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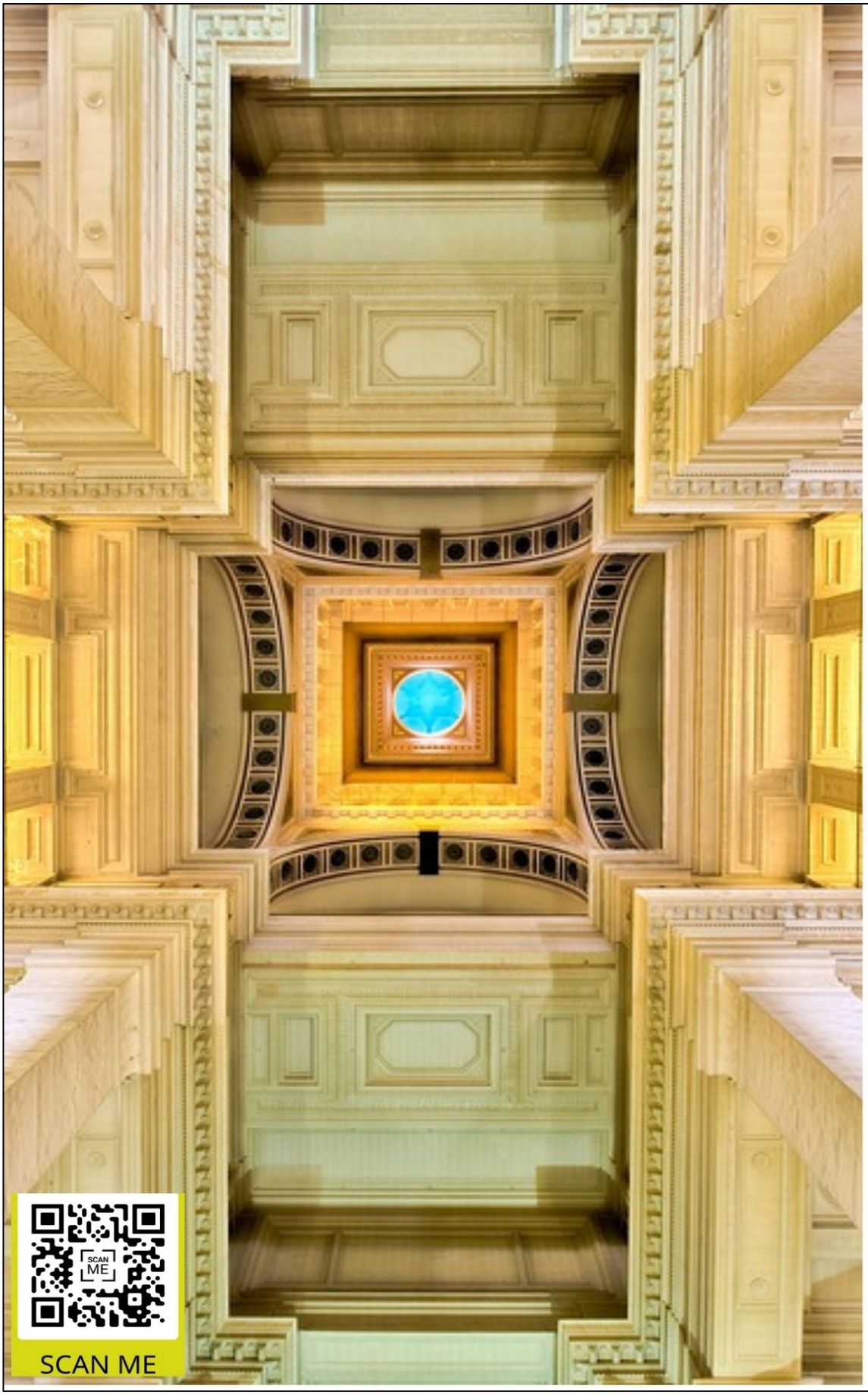

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Reformulation of Indonesian Human Rights Courts Competence in the Context of Ius Constituendum

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Abstract

Crime of aggression and war crimes are not regulated in the competence of Human Rights Courts in Indonesia, in this case indicates that in positive law of Indonesia especially Act Number 26 of 2000 indicates the existence of legal issues which is legal vacuum on that matter needed solution through academic study as the purpose of this research. The methodology used in this research is a normative juridical research method that is focused on studying the application of rules or norms in positive law. In the study of normative jurisprudence, activities to elaborate the law are not required data support or social facts, because normative legal science does not recognize data or social facts, only known for legal material, so to explain the law or to find meaning and give value of the law is only used the concept of law and the steps taken are normative steps. The results of this study indicate that the Indonesian Human Rights Court has not been able to work independently because there is still influence from outside tribunal which is the International Criminal Court.

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Introduction

Nowadays almost all the countries in the world proclaim themselves as a state of law, where universally the state of law concept is divided into two namely *Rechtsstaat*which develops in civil

law countries and Rule of law that develops in common law countries, there are elements typically same, that is a wedge between the two, strictly speaking every state law that embraces the concept of *Rechtsstaat*as well as the Rule of law that has this element is on Human Rights, therefore the issue of Human Rights becomes the state's attention in the world, in the context of Indonesia explicitly mentioned in Article 1 paragraph 3 of the 1945 Constitution, Therefore Indonesia is the state of law, also regulates the protection of Human Rights, it is formulated explicitly in the 1945 Constitution as written Constitution, and is followed up by the ecree Number XVII/MPR/1998 concerning Human Rights which mandates the establishment of a separate law on Human Rights. In the end, Act Number 39 of 1999 on Human Rights as the legal umbrella of all legislation on human rights.

In Article 104 paragraph 1 of Act No. 39 of 1999 mentions that in order to prosecute gross violations of human rights established by the Human Rights Court within the Public Courts, a follow-up to the provision was adopted by Act No. 26/2000 concerning the Human Rights Court.

The authority of the Human Rights Court under Article 7 of Act No. 26 of 2000 is to examine and decide cases of gross human rights violations in the form of crimes of genocide and crimes against humanity.

On the other hand, in the context of international law, based on Article 5 of the Rome Statute on the International Criminal Court which constitutes gross violations of human rights and the authority of the International Criminal Court is a crime of genocide, crimes against humanity, war crimes, and crimes of aggression here it appears that disharmonization between types of human rights gross violations regulated in Act No. 26 of 2000 and the Rome Statute, based on this background that the purpose of this study is to find out whether the Human Rights Court has been able to work independently and to find out the ideal formulation of the authority of the Indonesian Human Rights Court in the context of *iusconstituendum*.

Literaturereview

To answer the first problem will be used two theories namely the theory of monism in the relationship between international law and national law and the principle of *civitasmaxima*

In the context of international law, the relationship between international law and national law there is a concept of monism, the monism concept is based on the thought of the unity of all laws governing human life. In this framework of thinking, international law and national law are two parts of a larger unity of laws governing human life. The result of this monism view is that between these two sets of legal provisions there may be a hierarchical relationship. The problem of hierarchy between national law and international law creates several different points of view in the flow of monism on which law is central to the relationship between national law and international law. There are those who consider that in the relationship between national law and international law the main one is national law. This understanding is monism with the primacy of national law. Other understandings hold that in the relationship between national law and international law the main one is international law. This view is called monism with the primacy of international law. According to theories and concept of monism, both are possible (Mochtar Kusumaatmadja & Etty R. Agoes, 2015)

The principle of *civitasmaxima*as an international criminal law principle that comes from the general principle of international law. In some literatures, the *civitasmaxima*is known by the principle of *imperiumromanum*or the principle of Roman Empire. This principle implies that there is a universal legal system adopted by all nations of the world and must be respected and implemented (M. Cherif Bassiouni, 2003). When, associated with the theory of the relationship between international law and national law, this principle of *maximacivitas*is in line with monism theory which sees international

law and national law as a unified system by placing international law over national law (Eddy O.S. Hiariej, 2009)

While to answer the second problem used the State of law theory and territorial principle

The state of law theory, the concept of the state of law in the world as general can be grouped into two types namely *rechtsstaat*and rule of law, *rechtsstaat*developed in countries that embrace civil law system while rule of law developed in countries that embrace common law system, the elements of the state of law *rechtsstaat*are: the recognition of human rights, the separation of state power, the government by law and the administrative court, while the elements of rule of law are supremacy of law, equality before the law, and basic law is based on human rights (Widodo Ekatjahjana, 2015). When considered between the concept state of law *rechtsstaat*and rule of law there is an element that intersects which is the protection of human rights, strictly speaking every state of law has an element related with the protection of human rights.

According to territorial principles, criminal policies applies to all crimes committed within the territory of the state, whether by citizens of their own or by foreigners (Moeljatno, 2015), Enschede stated, *"dathetnationalestrafrechtto epasselijkisopeenieder,diezichophetnationalegrondgebiedaanenig,volgensdenationalewetstrafbaarfeitschuldigmaa kt"*(national criminal law is applied to any person committing criminal acts in the national territory of his country). This is based on *postulatinterestreipublicaenemaleficiaremaneantimpunita*. Meaning that, the interests of a state for crimes that occurred in that state is not left alone (Eddy O.S. Hiariej, 2016).

Research and Method

The methodology used in this research is a normative juridical research method that is research focused on assessing the application of rules or norms in positive law (Herowati Poesoko, 2013).

In the study of normative jurisprudence, activities to elaborate the law are not required data support or social facts, because normative legal science does not recognize data or social facts, only known for legal material, so to explain the law or to find meaning and give value of the law is only used the concept of law and the steps taken are normative steps (Bahder Johan Nasution, 2008).

the approach used in this research isp (Jhonny Ibrahim, 2008):

1. statute approach, conducted by reviewing all Acts and regulations relating to the legal issues being addressed.

2. conceptual approach,depart from the views and doctrines that developed in the

science of law related to the issue of the law being raised.

Result and Discussion

In response to the first issue, the independence of the court, including the human rights court, will be realized when exercising its authority free from outside influences or intervention, while under Article 4 jo Article 7 of Act No. 26 of 2000 the competence of the human rights court only examines and decides two types of gross human rights violations of crimes of genocide and crimes against humanity,In Article 5 of the Rome statute, there are four types of gross human rights violations that become competence of the International Criminal Court (ICC), namely crimes of genocide, crimes against humanity, war crimes, and crime of aggression, whereas in Indonesia there is the potential for war, which will be directly proportional to the potential for war crimes. But in Act No. 26 of 2000 war crimes are not among the competencies of the Human Rights Court

If looking at the history of the establishment of Act No. 26 of 2000 this is a mandate of Article 104 paragraph (1) of the Act No. 39 of 1999 concerning Human Rights which is the legal umbrella of all laws and regulations on human rights, where in the article explanation of Act no. 39 of 1999 stipulates that "In this Act, the provisions concerning human rights shall be determined by reference to the United Nations Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, the United Nations Convention on the Rights of the Child, and other international instruments regulating human rights ".

Therefore, the international instrument also became the reference for the implementation of Act No.

26 of 2000. This is in related with the doctrine of monism, which is based on the thought of the unity of all laws governing human life. In this framework of thinking, international law and national law are two parts of a larger unity of laws governing human life. The result of this monism view is that between these two sets of legal provisions there may be a hierarchical relationship (Mochtar Kusumaatmadja&Etty R. Agoes, 2015). Regarding the relationship between the International Criminal Court and the Indonesian Human Rights Court can be seen from the Preamble which states "An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions" from that provision it can be seen that jurisdiction in the International Criminal Court is a complement to the jurisdiction of the National Criminal Court. The meaning of the provision is that the jurisdiction of the International Criminal Court can be enacted, if an effective judicial process through legal action at the national level can not be implemented. Thus, the International Criminal Court has no jurisdiction directly or directly against the gross human rights violations that have occurred (R. Wiyono, 2004).

Back in the Indonesian context, there are two types of gross human rights violations mentioned in the statutes of Rome but have not been accommodated as the authority of the Human Rights Court, namely war crimes and crimes of aggression, especially war crimes that potentially occur in Indonesia and the Indonesian legal system has not regulated it, there is a legal vacuum and this becomes an inability of the national legal system which has resulted in this type of gross human rights violation being the jurisdiction of the International Criminal Court in accordance with the *maximacivitas*principle, which is in line with the theory of monism which sees international law and national law as a unified system by placing international law above the law national (Eddy O.S. Hiariej, 2009). Therefore, it has been proven that in enforcing the law of gross human rights violations there is still influence from

international law especially if war crime occurs in Indonesia, It shows that the Human Rights Court has not been able to work independently.

In answer to the second issue, the ideal formulation of the competency of the Human Rights Court in Indonesia in the context of *iusconstituendum*, in Article 1 Paragraph 3 of the 1945 Constitution states that Indonesia is a state of law, the concept of the state of law in the world generally can be grouped into two types namely *rechtsstaat*and rule of law, *rechtsstaat*develops in countries that embraced civil law system while rule of law developed in countries that embrace common law system, elements of state law *rechtsstaat*are: recognition of human rights, separation of state power, government based

on law , and administrative justice, while the elements of the rule of law are supremacy of law, equality before the law, and basic law derived from human rights (Widodo Ekatjahjana, 2015).

Considering between the concept of state of law *rechtsstaat*and Rule of law there are elements that intersect which the protection of human rights, strictly speaking every state law has elements relating to the protection of human rights, and violations of human rights, especially the gross violation of human rights should receive attention by every state of law including Indonesia, the problem is there is a legal vacuum in Act No. 26 of 2000 which has not yet regulated the types of gross human rights violations in the form of war crimes that have the potential to occur in Indonesia, which brought the legal consequences of war crimes being the competence of the International Criminal Court (ICC), in accordance with the territorial principle that criminal law policies applies to all crimes committed within the territory of the state, whether by citizens of their own or by foreigners and based on postulates *interestreipublicaenemaleficiaremaneantimpunita*. Meaning, the interests of a country to prevent the crimes committed in the country are not left alone (Eddy O.S. Hiariej, 2016), therefore the formulation for competence of the Indonesian human rights court in the context of *iusconstituendum*must cover all forms of gross human rights violations contained in the Rome statute, especially regarding potential war crimes in Indonesia, so that the human rights court can actually work independently without any international interference.

Conclusion

So it can be concluded that currently the Indonesian Human Rights Court has not been able to work independently because there are still gross human rights violations that have not become the competence of the Human Rights Court and the legal consequence is become the competence of the International Criminal Court (ICC).

In the context of *iusconstituendum*the competence of the human rights court should be added, i.e all gross human rights violations mentioned in the Rome Statute should be included into the competence of the Indonesian Human Rights Court so that the Court can work independently.

It can be recommended that the Government and the Parliament should immediately make legal reform by revising Act No. 26 of 2000 and incorporates war crimes and crimes of aggression into the competence of the Human Rights Court.

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