maka dapat ditarik kesimpulan sebagai berikut:

1. Penerapan *hybrid tribunal* bersifat kasuistis yang bergantung pada situasi dalam tiap kasus. Secara garis besar, dapat dikatakan bahwa pengadilan campuran dibentuk dengan dua bentuk, yaitu melalui permintaan dari negara tempat kejadian perkara yang diteruskan dalam bentuk perjanjian dan dengan membentuk regulasi atau peraturan yang dibuat oleh perwakilan dari PBB *(Transitional Administration)* yang ada dalam negara tersebut. Hukum yang digunakan pun merupakan hukum campuran antara hukum nasional negara tersebut dengan hukum internasional yang berlaku. Berbeda dengan pengadilan internasional lainnya, pengadilan campuran memiliki anggaran yang berasal dari bantuan atau donor dari beberapa negara, anggaran dari perwakilan PBB di negara tersebut, dan dari negara tempat kejadian perkara itu sendiri.
2. Pengadilan campuran selain dengan biaya yang murah dengan proses yang lebih mudah akibat dari lokasi pengadilan yang berada di tempat kejadian perkara, ada beberapa keuntungan lain yang

dapat diperoleh. Kentungan tersebut antara lain peningkatan profesionalisme dari personel nasional dan meningkatkan kapasitas dan kekuatan hukum dari pengadilan tersebut. Ditambah lagi fleksibilitas dari pengadilan ini menyebabkan pengadilan ini menjadi opsi yang patut untuk diperhitungkan.

B. Saran

Dari kesimpulan yang ada di atas, maka penulis mengajukan saran sebagai berikut:

1. Agar kasus kejahatan internasional dapat terselesaikan dengan baik diperlukannya komitmen dari negara dan juga komunitas internasional untuk bersama-sama menyelesaikan kasus kejahatan internasional. Karena tidak mungkin sebuah kasus akan terselesaikan jika bukan para pihak sendiri yang menginginkannya.
2. Diperlukan perhatian khusus mengenai pilihan pengadilan campuran ini sebagai metode penyelesaian kasus kejahatan internasional, mengingat beberapa keuntungan yang dimilikinya tapi tidak dimiliki oleh pengadilan internasional lainnya.
3. Diperlukannya penelitian yang lebih lanjut mengenai pengadilan campuran ini sebagai opsi pengadilan masa depan di dunia internasional.

DAFTAR PUSTAKA

Alma Manuputy, dkk. 2008. Hukum Internasional. Recht-Ta: Jakarta.

Anonim. Bahan Bacaan Pelatihan Hukum Hak Asasi Manusia Bagi Penegak Hukum. ELSAM: Jakarta.

A. Rahman Zainuddin (Penerjemah). 1993. *Hak-Hak Asasi Manusia di Dunia yang Berubah*, terjemahan dari *Human Rights in a Changing World*. Antonio Cessese. Yayasan Obor Indonesia: Jakarta.

Antonio Cassese. 2003. *International Criminal Law*. Oxford University Press.

Boer Mauna. 2005. *Hukum internasional: Pengertian, Peranan, dan Fungsi dalam Era Dinamika Global*. Alumni: Bandung.

Eddy O.S.Hiariej. 2009. *Pengantar Hukum Pidana Internasional*. Erlangga: Jakarta.

Erikson H. Gultom. 2006. Kompetensi Mahkamah Pidana Internasional dan Peradilan Kejahatan Terhadap Kemanusiaan di Timor Timur. PT.Tatanusa: Jakarta.

Fadillah Agus. 2007. *Pengantar Hukum Internasional dan Hukum Humaniter Internasional*. Jakarta.

I Wayan Patiana. 2003. *Hukum Pidana Internasional dan Ekstradisi*. Yrama Widya: Bandung.

Komisi Kebenaran dan Persahabatan Indonesia-Timor Timur. *Per Memoriam Ad Spem: Dilengkapi dengan Laporan Konsultan*. ELSAM: Jakarta.

Mappasessu. 2005. *Perbandingan Yurisdiksi Antara International Criminal Tribunal for the Former Yugoslavia (ICTY) dan Interational Criminal Tribunal for Rwanda (ICTR)*. Skripsi. Sarjana Hukum. Fakultas Hukum Universitas Hasanuddin.

M. Hariwijaya. 2007. *Metodologi dan Teknik Penulisan Skripsi, Tesis, dan Disertasi*. Elmatera-publishing: Yogyakarta.

Muladi. 2003. *Peradilan Hak Asasi Manusia dalam Konteks Nasional dan internasional*. Jakarta.

Radhika Coomaraswammy. *Key Document Series: Report From The UN Special Rapporteur on Violence Against Women its Causes and Consequences* 20 November – 4 Desember 1998. Publikasi Komnas Perempuan.

Romli Atmasasmita. 2003. *Pengantar Hukum Pidana Internasional*. PT. Refikaaditama: Bandung.

Shinta Agustina. 2006. Hukum Pidana Internasional. Andalas University Press: Padang.

Steven R. Ratner & Jason S. Abraham. 2008. Melampui Warisan Nuremberg: Pertanggungjawaban untuk Kejahatan Terhadap Hak Asasi Manusia Dalam Hukum Internasional. ELSAM: Jakarta.

Regulation and Agreement:

- Regulation No.1999/1 On The Authority of the Transitional Administration in East Timor.
- Regulation No. 2000/11 on the Organization of Courts in East Timor.
- Regulation No. 2000/15 on the Establishment of Panels With Exclusive Jurisdiction Over Serious Criminal Offences
- Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.
- Agreement Between The United Nations And The Royal Government Of Cambodia Concerning The Prosecution Under Cambodian Law Of Crimes Committed During The Period Of Democratic Kampuchea.
- UNMIK Regulation No. 2000/6 on the Appointment and Removal From Office of International Judges and International Prosecutors
- UNMIK/REG/2000/64 on Assignment Of International Judges/Prosecutors and/or Change Of Venue.
- Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone.
- Statute of the Special Court for Sierra Leone.

Sumber Lain:

Elien Skinnider. 2007. Experience and Lesson From "Hybird Tribunal": Sierra Leone, East Timor, and Cambodia. http://www.icclr.law.ubc.ca/Site%20Map/ICC/ExperiencesfromInternationalSpecialCourts.pdf. Diakses terakhir pada Tanggal 12 Juli 2010.

Lindsey Raub. 2009. *Positioning Hybrid Tribunal in Internasional Criminal Justice.*https://www.law.nyu.edu/...**international**.../ecm_pro_064132.pdf. Diakses terakhir pada tanggal 12 Juli 2010.

Sarah M.H. Nouwen. Hybrid Court: the Hybrid Category of a New Type of Internasional Crimes Court. www.utrechtlawreview.org/publish/articles/000033/article.pdf. Diakses terakhir pada tanggal 12 Juli 2010.

Steven R. Ratner. 1999. *Crimes Against Peace. Crimes of War Project.*http://www.pjtv.or.id/crimesofwar-book/crimesagainst peace.htm. Terakhir diakses pada tanggal 28 April 2010.

_____. 1999. *Aggression. Crimes of War Project.* http://www.pjtv.or.id/crimesofwar-book/aggression.htm. Terakhir diakses pada tanggal 28 April 2010.

Tom Perrielo dan Marieke Wierda. 2006. *Lessons From the Deployment of Internasional Judges and Prosecutors in Kosovo.* www.ictj.org/static/Prosecutions/**Kosovo.study**.pdf. Diakses terakhir pada tanggal 12 Juli 2010

http://www.law.harvard.edu/students/orgs/hrj/iss16/katzenstein.pdf

http://www.balkandevelopment.org/edu_kos.html

http://www.eccc.gov.kh/english/backgroundECCC.aspx

www.afrol.com/News/sil007_**civil_war**.htm

www.wcl.american.edu/hrbrief/15/3skilbeck.pdf

www.ictj.org/static/Prosecutions/**Sierra.study**.pdf

www.ictj.org/static/Prosecutions/**Timor.study**.pdf

http://sites.google.com/site/internationalcriminallaw/Home/26-hybridity-the-best-of-both-worlds

http://www.duhaime.org/LegalDictionary.

LAMPIRAN

SURAT KETERANGAN

Ref.: 218/RS/ELSAM/VII/10

Melalui surat ini, kami sampaikan bahwa Mahasiswa Fakultas Hukum Universitas Hasanuddin dengan nama sebagai berikut:

Nama	**: Danil Ramadani Tawaddude**
No.Pokok	**: B111 06 310**
Program Studi	**: Ilmu Hukum**
Alamat	**: Jl. Sahabat I No. 39, Makassar**

Telah melakukan penelitian dan wawancara di Lembaga Studi & Advokasi Masyarakat (ELSAM) untuk keperluan penyusunan skripsi dengan judul *"HYBRID TRIBUNAL (PENGADILAN CAMPURAN) SEBAGAI METODE PENYELESAIAN KASUS KEJAHATAN INTERNASIONAL"*.

Demikian surat ini kami buat untuk dipergunakan sebagaimana mestinya.

Jakarta, 2 Juli 2010

LEMBAGA STUDI DAN ADVOKASI ELSAM MASYARAKAT

Betty Yolanda
Koordinator Studi & Riset

ga Studi dan Advokasi Masyarakat (ELSAM)
3 II No.31, Pejalen Barat, Pasar Minggu
12510, Indonesia
2-21) 797 2662, 7919 2564

KEMENTERIAN LUAR NEGERI
REPUBLIK INDONESIA

Jakarta, 02 Juli 2010

Nomor : 00521/DL/VII/2010/57
Lampiran : –
Perihal : Surat Keterangan PENELITIAN

Kepada Yang Terhormat :
Dekan Fakultas Hukum
Universitas Hasanudin
Di-

Makasar.

Dengan hormat,

Merujuk Surat Saudara nomor 4423/H4.7.3/PI.08/2010 tanggal 09 Juni 2010, tersebut pada pokok surat, bersama ini disampaikan bahwa :

Nama	:	Danil Ramadan Tawaddude
NIM	:	B11106310
Fakultas	:	Hukum
Universitas	:	Hasanudin

Telah melaksanakan kegiatan Penelitian / pencarian data dan informasi di Direktorat Hukum dan Direktorat Perjanjian Polkamwil, Direktorat Jenderal Hukum dan Perjanjian Internasional, Kementerian Luar Negeri, pada bulan Juli 2010, dalam rangka tugas akhir / penyusunan skripsi, yang berjudul:

" ***Hybrid Tribunal (Pengadilan Campuran) sebagai Metode Penyelesaian Kasus Kejahatan Internasional*** ".

Untuk melengkapi referensi perpustakaan Direktorat Jenderal Hukum dan Perjanjian Internasional, dimohon kiranya Saudara dapat menginformasikan kepada yang bersangkutan untuk mengirimkan 1 (satu) copy skripsi dimaksud, kepada kami.

Demikian, atas perhatian dan kerjasama Saudara diucapkan terima kasih.

Sekretaris Ditjen HPI

KEMENTERIAN LUAR NEGERI REPUBLIK INDONESIA

[illegible]ULYA WIRANA
[illegible]958[illegible]117.198503.1.001

Tembusan :
Yth. Direktur Jenderal HPI (sebagai laporan).

TIMOR TIMUR

UNTAET/REG/1991/1
27 November 1999

REGULATION NO. 1999/1
ON THE AUTHORITY OF THE TRANSITIONAL ADMINISTRATION IN EAST TIMOR

The Special Representative of the Secretary-General (hereinafter: Transitional Administrator),

Recalling resolution 1272 (1999) of 25 October 1999, whereby the United Nations Security Council, acting under Chapter VII of the Charter of the United Nations, decided to establish a United Nations Transitional Administration in East Timor (UNTAET), endowed with overall responsibility for the administration of East Timor empowered to exercise all legislative and executive authority, including the administration of justice, with the mandate as described in the resolution;

Acting pursuant to the authority given to him under United Nations Security Council resolution 1272 (1999) of 25 October 1999, after consultation with representatives of the East Timorese people, and for the purpose of establishing and maintaining an effective transitional administration in East Timor;

Hereby promulgates the following:

Section 1

Authority of the interim administration

1.1 All legislative and executive authority with respect to East Timor, including the administration of the judiciary, is vested in UNTAET and is exercised by the Transitional Administrator. In exercising these functions the Transitional Administrator shall consult and cooperate closely with representatives of the East Timorese people.

1.2 The Transitional Administrator may appoint any person to perform functions in the civil administration in East Timor, including the judiciary, or remove such person. Such functions shall be exercised in accordance with the existing laws, as specified in section 3, and any regulations and directives issued by the Transitional Administrator.

Section 2

Observance of internationally recognized standards

In exercising their functions, all persons undertaking public duties or holding public office in East Timor shall observe internationally recognized human rights standards, as reflected, in particular, in:

The Universal Declaration on Human Rights of 10 December 1948;
The International Covenant on Civil and Political Rights of 16

December 1966 and its Protocols;
The International Covenant on Economic, Social and Cultural Rights of 16 December 1966;
The Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965;
The Convention on the Elimination of All Forms of Discrimination Against Women of 17 December 1979;
The Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment of 17 December 1984;
The International Convention on the Rights of the Child of 20 November 1989.

They shall not discriminate against any person on any ground such as sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, association with a national community, property, birth or all other status.

Section 3

Applicable law in East Timor

3.1 Until replaced by UNTAET regulations or subsequent legislation of democratically established institutions of East Timor, the laws applied in East Timor prior to 25 October 1999 shall apply in East Timor insofar as they do not conflict with the standards referred to in section 2, the fulfillment of the mandate given to UNTAET under United Nations Security Council resolution 1272 (1999), or the present or any other regulation and directive issued by the Transitional Administrator.

3.2 Without prejudice to the review of other legislation, the following laws, which do not comply with the standards referred to in section 2 and 3 of the present regulation, as well as any subsequent amendments to these laws and their administrative regulations, shall no longer be applied in East Timor:

Law on Anti-Subversion;
Law on Social Organizations;
Law on National Security;
Law on National Protection and Defense;
Law on Mobilization and Demobilization;
Law on Defense and Security.

3.3 Capital punishment is abolished.

Section 4

Regulations issued by UNTAET

In the performance of the duties entrusted to the transitional administration under United Nations Security Council resolution 1272 (1999), the Transitional Administrator will, as necessary, issue legislative acts in the form

of regulations. Such regulations will remain in force until repealed by the Transitional Administrator or superseded by such rules as are issued upon the transfer of UNTAET's administrative and public service functions to the democratic institutions of East Timor, as provided for in United Nations Security Council resolution 1272 (1999).

Section 5

Entry into force and promulgation of regulations issued by UNTAET

5.1 The promulgation of any UNTAET regulation requires the approval and the signature of the Transitional Administrator. The regulation shall enter into force upon the date specified therein.

5.2 UNTAET regulations shall be issued in English, Portuguese and Bahasa Indonesian. Translations in Tetun shall be made available as required. In case of divergence, the English text shall prevail. The regulations shall be published in a manner that ensures their wide dissemination by public announcement and publication.

5.3 UNTAET regulations shall bear the symbol UNTAET/REG/, followed by the year of issuance and the issuance number of that year. A register of the regulations shall indicate the date of entry into force, the subject matter and amendments or changes thereto or the repeal or suspension thereof.

Section 6

Directives

6.1 The Transitional Administrator shall have the power to issue administrative directives in relation to the implementation of regulations promulgated.

6.2 The provisions of section 5 shall apply also to administrative directives. They shall bear the symbol of UNTAET/DIR/, followed by the year of issuance and the issuance number of that year.

Section 7

Administration of property

7.1 UNTAET shall administer immovable or movable property, including monies, bank accounts, and other property of, or registered in the name of the Republic of Indonesia, or any of its subsidiary organs and agencies, which is in the territory of East Timor.

7.2 UNTAET shall also administer any property, both as specified in section 7.1 of the present regulation and privately owned that was abandoned after 30 August 1999, the date of the popular consultation, until such time as the lawful owners are determined.

Section 8

Entry into force

The present regulation shall be deemed to have entered into force as of 25 October 1999, the date of adoption by the United Nations Security Council of resolution 1272 (1999).

(Signed)
Sergio Vieira de Mello
Transitional Administrator

UNITED NATIONS
United Nations Transitional Administration
in East Timor

NATIONS UNIES
Administration Transitoire de Nations Unie
au Timor Oriental

UNTAET

UNITED NATIONS TRANSITIONAL ADMINISTRATION IN EAST TIMOR
Administração Transitória das Nações Unidas em Timor Leste

UNTAET/REG/2000/11
6 March 2000

REGULATION NO. 2000/11

ON THE ORGANIZATION OF COURTS IN EAST TIMOR

The Special Representative of the Secretary-General (hereinafter: Transitional Administrator),

Pursuant to the authority given to him under United Nations Security Council resolution 1272 (1999) of 25 October 1999,

Taking into account United Nations Transitional Administration in East Timor (UNTAET) Regulation 1999/1 of 27 November 1999 on the Authority of the Transitional Administration in East Timor,

After consultation in the National Consultative Council,

For the purpose of regulating the functioning and organization of the courts during the period of the transitional administration in East Timor,

Promulgates the following:

I. General Provisions

Section 1
Judicial Authority

Judicial authority in East Timor shall be exclusively vested in courts that are established by law and composed of judges who are appointed to these courts in accordance with UNTAET Regulation No. 1999/3.

Section 2
Independence of the Judiciary

2.1 Judges shall perform their duties independently and impartially, and in accordance with applicable laws in East Timor and the oath or solemn declaration given by them to the Transitional Administration pursuant to UNTAET Regulation No. 1999/3.

2.2 Judges shall decide matters before them without prejudice and in accordance with their impartial assessment of the facts and their understanding of the law, without improper influence, direct or indirect, from any source.

2.3 In the decision-making process, any hierarchical organization of the judiciary or any difference among judges in grade or rank shall in no way interfere with the duty of the judge, whether exercising jurisdiction individually or acting collectively on a panel, to pronounce judgement in accordance with Section 2.2 of the present regulation.

2.4 While in office, judges and prosecutors shall be barred from accepting political or any other public office, or from accepting any employment, including for teaching law, participating in the drafting of law, or carrying out legal research on a part-time basis, unless for honorary unpaid purposes.

Section 3
Refusal of Justice

No judge may refuse to hear, try or decide a case that is brought before the court in accordance with the relevant procedural provisions.

Section 4
Courts in East Timor

The judiciary in East Timor shall be composed of District Courts, as determined by the present regulation, and one Court of Appeal.

Section 5
Applicable Law

5.1 In exercising their jurisdiction, the courts in East Timor shall apply the law of East Timor as promulgated by Section 3 of UNTAET Regulation No. 1999/1.

5.2 Courts shall have jurisdiction in respect of crimes committed in East Timor prior to 25 October 1999 only insofar as the law on which the offence is based is consistent with Section 3.1 of UNTAET Regulation No. 1999/1 or any other UNTAET regulation.

5.3 Courts shall have jurisdiction in respect of civil claims which arose in East Timor prior to 25 October 1999 only insofar as the law on which the claim is based is consistent with Section 3.1 of UNTAET Regulation No. 1999/1 or any other UNTAET regulation.

II. District Courts

Section 6
Subject Matter Jurisdiction of the District Courts

District Courts shall have jurisdiction in all matters as courts of first instance, subject to Section 10 of the present regulation.

Section 7
Territorial Jurisdiction of the District Courts

7.1 District Courts shall be established for the following locations in East Timor:

(a) Dili, with jurisdiction for the Districts of Dili and Aileu;
(b) Baucau, with jurisdiction for the District of Baucau, and the sub-districts of Laclo, Manatuto, Laleia and Laclubar within the District of Manatuto;
(c) Los Palos, with jurisdiction for the District of Lautem;
(d) Viqueque, with jurisdiction for the District of Viqueque, and the sub-districts of Soibada and Barique within the District of Manatuto;
(e) Same, with jurisdiction for the Districts of Manufahi and Ainaro;
(f) Maliana, with jurisdiction for the Districts of Bobonaro and Covalima;
(g) Ermera, with jurisdiction for the District of Ermera and Liquica;
(h) Oecussi, with jurisdiction for the District of Oecussi.

7.2 Each District Court shall exercise its functions and powers, as provided by law, on the territory of its area of jurisdiction. In the event that a District Court lacks jurisdiction over a case which comes before it, that District Court shall refer the case to the competent District Court of jurisdiction. Any dispute between two or more courts regarding the jurisdiction over a case shall be settled by the Court of Appeal.

7.3 For a transitional period and until otherwise determined by the Transitional Administrator, the judges appointed to the District Court in Dili shall have jurisdiction throughout the entire territory of East Timor.

Section 8
Legal Cooperation

8.1 Any District Court in East Timor shall cooperate with the request of another District Court to

(a) interrogate witnesses who are registered or permanently accommodated in the area of the requested court's jurisdiction;
(b) carry out at-the-scene examinations or re-enactments of crimes in the area of the requested court's jurisdiction;
(c) serve summonses of the requesting court on witnesses in the requested court's jurisdiction;
(d) serve decisions of the requesting court on individuals in the requested court's jurisdiction;
(e) execute the decisions of the requesting court if the subject of dispute is located in the requested court's jurisdiction;
(f) access files of the requested court for information purposes or decision.

8.2 The request may not be rejected except in the case of lack of jurisdiction of the requested court.

Section 9
Composition of the District Courts

9.1 Each District court shall be composed of judges who are appointed to the respective court by the Transitional Administrator in accordance with Regulation No. 1999/3.

9.2 The judges shall sit in panels of three judges, as determined by the plan of distribution of incoming cases pursuant to Section 35 of the present regulation, with equal votes. The panel shall take its decisions by majority vote.

9.3 Relatives shall not sit as judges on the same panel.

9.4 The number of judges at each District court shall be determined by the Transitional Administrator based on the caseload of each court.

9.5 The Transitional Administrator may decide to vest jurisdiction on matters of particular concern, including matters related to public administration, taxation, labor relations, land and property disputes, or serious criminal offences, exclusively into individual District Courts, where the interests and efficacy of justice so requires.

Section 10
Exclusive Jurisdiction for Serious Crimes

10.1 The District Court in Dili shall have exclusive jurisdiction over the following serious criminal offences:

(a) Genocide
(b) War crimes
(c) Crimes against humanity
(d) Murder
(e) Sexual offences
(f) Torture

10.2 With regard to the criminal offences listed in Section 10.1 (d) – (f) of the present regulation, the District Court in Dili shall have exclusive jurisdiction only insofar as the offence was committed in the period between 1 January 1999 and 25 October 1999.

10.3 The Transitional Administrator, after consultation of the Court Presidency, may decide to establish panels with the expertise to exercise exclusive jurisdiction vested in the court by Section 10.1 of the present regulation. Such panels shall be composed of both East Timorese and international judges, appointed to the Court in accordance with UNTAET Regulation No. 1999/3.

10.4 The establishment of panels with exclusive jurisdiction over serious criminal offences shall not preclude the jurisdiction of an international tribunal for East Timor over these offences, once such a tribunal is established.

Section 11
Individual Judge

11.1 In criminal matters that carry a maximum penalty of one year, as provided by law, and in civil law matters involving claims not exceeding US$ 1000, the Presidency of the respective District Court may decide to assign the case to a judge of the respective court as an individual judge, for decision. The Presidency of the respective court shall establish individual judges where required by law.

11.2 If, in the course of the proceedings, the individual judge finds that the penalty may exceed one year or that the claim may exceed US$ 1000, the case shall be referred to a panel of the same District Court.

Section 12

Investigating Judge

12.1 In criminal matters, there shall be at least one judge assigned as investigating judge at every District Court in East Timor.

12.2 The investigating judge shall have the powers defined in the Criminal Procedure Code and other relevant UNTAET regulations.

Section 13
Supervision of the Execution of Prison Sentences

13.1 The Presidency of each District Court shall assign all matters related to the supervision and execution of prison sentences to a panel of judges of that District Court, in accordance with Section 35 of the present regulation.

13.2 Prisoners may file complaints or requests related to the execution of their prison sentence, in writing, with the panel, or, where applicable, the individual judge, that pronounced the sentence.

III. Court of Appeal

Section 14
Jurisdiction of the Court of Appeal

14.1 There shall be established a Court of Appeal for East Timor. The court shall have its seat in Dili.

14.2 The Court of Appeal shall have jurisdiction to hear appeals of decisions rendered by any District Court in East Timor, and such other matters as are provided for in the present or any other UNTAET regulation.

Section 15
Composition of the Court of Appeal

15.1 The Court of Appeal shall be composed of judges appointed by the Transitional Administrator to the Court of Appeal in accordance with UNTAET Regulation No. 1999/3.

15.2 The judges shall sit in panels of three judges, as determined by the plan of distribution of incoming cases as provided for in Section 35 of the present regulation. The panel shall take its decisions by majority vote. The vote of each judge shall have equal weight.

15.3 Relatives shall not sit as judges on the same panel.

15.4 In cases of special importance or gravity, the Presidency of the respective District Court may decide, after hearing the parties to the proceedings, to establish a panel of five judges to hear the case.

15.5 In the event of an appeal on a matter provided in Section 10 of the present regulation, the Transitional Administrator, after consultation with the Court Presidency, shall establish a panel with the expertise to hear and decide such appeals. Such panels shall be composed of both East Timorese and international judges, appointed to the Court in accordance with UNTAET Regulation No. 1999/3.

IV. Organs of the Court and their Competencies

Section 16
Court Presidency

16.1 Each court in East Timor shall have a Presidency. The Presidency shall be composed of the Court President and two presiding judges.

16.2 The members of the presidency, including the Court President, shall be elected by a majority vote of all judges of the respective court. The members of the Presidency shall be elected for a term of three (3) years, and shall not be eligible for more than two (2) consecutive terms.

16.3 Upon election, the Court President shall designate one member of the Presidency to carry out the functions of the Court President in the event that the court president is unavailable or otherwise unable to exercise the functions of the Court President.

16.4 If the vote of any of the members of the Presidency is in contravention of law, each judge who was entitled to participate in the vote may challenge the vote by filing a written complaint with the Court of Appeal. If the vote concerns the election of the Presidency of the Court of Appeal, the complaint shall be filed with a different panel of the Court of Appeal.

Section 17
Competencies of the Presidency

17.1 The Presidency shall be responsible for the proper administration of the court, including the orderly and expeditious discharge of duties. In particular, it shall have the

competency to decide on the establishment and the composition of the panels of judges and the assignment of individual judges and investigating judges.

17.2 The Presidency shall make written recommendations to the Transitional Judicial Service Commission, through the Transitional Administrator, on the need for appointment of additional judges to the respective court.

17.3 For every new calendar year, the Presidency shall prepare a precise plan outlining the general system of distribution of incoming cases to the judges of the court for that year. The plan shall be published in the Official Gazette of East Timor.

17.4 Except where provided otherwise in the present regulation, the Presidency shall have the responsibility of ensuring law and order within the court building and its premises.

17.5 Where a matter of practice or proceedings arises that has not been regulated by the present regulation, the matter shall be decided by the Presidency.

Section 18
Presiding Judge

18.1 There shall be a Presiding judge on any panel of judges. The Presiding judge shall be appointed by the Presidency of the respective court.

18.2 The Presiding judge is responsible for the distribution and scheduling of cases within the panel and the conduct of hearings of the panel. For every case pending before the panel, the Presiding judge shall assign one judge to be the judge rapporteur to record the proceedings and to prepare the decisions of the panel.

18.3 The Presiding judge shall not give directions to the other judges of the panel on substantive matters of law, their assessment of the evidence, or their findings in a case.

18.4 The Presiding judge or, where applicable, the individual judge shall ensure order in the courtroom.

Section 19
Additional Judge

19.1 In cases of special importance or gravity, or of an expected duration of more than three consecutive trial days, the Presidency of the respective court may decide to assign an additional judge from a different panel of the same court to attend the trial sessions of a relevant panel.

19.2 The additional judge shall not have a vote and shall not participate in the proceedings, unless one of the three regular judges of the panel is unable to attend one or more of the trial sessions, due to illness, death or any other serious reason that prevents the regular judge from attending the trial sessions in this period.

Section 20

Disqualification of Judges

20.1 The Presidency may, at the request of a judge or a party to a proceeding, excuse that judge from the exercise of a function in any case in which the impartiality of the judge might reasonably be doubted on any ground.

20.2 A judge shall be disqualified from a case in accordance with the present section if that judge has previously been involved in any capacity in that case before the court.

20.3 A judge shall be obliged to request the Presidency to be excused from the exercise of a function in any case in which a party to the proceedings is a spouse or a relative of second degree of that judge.

20.4 Any question as to the disqualification of a judge shall be decided by majority vote by the Presidency. The challenged judge shall be entitled to present comments on the matter but shall not take part in the decision.

Section 21
Court Registry

21.1 There shall be a Registry at every court in East Timor.

21.2 The Registry shall have responsibility for the receipt of documents to be filed in the court, for organizing court documents and ensuring security of court documents, and for such other functions as are permitted by an UNTAET regulation or directive. The staff of the registry shall exercise these responsibilities under the direction of the Presidency.

21.3 The staff of the Registry shall have legal and administrative skills, and shall be appointed by the Public Service Commission, pursuant to UNTAET Regulation No. 2000/3.

Section 22
Court Staff

22.1 Each court in East Timor shall have such qualified staff as may be required for the proper functioning of the court and the discharge of the responsibilities of its judges. The court staff shall exercise these responsibilities under the direction of the Presidency.

22.2 Each panel of judges or each individual judge shall be assisted during the trial sessions by a member of the court staff.

22.3 The court staff shall be selected by the Public Service Commission, pursuant to UNTAET Regulation No. 2000/3.

Section 23
Translation Service

Courts shall provide translation and interpretation services in every case where a party to the proceedings, or a judge, or a witness, or expert witness does not sufficiently speak or understand the language spoken in that court.

Section 24
Prosecution Service

A Prosecution Service shall be established within the jurisdiction of every District Court in East Timor in accordance with applicable law.

V. Hearing

Section 25
Hearings

25.1 Hearings of the court and deliberations, generally, shall take place at the seat of the court which has jurisdiction to hear the case, pursuant to Section 7.1 of the present regulation. The panel of judges or, where applicable, the individual judge may decide to hold hearings of the court in places other than at the seat of the court if this in the interest of justice. In making the decision, the panel of judges or the individual judge shall be guided by the particular circumstances of the case and their responsibility to facilitate equal access to justice.

25.2 The hearings of the court, including the pronouncement of the decision, shall be public, unless otherwise determined by the present regulation or by law, insofar as the law is consistent with Section 3.1 of UNTAET Regulation No. 1999/1.

25.3 Radio and television broadcasting within the courtroom is prohibited, except for the broadcast of a final judgement in appropriate cases, as sanctioned by the Presidency after consultation with the Presiding judge of the panel at issue.

25.4 The deliberations of the panel of judges shall remain confidential.

Section 26
Transcript of Proceedings

26.1 The court shall ensure that, in each hearing by a panel of judges, a transcript of the proceedings are taken and that the transcript is made available, on request, to all parties to the proceedings, including their legal counsel. In all other cases the individual judge shall take, as appropriate, notes of the proceedings and submit them to the files.

26.2 Upon request, the transcript shall be made available to the public, unless a determination has been made under Section 25.2 of the present regulation that the hearing shall not be public.

Section 27
Legal Representation at Hearings

27.1 A party to a proceeding before a court in East Timor has the right to a legal representative of its own choosing.

27.2 UNTAET shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within the territory of East Timor, without any discrimination based on sex, race, color, language, religion, political or

other opinion, national, ethnic or social origin, association with a national minority, property, birth or any other status.

VI. Rights and Duties of Judges

Section 28
Tenure

28.1 After an initial period of no less than two (2) but no more than three (3) years, judges shall be appointed for life.

28.2 During the initial period, the performance of duties of every judge shall be solely monitored by the Transitional Judicial Service Commission. With regard to the independence of each judge, the Commission shall only monitor the professional conduct of the judge, including the judge's integrity and dedication, regular attendance in court, ability to cope with the workload, impartiality shown in dealing with the cases, without any interference with, or influence upon, the substantive decisions of the judge.

28.3 At the end of the initial period, or at any given time before, the Transitional Judicial Service Commission, in accordance with UNTAET Regulation No. 1999/3, may recommend that the judge be appointed for life, unless the performance of the duties of that judge, as specified in Section 28.2 of the present regulation, was unsatisfactory, in which case the judge shall be dismissed from judicial service.

Section 29
Rights, Duties and Prohibitions

29.1 Upon appointment for life, every judge shall enjoy the following guarantees:

(a) A judge shall be removed only in the cases provided for in Section 13.3 of UNTAET Regulation No. 1999/3 or Section 28.3 of the present regulation upon recommendation of the Transitional Judicial Service Commission;

(b) A judge shall be re-assigned or appointed to another court in East Timor with their consent and where the interest of justice so requires, and in accordance with Section 14.1 of UNTAET Regulation No. 1999/3;

(c) A judge shall be remunerated in accordance with the salary scheme determined by an UNTAET directive for the East Timor administration; the remuneration shall not be subject to any reduction other than due to general taxes and levies imposed equally on all citizens;

(d) A judge shall be appointed for life, with compulsory retirement at the age of 65; the conditions of service shall not be altered to their disadvantage during their term of office, except as part of a uniform public economic measure, after consultations with representatives of members of the judiciary;

(e) A judge shall be independent in the conduct of their office and on all matters of law, notwithstanding the competence of the Presidency, as defined in

Sections 20.1 and 31.1 of the present regulation, and the Transitional Judicial Service Commission, in accordance with UNTAET Regulation No. 1999/3.

29.2 All judges are subject to the same rights and duties defined in a Code of Ethics, as prepared by the Transitional Judicial Service Commission, pursuant to Section 15 of UNTAET Regulation No.1999/3.

Section 30
Disclosure of Information

Judges shall not disclose any information or personal data related to or obtained in the discharge of their functions, except where authorized by the Court President for public information or research purposes.

Section 31
Privileges and Immunities

31.1 Judges shall enjoy such privileges and immunities as are provided by law.

31.2 In particular, judges shall not be liable or otherwise responsible for any adverse effects or any damage caused by any of their acts or omissions committed in the course of the discharge of their functions, except where such effects or damage are caused by intentional and wrongful conduct.

Section 32
Disciplinary Measures

A Judge who has committed misconduct in office shall be subject to disciplinary measures, as defined in an UNTAET regulation. The measure shall not interfere with the independence of the judge, as provided in Section 2 of the present regulation.

Section 33
Remuneration of Non-judicial Staff

Registrars and court clerks shall receive remuneration in accordance with the salary scheme determined by an UNTAET directive for the East Timor administration.

VII. Administrative matters

Section 34
Financial and Technical Support

During the transitional period, UNTAET shall provide the necessary financial and technical support to the courts in East Timor.

Section 35
Distribution of Incoming Cases

35.1 Everyone has the right to be tried by the panel of judges, or where applicable the judge, that has previously been determined by a plan of distribution of incoming cases.

35.2 Pursuant to Section 19.3 of the present regulation, the Presidency shall make a precise plan for every new calendar year indicating the distribution of incoming cases to the judges of the court. The Presidency shall decide by majority vote. The further requirements of the plan shall be regulated in an UNTAET directive, pursuant to Section 6 of UNTAET Regulation No. 1999/1.

35.3 The plan constitutes an act of judicial autonomy to ensure the fair distribution of work among the judges of a court and to facilitate transparency in the distribution of cases. The plan shall be binding on all judges and each Presidency for the duration of its term. It shall not be subject to individual assignments of cases in circumvention of the present provision and may only be changed in case of death, retirement or removal of a judge, or, exceptionally, where the workload of a panel or an individual judge requires that the plan be changed in the interest of justice, except in the cases provided for in Section 20 of the present regulation.

35.4 Before adopting the plan, the Presidency shall give each judge of the respective court the opportunity for a hearing.

35.5 The plan shall be published in the Official Gazette of East Timor.

Section 36
Working Languages

The working languages of the courts in East Timor, during the transitional period, shall be, as appropriate, Tetum, Portuguese, Bahasa Indonesia, and English.

Section 37
Seal

Each court shall have a seal, bearing the court's insignia, for sealing writs and other official documents of the respective court, as determined by an UNTAET administrative directive.

Section 38
Official Insignia

No court in East Timor shall bear any political insignia other than the insignia of the United Nations and UNTAET. Political manifestations within the court building are not permitted.

Section 39
Implementation

The Transitional Administrator may promulgate such other UNTAET regulations and directives as are necessary for the implementation of the present regulation.

Section 40
Entry into force

The present regulation shall enter into force on [ ] 2000.

Sergio Vieira de Mello
Transitional Administrator

UNITED NATIONS
United Nations Transitional Administration
in East Timor

UNTAET

NATIONS UNIES
Administration Transitoire des Nations Unie
au Timor Oriental

UNTAET/REG/2000/15
6 June 2000

REGULATION NO. 2000/15

ON THE ESTABLISHMENT OF PANELS WITH EXCLUSIVE JURISDICTION OVER SERIOUS CRIMINAL OFFENCES

The Special Representative of the Secretary-General (hereinafter: Transitional Administrator),

Pursuant to the authority given to him under United Nations Security Council resolution 1272 (1999) of 25 October 1999,

Taking into account United Nations Transitional Administration in East Timor (UNTAET) Regulation No.1999/1 of 27 November 1999 on the Authority of the Transitional Administration in East Timor (hereinafter: UNTAET Regulation No. 1999/1),

Taking into account UNTAET Regulation No. 2000/11 of 6 March 2000 on the Organisation of Courts in East Timor (hereinafter: UNTAET Regulation No. 2000/11) as amended by UNTAET Regulation No. 2000/14 of 10 May 2000 (hereinafter: UNTAET Regulation No. 2000/14),

Recalling the recommendations of the International Commission of Inquiry of East Timor in their report to the Secretary-General of January 2000,

After consultation in the National Consultative Council,

For the purpose of establishing panels with exclusive jurisdiction over serious criminal offences as referred to under Section 10.1 of UNTAET Regulation No. 2000/11,

Promulgates the following:

I. General

Section 1
Panels with Jurisdiction over Serious Criminal Offences

1.1 Pursuant to Section 10.3 of UNTAET Regulation No. 2000/11, there shall be established panels of judges (hereinafter: "panels") within the District Court in Dili with exclusive jurisdiction to deal with serious criminal offences.

1.2 Pursuant to Section 15.5 of UNTAET Regulation No. 2000/11 there shall be established panels within the Court of Appeal in Dili to hear and decide an appeal on a matter under Section 10 of UNTAET Regulation No. 2000/11, as specified in Sections 4 to 9 of the present regulation.

1.3 The panels established pursuant to Sections 10.3 and 15.5 of UNTAET Regulation No. 2000/11 and as specified under Section 1 of the present regulation, shall exercise jurisdiction in accordance with Section 10 of UNTAET Regulation No. 2000/11 and with the provisions of the present regulation with respect to the following serious criminal offences:

(a) Genocide;
(b) War Crimes;
(c) Crimes against Humanity;
(d) Murder;
(e) Sexual Offences; and
(f) Torture.

1.4 At any stage of the proceedings, in relation to cases of serious criminal offences listed under Section 10 (a) to (f) of UNTAET Regulation No. 2000/11, as specified in Sections 4 to 9 of the present regulation, a panel may have deferred to itself a case which is pending before another panel or court in East Timor.

Section 2
Jurisdiction

2.1 With regard to the serious criminal offences listed under Section 10.1 (a), (b), (c) and (f) of UNTAET Regulation No. 2000/11, as specified in Sections 4 to 7 of the present regulation, the panels shall have universal jurisdiction.

2.2 For the purposes of the present regulation, "universal jurisdiction" means jurisdiction irrespective of whether:

(a) the serious criminal offence at issue was committed within the territory of East Timor;
(b) the serious criminal offence was committed by an East Timorese citizen; or
(c) the victim of the serious criminal offence was an East Timorese citizen.

2.3 With regard to the serious criminal offences listed under Section 10.1(d) to (e) of UNTAET Regulation No. 2000/11 as specified in Sections 8 to 9 of the present regulation, the panels established within the District Court in Dili shall have exclusive jurisdiction only insofar as the offence was committed in the period between 1 January 1999 and 25 October 1999.

2.4 The panels shall have jurisdiction in respect of crimes committed in East Timor prior to 25 October 1999 only insofar as the law on which the serious criminal offence is based is consistent with Section 3.1 of UNTAET Regulation No. 1999/1 or any other UNTAET Regulation.

2.5 In accordance with Section 7.3 of UNTAET Regulation No. 2000/11, the panels established by the present regulation shall have jurisdiction (*ratione loci*) throughout the entire territory of East Timor.

Section 3
Applicable Law

3.1 In exercising their jurisdiction, the panels shall apply:

(a) the law of East Timor as promulgated by Sections 2 and 3 of UNTAET Regulation No. 1999/1 and any subsequent UNTAET regulations and directives; and

(b) where appropriate, applicable treaties and recognised principles and norms of international law, including the established principles of the international law of armed conflict.

3.2 In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

II. Serious Criminal Offences

Section 4
Genocide

For the purposes of the present regulation, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

Section 5
Crimes Against Humanity

5.1 For the purposes of the present regulation, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack:

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in Section 5.3 of the present regulation, or other grounds that are universally recognized as

impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the panels;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

5.2 For the purposes of Section 5.1 of the present regulation:

(a) "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(b) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(c) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(d) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(e) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(f) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(g) "The crime of apartheid" means inhumane acts of a character similar to those referred to in Section 5.1, committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(h) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

5.3 For the purpose of the present regulation, the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Section 6
War crimes

6.1 For the purposes of the present regulation, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural

environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Section 5.2 (e) of the present regulation, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Section 6.1 (c) of the present regulation applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Section 5.2 (e) of the present regulation, enforced sterilization, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest,

and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Section 6.1 (e) of the present regulation applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

6.2 Nothing in Section 6.1 (c) and (e) of the present regulation shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Section 7
Torture

7.1 For the purposes of the present regulation, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him/her or a third person information or a confession, punishing him/her for an act he/she or a third person has committed or is suspected of having committed, or humiliating, intimidating or coercing him/her or a third person, or for any reason based on discrimination of any kind. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

7.2 This Section is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

7.3 No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

Section 8
Murder

For the purposes of the present regulation, the provisions of the applicable Penal Code in East Timor shall, as appropriate, apply.

Section 9
Sexual Offences

For the purposes of the present regulation, the provisions of the applicable Penal Code in East Timor shall, as appropriate, apply.

Section 10
Penalties

10.1 A panel may impose one of the following penalties on a person convicted of a crime specified under Sections 4 to 7 of the present regulation:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 25 years. In determining the terms of imprisonment for the crimes referred to in Sections 4 to 7 of the present regulation, the panel shall have recourse to the general practice regarding prison sentences in the courts of East Timor and under international tribunals; for the crimes referred to in Sections 8 and 9 of the present regulation, the penalties prescribed in the respective provisions of the applicable Penal Code in East Timor, shall apply.

(b) A fine up to a maximum of US$ 500,000.

(c) A forfeiture of proceeds, property and assets derived directly or indirectly from the crime, without prejudice to the rights of *bona fide* third parties.

10.2 In imposing the sentences, the panel shall take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

10.3 In imposing a sentence of imprisonment, the panel shall deduct the time, if any, previously spent in detention due to an order of the panel or any other court in East Timor (for the same criminal conduct). The panel may deduct any time otherwise spent in detention in connection with the conduct (underlying the crime).

III. General Principles of Criminal Law

Section 11
Ne bis in idem

11.1 No person shall be tried before a panel established by the present regulation with respect to conduct (which formed the basis of crimes) for which the person has been convicted or acquitted by a panel.

11.2 No person shall be tried by another court (in East Timor) for a crime referred to in Sections 4 to 9 of the present regulation for which that person has already been convicted or acquitted by a panel.

11.3 No person who has been tried by another court for conduct also proscribed under Sections 4 to 9 of the present regulation shall be tried by a panel with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the panel; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Section 12
Nullum crimen sine lege

12.1 A person shall not be criminally responsible under the present regulation unless the conduct in question constitutes, at the time it takes place, a crime under international law or the laws of East Timor.

12.2 The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

12.3 The present Section shall not affect the characterization of any conduct as criminal under principles and rules of international law independently of the present regulation.

Section 13
Nulla poena sine lege

A person convicted by a panel may be punished only in accordance with the present regulation.

Section 14
Individual criminal responsibility

14.1 The panels shall have jurisdiction over natural persons pursuant to the present regulation.

14.2 A person who commits a crime within the jurisdiction of the panels shall be individually responsible and liable for punishment in accordance with the present regulation.

14.3 In accordance with the present regulation, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panels if that person:

(a) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the panels; or

(ii) be made in the knowledge of the intention of the group to commit the crime;

(e) in respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under the present regulation for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

Section 15
Irrelevance of official capacity

15.1 The present regulation shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under the present regulation, nor shall it, in and of itself, constitute a ground for reduction of sentence.

15.2 Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the panels from exercising its jurisdiction over such a person.

Section 16
Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under the present regulation for serious criminal offences referred to in Sections 4 to 7 of the present regulation, the fact that any of the acts referred to in the said Sections 4 to 7 was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Section 17
Statute of limitations

17.1 The serious criminal offences under Section 10.1 (a), (b), (c) and (f) of UNTAET Regulation No. 2000/11 and under Sections 4 to 7 of the present regulation shall not be subject to any statute of limitations.

17.2 The serious criminal offences under Section 10.1 (d) to (e) of UNTAET Regulation No. 2000/11 and under Sections 8 to 9 of the present regulation shall be subject to applicable law.

Section 18
Mental element

18.1 A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panels only if the material elements are committed with intent and knowledge.

18.2 For the purposes of the present Section, a person has "intent" where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

18.3 For the purposes of the present Section, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Section 19
Grounds for excluding criminal responsibility

19.1 A person shall not be criminally responsible if, at the time of that person's conduct:

(a) the person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) the person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the panels;

(c) the person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) the conduct which is alleged to constitute a crime within the jurisdiction of the panels has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) made by other persons; or

(ii) constituted by other circumstances beyond that person's control.

19.2 The panel shall determine the applicability of the grounds for excluding criminal responsibility provided for in the present regulation to the case before it.

19.3 At trial, the panel may consider a ground for excluding criminal responsibility other than those referred to in Section 19.1 of the present regulation where such a ground is derived from applicable law. The procedures relating to the consideration of such a ground shall be provided for in an UNTAET directive.

Section 20
Mistake of fact or mistake of law

20.1 A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

20.2 A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the panels shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in Section 21 of the present regulation.

Section 21
Superior orders and prescription of law

The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if a panel determines that justice so requires.

IV. Composition of the Panels and Procedure

Section 22
Composition of the Panels

22.1 In accordance with Sections 9 and 10.3 of UNTAET Regulation No. 2000/11 the panels in the District Court of Dili shall be composed of two international judges and one East Timorese judge.

22.2 In accordance with Section 15 of UNTAET Regulation No. 2000/11 the panels in the Court of Appeal in Dili shall be composed of two international judges and one East Timorese judge. In cases of special importance or gravity a panel of five judges composed of three international and two East Timorese judges may be established.

Section 23
Qualifications of Judges

23.1 The judges of the panels established within the District Court in Dili and the Court of Appeal in Dili shall be selected and appointed in accordance with UNTAET Regulation No. 1999/3, Section 10.3 of UNTAET Regulation No. 2000/11 and Sections 22 and 23 of the present regulation.

23.2 The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to judicial offices. In the overall composition of the panels due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

V. Other Matters

Section 24
Witness Protection

24.1 The panels shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the panels shall have regard to all relevant factors, including age, gender, health and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.

24.2 Procedures regarding the protection of witnesses shall be elaborated in an UNTAET directive.

Section 25
Trust Fund

25.1 A Trust Fund may be established by decision of the Transitional Administrator in consultation with the National Consultative Council for the benefit of victims of crimes within the jurisdiction of the panels, and of the families of such victims.

25.2 The panels may order money and other property collected through fines, forfeiture, foreign donors or other means to be transferred to the Trust Fund.

25.3 The Trust Fund shall be managed according to criteria to be determined by an UNTAET directive.

Section 26
Entry into force

The present regulation shall enter into force on 6 June 2000.

Sergio Vieira de Mello
Transitional Administrator

KAMBOJA

NS/RKM/1004/004

Reach Kram

We,
Preah Bat Samdech Preah Norodom Sihanouk
King of Cambodia,

- having taken into account the Constitution of the Kingdom of Cambodia;
- having taken into account Reach Kret No. NS/ RKT/0704/124 dated 15 July 2004 on the Appointment of the Royal Government of Cambodia;
- having taken into account Reach Kram No. 02/NS/94 dated 20 July1994 promulgating the Law on the Structure and Functioning of the Council of Ministers;
- having taken into account Reach Kram No. NS/RKM/0196/09 dated 24 January1996 promulgating the Law on the Establishment of the Council of Ministers;
- having taken into account the request by Samdech Prime Minister of the Royal Government of Cambodia and by the Deputy Prime Minister and Minister in Charge of the Council of Ministers,

hereby promulgate

the Law Approving the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, approved by the National Assembly on 4 October 2004, in the 1st Session of the 3rd Legislature, and approved in its entirety by the Senate of the Kingdom of Cambodia on 8 October 2004 in the 9th Session of the 1st Legislature, as follows:

Law Approving the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea

Article 1
To approve the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea signed in Phnom Penh on 6 June 2003, as attached hereto in its entirety.

Article 2
The Royal Government of Cambodia shall carry out all procedures that may be necessary to implement this Agreement.

Article 3
This law shall be proclaimed as urgent.

Phnom Penh Municipality, 19 October 2004.

Acting Head of State
(signed)
Chea Sim

Submitted for Royal Assent by
the Prime Minister

(signed)
Hun Sen

Submitted to the Prime Minister by the
Deputy Prime Minister and Minister in Charge of the Council of Ministers

(signed)
Sok An

No. 254 Ch.L.
For publication
Phnom Penh Municipality, 21 October 2004
Secretary-General for the Government

(signed and stamped)
Nady Tan

Ministry of Foreign Affairs
d International Cooperation

Deputy Prime Minister

NATION - RELIGION - KING

Instrument of Ratification
on the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea

WHEREAS the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea has been signed between the Royal Government of Cambodia and the United Nations on 06 June 2003;

WHEREAS Article 31 of the Agreement provides that this Agreement is subject to ratification; and

WHEREAS the Acting Head of State of the Kingdom of Cambodia Ratified the Agreement on 19 October 2004;

NOW THEREFORE, the Royal Government of Cambodia, having considered the above mentioned Agreement, undertakes faithfully to carry out the stipulations therein contained;

IN WITNESS WHEREOF, I have signed this Instrument of Ratification and affixed hereunto the seal of the Royal Government of Cambodia.

Done at Phnom Penh on 19 October 2004

HOR NAMHONG
Minister of Foreign Affairs
and International Cooperation

ess : N° 161, Preah Sisowath Quay,
Phnom Penh, Kingdom of Cambodia

Tel : (855) 23 214 441 , 216 122
Fax : (855) 23 216 144 , 216 939
Email: mfaicasean@online.com.kh

LAW ON THE ESTABLISHMENT OF EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA FOR THE PROSECUTION OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRACTIC KAMPUCHEA.

CHAPTER I
GENERAL PROVISIONS

Article 1:

The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, thatwere committed during the period from 17 April 1975 to 6 January 1979.

CHAPTER II
COMPETENCE

Article 2

Extraordinary Chambers shall be established in the existing court structure, namely the trial court, the appeals court and the supreme court to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979

Senior leaders of Democratic Kampuchea and those who were most responsible for the above acts are hereinafter designated as "Suspects".

Article 3

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed any of these crimes set forth in the 1956 Penal Code of Cambodia, and which were committed during the period from 17 April 1975 to 6 January 1979:

-- Homicide (Article 501, 503, 504, 505, 506, 507 and 508)
-- Torture (Article 500)
-- Religious Persecution (Articles 209 and 210)

The statute of limitations set forth in the 1956 Penal Code shall be extended for an additional 20 years for the crimes enumerated above, which are within the jurisdiction of the Extraordinary Chambers.

Article 4

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed the crimes of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and which were committed during the period from 17 April 1975 to 6 January 1979.

The acts of genocide, which have no statute of limitations, mean any acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such:

-- killing members of the group;
-- causing serious bodily or mental harm to members of the group;
-- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
-- imposing measures intended to prevent births within the group;
-- forcibly transferring children from one group to another group.

The following acts shall be punishable under this Article:

-- attempts to commit acts of genocide;
-- conspiracy to commit acts of genocide;
-- participation in acts of acts of genocide.

Article 5

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed crimes against humanity during the period 17 April 1975 to 6 January 1979.

Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack against any civilian population, on national, political, ethnical, racial or religious grounds, such as:

-- murder;
-- extermination;
-- enslavement;
-- deportation;
-- imprisonment;
-- torture;
-- rape;
-- persecutions on political, racial, and religious grounds;
-- other inhuman acts.

Article 6

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed or ordered the commission of grave breaches of the Geneva Convention of 12 August 1949, such as the following acts against persons or property protected under provisions of this Convention, and which were committed during the period 17 April 1975 to 6 January 1979:

-- willful killing;
-- torture or inhumane treatment;
-- willfully causing great suffering or serious injury to body or health;
-- destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly;
-- compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
-- wilfully depriving a prisoner of war or civilian the rights of fair and regular trial;

The acts of genocide, which have no statute of limitations, mean any acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such:

-- killing members of the group;
-- causing serious bodily or mental harm to members of the group;
-- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
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-- torture;
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-- willful killing;
-- torture or inhumane treatment;
-- willfully causing great suffering or serious injury to body or health;
-- destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly;
-- compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
-- wilfully depriving a prisoner of war or civilian the rights of fair and regular trial;

-- unlawful deportation or transfer or unlawful confinement of a civilian;
-- taking civilians as hostages.

Article7

The Extraordinary Chambers shall have the power to bring to trial all Suspects responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, and which were committed during the period from 17 April 1975 to 6 January 1979.

Article 8

The Extraordinary Chambers shall have the power to bring to trial all Suspects responsible for crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations, and which were committed during the period from 17 April 1975 to 6 January 1979. .

CHAPTER III
COMPOSITION OF THE EXTRAORDINARY CHAMBERS

Article 9

The trial court shall be an Extraordinary Chamber composed of five professional judges, of whom three are Cambodian judges, with one as president, and two are foreign judges; and before which the Co-Prosecutors shall present their cases. The president shall appoint one or more clerks of the court to participate.

The appeals court shall be an Extraordinary Chamber shall be composed of seven judges, of whom four are Cambodian judges, with one as president, and three are foreign judges; and before which the Co-Prosecutors shall present their cases. The president shall appoint one or more clerks of the court to participate.

The supreme court shall be an Extraordinary Chamber composed of nine judges, of whom five are Cambodian judges, with one as president, and four are foreign judges; and before which the Co-Prosecutors shall present their cases. The president shall appoint one or more clerks of the court to participate.

CHAPTER IV
APPOINTMENT OF JUDGES

Article 10

The judges of the Extraordinary Chambers shall be appointed from among the existing judges or from judges who are additionally appointed, in accordance with the existing procedures for appointment of judges, who have high moral character, a spirit of impartiality and integrity, and who are experienced, particularly in criminal law or international law.

Judges shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source.

Article 11

The Supreme Council of the Magistracy shall appoint at least twelve Cambodian judges to act as judges of the Extraordinary Chambers, and shall appoint reserve judges as needed, and shall also appoint the President of each of the Extraordinary Chambers from the above Cambodian judges so appointed, in accordance with the existing procedures for appointment of judges.

The reserve Cambodian judges shall replace the regularly appointed Cambodian judges in case of their absence or withdrawal. These reserve judges may continue to perform their regular duties in their respective courts.

The Supreme Council of the Magistracy shall appoint at least nine individuals of foreign nationality to act as foreign judges of the Extraordinary Chambers upon nomination by the Secretary-General of the United Nations.

The Secretary-General of the United Nations shall submit a list of not less than twelve candidates for foreign judges to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint nine sitting judges and three reserve judges. In addition to the foreign judges sitting in the Extraordinary Chambers and present at every stage of the proceedings, the President of the Chamber may, on a case-by-case basis, designate , one or more reserve judges already appointed by the Supreme Council of the Magistracy to be present at each stage of the trial, and to replace a foreign judge if that judge is unable to continue sitting.

Article 12

All judges under this law shall enjoy equal status and rank according to each level of the Extraordinary Chambers .

Each judge under this law shall be appointed for the period of these proceedings.

Article 13

Judges shall be assisted by Cambodian and international staff as needed.

In choosing staff to serve as assistants and law clerks, the Director of the Office of Administration shall interview if necessary, and with the approval of the Cambodian judges by majority vote, hire staff who shall be appointed by the Royal Government of Cambodia . The Deputy Director of the Office of Administration shall be responsible for the recruitment and administration of all international staff. The number of assistants and law clerks shall be chosen in proportion to the Cambodian judges and foreign judges.

Cambodian staff shall be selected from Cambodian civil servants or other qualified nationals of Cambodia, if necessary.

CHAPTER V
DECISIONS OF THE EXTRAORDINARY CHAMBERS

Article 14

1. The judges shall attempt to achieve unanimity in their decisions. If this is not possible, the following shall apply:

a) a decision by the Extraordinary Chamber of the trial court shall require the affirmative vote of at least four judges.

b) a decision by the Extraordinary Chamber of the appeals court shall require the affirmative vote of at least five judges.

c) a decision by the Extraordinary Chamber of the supreme court shall require the affirmative vote of at least six judges.

2. When there is no unanimity, the decision of the Extraordinary Chambers shall contain the views of the majority and the minority.

Article 15

The Presidents shall convene the appointed judges at the appropriate time to proceed with the work of the Extraordinary Chambers.

CHAPTER VI
CO-PROSECUTORS

Article 16

All indictments in the Extraordinary Chambers shall be made by two prosecutors, one Cambodian and another foreign, who shall work together as Co-Prosecutors to prepare indictments against the Suspects in the Extraordinary Chambers.

Article 17

The Co-Prosecutors in the trial court shall have the right to appeal the verdict of the Extraordinary Chamber of the trial court.

The Co-Prosecutors in the appeals court shall have the right to appeal the decision of the Extraordinary Chamber of the appeals court.

Article 18

The Supreme Council of the Magistracy shall appoint Cambodian prosecutors and Cambodian reserve prosecutors as necessary from among the Cambodian professional judges.

The reserve prosecutors shall replace the regularly appointed prosecutors in case of their absence or withdrawal. These reserve prosecutors may continue to perform their regular duties in their respective courts. One foreign prosecutor with the competence to appear in all

three Extraordinary Chambers shall be appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General of the United Nations.

The Secretary-General of the United Nations shall submit a list of at least two candidates for foreign Co-Prosecutor to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint one prosecutor and one reserve prosecutor.

Article 19

The Co-Prosecutors shall be appointed from among those individuals who are appointed in accordance with the existing procedures for selection of prosecutors who have high moral character and integrity and who are experienced in the conduct of investigations and prosecutions of criminal cases.

The Co-Prosecutors shall be independent in the performance of their functions and shall not accept or seek instructions from any government or any other source.

Article 20

The Co-Prosecutors shall prosecute in accordance with existing procedures in force. If necessary, and if there are lacunae in these existing procedures, the Co-Prosecutors may seek guidance in procedural rules established at the international level.

In the event of disagreement between the Co-Prosecutors the following shall apply:

The prosecution shall proceed unless the Co-Prosecutors or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions.

The Co-Prosecutors shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration.

The difference shall be settled forthwith by a Pre-Trial Chamber of five judges, three appointed by the Supreme Council of the Magistracy, with one as President, and two appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General of the United Nations. Article 10 shall apply to the judges.

Upon receipt of the statements referred to in the third paragraph, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.

A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the Co-Prosecutors. They shall immediately proceed in accordance with the decision of the Chamber. If there is no majority, as required for a decision, the prosecution shall proceed.

In carrying out the prosecution, the Co-Prosecutors may seek the assistance of the Royal Government of Cambodia if such assistance would be useful to the prosecution, and such assistance shall be provided.

Article 21

The Co-Prosecutors under this law shall enjoy equal status and rank according to each level of the Extraordinary Chambers .

Each Co-Prosecutor shall be appointed for the period of these proceedings.

In the event of the absence or withdrawal of the foreign Co-Prosecutor, he or she shall be replaced by the reserve Prosecutor.

Article 22

Each Co-Prosecutor shall have the right to choose one or more deputy prosecutors to assist him or her with prosecution before the chambers. Deputy foreign prosecutors shall be appointed by the Supreme Council of the Magistracy from a list provided by the Secretary-General.

The Co-prosecutors shall be assisted by Cambodian and international staff as needed. In choosing staff to serve as assistants, the Director of the Office of Administration shall interview, if necessary, and with the approval of the Cambodian Co-Prosecutor, hire staff who shall be appointed by the Royal Government of Cambodia . The Deputy Director of the Office of Administration shall be responsible for the recruitment and administration of all foreign staff. The number of assistants shall be chosen in proportion to the Cambodian judges and foreign judges.

Cambodian staff shall be selected from Cambodian civil servants and other qualified nationals of Cambodia, if necessary .

CHAPTER VII
INVESTIGATIONS

Article 23

All investigations shall be the joint responsibility of two investigating judges, one Cambodian and another foreign, hereinafter referred to as Co-Investigating Judges in accordance with existing procedures in force. If necessary, and if there are lacunae in these existing procedures, the Co-Investigating Judges may seek guidance in procedural rules established at the international level.

In the event of disagreement between the Co-Investigating Judges the following shall apply:

The investigation shall proceed unless the Co-Investigating Judges or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions.

The Co-Investigating Judges shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration.

The difference shall be settled forthwith by the Pre-Trial Chamber referred to in Article 20.

Upon receipt of the statements referred to in the third paragraph, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.

A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the Co-Investigating Judges. They shall immediately proceed in accordance with the decision of the Pre-Trial Chamber. If there is no majority as required for a decision, the investigation shall proceed.

The Co-Investigating Judges shall conduct investigations on the basis of information obtained from any source, including the Government, United Nations organs, or non-governmental organisations.

The Co-Investigating Judges shall have the power to question suspects, victims and witnesses, and to collect evidence in accordance with existing procedures in force. In the event the Co-Investigating Judges consider it necessary to do so, they may issue an order requesting the Co-Prosecutors to interrogate the witnesses.

In carrying out the investigations, the Co-Investigating Judges may seek the assistance of the Royal Government of Cambodia, if such assistance would be useful to the investigation, and such assistance shall be provided.

Article 24

During the investigation, Suspects shall be unconditionally entitled to assistance of counsel free of charge if they cannot afford it , including the right to interpretation of the proceedings into and from a language they speak and understand.

Article 25

The Co-Investigating Judges shall be appointed from among the existing judges or from judges who are additionally appointed in accordance with the existing procedures for appointment of judges, who have high moral character, a spirit of impartiality and integrity, and who are experienced in criminal investigations. They shall be independent in the performance of their functions and shall not accept or seek instructions from any government or any other source.

Article 26

The Cambodian Co-Investigating Judge and the reserve Investigating Judges shall be appointed by the Supreme Council of the Magistracy from among the Cambodian professional judges.

The reserve Investigating Judges shall replace the regularly appointed Investigating Judges in case of their absence or withdrawal. The reserve Investigating Judges may continue to perform their regular duties in their respective courts.

The Supreme Council of the Magistracy shall appoint the foreign Co-Investigating Judge for the period of investigations, upon nomination by the Secretary-General of the United Nations.

The Secretary-General of the United Nations shall submit a list of at least two candidates for foreign Co-Investigating Judge to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint one sitting Investigating Judge and one reserve Investigating Judge.

Article 27

All Investigating Judges under this law shall enjoy equal status and rank and the same terms and conditions of service.

Each Investigating Judge shall be appointed for the period of the investigation.

In the event of the absence or withdrawal of the foreign Co-Investigating Judge, he or she shall be replaced by the reserve Investigating Judge.

Article 28

The Co-Investigating Judges shall be assisted by Cambodian and international staff as needed.

In choosing staff to serve as assistants, the Director of the Office of Administration shall comply with the provisions set forth in Article 13 of this law.

CHAPTER VIII
INDIVIDUAL RESPONSIBILITY

Article 29

Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.

The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.

The fact that any of the acts referred to in Articles 3, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility.

CHAPTER IX
OFFICE OF ADMINISTRATION

Article 30

The staff of the judges, the investigating judges and prosecutors of the Extraordinary Chambers shall be supervised by an Office of Administration.

The Office of Administration shall have a Cambodian Director, a foreign Deputy Director and such other staff as necessary.

Article 31

The Director of the Office of Administration shall be appointed by the Royal Government of Cambodia for a two year term and shall be eligible for reappointment.

The Director of the Office of Administration shall be responsible for the overall management of the Office of Administration.

The Director of the Office of Administration shall be appointed from those with significant experience in court administration, be fluent in one of the foreign languages used in the Extraordinary Chambers, and be a person of high moral character and integrity. The foreign Deputy Director shall be nominated by the Secretary-General of the United Nations and appointed by the Royal Government of Cambodia, and shall be responsible for the recruitment and administration of all foreign staff, as required by the international components of the Extraordinary Chambers, the Co-Investigating Judges, the Co-Prosecutors' Office, and the Office of Administration. The Deputy Director shall administer the resources allotted against the United Nations Trust Fund.

The Office of Administration shall be assisted by Cambodian and foreign staff as necessary. All Cambodian staff of the Office of Administration shall be appointed by the Royal Government of Cambodia at the request of the Director. Foreign staff shall be appointed by the Deputy Director.

Cambodian staff shall be selected from the Cambodian civil service system and, if necessary, other qualified nationals of Cambodia.

Article 32

All staff assigned to the judges, Co-Investigating Judges, Co-Prosecutors, and Office of Administration shall enjoy the same working conditions according to each level of the Extraordinary Chambers.

CHAPTER X
TRIAL PROCEEDINGS OF THE EXTRAORDINARY CHAMBERS

Article 33

The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the

rights of the accused and for the protection of victims and witnesses. If necessary, and if there are lacunae in these existing procedures, guidance may be sought in procedural rules established at the international level.

Suspects who have been indicted and arrested shall be brought to the trial court according to existing procedures in force. The Royal Government of Cambodia shall guarantee the security of the Suspects who appear voluntarily before the court and is responsible in taking measures for the arrest of the Suspects prosecuted under this law. Justice police shall be assisted by other law enforcement elements of the Royal Government of Cambodia, including its armed forces, in order to ensure that accused persons are brought into custody immediately.

Conditions for the arrest and the custody of the accused shall conform to existing law in force.

The Court shall provide for the protection of victims and witnesses. Such protection measures shall include, but shall be not limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 34

Trials shall be public unless in exceptional circumstances the Extraordinary Chambers decide to close the proceedings for good cause in accordance with existing procedures in force.

Article 35

The accused shall be presumed innocent until proven guilty.

In determining charges against the accused, the accused shall be entitled to the following minimum guarantees, in equal fashion:

a) To be informed promptly and in detail in a language that they understand of the nature and cause of the charge against them;

b) To have adequate time to be prepared and contact their counsel;

c) To be tried without delay;

d) To defend themselves or with the assistance of their counsel;

e) To examine evidence against them and obtain the attendance and examination of evidence on their behalf under the same conditions as evidence against them;

f) To have the free assistance of an interpreter if the accused cannot understand or does not speak the language used in the court;

g) Not to be compelled to testify against themselves or to confess guilt.

Article 36

The Extraordinary Chamber of the appeals court shall decide the appeals from the accused persons, the victims, or by the Co-Prosecutors on the following grounds:

-- an error of fact
-- an error of law

The Extraordinary Chamber of the appeals court shall review the decision of the Extraordinary Chamber of the trial court and may affirm, reverse or modify the decision. In this case, the Extraordinary Chamber of the appeals court may apply existing procedures in force. If necessary, and if there are lacunae in these existing procedures, guidance may be sought in procedural rules established at the international level.

Article 37

The Extraordinary Chamber of the supreme court shall decide appeals made by the accused, the victims, or the Co-Prosecutors against the decision of the Extraordinary Chamber of the appeals court. In this case, the supreme court shall make final decisions on both issues of law and fact, and shall not return the case to the Extraordinary Chamber of the appeals court.

CHAPTER XI
PENALTIES

Article 38

All penalties shall be limited to imprisonment.

Article 39

Those who have committed crimes as provided in Articles 3, 4, 5, 6, 7 and 8 shall be sentenced to a prison term from five years to life imprisonment.

In addition to imprisonment, the Extraordinary Chamber of the trial court may order the confiscation of personal property, money, and real property acquired unlawfully or by criminal conduct.

The confiscated property shall be returned to the State.

CHAPTER XII
AMNESTY AND PARDONS

Article 40

The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in Articles 3, 4, 5, 6, 7 and 8 of this law.

CHAPTER XIII
STATUS, RIGHTS, PRIVILEGES AND IMMUNITIES

Article 41

The foreign judges, the foreign Co-Investigating Judge, the foreign Co-Prosecutor and the Deputy Director of the Office of Administration, together with their families forming part of their household, shall enjoy all of the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations. Such officials shall enjoy exemption from taxation in Cambodia on their salaries, emoluments and allowances.

Article 42

1. Cambodian personnel shall be accorded immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity.

2. Foreign personnel shall be accorded, in addition:
a. immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity.
b. immunity from taxation on salaries, allowances and emoluments paid to them by contributing States of the United Nations Trust Fund;
c. immunity from immigration restriction;
d. the right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Cambodia.

3. The counsel of a suspect or an accused who has been admitted as such by the Extraordinary Chambers shall not be subjected by the Government to any measure that may affect the free and independent exercise of his or her functions under the Law on the Establishment of the Extraordinary Chambers.

In particular, the counsel shall be accorded:
a. immunity from personal arrest or detention and from seizure of personal baggage while fulfilling his or her functions in the proceedings;
b. inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;
c. immunity from criminal or civil jurisdiction in in respect of words spoken or written and acts performed by them in their official capacity.

4. The archives of the court, and in general all documents and materials made available, belonging to, or used by it, wherever located in the Kingdom of Cambodia and by whomsoever held, shall be inviolable for the duration of the proceedings.

CHAPTER XIV
LOCATION OF THE Extraordinary Chambers

Article 43

The Extraordinary Chambers established in the trial court, the appeals court and the supreme court shall be located in Phnom Penh.

CHAPTER XV
EXPENSES AND SALARIES

Article 44

The expenses and salaries of the Extraordinary Chambers shall be as follows:

1. The expenses and salaries of the Cambodian administrative officials and staff, the Cambodian judges and reserve judges, the Cambodian investigating judges and reserve investigating judges, and the Cambodian prosecutors and reserve prosecutors shall be borne by the Cambodian national budget.

2. The expenses of the foreign administrative officials and staff, the foreign judges, the foreign Co-investigating judge and the foreign Co-prosecutor sent by the Secretary-General of the United Nations shall be borne by the United Nations Trust Fund.

3. The salaries of the foreign administrative officials and staff, the foreign judges, the foreign Co-Investigating Judge and the foreign Co-Prosecutor shall be borne by the countries that contribute them at the request of the Secretary-General of the United Nations.

4. The defence counsel may receive fees for mounting the defence;

5. The Extraordinary Chambers may receive additional assistance for their expenses from other voluntary funds contributed by foreign governments, international institutions, non-governmental organisations, and other persons wishing to assist the proceedings.

CHAPTER XVI
WORKING LANGUAGE

Article 45

The official working language of the Extraordinary Chambers shall be Khmer, with translations into English, French and Russian.

CHAPTER XVII
ABSENCE OF FOREIGN JUDGES OR CO-PROSECUTORS

Article 46

In order to ensure timely and smooth implementation of this law, in the event any foreign judges or foreign investigating judges or foreign prosecutors fail or refuse to participate in the Extraordinary Chambers, the Supreme Council of the Magistracy shall appoint other judges or investigating judges or prosecutors to fill any vacancies from the lists of foreign candidates provided for in Article 11, Article 18, and Article 26. In the event those lists are exhausted, any such vacancies shall be filled by the Supreme Council of the Magistracy from candidates recommended by the Governments of Member States of the United Nations or from among other foreign legal personalities.

If, following such procedures, there are still no foreign judges or foreign investigating judges or foreign prosecutors participating in the work of the Extraordinary Chambers and no foreign candidates have been identified to occupy the vacant positions, then the Supreme

Council of the Magistracy may choose replacement Cambodian judges, investigating judges or prosecutors.

CHAPTER XVIII
EXISTENCE OF THE COURT

Article 47

The Extraordinary Chambers in the courts of Cambodia shall be dissolved following the conclusion of these proceedings.

FINAL PROVISION

Article 48

This law shall be proclaimed as urgent.

This law was adopted by the National Assembly of the Kingdom of Cambodia on the _____th day of _____ in the year _____ in the _____th Session of the Second Legislature.

Phnom Penh Municipality, _____th day of _____ in the year ____.

President of the National Assembly

Norodom Ranariddh

AGREEMENT
BETWEEN THE UNITED NATIONS
AND THE ROYAL GOVERNMENT OF CAMBODIA
CONCERNING THE PROSECUTION UNDER CAMBODIAN LAW OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA

WHEREAS the General Assembly of the United Nations, in its resolution 57/228 of 18 December 2002, recalled that the serious violations of Cambodian and international humanitarian law during the period of Democratic Kampuchea from 1975 to 1979 continue to be matters of vitally important concern to the international community as a whole;

WHEREAS in the same resolution the General Assembly recognized the legitimate concern of the Government and the people of Cambodia in the pursuit of justice and national reconciliation, stability, peace and security;

WHEREAS the Cambodian authorities have requested assistance from the United Nations in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979;

WHEREAS prior to the negotiation of the present Agreement substantial progress had been made by the Secretary-General of the United Nations (hereinafter, "the Secretary-General") and the Royal Government of Cambodia towards the establishment, with international assistance, of Extraordinary Chambers within the existing court structure of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea;

WHEREAS by its resolution 57/228, the General Assembly welcomed the promulgation of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea and requested the Secretary-General to resume negotiations, without delay, to conclude an agreement with the Government, based on previous negotiations on the establishment of the Extraordinary Chambers consistent with the provisions of the said resolution, so that the Extraordinary Chambers may begin to function promptly;

WHEREAS the Secretary-General and the Royal Government of Cambodia have held negotiations on the establishment of the Extraordinary Chambers;

NOW THEREFORE the United Nations and the Royal Government of Cambodia have agreed as follows:

Article 1
Purpose

The purpose of the present Agreement is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979. The Agreement provides, inter alia, the legal basis and the principles and modalities for such cooperation.

Article 2
The Law on the Establishment of Extraordinary Chambers

1. The present Agreement recognizes that the Extraordinary Chambers have subject matter jurisdiction consistent with that set forth in "the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea" (hereinafter: "the Law on the Establishment of the Extraordinary Chambers"), as adopted and amended by the Cambodian Legislature under the Constitution of Cambodia. The present Agreement further recognizes that the Extraordinary Chambers have personal jurisdiction over senior leaders of Democratic Kampuchea and those who were most responsible for the crimes referred to in Article 1 of the Agreement.

2. The present Agreement shall be implemented in Cambodia through the Law on the Establishment of the Extraordinary Chambers as adopted and amended. The Vienna Convention on the Law of Treaties, and in particular its Articles 26 and 27, applies to the Agreement.

3. In case amendments to the Law on the Establishment of the Extraordinary Chambers are deemed necessary, such amendments shall always be preceded by consultations between the parties.

Article 3
Judges

1. Cambodian judges, on the one hand, and judges appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General of the United Nations (hereinafter: "international judges"), on the other hand, shall serve in each of the two Extraordinary Chambers.

2. The composition of the Chambers shall be as follows:

a. The Trial Chamber: three Cambodian judges and two international judges;

b. The Supreme Court Chamber, which shall serve as both appellate chamber and final instance: four Cambodian judges and three international judges.

3. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to judicial offices. They shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

4. In the overall composition of the Chambers due account should be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

5. The Secretary-General of the United Nations undertakes to forward a list of not less than seven nominees for international judges from which the Supreme Council of the Magistracy shall appoint five to serve as judges in the two Chambers. Appointment of international judges by the Supreme Council of the Magistracy shall be made only from the list submitted by the Secretary-General.

6. In the event of a vacancy of an international judge, the Supreme Council of the Magistracy shall appoint another international judge from the same list.

7. The judges shall be appointed for the duration of the proceedings.

8. In addition to the international judges sitting in the Chambers and present at every stage of the proceedings, the President of a Chamber may, on a case-by-case basis, designate from the list of nominees submitted by the Secretary-General, one or more

alternate judges to be present at each stage of the proceedings, and to replace an international judge if that judge is unable to continue sitting.

Article 4
Decision-making

1. The judges shall attempt to achieve unanimity in their decisions. If this is not possible, the following shall apply:

a. A decision by the Trial Chamber shall require the affirmative vote of at least four judges;

b. A decision by the Supreme Court Chamber shall require the affirmative vote of at least five judges.

2. When there is no unanimity, the decision of the Chamber shall contain the views of the majority and the minority.

Article 5
Investigating judges

1. There shall be one Cambodian and one international investigating judge serving as co-investigating judges. They shall be responsible for the conduct of investigations.

2. The co-investigating judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to such a judicial office.

3. The co-investigating judges shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source. It is understood, however, that the scope of the investigation is limited to senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

4. The co-investigating judges shall cooperate with a view to arriving at a common approach to the investigation. In case the co-investigating judges are unable to agree whether to proceed with an investigation, the investigation shall proceed unless the judges or one of them requests within thirty days that the difference shall be settled in accordance with Article 7.

5. In addition to the list of nominees provided for in Article 3, paragraph 5, the Secretary-General shall submit a list of two nominees from which the Supreme Council of the Magistracy shall appoint one to serve as an international co-investigating judge, and one as a reserve international co-investigating judge.

6. In case there is a vacancy or a need to fill the post of the international co-investigating judge, the person appointed to fill this post must be the reserve international co-investigating judge.

7. The co-investigating judges shall be appointed for the duration of the proceedings.

Article 6
Prosecutors

1. There shall be one Cambodian prosecutor and one international prosecutor competent to appear in both Chambers, serving as co-prosecutors. They shall be responsible for the conduct of the prosecutions.

2. The co-prosecutors shall be of high moral character, and possess a high level of professional competence and extensive experience in the conduct of investigations and prosecutions of criminal cases.

3. The co-prosecutors shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source. It is understood, however, that the scope of the prosecution is limited to senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

4. The co-prosecutors shall cooperate with a view to arriving at a common approach to the prosecution. In case the prosecutors are unable to agree whether to proceed with a prosecution, the prosecution shall proceed unless the prosecutors or one of them requests within thirty days that the difference shall be settled in accordance with Article 7.

5. The Secretary-General undertakes to forward a list of two nominees from which the Supreme Council of the Magistracy shall select one international co-prosecutor and one reserve international co-prosecutor.

6. In case there is a vacancy or a need to fill the post of the international co-prosecutor, the person appointed to fill this post must be the reserve international co-prosecutor.

7. The co-prosecutors shall be appointed for the duration of the proceedings.

8. Each co-prosecutor shall have one or more deputy prosecutors to assist him or her with prosecutions before the Chambers. Deputy international prosecutors shall be appointed by the international co-prosecutor from a list provided by the Secretary-General.

Article 7
Settlement of differences between the co-investigating judges or the co-prosecutors

1. In case the co-investigating judges or the co-prosecutors have made a request in accordance with Article 5, paragraph 4, or Article 6, paragraph 4, as the case may be, they shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration.

2. The difference shall be settled forthwith by a Pre-Trial Chamber of five judges, three appointed by the Supreme Council of the Magistracy, with one as President, and two appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General. Article 3, paragraph 3, shall apply to the judges.

3. Upon receipt of the statements referred to in paragraph 1, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.

4. A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the co-

investigating judges or the co-prosecutors. They shall immediately proceed in accordance with the decision of the Chamber. If there is no majority, as required for a decision, the investigation or prosecution shall proceed.

Article 8
Office of Administration

1. There shall be an Office of Administration to service the Extraordinary Chambers, the Pre-Trial Chamber, the co-investigating judges and the Prosecutors' Office.

2. There shall be a Cambodian Director of this Office, who shall be appointed by the Royal Government of Cambodia. The Director shall be responsible for the overall management of the Office of Administration, except in matters that are subject to United Nations rules and procedures.

3. There shall be an international Deputy Director of the Office of Administration, who shall be appointed by the Secretary-General. The Deputy Director shall be responsible for the recruitment of all international staff and all administration of the international components of the Extraordinary Chambers, the Pre-Trial Chamber, the co-investigating judges, the Prosecutors' Office and the Office of Administration. The United Nations and the Royal Government of Cambodia agree that, when an international Deputy Director has been appointed by the Secretary-General, the assignment of that person to that position by the Royal Government of Cambodia shall take place forthwith.

4. The Director and the Deputy Director shall cooperate in order to ensure an effective and efficient functioning of the administration.

Article 9
Crimes falling within the jurisdiction of the Extraordinary Chambers

The subject-matter jurisdiction of the Extraordinary Chambers shall be the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court and grave breaches of the 1949 Geneva Conventions and such

other crimes as defined in Chapter II of the Law on the Establishment of the Extraordinary Chambers as promulgated on 10 August 2001.

Article 10
Penalties

The maximum penalty for conviction for crimes falling within the jurisdiction of the Extraordinary Chambers shall be life imprisonment.

Article 11
Amnesty

1. The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in the present Agreement.

2. This provision is based upon a declaration by the Royal Government of Cambodia that until now, with regard to matters covered in the law, there has been only one case, dated 14 September 1996, when a pardon was granted to only one person with regard to a 1979 conviction on the charge of genocide. The United Nations and the Royal Government of Cambodia agree that the scope of this pardon is a matter to be decided by the Extraordinary Chambers.

Article 12
Procedure

1. The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.

2. The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party. In the interest of securing a fair and public hearing and credibility of the

procedure, it is understood that representatives of Member States of the United Nations, of the Secretary-General, of the media and of national and international non-governmental organizations will at all times have access to the proceedings before the Extraordinary Chambers. Any exclusion from such proceedings in accordance with the provisions of Article 14 of the Covenant shall only be to the extent strictly necessary in the opinion of the Chamber concerned and where publicity would prejudice the interests of justice.

Article 13
Rights of the accused

1. The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process. Such rights shall, in particular, include the right: to a fair and public hearing; to be presumed innocent until proved guilty; to engage a counsel of his or her choice; to have adequate time and facilities for the preparation of his or her defence; to have counsel provided if he or she does not have sufficient means to pay for it; and to examine or have examined the witnesses against him or her.

2. The United Nations and the Royal Government of Cambodia agree that the provisions on the right to defence counsel in the Law on the Establishment of Extraordinary Chambers mean that the accused has the right to engage counsel of his or her own choosing as guaranteed by the International Covenant on Civil and Political Rights.

Article 14
Premises

The Royal Government of Cambodia shall provide at its expense the premises for the co-investigating judges, the Prosecutors' Office, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration. It shall also provide for such utilities, facilities and other services necessary for their operation that may be mutually agreed upon by separate agreement between the United Nations and the Government.

Article 15
Cambodian personnel

Salaries and emoluments of Cambodian judges and other Cambodian personnel shall be defrayed by the Royal Government of Cambodia.

Article 16
International personnel

Salaries and emoluments of international judges, the international co-investigating judge, the international co-prosecutor and other personnel recruited by the United Nations shall be defrayed by the United Nations.

Article 17
Financial and other assistance of the United Nations

The United Nations shall be responsible for the following:

a. remuneration of the international judges, the international co-investigating judge, the international co-prosecutor, the Deputy Director of the Office of Administration and other international personnel;

b. costs for utilities and services as agreed separately between the United Nations and the Royal Government of Cambodia;

c. remuneration of defence counsel;

d. witnesses' travel from within Cambodia and from abroad;

e. safety and security arrangements as agreed separately between the United Nations and the Government;

f. such other limited assistance as may be necessary to ensure the smooth functioning of the investigation, the prosecution and the Extraordinary Chambers.

Article 18
Inviolability of archives and documents

The archives of the co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration, and in general all documents and materials made available, belonging to or used by them, wherever located in Cambodia and by whomsoever held, shall be inviolable for the duration of the proceedings.

Article 19
Privileges and immunities of international judges, the international co-investigating judge, the international co-prosecutor and the Deputy Director of the Office of Administration

1. The international judges, the international co-investigating judge, the international co-prosecutor and the Deputy Director of the Office of Administration, together with their families forming part of their household, shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations. They shall, in particular, enjoy:

a. personal inviolability, including immunity from arrest or detention;

b. immunity from criminal, civil and administrative jurisdiction in conformity with the Vienna Convention;

c. inviolability for all papers and documents;

d. exemption from immigration restrictions and alien registration;

e. the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic agents.

2. The international judges, the international co-investigating judge, the international co-prosecutor and the Deputy Director of the Office of Administration shall enjoy exemption from taxation in Cambodia on their salaries, emoluments and allowances.

Article 20

Privileges and immunities of Cambodian and international personnel

1. Cambodian judges, the Cambodian co-investigating judge, the Cambodian co-prosecutor and other Cambodian personnel shall be accorded immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity under the present Agreement. Such immunity shall continue to be accorded after termination of employment with the co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration.

2. International personnel shall be accorded:

   a. immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity under the present Agreement. Such immunity shall continue to be accorded after termination of employment with the co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration;

   b. immunity from taxation on salaries, allowances and emoluments paid to them by the United Nations;

   c. immunity from immigration restrictions;

   d. the right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Cambodia.

3. The United Nations and the Royal Government of Cambodia agree that the immunity granted by the Law on the Establishment of the Extraordinary Chambers in respect of words spoken or written and all acts performed by them in their official capacity under the present Agreement will apply also after the persons have left the service of the co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration.

Article 21
Counsel

1. The counsel of a suspect or an accused who has been admitted as such by the Extraordinary Chambers shall not be subjected by the Royal Government of Cambodia to any measure which may affect the free and independent exercise of his or her functions under the present Agreement.

2. In particular, the counsel shall be accorded:

   a. immunity from personal arrest or detention and from seizure of personal baggage;

   b. inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;

   c. immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed by them in their official capacity as counsel. Such immunity shall continue to be accorded to them after termination of their functions as a counsel of a suspect or accused.

3. Any counsel, whether of Cambodian or non-Cambodian nationality, engaged by or assigned to a suspect or an accused shall, in the defence of his or her client, act in accordance with the present Agreement, the Cambodian Law on the Statutes of the Bar and recognized standards and ethics of the legal profession.

Article 22
Witnesses and experts

Witnesses and experts appearing on a summons or a request of the judges, the co-investigating judges, or the co-prosecutors shall not be prosecuted, detained or subjected to any other restriction on their liberty by the Cambodian authorities. They shall not be subjected by the authorities to any measure which may affect the free and independent exercise of their functions.

Article 23
Protection of victims and witnesses

The co-investigating judges, the co-prosecutors and the Extraordinary Chambers shall provide for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the identity of a victim or witness.

Article 24
Security, safety and protection of persons referred to in the present Agreement

The Royal Government of Cambodia shall take all effective and adequate actions which may be required to ensure the security, safety and protection of persons referred to in the present Agreement. The United Nations and the Government agree that the Government is responsible for the security of all accused, irrespective of whether they appear voluntarily before the Extraordinary Chambers or whether they are under arrest.

Article 25
Obligation to assist the co-investigating judges, the co-prosecutors and the Extraordinary Chambers

The Royal Government of Cambodia shall comply without undue delay with any request for assistance by the co-investigating judges, the co-prosecutors and the Extraordinary Chambers or an order issued by any of them, including, but not limited to:

a. identification and location of persons;

b. service of documents;

c. arrest or detention of persons;

d. transfer of an indictee to the Extraordinary Chambers.

Article 26
Languages

1. The official language of the Extraordinary Chambers and the Pre-Trial Chamber is Khmer.

2. The official working languages of the Extraordinary Chambers and the Pre-Trial Chamber shall be Khmer, English and French.

3. Translations of public documents and interpretation at public hearings into Russian may be provided by the Royal Government of Cambodia at its discretion and expense on condition that such services do not hinder the proceedings before the Extraordinary Chambers.

Article 27
Practical arrangements

1. With a view to achieving efficiency and cost-effectiveness in the operation of the Extraordinary Chambers, a phased-in approach shall be adopted for their establishment in accordance with the chronological order of the legal process.

2. In the first phase of the operation of the Extraordinary Chambers, the judges, the co-investigating judges and the co-prosecutors will be appointed along with investigative and prosecutorial staff, and the process of investigations and prosecutions shall be initiated.

3. The trial process of those already in custody shall proceed simultaneously with the investigation of other persons responsible for crimes falling within the jurisdiction of the Extraordinary Chambers.

4. With the completion of the investigation of persons suspected of having committed the crimes falling within the jurisdiction of the Extraordinary Chambers, arrest warrants shall be issued and submitted to the Royal Government of Cambodia to effectuate the arrest.

5. With the arrest by the Royal Government of Cambodia of indicted persons situated in its territory, the Extraordinary Chambers shall be fully operational, provided that the judges of the Supreme Court Chamber shall serve when seized with a matter. The judges of the Pre-Trial Chamber shall serve only if and when their services are needed.

Article 28
Withdrawal of cooperation

Should the Royal Government of Cambodia change the structure or organization of the Extraordinary Chambers or otherwise cause them to function in a manner that does not conform with the terms of the present Agreement, the United Nations reserves the right to cease to provide assistance, financial or otherwise, pursuant to the present Agreement.

Article 29
Settlement of disputes

Any dispute between the Parties concerning the interpretation or application of the present Agreement shall be settled by negotiation, or by any other mutually agreed upon mode of settlement.

Article 30
Approval

To be binding on the parties, the present Agreement must be approved by the General Assembly of the United Nations and ratified by Cambodia. The Royal Government of Cambodia will make its best endeavours to obtain this ratification by the earliest possible date.

Article 31
Application within Cambodia

The present Agreement shall apply as law within the Kingdom of Cambodia following its ratification in accordance with the relevant provisions of the internal law of the Kingdom of Cambodia regarding competence to conclude treaties.

Article 32
Entry into force

The present Agreement shall enter into force on the day after both parties have notified each other in writing that the legal requirements for entry into force have been complied with.

Done at Phnom Penh on 6 June 2003 in two copies in the English language.

For the United Nations

[Signature omitted]

Sok An
Senior Minister
in Charge of the Council of Ministers

For the Royal Government of Cambodia

[Signature omitted]

Hans Corell
Under-Secretary-General for Legal Affairs
The Legal Counsel

SIERRA LEONE

AGREEMENT BETWEEN THE UNITED NATIONS AND THE GOVERNMENT OF SIERRA LEONE ON THE ESTABLISHMENT OF A SPECIAL COURT FOR SIERRA LEONE

WHEREAS the Security Council, in its resolution 1315 (2000) of 14 August 2000, expressed deep concern at the very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone and United Nations and associated personnel and at the prevailing situation of impunity;

WHEREAS by the said resolution, the Security Council requested the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law;

WHEREAS the Secretary-General of the United Nations (hereinafter "the Secretary-General") and the Government of Sierra Leone (hereinafter "the Government") have held such negotiations for the establishment of a Special Court for Sierra Leone (hereinafter "the Special Court");

NOW THEREFORE the United Nations and the Government of Sierra Leone have agreed as follows:

Article 1
Establishment of the Special Court

1. There is hereby established a Special Court for Sierra Leone to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

2. The Special Court shall function in accordance with the Statute of the Special Court for Sierra Leone. The Statute is annexed to this Agreement and forms an integral part thereof.

Article 2
Composition of the Special Court and appointment of judges

1. The Special Court shall be composed of a Trial Chamber and an Appeals Chamber with a second Trial Chamber to be created if, after the passage of at least six months from the commencement of the functioning of the Special Court, the Secretary-General, or the President of the Special Court so request. Up to two alternate judges shall similarly be appointed after six months if the President of the Special Court so determines.

2. The Chambers shall be composed of no fewer than eight independent judges and no more than eleven such judges who shall serve as follows:

(a) Three judges shall serve in the Trial Chamber where one shall be appointed by the

Government of Sierra Leone and two judges appointed by the Secretary-General, upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General;

(b) In the event of the creation of a second Trial Chamber, that Chamber shall be likewise composed in the manner contained in subparagraph (a) above;

(c) Five judges shall serve in the Appeals Chamber, of whom two shall be appointed by the Government of Sierra Leone and three judges shall be appointed by the Secretary-General upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General.

3. The Government of Sierra Leone and the Secretary-General shall consult on the appointment of judges.

4. Judges shall be appointed for a three-year term and shall be eligible for re-appointment.

5. If, at the request of the President of the Special Court, an alternate judge or judges have been appointed by the Government of Sierra Leone or the Secretary-General, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate such an alternate judge to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

Article 3
Appointment of a Prosecutor and a Deputy Prosecutor

1. The Secretary-General, after consultation with the Government of Sierra Leone, shall appoint a Prosecutor for a three-year term. The Prosecutor shall be eligible for reappointment.

2. The Government of Sierra Leone, in consultation with the Secretary-General and the Prosecutor, shall appoint a Sierra Leonean Deputy Prosecutor to assist the Prosecutor in the conduct of the investigations and prosecutions.

3. The Prosecutor and the Deputy Prosecutor shall be of high moral character and possess the highest level of professional competence and extensive experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor and the Deputy Prosecutor shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

4. The Prosecutor shall be assisted by such Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently.

Article 4
Appointment of a Registrar

1. The Secretary-General, in consultation with the President of the Special Court, shall appoint a Registrar who shall be responsible for the servicing of the Chambers and the Office of the

Prosecutor, and for the recruitment and administration of all support staff. He or she shall also administer the financial and staff resources of the Special Court.

2. The Registrar shall be a staff member of the United Nations. He or she shall serve a three-year term and shall be eligible for re-appointment.

Article 5
Premises

The Government shall assist in the provision of premises for the Special Court and such utilities, facilities and other services as may be necessary for its operation.

Article 6
Expenses of the Special Court

The expenses of the Special Court shall be borne by voluntary contributions from the international community. It is understood that the Secretary-General will commence the process of establishing the Court when he has sufficient contributions in hand to finance the establishment of the Court and 12 months of its operations plus pledges equal to the anticipated expenses of the following 24 months of the Court's operation. It is further understood that the Secretary-General will continue to seek contributions equal to the anticipated expenses of the Court beyond its first three years of operation. Should voluntary contributions be insufficient for the Court to implement its mandate, the Secretary-General and the Security Council shall explore alternate means of financing the Special Court.

Article 7
Management Committee

It is the understanding of the Parties that interested States will establish a management committee to assist the Secretary-General in obtaining adequate funding, and provide advice and policy direction on all non-judicial aspects of the operation of the Court, including questions of efficiency, and to perform other functions as agreed by interested States. The management committee shall consist of important contributors to the Special Court. The Government of Sierra Leone and the Secretary-General will also participate in the management committee.

Article 8
Inviolability of premises, archives and all other documents

1. The premises of the Special Court shall be inviolable. The competent authorities shall take appropriate action that may be necessary to ensure that the Special Court shall not be dispossessed of all or any part of the premises of the Court without its express consent.

2. The property, funds and assets of the Special Court, wherever located and by whomsoever held, shall be immune from search, seizure, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

3. The archives of the Court, and in general all documents and materials made available,

belonging to or used by it, wherever located and by whomsoever held, shall be inviolable.

Article 9
Funds, assets and other property

1. The Special Court, its funds, assets and other property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process,

except insofar as in any particular case the Court has expressly waived its immunity. It is understood, however, that no waiver of immunity shall extend to any measure of execution.

2. Without being restricted by financial controls, regulations or moratoriums of any kind, the Special Court:

(a) May hold and use funds, gold or negotiable instruments of any kind and maintain and operate accounts in any currency and convert any currency held by it into any other currency;

(b) Shall be free to transfer its funds, gold or currency from one country to another, or within Sierra Leone, to the United Nations or any other agency.

Article 10
Seat of the Special Court

The Special Court shall have its seat in Sierra Leone. The Court may meet away from its seat if it considers it necessary for the efficient exercise of its functions, and may be relocated outside Sierra Leone, if circumstances so require, and subject to the conclusion of a Headquarters Agreement between the Secretary-General of the United Nations and the Government of Sierra Leone, on the one hand, and the Government of the alternative seat, on the other.

Article 11
Juridical capacity

The Special Court shall possess the juridical capacity necessary to:

(a) Contract;

(b) Acquire and dispose of movable and immovable property;

(c) Institute legal proceedings;

(d) Enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court.

Article 12
Privileges and immunities of the judges, the Prosecutor and the Registrar

1. The judges, the Prosecutor and the Registrar, together with their families forming part of their

household, shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations. They shall, in particular, enjoy:

(a) Personal inviolability, including immunity from arrest or detention;

(b) Immunity from criminal, civil and administrative jurisdiction in conformity with the Vienna Convention;

(c) Inviolability for all papers and documents;

(d) Exemption, as appropriate, from immigration restrictions and other alien registrations;

(e) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic agents by the Vienna Convention;

(f) Exemption from taxation in Sierra Leone on their salaries, emoluments and allowances.

2. Privileges and immunities are accorded to the judges, the Prosecutor and the Registrar in the interest of the Special Court and not for the personal benefit of the individuals themselves. The right and the duty to waive the immunity, in any case where it can be waived without prejudice to the purpose for which it is accorded, shall lie with the Secretary-General, in consultation with the President.

Article 13
Privileges and immunities of international and Sierra Leonean personnel

1. Sierra Leonean and international personnel of the Special Court shall be accorded:

(a) Immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the Special Court;

(b) Immunity from taxation on salaries, allowances and emoluments paid to them.

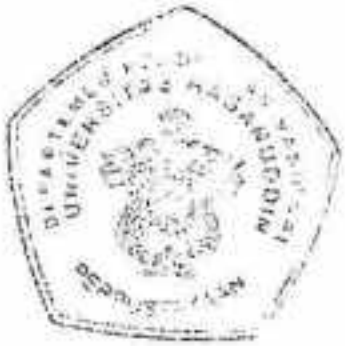
2. International personnel shall, in addition thereto, be accorded:

(a) Immunity from immigration restriction;

(b) The right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Sierra Leone.

3. The privileges and immunities are granted to the officials of the Special Court in the interest of the Court and not for their personal benefit. The right and the duty to waive the immunity in any particular case where it can be waived without prejudice to the purpose for which it is accorded

shall lie with the Registrar of the Court.



Article 14
Counsel

1. The Government shall ensure that the counsel of a suspect or an accused who has been admitted as such by the Special Court shall not be subjected to any measure which may affect the free and independent exercise of his or her functions.

2. In particular, the counsel shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of personal baggage;

(b) Inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;

(c) Immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of his or her functions as a counsel of a suspect or accused.

(d) Immunity from any immigration restrictions during his or her stay as well as during his or her journey to the Court and back.

Article 15
Witnesses and experts

Witnesses and experts appearing from outside Sierra Leone on a summons or a request of the judges or the Prosecutor shall not be prosecuted, detained or subjected to any restriction on their liberty by the Sierra Leonean authorities. They shall not be subjected to any measure which may affect the free and independent exercise of their functions. The provisions of article 14, paragraph 2(a) and (d), shall apply to them.

Article 16
Security, safety and protection of persons referred to in this Agreement

Recognizing the responsibility of the Government under international law to ensure the security, safety and protection of persons referred to in this Agreement and its present incapacity to do so pending the restructuring and rebuilding of its security forces, it is agreed that the United Nations Mission in Sierra Leone shall provide the necessary security to premises and personnel of the Special Court, subject to an appropriate mandate by the Security Council and within its capabilities.

Article 17
Cooperation with the Special Court

1. The Government shall cooperate with all organs of the Special Court at all stages of the

proceedings. It shall, in particular, facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation.

2. The Government shall comply without undue delay with any request for assistance by the Special Court or an order issued by the Chambers, including, but not limited to:

(a) Identification and location of persons;

(b) Service of documents;

(c) Arrest or detention of persons;

(d) Transfer of an indictee to the Court.

Article 18
Working language

The official working language of the Special Court shall be English.

Article 19
Practical arrangements

1. With a view to achieving efficiency and cost-effectiveness in the operation of the Special Court, a phased-in approach shall be adopted for its establishment in accordance with the chronological order of the legal process.

2. In the first phase of the operation of the Special Court, judges, the Prosecutor and the Registrar will be appointed along with investigative and prosecutorial staff. The process of investigations and prosecutions of those already in custody shall be initiated.

3. In the initial phase, judges of the Trial Chamber and the Appeals Chamber shall be convened on an ad hoc basis for dealing with organizational matters, and serving when required to perform their duties.

4. Judges of the Trial Chamber shall take permanent office shortly before the investigation process has been completed. Judges of the Appeals Chamber shall take permanent office when the first trial process has been completed.

Article 20
Settlement of Disputes

Any dispute between the Parties concerning the interpretation or application of this Agreement shall be settled by negotiation, or by any other mutually agreed-upon mode of settlement.

Article 21
Entry into force

The present Agreement shall enter into force on the day after both Parties have notified each other in writing that the legal requirements for entry into force have been complied with.

Article 22
Amendment

This Agreement may be amended by written agreement between the Parties.

Article 23
Termination

This Agreement shall be terminated by agreement of the Parties upon completion of the judicial activities of the Special Court.

IN WITNESS WHEREOF, the following duly authorized representatives of the United Nations and of the Government of Sierra Leone have signed this Agreement.

Done at Freetown, on 16 January 2002 in two originals in the English language.

For the United Nations
Hans Corell, Under-Secretary-General for Legal Affairs

For the Government of Sierra Leone
Solomon Berewa, Attorney General and Minister of Justice

STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE

Having been established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, the Special Court for Sierra Leone (hereinafter "the Special Court") shall function in accordance with the provisions of the present Statute.

Article 1
Competence of the Special Court

1. The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.

2. Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State.

3. In the event the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons.

Article 2
Crimes against humanity

The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

a. Murder;
b. Extermination;
c. Enslavement;
d. Deportation;
e. Imprisonment;
f. Torture;
g. Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;
h. Persecution on political, racial, ethnic or religious grounds;
i. Other inhumane acts.

Article 3
Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

The Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include:

a. Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
b. Collective punishments;
c. Taking of hostages;
d. Acts of terrorism;
e. Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
f. Pillage;
g. The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
h. Threats to commit any of the foregoing acts.

Article 4
Other serious violations of international humanitarian law

The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

a. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
b. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
c. Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

Article 5
Crimes under Sierra Leonean law

The Special Court shall have the power to prosecute persons who have committed the following crimes under Sierra Leonean law:

a. Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31):

    i. Abusing a girl under 13 years of age, contrary to section 6;

    ii. Abusing a girl between 13 and 14 years of age, contrary to section 7;

    iii. Abduction of a girl for immoral purposes, contrary to section 12.

b. Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861:

i. Setting fire to dwelling - houses, any person being therein, contrary to section 2;

ii. Setting fire to public buildings, contrary to sections 5 and 6;

iii. Setting fire to other buildings, contrary to section 6.

Article 6
Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.

2. The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires.

5. Individual criminal responsibility for the crimes referred to in article 5 shall be determined in accordance with the respective laws of Sierra Leone.

Article 7
Jurisdiction over persons of 15 years of age

1. The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.

2. In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.

Article 8
Concurrent jurisdiction

1. The Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction.

2. The Special Court shall have primacy over the national courts of Sierra Leone. At any stage of the procedure, the Special Court may formally request a national court to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence.

Article 9
Non bis in idem

1. No person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court.

2. A person who has been tried by a national court for the acts referred to in articles 2 to 4 of the present Statute may be subsequently tried by the Special Court if:

a. The act for which he or she was tried was characterized as an ordinary crime; or
b. The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Special Court shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10
Amnesty

An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.

Article 11
Organization of the Special Court

The Special Court shall consist of the following organs:

a. The Chambers, comprising one or more Trial Chambers and an Appeals Chamber;
b. The Prosecutor; and
c. The Registry.

Article 12
Composition of the Chambers

1. The Chambers shall be composed of not less than eight (8) or more than eleven (11) independent judges, who shall serve as follows:

a. Three judges shall serve in the Trial Chamber, of whom one shall be a judge appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General of the United Nations (hereinafter "the Secretary-General").
b. Five judges shall serve in the Appeals Chamber, of whom two shall be judges appointed by the

Government of Sierra Leone, and three judges appointed by the Secretary-General.

2. Each judge shall serve only in the Chamber to which he or she has been appointed.

3. The judges of the Appeals Chamber and the judges of the Trial Chamber, respectively, shall elect a presiding judge who shall conduct the proceedings in the Chamber to which he or she was elected. The presiding judge of the Appeals Chamber shall be the President of the Special Court.

4. If, at the request of the President of the Special Court, an alternate judge or judges have been appointed by the Government of Sierra Leone or the Secretary-General, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate such an alternate judge to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

Article 13
Qualification and appointment of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. They shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source.

2. In the overall composition of the Chambers, due account shall be taken of the experience of the judges in international law, including international humanitarian law and human rights law, criminal law and juvenile justice.

3. The judges shall be appointed for a three-year period and shall be eligible for reappointment.

Article 14
Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable *mutatis mutandis* to the conduct of the legal proceedings before the Special Court.

2. The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone.

Article 15
The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. The Prosecutor shall act independently as a separate organ of the Special Court. He or she shall not seek or receive instructions from any Government or from any other source.

2. The Office of the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor shall, as appropriate, be assisted by the Sierra Leonean authorities concerned.

3. The Prosecutor shall be appointed by the Secretary-General for a three-year term and shall be eligible for re-appointment. He or she shall be of high moral character and possess the highest level of professional competence, and have extensive experience in the conduct of investigations and prosecutions of criminal cases.

4. The Prosecutor shall be assisted by a Sierra Leonean Deputy Prosecutor, and by such other Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently. Given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape, sexual assault, abduction and slavery of all kinds, due consideration should be given in the appointment of staff to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice.

5. In the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-rehabilitation programme is not placed at risk and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability.

Article 16
The Registry

1. The Registry shall be responsible for the administration and servicing of the Special Court.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the Special Court and shall be a staff member of the United Nations. He or she shall serve for a three-year term and be eligible for re-appointment.

4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.

Article 17
Rights of the accused

1. All accused shall be equal before the Special Court.

2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

a. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
b. To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
c. To be tried without undue delay;
d. To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
f. To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;
g. Not to be compelled to testify against himself or herself or to confess guilt.

Article 18
Judgement

The judgement shall be rendered by a majority of the judges of the Trial Chamber or of the Appeals Chamber, and shall be delivered in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 19
Penalties

1. The Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone.

2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone.

Article 20
Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:

a. A procedural error;
b. An error on a question of law invalidating the decision;
c. An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.

3. The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone.

Article 21
Review proceedings

1. Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit an application for review of the judgement.

2. An application for review shall be submitted to the Appeals Chamber. The Appeals Chamber may reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

a. Reconvene the Trial Chamber;
b. Retain jurisdiction over the matter.

Article 22
Enforcement of sentences

1. Imprisonment shall be served in Sierra Leone. If circumstances so require, imprisonment may also be served in any of the States which have concluded with the International Criminal Tribunal for Rwanda or the International Criminal Tribunal for the former Yugoslavia an agreement for the enforcement of sentences, and which have indicated to the Registrar of the Special Court their willingness to accept convicted persons. The Special Court may conclude similar agreements for the enforcement of sentences with other States.

2. Conditions of imprisonment, whether in Sierra Leone or in a third State, shall be governed by the law of the State of enforcement subject to the supervision of the Special Court. The State of enforcement shall be bound by the duration of the sentence, subject to article 23 of the present Statute.

Article 23
Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Special Court accordingly. There shall only be pardon or commutation of sentence if the President of the Special Court, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 24
Working language

The working language of the Special Court shall be English.

Article 25
Annual Report

The President of the Special Court shall submit an annual report on the operation and activities of the Court to the Secretary-General and to the Government of Sierra Leone.

KOSOVO

15 December 2000

REGULATION NO. 2000/64

ON ASSIGNMENT OF INTERNATIONAL JUDGES/PROSECUTORS AND/OR CHANGE OF VENUE

The Special Representative of the Secretary-General,

Pursuant to the authority given to him under United Nations Security Council resolution 1244 (1999) of 10 June 1999,

Recognizing the responsibility of the international civil presence to maintain civil law and order and protect and promote human rights,

Taking into account United Nations Interim Administration Mission in Kosovo (UNMIK) Regulation No. 1999/1 of 25 July 1999, as amended, on the Authority of the Interim Administration in Kosovo and UNMIK Regulation No. 2000/6 of 15 February 2000, as amended, on the Appointment and Removal from Office of International Judges and International Prosecutors,

Recognizing that the presence of security threats may undermine the independence and impartiality of the judiciary and impede the ability of the judiciary to properly prosecute crimes which gravely undermine the peace process and the full establishment of the rule of law in Kosovo,

For the purpose of ensuring the independence and impartiality of the judiciary and the proper administration of justice,

Hereby promulgates the following:

Section 1

Recommendation for Assignment of International Judges/Prosecutors and/or Change of Venue

1.1 At any stage in the criminal proceedings, the competent prosecutor, the accused or the defence counsel may submit to the Department of Judicial Affairs a petition for an assignment of international judges/prosecutors and/or a change of venue where this is considered necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice.

1.2 At any stage in the criminal proceedings, the Department of Judicial Affairs, on the basis of the petition referred to in section 1.1 above or on its own motion, may submit a recommendation to the Special Representative of the Secretary-General for the assignment of international judges/prosecutors and/or a change of venue if it determines that this is necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice.

1.3 The Special Representative of the Secretary-General shall review a recommendation submitted by the Department of Judicial Affairs and signify his approval or rejection thereof. Such a review shall not stay the ongoing criminal proceedings.

Section 2

Designation of International Judges/Prosecutors and/or New Venue

2.1 Upon approval of the Special Representative of the Secretary-General in accordance with section 1 above, the Department of Judicial Affairs shall expeditiously designate:

(a) an international prosecutor,

(b) an international investigating judge, and/or

(c) a panel composed only of three (3) judges, including at least two international judges, of which one shall be the presiding judge, as required by the particular stage at which the criminal proceeding has reached in a case.

2.2 Upon designation by the Department of Judicial Affairs, in accordance with the present regulation, international judges and international prosecutors shall have the authority to perform the functions of their office throughout Kosovo.

2.3 Upon approval of the Special Representative of the Secretary-General, in accordance with section 1 above, the Department of Judicial Affairs shall expeditiously designate a new venue for the conduct of criminal proceedings.

2.4 A new venue or panel shall not be designated:

(a) for a trial, once a trial session has already commenced. This will not bar the designation of a new venue or panel, in accordance with the present regulation, during a subsequent review of an appeal or an extraordinary legal remedy; and

(b) for appellate review once an appellate panel session has already commenced. This will not bar the designation of a new venue or panel, in accordance with the present regulation, during a subsequent review of an extraordinary legal remedy.

2.5 A decision of the Department of Judicial Affairs regarding the designation of a new venue, an international judge, an international prosecutor and/or an international panel shall be communicated immediately to the president of the competent court, the prosecutor, the accused and the defence counsel.

Section 3

Applicable Law

3.1 The present regulation shall supersede any other provision in the applicable law which is inconsistent with it.

3.2 Nothing in the present regulation shall affect the authority and responsibility of an international judge or an international prosecutor to perform the functions of his or her office, including to select and take responsibility for new and pending criminal cases, in accordance with UNMIK Regulation No. 2000/6, as amended.

Section 4

Entry into Force

The present regulation shall enter into force on 15 December 2000 and shall remain in force for an initial period of twelve (12) months. Upon review, this period may be extended by the Special Representative of the Secretary-General.

Bernard Kouchner

Special Representative of the Secretary-General

REGULATION NO. 2000/6

UNMIK/REG/2000/6

15 February 2000

ON THE APPOINTMENT AND REMOVAL FROM OFFICE OF INTERNATIONAL JUDGES AND INTERNATIONAL PROSECUTORS

The Special Representative of the Secretary-General,

Pursuant to the authority given to him under United Nations Security Council resolution 1244 (1999) of 10 June 1999,

Taking into account United Nations Interim Administration Mission in Kosovo (UNMIK) Regulation No. 1999/1 of 25 July 1999, as amended, on the Authority of the Interim Administration in Kosovo,

For the purpose of assisting in the judicial process in Mitrovica,

Hereby promulgates the following:

Section 1

APPOINTMENT AND REMOVAL FROM OFFICE OF INTERNATIONAL JUDGES AND INTERNATIONAL PROSECUTORS

1.1 The Special Representative of the Secretary-General may appoint and remove from office international judges and international prosecutors, taking into account the criteria set forth under sections 2 and 4 of the present regulation. Such appointments shall be made to the District Court of Mitrovica, other courts within the territorial jurisdiction of the District Court of Mitrovica and offices of the prosecutor with corresponding jurisdiction.

1.2 International judges shall have the authority and responsibility to perform the functions of their office, including the authority to select and take responsibility for new and pending criminal cases within the jurisdiction of the court to which he or she is appointed.

1.3 International prosecutors shall have the authority and responsibility to perform the functions of their office, including the authority and responsibility to conduct criminal investigations and to select and take responsibility for new and pending criminal investigations or proceedings within the jurisdiction of the office of the prosecutor to which he or she is appointed.

Section 2

CRITERIA FOR INTERNATIONAL JUDGES AND INTERNATIONAL PROSECUTORS

International judges and international prosecutors shall:

(a) have a university degree in law;

(b) have been appointed and have served, for a minimum of 5 years, as a judge or prosecutor in their respective home country;

(c) be of high moral integrity; and

(d) not have a criminal record.

Section 3

OATH OR SOLEMN DECLARATION

Upon appointment, each international judge and international prosecutor shall subscribe to the following oath or solemn declaration before the Special Representative of the Secretary-General:

"I,_____, do hereby solemnly swear (or solemnly declare) that:

In carrying out the functions of my office, I shall act in accordance with the highest standards of professionalism and with utmost respect for the dignity of my office and the duties with which I have been entrusted. I shall perform my duties and exercise my powers impartially, in accordance with my conscience and with the applicable law in Kosovo.

In carrying out the functions of my office, I shall uphold at all times the highest level of internationally recognized human rights, including those embodied in the principles of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols.

In carrying out the functions of my office, I shall ensure at all times that the enjoyment of these human rights shall be secured to all persons in Kosovo without discrimination on any ground such as ethnicity, sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Section 4

REMOVAL FROM OFFICE OF INTERNATIONAL JUDGES AND INTERNATIONAL PROSECUTORS

4.1 The Special Representative of the Secretary-General may remove from office an international judge or international prosecutor on any of the following grounds:

(a) physical or mental incapacity which is likely to be permanent or prolonged;

(b) serious misconduct;

(c) failure in the due execution of office; or

(d) having been placed, by personal conduct or otherwise, in a position incompatible with the due execution of office.

4.2 An international judge or international prosecutor shall not hold any other public or administrative office incompatible with his or her functions, or engage in any occupation of a professional nature, whether remunerative or not, or otherwise engage in any activity that is incompatible with his or her functions.

Section 5

APPLICABLE LAW

The present regulation shall supersede any provision in the applicable law relating to the appointment and removal from office of judges and prosecutors which is inconsistent with it.

Section 6

ENTRY INTO FORCE

The present regulation shall enter into force on 15 February 2000.

Bernard Kouchner

Special Representative of the Secretary-General