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# Accessing Justice through Trial Monitoring At the Indonesian Human Right Court

Yustina Trihoni Nalesti DEWI

**Abstract**—The participation of society who has a great attention to law enforcement in Indonesia is a control mechanism for a trial process, particularly in the cases which are sensitive to sense of justice such as in the cases of gross violations of human rights. The public control should be encouraged and empowered with the purpose to minimize or even abolish practices which deviate from the principles of fair trial. Public control needs to be implemented to test whether the legal reasoning used in the whole legal process, inquiry, investigation, prosecution to verdict are in accordance to the principles of good and proper of law based on the legal studies and in conformity with both material and formal law. It is also to find whether the whole process in accordance with the legal, moral, and social justice. With such public control, the judge, prosecutor, and all parties involved in a judicial process are required to improve their integrity, credibility, and professionalism in examining a case so as not to be a controversial decision that could potentially injure the sense of justice to victims and society. As a matter of fact, the enforcement of law and justice in the cases of gross violations of human rights requires the expertise and competence of prosecutors, advocates, judges and police officers. Moreover, it also needs moral and legal commitment as well as a favorable situation in which the interference of of political power will not affect legal process.

**Keywords**—Accessing Justice, Trial Monitoring, Human Rights Court.

## I. INTRODUCTION

**P**ROTECTION, respect and fulfillment of human rights are the fundamental rights of every person and citizen which are constitutionally guaranteed by every government and state. One of the main instruments in achieving the compliance of the citizen's basic rights is the realization of judiciary independence to enforce law and justice including the guarantee for a fair trial. Law enforcement which is the enforcement of regulations containing commands supported by threats is the main foundation of the state life in order to create order and peace so that credible law enforcement is the priority of policies and renewals of each country. The idea is to guarantee human rights, so law enforcement highly requires the integration of values and human right standards. Application of the judicial system which violate human rights and is not sensitive to the values of humanity will not be able

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to positively contribute to the implementation of the governance that meets the sense of justice. To accomplish this, it is necessary to have a fair trial in its performance to uphold, respect, promote, and protect human rights in the whole process of the court, especially in the Human Right Courts.

Since the enactment of Law No. 26 of 2000, Indonesian Human Rights Court has dealt with 18 case files of gross human right violations. Of the cases handled by the Human Right Court, the first level decree freed 10 defendants and punished 8 defendants, then, of 8 case files appealed, only two defendants who were punished while others were not found guilty. Similarly, the court of cassation level left only 1 person found guilty and the other defendants were free.[1] This condition raises a big question that the emergence of a large number of victims is not correlated with the finding and the determination of violators, and then who should be responsible for the gross violations of human rights?

Given this reality in mind, it makes sense if there are doubts of a large number of parties to the administrations of fair trial in Human Right Court. Human Right Courts are considered not to be able to demonstrate a sense of justice, especially for the victims because almost all trials held were unable to prove that there have been gross violations of human rights. On the other hand, the Violation Investigation Commission (KPP) of Human Rights established by the National Commission of Human Rights (Komnas HAM) has managed to gather the contrary facts and evidence that show the strong indication that there have been gross violations of human rights in the existing cases. According to the report of the Violation Investigation Commission of Human Rights (KPP HAM), the serious human rights violations were carried out in a planned, systematic and large-scale and widespread ways that include mass murder, torture and battering, forced disappearances, violence against women and children (including rape and sexual slavery), forced displacement, annihilation and destruction of property which all of them were crimes against humanity.[2]

To find out the weaknesses of the judicial process to the cases of gross human right violations, there should be a comprehensive review through a monitoring of human right court. Monitoring Human Right Court is widely regarded as a powerful tool to support the process of judicial reform in line with the guarantee of fair trial domestically and internationally. By improving the transparency of judicial process, Monitoring to human right court is an exercise to support the realization of the rights of the parties in a trial. Some public advocacy

organizations in Indonesian such as ELSAM and CONTRAST have monitored the trial processes in the Human Right Courts. Judicial monitoring is considered one of the important parts of human rights advocacy that periodically needs to be done, especially in the cases that have an impact on human right enforcement.

## II. UNIVERSAL STANDARD OF HUMAN RIGHT GUARANTEES FOR VICTIMS IN THE JUDICIAL PROCESS

International legal order are increasingly concerned with human rights; one example is shown by the involvement of the UN Security Council which runs its authority to conduct military intervention in order to stop the massive human rights violations occurred in Bosnia and Somalia. The International Court with its Ad Hoc and permanent nature has been created to prosecute gross violations of human rights, genocide, and war crimes in order to demonstrate the supremacy of international law on the national law so that it reinforces the idea that state sovereignty has its limits in international law.[3] The above description clarifies the status of international human right law in the national law.

There are several important reasons which stipulate the need to take the punishment to the gross violations of human rights. First, there is a moral obligation for the state to guarantee the protection to its citizens in all conditions both at the time of war and peace so that the state is also obliged to strictly limit the use of violence and try those who violate them. Therefore, the state shall provide the facilities to guarantee the respect to humanity and guarantee the promotion of human dignity by assuring punishment for the gross violators of human rights. Secondly, the respect for international human rights law is part of a rational strategy so that the punishment to gross human right violations is based on the use of resources and it is a reasonable choice to break the chain of impunity. Third, the punishment to gross human right violators is a political choice that makes sense since it is the best way to obtain the respect and support of international community as a whole.

In 1985, the UN General Assembly adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[4] This Declaration establishes the rights of victims in a criminal justice process including the right of access to justice, the right to be treated with respect and dignity, the right to protection and assistance, and the right to reparations. This declaration becomes the cornerstone (foundation) to establish legal rights for victims based on international law.

The rights of the victims of human right gross violations to participate in the international criminal justice process was first recognized explicitly in the Rome Statute of 1998, which was the Statute for the establishment of the International Criminal Court. One of the major achievements of the Rome Statute of 1998 was the recognition of victim's independence status. This recognition is based on the new developments of the branch of human right law and it was also caused by some fundamental weaknesses of previous international criminal tribunal.

Various mechanisms have been developed to give the victims access to justice when they cannot get it based on their national courts. In the Criminal Court in Nuremberg and Tokyo established after the end of World War II and the Ad Hoc Criminal Tribunal for Yugoslavia (ICTR) and Rwanda (ICTR) established in 1994, the victims' interests had been ignored and their roles were generally limited as the witnesses in the trials. However, in a later development, a movement widely supported by non-governmental organizations as well as some countries is finally able to recognize the rights of victims to participate in judicial processes and receive reparations for the harm they have suffered.[5] Three core instruments that give the rights to the protection of victims are:

### a. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

The implementation of the UN Declaration on Justice for Victims adopted by the General Assembly, on November 29, 1952 is a major step in the recognition of victim's rights. The UN Declaration is the first international instrument that specifically focuses on the rights and interests of victims in the administration of justice. This instrument is primarily concerned with victim's position in national criminal justice system, but the general principles are equally applicable to international system.[6] "Victims. . . are entitled to access to the mechanisms of justice and to prompt redress. . . for the harm that they have suffered." [7] The purpose of the UN Declaration on Justice for Victims is to ensure that all victims have access to judicial system as well as the support during judicial process.

### b. The United Nation's Basic Principles and Guidelines on the Right to a Remedy and reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law - the "Van Boven / Bassiouni Principles.

The principle states that, "Recognizing that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and futures human generations, and reaffirms the international legal principles of accountability, justice and the rule of law." These principles set out of the concern for victims of gross violations of human rights or serious violations of human right law so that it is necessary to create an effective judiciary to realize the rights of victims to remedy and reparation. The state's next task is to prevent violations, investigate, prosecute and punish perpetrators, provide effective access to justice for victims and pay full reparation.[8]

### c. The United Nation's principles for the protection and promotion of human rights through action to combat impunity—the "Joinet/ Orentlicher Principles"

The Joinet / Orentlicher Principles establish the state duty to investigate violations of human rights and international

human right law and to bring the perpetrators to justice. At the 61st Session of 2005, the UN Human Right Commission noted that these principles have been applied at the regional and national levels. On the occasion, the states, inter-governmental organizations and non-governmental organizations were encouraged to develop and implement effective measures to combat impunity. Principle 1 defines the state's general obligation to take effective measures to combat impunity, "Impunity arises from a failure by states to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations."

The principles of Joinet / Orentlicher also define the right to know, the right to justice, and the right to reparation and the guarantee of non-recurrence.[9]

### III. FAIR TRIAL IN HUMAN RIGHTS PERSPECTIVE

Modernism believes that law is a tool to control society and their lives. Law that should have a rational truth, namely a truth accounted on the basis of critical-logical (as opposed to dogmatism), will ensure certainty and justice. In such situations, Roscoe Pound states that validity of law does not stand up in the sky, but it is associated with the dynamics of society. The development of technology and its impact on the lives of individuals and society as a whole make law has to follow them. Law is said as a tool of social engineering.[10]

Similar to the understanding of law, the concept of justice is inseparable from the discourse and the lack of understanding. Therefore, is there a universal justice that meets the criteria of social and individual justice? Problems always arise when justice individuals who have a variety of different interests are in conflict. In these situations, the principles of universal justice should be able to perform as the decision maker and final determinant for the dispute of justice. Universal in its application has the meaning that its demands must be applicable and in line with the interests of all members of society. In order that justice can guide the actions of citizens, these principles must be announced and understandable by everyone. The principle of justice that can be accepted by entire community will be a principle of justice derived from a binding agreement and contains a commitment to preserve the principle of justice.

Even though a fair trial has the principles that have been guaranteed by law - from the idea up to the positive norm - it will be determined by what happens in practice before the court. What is before law and according to law are not necessarily the case of before the court and according to the court.[11] Fair trial in the perspective of Human Right Court is not often associated with justice for victims because empirical experience shows that the interests of victims are often

violated in Human Right Court. An important element in terms of the holding of a fair trial with regard to the interests of victims is that the trial shall be carried out by a competent, independent, and impartial court.

Competent, independent and impartial court is fundamental to evaluate whether the principles of fair trial have been implemented by judiciary institution. A public prosecutor who represents the victims of human rights violations before a trial must have the knowledge and ability to assess whether a trial has met the principles of fair trial. Public prosecutor plays a crucial role in the administration of justice. The provisions relating to the performance of the important responsibilities of a prosecutor should contribute to fair trial and equality before the law as well as provide effective protection to citizens against all kinds of offences.[12]

Competent in the sense of human right court will also depend on a competent judge. Therefore, it is necessary to emphasize the importance of the background of judge's decision. Judge's personal capacity should really be free from executive interests. The competence of a judge will be associated with the recruitment process. A judge should be requited in a way which is free from non-discrimination of any person who has integrity, has undergone adequate training, and has high qualifications. A judge must have sufficient tenure, both within a specified period and until retirement. A judge is forbidden to hold an office or has a second job which is not in accordance with his/her positions and functions or would interfere with his/ her role in creating fair trial. The promotion and transfer of a judge should be regulated by objective factors which are clearly implemented consistently. A judge may be disciplined or transferred (fired) only if on the basis of a reason of not having the capacity or conduct that is incompatible with his/ her integrity or independence as a judge. A judge should not be involved in the case before a trial is run and should not comment on the cases to the public.[13]

European Human Right Court made a progressive step in determining the criteria of impartiality and independence of a court, namely a court is said independent when: (a) how the manner of the appointment of its members and their term of office); (b) the guarantee not to be affected by external pressure; (c) whether the body presents an appearance of independence). Meanwhile, a court is said impartial when: (a) free of prejudice or personal bias; (b) must be impartial objectively, that is, there must be reasonable assurance to rule out any doubt to the judge impartiality. European Human Right Court assumes that a judge is impartial and independent until there is evidence to answer the doubt (to go beyond legitimate doubts) that the judge is impartial and independent.[14]

Meanwhile, the UN Human Right Committee distinguishes between impartiality and independence of judiciary. Impartiality involves objective and subjective terms of judges. The element of subjectivity regards whether judge has relationship with defendant directly or indirectly by either filiation or job, causing the bias of a court decision. The objectivity matter of a judge is how a judge decides a case whether he is under the pressure of external parties which has an impact on a decision. Judiciary independence regards the

judge's ways, and whether there is clarity of the judge's term of office. Another thing that concerns judiciary independence is how a trial runs its operation, whether the court is under government offices or legislative, and in budget, whether the court has separated budget from the state and is not part of government or legislative budget.[15]

It is very important to guarantee a fair trial in Human Right Court is the guarantee that the trial is open to public. The right to an open trial is also part of fair trial with the purpose to protect defendant or victims interest in the trial held on the confidentiality of a trial in the absence of public scrutiny. The crimes requiring public attention because of its public interest as well as gross human rights violations must be held in an open trial to public. In practice, as well as the Human Right Court, the closure of a court leads to the closure of access for justice seekers so that the information relating to the appointment of judges is not accessible. As a result, the parties who have interests in the court "set" the composition of judges. It is also obviously a form of violation of the principles of judiciary independency.[16]

In a gross violation of human rights, the state is obliged to provide effective judicial remedy for the victims. Competent, independent and impartial court is the first step in the protection of victims, particularly by the realization of the right to a fair trial. That is not all; the court is also required to provide restitution, rehabilitation and compensation for the victims of gross human right violations. If this is not met by the state, the state does not only violate the obligation to provide judicial remedy for those who are violated, but also violates the right to a fair trial.

#### IV. MONITORING PROGRAM FOR HUMAN RIGHT COURT

The trial in Human Right Court is open to public for the purpose of serving transparency in order to create a fair and impartial trial. However, the presence of people in a trial should not disturb the trial. Everyone has a duty to respect the dignity of judiciary. In addition, the right to open trial has the limit, that is, this principle can be ruled out on the basis of the interests of morals, public rules, or national security in a democratic society, and the interests of children.

Human Right Court Monitoring is widely regarded as a powerful tool to support the process of judicial reform in line with the guarantee of a fair trial domestically and internationally. By promoting the transparency of judicial process, human right court monitoring is an exercise to support the realization of the parties' rights in a trial. When set up as a long-term program, Human Right Court Monitoring is a unique diagnostic tool that allows the assessment of an important part function of judicial system, and serves as a spotlight to identify the areas in need of reform as well as providing the direction of this reform. Human right court monitoring program can also be an effective vehicle to train and involve all stakeholders in the process of judicial reform, thereby increasing their long-term capacity.[17]

Monitoring can lead to the testing of the whole judicial process at the level of investigation, prosecution, examination, and decision making. Monitoring is also a public control that

can critically observe, monitor and assess the whole process of a trial and reveal the errors of the application of legal principles and basis that may be contained in the process of inquiry, investigation, prosecution, trial and decision making.[18]

It expected that the monitoring will have the impact on the performance of courts where the judges who have task to try will pay more attention to the technical and quality aspects of decisions, in addition to involving the context of general sense of justice, which is importantly the protection of witnesses and victims. Monitoring is also intended to provide information as broad as possible for the parties directly related to the trial of human right such as victim and public about clear and critical picture about the trial process.[19]

In line with the aforementioned above, a model of monitoring is required for the implementation of Human Right Court which is expected to be a source of reference for those who have the task of monitoring such as practitioners, professional associations, and other groups to support the reform of the Human Right Court. The model can provide guidance on how to develop, organize, and support monitoring program. Therefore, with the model, monitors may prepare a report which is independent and impartial from trial processes and can display building critics for some institutions such as the National Commission of Human Rights (Komnas HAM), Prosecutors and Judges. Thus, the law enforcement officers will be more concerned with the technical and quality aspects of the inquiry, investigation, trial process and decisions that will ultimately also improve their performance for the creation of a fair trial, honest, and impartial trial.

So far, the monitoring of the implementation of Human Rights Court still has various constraints because of the unavailability of a monitoring model. The model unavailability will complicate the process of monitoring and also increase the monitoring subjectivity because monitors do not have their standard that can keep them to always be independent and impartial. Unconsciously, in terms of their empathy to victims, monitors often put themselves in contrary with defendants and their legal counsel in a court of human rights. They would act as opponents so that before the judicial process they have had their own assumptions since they have been filled with opinions which have initially judged the accused. This of course should not happen. In other hand, a monitor, with no adequate understanding of law will be depressed by the atmosphere of a trial which is dominated by the forces that favor the defendants. Therefore, in his unconscious mind, it will direct his report on such attitude of opinion. With monitoring model to the implementation of human right courts, the model can be used as a guide for various institutions that have the mission of monitoring and supervision to the trials of human rights in Indonesia. The model availability would facilitate and provide the standard in monitoring and examination of the process of law enforcement for gross human rights violations.

In a broader perspective, the model will also give the

atmosphere and a positive boost to human right court because the model introduces and provides the insight to judicial institutions, governments, and public about the criteria for the creation of a fair trial. Judicial institutions, governments and public are expected to increasingly be interested and concerned in judicial system issues, especially on the issues of human right court. Finally, the model also aims to promote the mental attitude of law enforcement officers, because the presence of independent and impartial monitors can accurately assess the entire process of trials that will affect the performance of law enforcement officers to be much better.

#### V. CONCLUSION

A fair, effective, and transparent human right court is being pursued by all Indonesian people so that human right court monitoring program is expected to serve as a tool in the process. The monitoring program of human right court is primarily intended to assess whether the judicial procedures are in accordance with the minimum procedure guarantees of a fair trial by international standards. Thus, the monitoring program of human right court may have at least three functions; first, as a diagnostic tool to support judicial reform. The recommendations and advocacies generated can affect the authorities, officials, and other stakeholders to take action and make the responsive reforms to the resulted conclusions. Second, it is the implementation of the right to a fair trial for all parties and the expression of the public's right to enhance the transparency of judicial process through the presence of a monitor representing public interests. Third, it is development of judicial capacity to provide the vehicle to educate and train all stakeholders in judicial system at national and international standards to be involved indirectly in the process of legal reform.

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