WACANA TERORISME SEBAGAI KEJAHATAN INTERNASIONAL

DALAM HUKUM INTERNASIONAL

SKRIPSI

Diajukan sebagai salah satu syarat untuk memperoleh gelar
Sarjana Hukum pada Fakultas Hukum Universitas Indonesia

HADYU IKRAMI
050300126X

PK VI
Hukum tentang Hubungan Transnasional

FAKULTAS HUKUM
UNIVERSITAS INDONESIA

DEPOK
2008

Heartily dedicated to
all the innocent lives who perished
as a result of terrorist attacks all around the world.
May the thoughts and memories of you always be reminisced
by those who once shared moments of lives with you.
Rest in eternal peace.

"TERRORISM IN ALL ITS FORMS AND MANIFESTATIONS, COMMITTED BY WHOMEVER, WHEREVER, AND FOR WHATEVER PURPOSES, MUST BE CONDEMNED AND SHALL NOT BE TOLERATED"

~Sheikha Haya Rashed Al Khalifa, President of the 61st Session of the UN General Assembly, 19 September 2006~

Universitas Indonesia

Fakultas Hukum

Tanda Persetujuan Skripsi

1. Nama	:	Hadyu Ikrami
2. N.P.M.	:	050300126X
3. Program Kekhususan	:	VI (Hukum tentang Hubungan Transnasional)
4. Konsentrasi Skripsi	:	Hukum Pidana Internasional
5. Judul Skripsi	:	Wacana Terorisme sebagai Kejahatan Internasional dalam Hukum Internasional

Depok, Juli 2008

Ketua Bidang Studi Hukum Tentang Hubungan Transnasional

(Lita Arijati, S.H., LL.M.)

Pembimbing I	Pembimbing II
(Prof. Hikmahanto Juwana, S.H., LL.M., Ph.D.)	(Adijaya Yusuf, S.H., LL.M.)

ABSTRAKSI

Hadyu Ikrami (050300126X): Wacana Terorisme sebagai Kejahatan Internasional dalam Hukum Internasional. PK VI. Hukum tentang Hubungan Transnasional. Fakultas Hukum Universitas Indonesia.

Terorisme adalah suatu konsep kejahatan yang telah dikenal dalam hukum internasional sejak 1937. Walaupun demikian, perhatian masyarakat internasional untuk mencegah dan menanggulanginya baru tampak secara signifikan pada akhir abad ke-20. Hal ini disebabkan oleh meningkatnya frekuensi serangan teroris secara tajam di berbagai belahan dunia, yang merenggut korban jiwa yang tidak sedikit dan menimbulkan akibat-akibat yang luar biasa terhadap aspek politik, sosial, dan ekonomi suatu negara. Kekejaman teroris yang ditunjukkan oleh fakta bahwa korban ditargetkan secara acak (*indiscriminate attack*) membuat negara-negara semakin menegaskan komitmen mereka untuk memberantas terorisme. Namun dalam praktiknya, pencegahan dan penanggulangan terorisme dalam hukum internasional masih menemui beberapa kendala yang berkaitan dengan apakah: (1) masyarakat internasional telah mengkriminalisasi terorisme secara universal, (2) hukum internasional dapat menjangkau pelaku terorisme di luar batas-batas teritorial negara, dan (3) hukum internasional dapat menjangkau pelaku terorisme di luar batas waktu. Pemikiran ini menimbulkan pertanyaan apakah terorisme telah dikualifikasi sebagai kejahatan internasional dalam hukum internasional, dengan memperhatikan apakah: (1) terorisme telah diterima sebagai kejahatan internasional dalam hukum perjanjian internasional maupun hukum kebiasaan internasional, (2) pelaku terorisme dapat diadili berdasarkan yurisdiksi universal, dan (3) pelaku terorisme dapat diadili berdasarkan asas retroaktif. Baik pandangan yang mendukung dan menentang kualifikasi terorisme sebagai kejahatan internasional sama-sama memiliki landasan hukum yang kuat. Oleh karena itu, di dalam penulisan ini, pandangan-pandangan tersebut diuraikan secara mendalam, termasuk pandangan Indonesia menurut ketentuan hukum yang berlaku dan aplikasinya oleh pengadilan nasional.

KATA PENGANTAR

Setelah melakukan berbagai penelitian dan penelusuran literatur hukum mengenai tindak pidana terorisme, penulis merasa sangat bersyukur karena skripsi ini akhirnya dapat dirampungkan dalam kurun waktu yang relatif tidak lama. Skripsi yang diajukan untuk memperoleh gelar Sarjana Hukum ini berjudul "Wacana Terorisme sebagai Kejahatan Internasional dalam Hukum Internasional". Penulis memilih topik ini karena sangat prihatin dengan fakta bahwa tiap tahun jumlah orang tidak bersalah yang menjadi korban terorisme meningkat secara tajam; setiap orang dapat menjadi korban terorisme kapan saja dan dimana saja. Oleh karena itu, kerangka hukum yang kokoh mutlak diperlukan untuk menjamin perlindungan setiap orang dari kejahatan tersebut.

Dalam menyusun skripsi ini, penulis juga merasa bersyukur karena tidak menemui rintangan dan kendala yang berarti. Hal tersebut dikarenakan dukungan, bimbingan, dan do'a yang tulus dari berbagai orang di bawah ini, kepada siapa penulis perlu menyampaikan rasa terima kasih yang sedalam-dalamnya:

1. Bapak Prof. Hikmahanto Juwana, S.H., LL.M., Ph.D. selaku Pembimbing I, dan Bpk. Adijaya Yusuf, S.H., LL.M. selaku Pembimbing II. Terima kasih yang sebesar-besarnya karena telah meluangkan begitu banyak waktunya yang sangat berharga untuk memberikan perhatian, bimbingan, arahan, dan masukan kepada penulis dalam menulis skripsi ini.
2. Mom; my guardian angel, my savior, the light of my life. I owe you a lot. Things might not always go as well as they could have, but thank you for never being tired of me. Thank's for teaching me that life is all about struggles and embracing failures in order to learn from them. You've been inspirational in a way that you were probably never aware of.
3. Icha; my sister, my baby, my friend. Thank you for all the support and encouragement you've been giving me since day 1. Terima kasih juga kepada Ayah atas dukungan dan do'anya.
4. International Law Moot Court Society, for equipping me with all the advocacy skills; how to do legal research and legal writing, in particular. Without

those, this thesis might not even have come to existence.

5. Bharata Ramedhan. Thank you for being able to fit in different important roles in my life: a mentor, a friend, and a brother. Can't thank you enough.
6. Tiza Mafira, for all the good times and bad times. Thank you.
7. Those who have worked with me at ILMS. Thank's for sharing all the moments of fun, laughter, and tears.
8. Desi Rutvikasari, for being a great listener and adviser; for not judging; and for comprehending.
9. Meiske, buat semuanya: dari mulai pengalaman kita di Asia Cup, buat mengizinkan makan dan menginap di Kelapa Gading sampai berhari-hari, buat menemani jalan-jalan kemana saja. A great friend for all the different occasions.
10. Teman-teman kerja di LPHI, khususnya Mbak Indri dan Anita, atas masukan-masukannya yang sangat membantu dalam menyusun skripsi ini.

11. All the other persons who have let me see the life from bitter perspectives. Thank's for making me learn the hard way. Thank's for making me fighter.

Akhir kata, penulis menyadari bahwa skripsi ini tidak terlepas dari segala kekurangan dan kelemahan. Oleh karena itu, penulis terbuka atas segala masukan, kritik, dan saran. Semoga skripsi ini dapat bermanfaat bagi para pembacanya.

Depok, Juli 2008

Hadyu Ikrami.

DAFTAR ISI

BAB I

PENDAHULUAN

A. LATAR BELAKANG

Perubahan peta geopolitik dunia dan perkembangan kebijakan dalam maupun luar negeri negara-negara telah melahirkan ketidakseimbangan posisi tawar (*bargaining position*) antara negara-negara yang memiliki posisi politik yang kuat dengan yang lemah, maupun antara sebuah negara dengan kelompok-kelompok yang mengklaim termarjinalisasi dalam negara tersebut. Hal ini telah menyebabkan ketidakpuasan yang melahirkan gagasan untuk mengubah ideologi, kebijakan, maupun tatanan yang telah ada di suatu negara dengan menghalalkan aksi-aksi kekerasan. Ide tersebut dicapai dengan menumbuhkan radikalisme, ekstremisme, dan indoktrinasi yang pada akhirnya melahirkan aksi-aksi terorisme.[1]

[1] Para sarjana psikologi dan kriminologi sepakat bahwa pembentukan seorang individu menjadi teroris tidak terjadi begitu saja, melainkan melalui proses gradual yang panjang dan tidak singkat. Beberapa faktor yang melahirkan terorisme adalah:

a. Identitas negatif yang lahir dari rasa ketidakadilan atau ketidakpuasan:

"*Negative identity involves a vindictive rejection of the role regarded as desirable and proper by an individual's family and community...* ***terrorists engage in terrorism as a result of feelings of rage and helplessness over the lack of alternatives***," Jeanne N. Knutson, "Social and Psychodynamic Pressures Toward a Negative Identity" dalam *Behavioral and Quantitative Perspectives on Terrorism*, edited by Yonah Alexander and John M. Gleason, (New York: Pergamon, 1981), hlm. 105-152. Lihat juga Jeffrey Ross, "Structural Causes of Oppositional Political Terrorism," *Journal of Peace Research* 30 (1993), hlm. 317-329: "***Perceptions of injustice may also be viewed as grievances, which ... posed as the most important precipitant cause of terrorism*** *... Such grievances may be economic, ethnic, racial, legal, political, religious, and/or social, and that they may be targeted to individuals, groups, institutions or categories of people*." Cetak tebal oleh penulis.

b. Sikap yang cenderung mentolerir ekstremisme dan kekerasan:

"*What we know of actual terrorists suggests that there is rarely a conscious decision made to become a terrorist.* ***Most involvement in terrorism results from gradual exposure and socialisation towards extreme behavior***," J. Horgan dan M. Taylor, "The Making of A Terrorist," *Jane's Intelligence Review* 13 (12) (2001):16-18. Lihat juga Kent Layne Oots dan Thomas C. Wiegele, "Terrorist and Victim: Psychiatric and Physiological Approaches from a Social Science Perspective," *Terrorism: An International Journal* 8, No. 1 (1985): 1-32: "***Terrorists must, by the nature of their actions, have an attitude which allows violence...*** *because terrorists are disposed to manipulating their victims as well as the press, the public, and the authorities... the potential terrorist need only see that terrorism has worked for others in order to become aggressively aroused*." Cetak tebal oleh penulis.

c. Rasa membutuhkan untuk berada dalam kawanan mereka:

"*For these alienated individuals from the margins of society,* ***joining a terrorist group represented the first real sense of belonging after a lifetime of rejection,*** *and the terrorist group was to become the family they never had*," Robert Luckabaugh, *et al.*, "Terrorist behavior and US foreign policy: Who Is the Enemy? Some Psychological and Political Perspectives" dalam *Psychology*, 34 (2) (1997), hlm. 1-15. Lihat juga R.F. Baumeister dan M.R. Leary, "The Need to Belong: Desire for Interpersonal Attachments as A Fundamental Human Motivation," *Psychological Bulletin*, 117 (1995), hlm. 497-529: "***This strong sense of belonging has critical importance as a motivating factor*** *for joining, a*

Konsep tentang terorisme sebetulnya telah ada bahkan sebelum Perang Dunia Kedua dimulai. Pada 1937, Liga Bangsa-Bangsa berupaya mengkodifikasikan sebuah konvensi internasional yang bertujuan untuk mencegah dan menanggulangi terorisme. Namun karena kurangnya penandatanganan dan ratifikasi konvensi ini, pada akhirnya konvensi tersebut tidak pernah berlaku.[2]

Kesadaran masyarakat internasional akan kekejaman terorisme mulai meningkat sejak akhir abad ke-20, dimana terorisme mulai menampakkan bahaya dan ancaman yang sangat serius terhadap pemeliharaan keamanan dan kedamaian internasional. Pada 6 September 1972, sembilan atlet Israel yang berpartisipasi dalam Olimpiade Munich diculik dan diledakkan hidup-hidup di dalam sebuah helikopter oleh kawanan teroris.[3] Pada 21 Desember 1988, sebuah bom yang ditanam teroris di dalam badan pesawat komersial Pan Am No. 103 meledak ketika pesawat sedang terbang di atas daerah

---

compelling reason for staying, and a forceful influence for acting". Cetak tebal oleh penulis.

[2] Ilias Bantekas dan Susan Nash, *International Criminal Law*, 3rd ed. (London dan New York: Routledge-Cavendish, 2007), hlm. 195.

[3] "1972: Olympic Hostages Killed in Gun Battle," <http://news.bbc.co.uk/onthisday/hi/dates/stories/september/6/newsid_2500000/2500769.stm>, diakses 18 Maret 2008.

Lockerbie, Skotlandia Selatan, dalam perjalanannya dari London ke New York.[4] Tidak satupun dari 259 penumpang dan awak kabin selamat dalam peristiwa tersebut. Selain itu 11 orang di darat juga tewas terkena dampak hancurnya pesawat.[5]

Serangan teroris dengan menggunakan pesawat udara komersial yang mengabaikan nyawa orang-orang tak bersalah juga terjadi pada 11 September 2001 terhadap Menara Kembar World Trade Center (WTC) di New York. Setidaknya 3.000 orang yang berasal dari berbagai belahan dunia tewas dalam peristiwa tersebut.[6]

Pada 16 Mei 2003, lima bom meledak secara beruntun di kota terbesar Maroko, Casablanca. Serangan ini menewaskan setidaknya 41 orang dan menciderai sekitar 100 lainnya.[7] Satu tahun kemudian, pada 11 Maret 2004, serangkaian pemboman beruntun diarahkan terhadap masyarakat pengguna

---

[4] Bantekas dan Nash, *op. cit.*, hlm. 204.

[5] "World: Europe Lockerbie History," <http://news.bbc.co.uk/2/hi/europe/228813.stm>, 6 Desember 1998.

[6] United States of America, Department of State, Office of the Coordinator for Counterterrorism, "Patterns of Global Terrorism 2001," <http://www.state.gov/s/ct/rls/crt/2001/html/10235.htm>, 21 Mei 2002.

[7] "Terror blasts rock Casablanca," <http://news.bbc.co.uk/2/hi/africa/3035803.stm>, 17 Mei 2003.

jasa kereta api komuter di ibukota Spanyol, Madrid. Sebanyak 191 orang tewas dan 1.824 orang mengalami luka-luka.[8]

Pada 23 Juli 2005, rangkaian bom bunuh diri dilakukan di sebuah resor turis di Sharm-el-Sheikh, Semenanjung Sinnai, Mesir. Setidaknya 88 orang tewas dan lebih dari 200 lainnya luka-luka.[9] Pada bulan yang sama, serangkaian serangan teroris di London menargetkan penumpang kereta api bawah tanah dan pengguna jasa bus umum. Setidaknya 52 orang tewas dan 700 orang luka-luka.[10] Serangan teroris juga terjadi pada malam pergantian tahun baru 2007, dimana 8 rangkaian bom meledak di berbagai penjuru Bangkok, Thailand, dan menewaskan 3 orang serta menciderai 38 orang lainnya.[11]

---

[8] "Massacre in Madrid," <http://edition.cnn.com/SPECIALS/2004/madrid.bombing/>, diakses 18 Maret 2008.

[9] "Dozens Killed in Egypt Bomb Blast," <http://news.bbc.co.uk/onthisday/hi/dates/stories/july/23/newsid_4947000/4947674.stm>, diakses 18 Maret 2008.

[10] "Bombers Target London," <http://edition.cnn.com/SPECIALS/2005/london.bombing/>, diakses 18 Maret 2008.

[11] "Thai Blast Tourist Undeterred," <http://news.bbc.co.uk/2/hi/uk_news/england/southern_counties/6222545.stm>, 1 Januari 2007.

Indonesia sendiri juga salah satu korban terbesar terorisme di Asia Tenggara. Pada 13 September 2000, sebuah bom dengan daya ledak tinggi (*high explosive*) meledak di tempat parkir bawah tanah Bursa Efek Jakarta, menewaskan setidaknya 15 orang.[12] Pada malam natal 2000, serangkaian peledakan bom di tujuh kota berbeda di Indonesia menewaskan setidaknya 14 orang.[13] Pada 12 Oktober 2002, serangkaian peledakan bom terjadi di tempat-tempat hiburan malam di Kuta, Bali. Serangan ini menewaskan 202 orang, 88 diantaranya adalah warga negara Australia. Selain itu, lebih dari 300 orang mengalami luka-luka.[14]

Pada 5 Agustus 2003, sebuah bom meledak di depan Hotel J.W. Marriott Jakarta, menewaskan 12 orang dan melukai hampir 150 orang.[15] Pada 9 September 2004 sebuah bom mobil meledak di depan Kedutaan Besar Australia di Kuningan,

---

[12] "Death Toll Hits 15 in Jakarta Stock Exchange Bomb," <http://edition.cnn.com/2000/ASIANOW/southeast/09/13/indonesia.explosion.04/>, 14 September 2000.

[13] "Church Bombings Prompt Calls for Calm," <http://news.bbc.co.uk/2/hi/asia-pacific/1086892.stm>, 25 Desember 2000.

[14] "Bali Bombings: Horror in Paradise," <http://edition.cnn.com/SPECIALS/2002/bali/>, diakses 18 Maret 2008.

[15] "Marriott Blast Suspects Named", <http://edition.cnn.com/2003/WORLD/asiapcf/southeast/08/19/indonesia.arrests.names/>, 19 Agustus 2003.

Jakarta, menewaskan 9 orang dan menciderai lebih dari 180 lainnya.[16] Serangkaian bom juga kembali meledak di beberapa lokasi berbeda di Bali pada 1 Oktober 2005, membunuh 19 orang dan menciderai setidaknya 132 orang.[17]

Serangan-serangan yang disebutkan di atas hanya merupakan serangan terorisme yang berskala besar dan belum termasuk serangan-serangan yang berskala lebih kecil yang bahkan lebih banyak terjadi di berbagai penjuru dunia. Menurut data Departemen Luar Negeri Amerika Serikat, dari tahun 1982 sampai dengan 2003, terdapat 9.484 serangan teroris internasional di seluruh dunia.[18] Dari tahun 1998 sampai dengan 2003 saja, terdapat 21.995 korban jiwa dari serangan terorisme.[19] Jumlah serangan terbanyak terjadi di Amerika Latin pada 2001, sedangkan jumlah korban terbanyak berada di benua Afrika pada 1998.[20] Jumlah korban terbanyak

---

[16] "Text Warned of Jakarta Bomb," <http://edition.cnn.com/2004/WORLD/asiapcf/09/10/indonesia.blast/index.html?iref=newssearch>, 10 September 2004.

[17] "Security Tightened after Bali Suicide Bombings," <http://edition.cnn.com/2005/WORLD/asiapcf/10/02/bali.blasts/>, 2 Oktober 2005.

[18] United States of America, Department of State, Office of the Coordinator for Counterterrorism, "Patterns of Global Terrorism 2003," <http://www.state.gov/s/ct/rls/crt/2003/33777.htm>, 22 Juni 2004.

[19] *Ibid.*

[20] *Ibid.*

kedua berasal dari serangan teroris di Gedung WTC New York pada 2001.[21]

Data terbaru yang dikeluarkan oleh *National Counter-terrorism Center* Amerika Serikat pada 30 April 2008 menyebutkan bahwa sepanjang 2007 terdapat 14.499 serangan teroris di seluruh dunia,[22] naik dari 11.153 serangan pada 2005.[23] Jumlah korban tewas akibat terorisme juga naik dari 14.618 orang pada 2005[24] menjadi 22.685 pada 2007.[25] Jumlah korban terbanyak terdapat di Irak.[26]

Besarnya bahaya dan kekejaman terorisme ditunjukkan oleh fakta bahwa teroris beroperasi atas dasar "depersonalisasi korban" (*dépersonnalisation de la victime*).[27] Maksudnya adalah, teroris sama sekali buta akan

---

[21] *Ibid.*

[22] United States of America, National Counterterrorism Center, "2007 Report on Terrorism," <http://wits.nctc.gov/reports/crot2007nctcannexfinal.pdf>, 30 April 2008, hlm. 21.

[23] United States of America, National Counterterrorism Center, "Report on Terrorist Incidents 2006," <wits.nctc.gov/reports/crot2006nctcannexfinal.pdf>, 30 April 2007, hlm. 14-15.

[24] *Ibid.*

[25] United States of America, "2007 Report on Terrorism," *loc. cit.*

[26] *Ibid,* hlm. 26.

[27] M. Delmas-Marty, "Les Crimes Internationaux Peuvent-ils Contribuer au Débat entre Universalisme et Relativisme des Valeurs?" dalam Cassese dan Delmas-Marty (eds), *Crimes Internationaux*, at 67.

korban mereka. Mereka tidak mengenal siapakah korban mereka, dari mana mereka berasal, ataupun dari golongan tertentu apakah mereka berasal. Mereka tidak menargetkan korban secara spesifik berdasarkan hubungan dengan teroris tersebut, aset, gender, kewarganegaraan, posisi sosial, dan sebagainya. Korban bisa saja muda atau tua, pria atau wanita, warga nasional atau asing, kaya atau miskin, dan sebagainya. Korban terorisme sama sekali acak dan hanya dijadikan sebagai "alat perantara" ("*tools*") oleh para teroris dalam mencapai tujuan mereka.[28]

Penulisan literatur hukum di Indonesia yang secara spesifik menyoroti permasalahan terorisme sebagai kejahatan internasional masih jarang ditemukan. Oleh karena itu, penulisan ini disusun dengan harapan dapat menambah pustaka hukum Indonesia mengenai wacana terorisme sebagai kejahatan internasional.

B. POKOK PERMASALAHAN

Dari latar belakang di atas, dapat ditarik pokok-pokok permasalahan sebagai berikut:

[28] Antonio Cassese, *International Criminal Law*, 1st ed. (New York: Oxford University Press, 2003), hlm. 125.

1. Apa kualifikasi sebuah kejahatan sebagai kejahatan internasional dalam hukum internasional?
2. Apa argumentasi hukum yang mendukung dan menentang kualifikasi terorisme sebagai kejahatan internasional dalam hukum internasional?
3. Apakah Indonesia mengkualifikasi terorisme sebagai kejahatan internasional?

C. TUJUAN PENELITIAN

1. Tujuan Umum

   Penelitian ini memiliki tujuan umum untuk memaparkan wacana terorisme sebagai kejahatan internasional dalam hukum internasional. Hal ini penting untuk melihat sejauh mana hukum internasional telah ditegakkan untuk mencegah dan memberantas tindak pidana terorisme.

2. Tujuan Khusus

   Yang menjadi tujuan khusus penelitian ini adalah:

   a. Menguraikan kualifikasi kejahatan internasional dalam hukum internasional.
   b. Menjabarkan argumentasi-argumentasi, baik yang menerima maupun yang menolak terorisme

sebagai kejahatan internasional dalam hukum internasional.

c. Memaparkan perspektif Indonesia terhadap kualifikasi terorisme sebagai kejahatan internasional.

D. KERANGKA KONSEPSIONAL

Untuk membatasi ruang lingkup dari penelitian ini, maka konsep-konsep yang akan digunakan adalah sebagai berikut:

1. Terorisme

Terorisme dalam hukum internasional didefinisikan sebagai berikut:

> "*Any act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.*"[29]

[29] United Nations, *International Convention for the Supression of the Financing of Terrorism*, GA Res 54/109, 9 Desember 1999, ps. 2 (1) (b). Definisi ini telah diakui oleh Mahkamah Agung Kanada sebagai definisi yang "*catches the essence of what the world understands by terrorism*", lihat Putusan Supreme Court of Canada dalam Kasus Suresh, 11 Januari 2002, par. 98. Menurut Antonio Cassese, definisi ini juga senada dengan definisi terorisme dalam berbagai instrumen hukum internasional dan nasional lainnya, lihat a.l.: *Arab Convention for the Suppression of Terrorism*, 1998, ps. 1 (2); *Convention of the Organization of the Islamic Conference on Combating International*

Sedangkan dalam ketentuan perundang-undangan nasional Indonesia, terorisme didefinisikan sebagai tindakan yang:

> "...menimbulkan suasana teror atau rasa takut terhadap orang secara meluas atau menimbulkan korban yang bersifat massal, dengan cara merampas kemerdekaan atau hilangnya nyawa dan harta benda orang lain, atau mengakibatkan kerusakan atau kehancuran terhadap obyek-obyek vital yang strategis atau lingkungan hidup atau fasilitas publik atau fasilitas internasional..."[30]

2. Kejahatan internasional

Kejahatan internasional didefinisikan sebagai segala tindakan yang melanggar ketentuan-ketentuan hukum internasional, baik yang berada dalam perjanjian-perjanjian internasional maupun

---

Terrorism, 1 Juli 1999, ps. 1 (2); *Convention of the Organization of African Unity on the Prevention and Combating of Terrorism*, 14 Juli 1999; Amerika Serikat, *Iran and Libya Sanctions Act*, Public Law 104-172, 5 Agustus 1996; Amerika Serikat, *Antiterrorism Act*, 2000; Inggris, *Terrorism Act*, 2000; Australia, *Schedule to the Australian Security Legislation Amendment Terrorism Bill*, 2002, par. 100.1 (2); Kanada, *Antiterrorism Act*, Bill C-36, section 2 (2). Lihat Cassese, *ibid,* hlm. 120-125.

[30] Indonesia, *Peraturan Pemerintah Pengganti Undang-Undang tentang Pemberantasan Tindak Pidana Terorisme*, Perpu No. 1 Tahun 2002, LN No. 106 Tahun 2002, TLN No. 4232, ps. 6. Perpu ini telah disahkan menjadi Undang-undang melalui *Undang-undang tentang Penetapan Perpu No. 1 Tahun 2002*, UU No. 15 Tahun 2003, LN No. 45 Tahun 2003, TLN No. 4284.

dalam hukum kebiasaan internasional, yang melahirkan tanggung jawab pidana individual dari pelaku.[31]

E. METODE PENELITIAN

Penelitian ini dilakukan dengan metode penelitian hukum normatif. Pada penelitian hukum normatif, bahan pustaka merupakan data dasar yang dalam ilmu penelitian digolongkan sebagai data sekunder.[32]

Karena penelitian ini dilakukan dengan menggunakan data sekunder, maka alat pengumpulan data yang diperlukan berupa studi dokumen,[33] dengan mempergunakan *"content analysis"*, yaitu: *"... any technique for making inferences by objectively and systematically identifying specified*

---

[31] Cassese, *op. cit.*, hlm. 23: *"International crimes are breaches of international rules entailing* ***the personal criminal liability*** *of the individuals concerned (as opposed to the responsibility of the State of which the individuals may act as organs)*. Lihat juga Bantekas dan Nash, *op. cit.*, hlm. 6: *"An international offence is any act entailing the criminal liability of the perpetrator, and* ***emanating from treaty or custom****."* Cetak tebal oleh penulis.

[32] Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif-Suatu Tinjauan Singkat* (Jakarta: PT Raja Grafindo Persada, 2006), hlm. 24.

[33] *Ibid.*

characteristics of messages."[34] Bahan hukum yang digunakan adalah bahan hukum primer, sekunder, dan tersier. Bahan hukum primer adalah bahan-bahan hukum yang mengikat,[35] yang dijadikan sebagai landasan hukum dalam menyusun penelitian. Bahan-bahan tersebut berupa konvensi-konvensi internasional maupun resolusi-resolusi Dewan Keamanan PBB.

Bahan hukum sekunder merupakan bahan hukum yang memberikan penjelasan mengenai bahan hukum primer.[36] Dalam penelitian ini, bahan-bahan tersebut berupa buku-buku mengenai hukum internasional, artikel-artikel yang ditulis oleh para ahli hukum internasional, putusan-putusan pengadilan internasional, laporan-laporan institusi pemerintah, maupun artikel-artikel berita.

Sedangkan bahan hukum tersier adalah bahan yang memberikan petunjuk maupun penjelasan terhadap bahan hukum primer dan sekunder.[37] Dalam penelitian ini, bahan semacam itu berupa bahan-bahan acuan di luar bidang hukum, seperti yang berasal dari bidang psikologi dan kriminologi.

---

[34] Ole R. Holsti, *Content Analysis for the Social Sciences and Humanities* (Tanpa tempat: Addision-Wesley, 1969), hlm. 13.

[35] Soekanto dan Mamudji, *op. cit.*, hlm. 13.

[36] *Ibid.*

[37] *Ibid.*

Pendekatan yang akan dilakukan dalam penelitian ini adalah pendekatan kualitatif, yang bertujuan untuk mengerti dan memahami gejala yang diteliti,[38] sehingga penelitian ini dilakukan terhadap obyek yang utuh atau nyata,[39] yang dalam hal ini adalah kejahatan terorisme. Penelitian kualitatif disebut bersifat holistik, karena menganalisis data secara komprehensif dan mendalam.[40]

Penelitian kualitatif ini akan menghasilkan data yang bersifat deskriptif-analitis.[41] Deskriptif maksudnya untuk memberikan data yang seteliti mungkin tentang manusia, keadaan, atau gejala-gejala lainnya,[42] yang dalam hal ini adalah gejala-gejala mengenai terorisme sebagai kejahatan internasional. Sementara itu, secara analitis penelitian ini bertujuan untuk menarik asas-asas hukum tertentu yang terdapat di dalam ketentuan hukum positif internasional

---

[38] Robert Bogdan dan Steven J. Taylor, *Introduction to Qualitative Research Methods* (New York: John Willey & Sons, Inc., 1975).

[39] Soerjono Soekanto, *Pengantar Penelitian Hukum*, cet. 3 (Jakarta: UI Press, 2006), hlm. 32.

[40] Valerie J. Janesick, "The Dance of Qualitative Research Design, Methapor, Methodology, and Meaning" dalam *Handbook of Qualitative Research,* edited by Norman K. Denzin dan Yvonne S. Lincoln (Tanpa tempat: Sage Publication, Inc., 1994), p. 212.

[41] Soekanto, *op. cit.* hlm. 250.

[42] *Ibid,* hlm. 10.

maupun nasional dan menguraikan apakah kaedah hukum yang terkait benar berasal dari asas, doktrin, dan teori hukum yang merupakan landasan penelitian ini.

F. KEGUNAAN TEORITIS DAN PRAKTIS

Kegunaan teoritis penelitian ini adalah untuk memperluas pemahaman mengenai hubungan terorisme dengan kejahatan internasional dalam hukum internasional beserta permasalahan-permasalahan hukumnya.

Kegunaan praktis penelitian ini adalah untuk menganalisis permasalahan-permasalahan tersebut dan memberi masukan-masukan dalam hal wacana terorisme sebagai kejahatan internasional agar dapat mencari pemecahan permasalahan, khususnya dalam penerapannya dalam pengadilan-pengadilan internasional maupun pengadilan nasional Indonesia.

G. SISTEMATIKA PENULISAN

Penulisan ini disusun berdasarkan sistematika sebagai berikut:

BAB II: Bab ini membahas mengenai konsep kejahatan internasional. Pokok-pokok pembahasannya meliputi:

definisi kejahatan internasional, karakteristik kejahatan internasional, bentuk-bentuk kejahatan internasional, dan perbandingan konsep kejahatan internasional dengan konsep-konsep lain yang serupa.

BAB III: Bab ini membahas mengenai argumentasi-argumentasi hukum yang ada terhadap kualifikasi terorisme sebagai kejahatan internasional dalam hukum internasional. Argumentasi-argumentasi tersebut berupa argumentasi hukum yang mendukung maupun menolak kualifikasi terorisme sebagai kejahatan internasional.

BAB IV: Bab ini menjabarkan perspektif Indonesia terhadap terorisme sebagai kejahatan internasional, baik menurut ketentuan hukum positif Indonesia, penerapannya di pengadilan nasional, maupun pernyataan-pernyataan resmi pemerintah.

BAB V: Penulisan ini akan ditutup pada bab V dengan memberikan kesimpulan dan saran-saran.

BAB II

KONSEP KEJAHATAN INTERNASIONAL

Salah satu peristiwa terpenting dalam sejarah hukum internasional yang merupakan cikal bakal lahirnya konsep tentang kejahatan internasional terjadi pada 1474 di Breisach, Austria. Ketika itu Sir Peter von Hagenbach dituduh melakukan serangkaian kejahatan terhadap warga sipil di Breisach dalam usahanya menundukkan mereka

terhadap penguasaan Duke Charles dari Burgundy. Setelah Breisach dibebaskan oleh Austria, Berne, Perancis, dan beberapa kota dan ksatriaan di Upper Rhine yang kesemuanya tergabung dalam Kekaisaran Roma Suci, Hagenbach diadili oleh sebuah pengadilan yang terdiri dari 28 hakim dari Austria dan sekutu-sekutunya tersebut.[43]

Ia didakwa telah melakukan pembunuhan, pemerkosaan, penipuan di depan pengadilan,[44] pemungutan pajak secara ilegal, dan penyitaan kekayaan pribadi secara ilegal.[45] Tindakan-tindakan ini tidak saja dilakukannya terhadap warga sipil Breisach, namun juga penduduk daerah-daerah tetangga, termasuk pedagang dari Swiss yang sedang dalam perjalanan ke pasar Frankfurt.[46] Pengadilan memutuskan bahwa tindakan-tindakan ini telah melanggar "hukum-hukum Tuhan

---

[43] G. Schwartzenberger, *The Law of Armed Conflict, International Law as Applied by International Courts and Tribunals,* vol. II (London: Stevens, 1968), hlm. 15.

[44] Kriangsak Kittichaisaree, *International Criminal Law* (New York: Oxford University Press, 2001), hlm. 14.

[45] Edoardo Greppi, "The Evolution of Individual Criminal Responsibility under International Law," <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JQ2X>, 30 September 1999.

[46] *Ibid.*

dan manusia", dan kemudian melucutinya dari gelar-gelar ksatriannya serta menjatuhinya hukuman mati.[47]

Adanya pemikiran mengenai kejahatan terhadap "hukum-hukum Tuhan dan manusia" yang perlu diadili oleh pengadilan yang dibentuk oleh masyarakat asing yang bahkan tidak terkena dampak langsung kejahatan tersebut merupakan salah satu konsep paling awal mengenai kejahatan internasional. Hari ini, hukum internasional mengenal konsep tersebut dengan jauh lebih luas dan berkembang.

A. DEFINISI KEJAHATAN INTERNASIONAL

1. Menurut Perjanjian-perjanjian Internasional

a. Statuta Roma tentang Mahkamah Pidana Internasional 1998

Statuta Roma 1998 yang mendirikan Mahkamah Pidana Internasional (*International Criminal Court*) sebagai satu-satunya mahkamah internasional permanen untuk mengadili pelaku kejahatan-kejahatan internasional tidak mendefinisikan dengan tegas kejahatan internasional itu sendiri. Namun kita dapat menarik beberapa pertimbangan

[47] Kittichaisaree, *loc. cit.*

didirikannya Mahkamah ini dalam Paragraf 2, 3, dan 4 Mukadimah Statuta Roma untuk mendefinisikan kejahatan internasional:

> "... *Mindful that during this century millions of children, women, and men have been victims of* ***unimaginable atrocities that deeply shock the consciense of humanity,***
>
> *Recognizing that* ***such grave crimes threaten the peace, security, and well-being of the world,***
>
> *Affirming that* ***the most serious crimes of concern to the international community as a whole*** *must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.*"[48]

Selain itu, Pasal 5 ayat (1) Statuta juga menyebutkan bahwa: "*The jurisdiction of the Court shall be limited to* ***the most serious crimes of concern to the international community as a whole.***"[49] Karena Mahkamah berwenang mengadili kejahatan-kejahatan internasional, maka ketentuan yang tercantum tersebut dapat dijadikan sebagai pijakan dalam melihat bagaimana Mahkamah mendefinisikan kejahatan internasional.

---

[48] Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9 ["Rome Statute"], Preamble pars. 2; 3; 4. Cetak tebal oleh penulis.

[49] *Ibid*, art. 5 (1).

b. *Statuta Pengadilan Internasional untuk Bekas Yugoslavia 1993*

Statuta yang dibentuk oleh Dewan Keamanan Perserikatan Bangsa-Bangsa (PBB) melalui Resolusi 827 pada 25 Mei 1993 ini mendirikan pengadilan internasional untuk mengadili kejahatan-kejahatan internasional yang dilakukan di wilayah bekas Yugoslavia sejak 1991. Sama halnya dengan Statuta Roma, Statuta ini pun tidak dengan tegas mendefinisikan kejahatan internasional. Namun Pasal 1 Statuta memberikan ketentuan yang dapat disimpulkan sebagai definisi implisit Pengadilan atas kejahatan internasional, yaitu: "*The International Tribunal shall have the power to prosecute persons responsible for* ***serious violations of international humanitarian law...***"[50]

c. *Statuta Pengadilan Internasional untuk Rwanda 1994*

Statuta ini dibentuk melalui Resolusi Dewan Keamanan PBB No. 955 pada 8 November 1994 untuk mendirikan pengadilan internasional di Arusha, Tanzania

[50] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Security Council Resolution 827 (1993), 25 May 1993 ["Statute of Yugoslavia Tribunal"], art. 1. Cetak tebal oleh penulis.

yang mengadili pelaku pembantaian sekitar 500 ribu s.d. 1 juta anggota suku Tutsi oleh suku Hutu di Rwanda pada 1994.[51] Sama seperti Statuta untuk Pengadilan Yugoslavia, Statuta Pengadilan ini tidak mendefinisikan dengan tegas kejahatan internasional. Namun Pasal 1 Statuta mendefinisikan secara implisit kejahatan internasional, yaitu: "*The International Tribunal shall have the power to prosecute persons responsible for* ***serious violations of international humanitarian law...***"[52]

2. Menurut Hukum Nasional Negara-negara

a. Amerika Serikat

Hukum Amerika Serikat tidak mendefinisikan dengan tegas kejahatan internasional, namun Konstitusi Amerika Serikat menggariskan ketentuan yang dapat ditarik sebagai definisi implisit kejahatan internasional.

[51] Bantekas dan Nash, *op. cit.*, hlm. 514-515.

[52] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 ["Statute of Rwanda Tribunal"], art. 1. Cetak tebal oleh penulis.

Konstitusi memberikan wewenang kepada Kongres untuk: "...*define and punish piracies and felonies committed on the high seas, and* ***offenses against the law of nations***."[53]

Lebih jauh lagi, Hukum pidana Amerika Serikat mengenal adanya kewajiban negara tersebut untuk menghukum pelaku kejahatan-kejahatan internasional yang telah diatur dalam perjanjian-perjanjian internasional yang mengikat Amerika Serikat. Kejahatan-kejahatan ini antara lain adalah: genosida,[54] perbudakan,[55] dan kejahatan perang.[56]

b. Australia

Australia juga tidak memberikan dengan tegas definisi kejahatan internasional dalam hukum

---

[53] Amerika Serikat, U.S. Constitution, art. I, § 8, cl. 10; lihat Comment, "The Offenses Clause: Congress' International Penal Power," 8 COLUM. J. TRANSNAT'L L. 279 (1969). Cetak tebal oleh penulis.

[54] Amerika Serikat, 18 U.S.C. §§ 1091-1093; Amerika Serikat, Genocide Convention Implementation Act of 1987, Pub. L. 100-606, 102 Stat. 3045, enacted on November 5, 1988.

[55] Amerika Serikat, 18 U.S.C. § 1582-1588.

[56] Amerika Serikat, 10 U.S.C. § 818; Amerika Serikat, 10 U.S.C. § 821: "*violations of the Hague Regulations, as well as other conventional war crimes, are punishable in United States law by virtue of the provisions of the Uniform Code of Military Justice which confer jurisdiction on military tribunals to try any person who by the law of war is subject to trial by a military tribunal...*"

nasionalnya, namun ia memiliki ketentuan perundang-undangan yang melarang dengan tegas beberapa bentuk kejahatan internasional. Kejahatan-kejahatan ini antara lain genosida[57] dan kejahatan perang.[58]

c. Belgia

Serupa dengan pendekatan-pendekatan yang dilakukan oleh negara-negara lain, Belgia juga tidak memberikan definisi tegas atas kejahatan internasional. Namun Pasal 3 ayat (2) Undang-undang 10 Februari 1999 menggariskan ketentuan yang secara implisit mendefinisikan kejahatan internasional, yaitu:

> "*...**constitute a crime of international law** and is repressed in accordance with the provisions of this law, the crime against humanity, such as defined below, that it is made in times of peace or times of war...*"[59]

3. Menurut Komisi Hukum Internasional

---

[57] Australia, Genocide Convention Act (1949).

[58] Australia, War Crimes Act (1945); lihat Australia, War Crimes Amendment Act (1988).

[59] Belgia, *Loi relative à la répression des violations graves de droit international humanitaire, 10 fevrier 1999,* art. 3 (2); lihat Belgia, *Loi du 16 juin 1993 relative à la répression des infractions graves aux conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces conventions*. Cetak tebal oleh penulis.

Komisi Hukum Internasional[60] pada 1976 mengadopsi sebuah definisi hukum internasional dalam Pasal 19 ayat (2) *Draft Articles on State Responsibility* yang berbunyi:

> "*An internationally wrongful act which results from* ***the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community*** *that its breach is* ***recognized as a crime by the community as a whole*** *constitutes an international crime.*"[61]

Pencantuman ketentuan ini merupakan buah pemikiran García Amador, Pelapor Khusus pertama *Draft* Komisi Hukum Internasional tentang Tanggung Jawab Negara. Dalam opininya pada 1956, kejahatan dalam hukum internasional yang dilakukan oleh individu yang merupakan organ negara dapat dihukum oleh negara-negara selain negara di mana ia merupakan organ. Namun, ide ini tidak didukung oleh anggota-anggota Komisi yang lain karena mereka menganggap

---

[60] Komisi Hukum Internasional didirikan oleh PBB melalui Resolusi Majelis Umum 174 (III) pada 21 November 1947. Pasal 1 ayat (1) Statuta Komisi menyatakan bahwa tujuan didirikannya Komisi adalah untuk mempromosikan perkembangan progresif hukum internasional dan kodifikasinya, lihat "International Law Commission," <http://www.un.org/law/ilc/>, diakses 23 April 2008.

[61] International Law Commission, Fifth Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur- the Internationally Wrongful Act of the State, Source of International Responsibility (continued), A/CN.4/291 and Add.1 & 2 and Corr.1, 1976 ["ILC Draft 1976"], art. 19 (2). Cetak tebal oleh penulis.

bahwa ide untuk menghukum organ negara tidak sesuai dengan konteks kodifikasi hukum tentang Tanggung Jawab Negara.[62]

Ide García Amador ini kemudian dihidupkan kembali pada 1976 oleh Pelapor Khusus Komisi Hukum Internasional lainnya, Profesor Roberto Ago, yang berpendapat bahwa hukum internasional telah mengakui bahwa kejahatan-kejahatan tertentu seperti genosida dan agresi merupakan kejahatan terhadap kewajiban-kewajiban negara yang sangat penting dalam hukum internasional, dan karenanya perlu diinkorporasikan ke dalam *Draft Articles on State Responsibility*. Pemikirannya ini kemudian mendapat dukungan oleh anggota Komisi yang lain sehingga dicantumkan dalam Pasal 19 *Draft* Komisi Hukum Internasional pada 1976 tersebut.[63]

4. Menurut Putusan Pengadilan

Salah satu yurisprudensi pengadilan yang paling relevan dalam mendefinisikan kejahatan internasional adalah

[62] M. Spinedi, "Crimes of State: The Legislative History" in *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, edited by J.H.H. Weiler; Antonio Cassese; dan M. Spinedi, (Walter de Gruyter, 1989), 7 at 11-12.

[63] *Ibid.*

kasus "*re List and Others*" yang diputus oleh Pengadilan Militer Amerika Serikat di Nuremberg pada 1948. Dalam kasus tersebut, Pengadilan memberikan definisi kejahatan internasional sebagai:

> "*... such act **universally recognized as criminal,** which is considered **a grave matter of international concern** and for some valid reason **cannot be left within the exclusive jurisdiction of the State** that would have control over it under ordinary circumstances...*"[64]

5. Menurut Ahli Hukum Internasional

a. Antonio Cassese

Cassese[65] mendefinisikan kejahatan internasional sebagai:

> "*... **breaches of international rules entailing the personal criminal liability** of the individuals concerned (as opposed to the responsibility of the State of which the individuals may act as organs.*"[66]

---

[64] *Hostages Trial*, US Military Tribunal at Nuremberg, 19 Feb. 1948 (1953), 15 Annual Digest and Reports of Public International Law Cases, vols. 1-16 (1932-1955) 632 at 636. Cetak tebal oleh penulis.

[65] Presiden *Council of Europe Committee against Torture* (1989-1993), Presiden *International Criminal Tribunal for the Former Yugoslavia* (1993-1997), Kepala *UN Commission of Inquiry on Darfur* (2004-2005).

[66] Cassese, *op. cit.*, hlm. 23. Cetak tebal oleh penulis.

b. Ilias Bantekas dan Susan Nash

Bantekas[67] dan Nash[68] mendefinisikan kejahatan internasional sebagai: "*... **any act entailing the criminal liability** of the perpetrator, and **emanating from treaty or custom**.*"[69] Lebih lanjut, mereka berpendapat bahwa:

> " *... the establishment of international offences is the **direct result of interstate consensus**, all other considerations bearing a distinct subordinate caracter. The legal basis for considering an offence to be of international import is where **existing treaties or customs consider the act being an international crime**.*"[70]

B. KARAKTERISTIK KEJAHATAN INTERNASIONAL

M. Cherif Bassiouni,[71] setelah menganalisis 22 bentuk kejahatan yang ada dalam berbagai perjanjian

---

[67] Profesor Hukum Internasional dan Wakil Dekan *Law School Brunel University*.

[68] Profesor Hukum *University of Westminster* dan Kepala Departemen Pascasarjana Ilmu Hukum.

[69] Bantekas dan Nash, *op. cit.*, hlm. 6. Cetak tebal oleh penulis.

[70] *Ibid*, cetak tebal oleh penulis.

[71] Kepala *Drafting Committee of the UN Diplomatic Conference on the Establishment of an International Criminal Court* (1998); Kepala *UN Commission of Experts Established Pursuant to Security Council Resolution 780 to Investigate Violations of International Humanitarian Law in the Former Yugoslavia* (1992); *Special Rapporteur UN Commission on Human Rights* tentang *Right to Restitution, Compensation, and*

internasional,[72] menyimpulkan bahwa kejahatan internasional memiliki 10 karakteristik, yaitu:

1. Adanya pengakuan tegas bahwa suatu tindakan adalah "kejahatan internasional," atau "kejahatan dalam hukum internasional," atau "kejahatan";
2. Adanya pengakuan diam-diam atas sifat pidana dari tindakan tersebut dengan menerapkan kewajiban untuk melarang, mencegah, mengadili, menghukum, atau sejenisnya;
3. Adanya kriminalisasi dari tindakan tersebut;
4. Adanya kewajiban atau hak untuk mengadili;
5. Adanya kewajiban atau hak untuk menghukum tindakan tersebut;

Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms (1998).

[72] Dua puluh dua kejahatan tersebut adalah:

(1) Genosida, (2) Kejahatan perang, (3) Agresi, (4) Kejahatan terhadap kemanusiaan, (5) Penyiksaan, (6) Pembajakan laut, (7) Penggunaan/penempatan senjata secara tidak sah, (8) Diskriminasi rasial dan apartheid, (9) Perbudakan, (10) Eksperimentasi manusia yang tidak sah, (11) Pembajakan pesawat udara, (12) Ancaman atau penggunaan kekerasan terhadap orang-orang yang dilindungi secara internasional, (13) Penyanderaan warga sipil, (14) Kejahatan tentang narkotika, (15) Perdagangan internasional atas publikasi pornografi, (16) Penghancuran/ pencurian kekayaan nasional, (17) Perusakan lingkungan, (18) Penggunaan media surat secara tidak sah, (19) Intervensi dengan kabel-kabel bawah laut, (20) Pemalsuan, (21) Penyuapan pejabat publik asing, dan (22) Pencurian bahan-bahan nuklir,
lihat MC. Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Court* (1987), at 28-29.

6. Adanya kewajiban atau hak untuk mengekstradisi;
7. Adanya kewajiban atau hak untuk bekerja sama dalam mengadili atau menghukum (termasuk kerja sama dalam acara pengadilan pidana);
8. Didirikannya dasar yurisdiksi pidana (atau teori yurisdiksi pidana atau prioritas dalam yurisdiksi kriminal);
9. Referensi terhadap pendirian mahkamah pidana internasional atau pengadilan internasional dengan karakteristik pidana;
10. Penghapusan dasar pemaaf karena adanya perintah atasan (*superior order*).[73]

Sedangkan Cassese menjelaskan bahwa sebuah kejahatan internasional dapat secara kumulatif memenuhi elemen-elemen berikut:

1. Pelanggaran atas hukum kebiasaan internasional (dan juga perjanjian internasional di mana ketentuan tersebut berada dan mengkodifikasi atau menyebutkan ketentuan hukum kebiasaan internasional yang membentuknya);

[73] M. Cherif Bassiouni, *International Criminal Law,* (New York: Transnational Publishers Inc., 1986), 3.

2. Pelanggaran atas ketentuan yang dimaksudkan untuk melindungi nilai-nilai yang dianggap penting oleh seluruh masyarakat internasional dan karenanya, mengikat semua negara dan individu;
3. Adanya kepentingan universal dalam memberantas kejahatan tersebut;
4. Tidak adanya kekebalan (*immunity*) dalam yurisdiksi pidana atau perdata bagi pelaku kejahatan yang merupakan organ negara.[74]

Disamping karakteristik-karakteristik yang disebutkan di atas, kejahatan internasional juga dapat mengandung elemen lain, yaitu terhadap pelakunya tidak berlaku asas non-retroaktif. Seperti yang akan ditunjukkan di bawah, yurisprudensi berbagai pengadilan pidana internasional *ad-hoc*, yaitu Pengadilan Militer Internasional di Nuremberg dan Tokyo, serta Pengadilan Pidana Internasional untuk Rwanda menunjukkan ketidakberlakuan asas ini.

Dengan demikian, dapat disimpulkan bahwa kejahatan internasional setidaknya memenuhi 3 (tiga) karakteristik, yang juga sesuai dengan definisi-definisi kejahatan

[74] Cassese, *op. cit.*, hlm. 23.

internasional yang telah diberikan di atas. Karakteristik ini adalah: (1) Tindakan tersebut telah diterima secara universal oleh masyarakat internasional sebagai kejahatan internasional, (2) Tindakan tersebut dapat diadili berdasarkan prinsip yurisdiksi universal, dan (3) Tindakan tersebut dapat diadili berdasarkan asas retroaktif.

1. Tindakan tersebut telah diterima secara universal oleh masyarakat internasional sebagai kejahatan internasional

Landasan hukum yang dapat digunakan untuk melihat apakah suatu tindakan telah diterima secara universal oleh masyarakat internasional sebagai kejahatan internasional adalah dengan melihat apakah tindakan yang dimaksud telah diterima sebagai kejahatan internasional dalam perjanjian internasional atau hukum kebiasaan internasional.[75]

a. Tindakan tersebut telah diterima sebagai kejahatan internasional dalam perjanjian internasional

Perjanjian-perjanjian internasional yang menerima bahwa suatu tindakan adalah kejahatan internasional secara umum dapat dibagi menjadi dua: (i) Perjanjian yang secara tegas menyatakan bahwa suatu tindakan adalah

[75] Bantekas dan Nash, *op. cit*, hlm. 6.

"kejahatan internasional", "kejahatan dalam hukum internasional", atau "kejahatan", dan (ii) Perjanjian yang tidak secara tegas menyatakan bahwa suatu tindakan adalah kejahatan, namun secara tegas memberikan kewajiban bagi negara anggota untuk melarang atau mencegah tindakan tersebut; mengadili, menghukum, atau mengekstradisi pelakunya; atau mewajibkan negara anggota untuk mengkriminalisasi tindakan tersebut dalam hukum nasional mereka.[76]

Perjanjian jenis pertama dapat dilihat dalam *Convention on the Prevention and Punishment of the Crime of Genocide 1948*. Pasal 1 Konvensi ini dengan tegas menyatakan bahwa:

> "*The Contracting Parties affirm that genocide, whether committed in time of peace or in time of war, is* ***a crime under international law*** *which they undertake to prevent and punish.*"[77]

Sedangkan perjanjian jenis kedua dapat dilihat dalam *Convention Against Torture and Other Cruel,*

[76] *Ibid*, hlm. 6-7.

[77] Convention on the Prevention and Punishment of the Crime of Genocide, 1 January 1948, 78 United Nations Treaty Series 277 ["Genocide Convention"], art. 1. Cetak tebal oleh penulis.

Inhuman, or Degrading Treatment or Punishment 1984.

Pasal 2 ayat (1) Konvensi ini menyatakan bahwa:

"*Each State Party* ***shall take effective legislative, administrative, judicial, or other measures to prevent*** *acts of torture in any territory under its jurisdiction.*"[78]

Pasal 4 ayat (1) dan (2) menegaskan kembali ketentuan di atas dengan menyatakan bahwa:

"*Each State Party* ***shall ensure that all acts of torture are offences under its criminal law.*** *The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.*

Each State Party ***shall make these offences punishable*** *by appropriate penalties which take into account their grave nature.*"[79]

Selanjutnya, Pasal 8 Konvensi juga memberikan ketentuan bahwa pelaku kejahatan penyiksaan dapat diekstradisi ke negara lain.[80]

Contoh lain dari perjanjian jenis kedua ini adalah *Geneva Convention III Relative to the Treatment of*

---

[78] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 United Nations Treaty Series 85, art. 2 (1). Cetak tebal oleh penulis.

[79] *Ibid*, arts. 4 (1); 4 (2). Cetak tebal oleh penulis.

[80] *Ibid*, art. 8.

Prisoners of War 1949. Pasal 129 Konvensi ini mengatur bahwa:

"*The High Contracting Parties* ***undertake to enact any legislation necessary to provide effective penal sanctions*** *for persons committing, or ordering to be committed, any of the grave breaches of the present Convention...*"[81]

b. *Tindakan tersebut telah diterima sebagai kejahatan internasional dalam hukum kebiasaan internasional*

Mahkamah Internasional (*International Court of Justice*) menjabarkan dengan jelas konsep hukum kebiasaan internasional dalam *North Sea Continental Shelf Cases* dimana Republik Federal Jerman bersengketa dengan Denmark dan Belanda pada 1969,[82] dan *Asylum Case* dimana Kolombia bersengketa dengan Peru pada 1950.[83]

Mahkamah menyatakan bahwa hukum kebiasaan internasional harus memenuhi 2 (dua) unsur, yaitu: praktik negara-negara dan *opinio juris sive*

[81] Geneva Convention III Relative to the Treatment of Prisoners of War, 12 Agustus 1949, art. 129. Cetak tebal oleh penulis.

[82] *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. the Netherlands), ICJ Reports 1969 ["North Sea Cases"].

[83] *Asylum Case* (Colombia v. Peru), ICJ Reports 1950 ["Asylum Case"].

necessitatis.[84] Praktik negara-negara maksudnya adalah suatu norma harus dipraktikkan oleh negara-negara secara tetap dan seragam,[85] serta luas dan mewakili negara-negara yang kepentingannya secara khusus terpengaruh (*States whose interests were specially affected*).[86]

Sedangkan *opinio juris* berarti, praktik-praktik ini harus dilakukan oleh negara-negara tidak semata-mata karena adanya kepentingan politik (*reasons of political expediency*), tetapi karena mereka menerima praktik tersebut sebagai kewajiban dalam hukum.[87]

Salah satu contoh tindakan yang telah diterima sebagai kejahatan internasional dalam hukum kebiasaan internasional adalah penyiksaan.[88] Penyiksaan telah dilarang dalam hukum kebiasaan internasional dalam waktu yang lama dan berkembang secara gradual. Hal ini ditunjukkan dari antara lain: Resolusi Majelis Umum PBB

---

[84] North Sea Cases, *loc. cit.*, p. 3, par. 77.

[85] Asylum Case, *loc. cit.*, p. 266.

[86] North Sea Cases, *loc. cit.*, par. 73.

[87] Asylum Case, *loc. cit.*

[88] Cassese, *op. cit.*, hlm. 119.

No. 3452 (XXX) 9 Desember 1975;[89] diratifikasinya *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* 1984 oleh sebagian besar negara di dunia (145 negara sampai dengan April 2008);[90] dan berbagai yurisprudensi pengadilan nasional dan internasional yang melarang aksi penyiksaan.[91] Lebih lanjut, pengadilan Amerika Serikat dalam kasus *Filartiga v. Peña-Irala* secara spesifik menyatakan: "...*the torturer has become, like the pirate or slave trader before him,* hostis humani generis, *an enemy of all mankind.*"[92]

Namun, besarnya jumlah penerimaan negara-negara terhadap keberlakuan suatu norma yang melarang suatu tindakan tertentu tidak selalu menjadi tolak ukur untuk menentukan bahwa tindakan tersebut telah berkembang

---

[89] *Ibid.*

[90] Lihat Office of High Commissioner for Human Rights, <http://www2.ohchr.org/english/bodies/ratification/9.htm>, last updated 18 April 2008.

[91] *Siderman de Blake v. Argentina*, 965 F 2d 699 (1992); *Aksoy v. Turkey*, European Court of Human Rights (18 Desember 1996), par. 62; *Selmouni v. France*, European Court of Human Rights (7 Juli 1999), par. 96-105; *Prosecutor v. Furundžija*, International Criminal Tribunal for the Former Yugoslavia (10 December 1998), par. 146.

[92] *Filartiga v. Peña-Irala*, United States Court of Appeals, Second Circuit (30 Juni 1980), at 980.

menjadi kejahatan internasional dalam hukum kebiasaan internasional. Mahkamah Internasional menyatakan bahwa hukum kebiasaan internasional tidak tergantung pada banyaknya jumlah praktik negara-negara, namun hal yang terpenting adalah apakah praktik tersebut konsisten[93] dan mewakili kepentingan negara-negara yang relevan.[94]

Bantekas dan Nash berpendapat bahwa salah satu tindakan yang telah berkembang menjadi kejahatan internasional dalam hukum kebiasaan internasional terlepas dari jumlah negara yang melarang tindakan tersebut adalah perdagangan manusia dan eksploitasi prostitusi.[95] Tindakan ini diatur dalam *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* 1949.[96] Menurut mereka, walaupun Konvensi tersebut hanya diratifikasi oleh sejumlah kecil negara, namun dari berbagai macam sumber seperti *travaux préparatoires* Konvensi tersebut, keseragaman berbagai legislasi

[93] Asylum Case, *loc. cit*.

[94] North Sea Cases, *loc. cit.*

[95] Bantekas dan Nash, *op. cit.*, hlm. 7.

[96] 96 United Nations Treaty Series 271.

nasional, pernyataan-pernyataan resmi yang dikeluarkan dalam fora internasional, dan perjanjian-perjanjian lain yang relevan, tidak diragukan lagi bahwa perdagangan manusia dan prostitusi paksa (*involuntary prostitution*) adalah tindakan yang telah dikriminalisasi dalam hukum kebiasaan internasional. Karenanya menurut mereka, tindakan tersebut telah menjadi kejahatan internasional dalam hukum kebiasaan internasional.[97]

2. Tindakan tersebut dapat diadili berdasarkan prinsip yurisdiksi universal

   a. *Konsep yurisdiksi universal*

Yurisdiksi[98] universal adalah hak yang dimiliki oleh setiap negara untuk mengadili pelaku kejahatan-kejahatan tertentu, terlepas dari apakah: pelaku adalah

---

[97] Bantekas dan Nash, *op. cit.*, hlm. 7-8.

[98] "*The term jurisdiction, whether it applies to civil or criminal matters, includes* ***the powers to prescribe, adjudicate, and enforce. It also includes the means by which the exercise of jurisdiction is obtained over a person.*** *In the post-Westphalian state-centric system of international law predicated on sovereignty, these powers have been reserved to states*," lihat Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice," *Virginia Journal of International Law,* 42 Va. J. Int'l L. 81 (2001): 89; Kenneth C. Randall, "Universal Jurisdiction under International Law," *Texas Law Review,* 66 Tex. L. Rev. 785 (Maret 1988). Cetak tebal oleh penulis.

warga negara tersebut; kejahatan terjadi di dalam negara tersebut; korban adalah warga negara tersebut; atau apakah kejahatan yang dimaksud merupakan ancaman langsung terhadap kepentingan negara tersebut.[99]

Konsep ini lahir karena adanya kebutuhan semua negara di dunia untuk mencegah dan menanggulangi kejahatan-kejahatan internasional, baik yang merupakan kejahatan terhadap perjanjian internasional maupun hukum kebiasaan internasional, yang telah disetujui oleh negara-negara sebagai kejahatan yang paling kejam.[100] Karenanya, kejahatan-kejahatan tersebut dipandang sebagai ancaman yang dapat merusak tatanan internasional, sehingga terdapat kepentingan universal negara-negara untuk menanggulanginya secara bersama.[101]

Prinsip ini pertama kali lahir dalam hukum kebiasaan internasional pada abad ke-17 terkait dengan

---

[99] Cassese, *op. cit.*, hlm. 284; Martin Dixon dan Robert McCorquodale, *Cases and Materials on International Law*, 4th Ed. (New York: Oxford University Press, 2003), hlm. 289.

[100] Bassiouni, *loc. cit.*: 82; F.A. Mann, "The Doctrine of Jurisdiction in International Law", 113-1 Recueil des Cours (1964), pp. 9, 95.

[101] American Law Institute, *Restatement (Third) Foreign Relations Law of the United States* (1987), pp. 254-256; D.J. Harris, *Cases and Materials on International Law*, 5th Ed. (London: Sweet & Maxwell, 1998), hlm. 290.

pembajakan laut.[102] Pada waktu itu kejahatan bajak laut tidak hanya telah menghalangi kebebasan berlayar di laut lepas, namun juga telah merugikan ekonomi negara-negara.[103] Karenanya negara-negara sepakat untuk menjadikan pembajakan laut sebagai kejahatan yang boleh ditangani oleh negara manapun yang berhasil menangkap pelakunya. Negara yang mengadili bajak laut dianggap melindungi kepentingannya sendiri, dan secara bersamaan melindungi kepentingan negara-negara lain.[104]

Dalam hukum internasional modern, kita dapat melihat prinsip yurisdiksi universal untuk pembajakan di laut lepas diatur dalam Pasal 150 *United Nations Convention on the Law of the Sea 1982* yang mengadopsi Pasal 19 *Geneva Convention on the Law of the High Seas*. Pasal ini berbunyi:

> "*On the high seas, or in **any other place outside the jurisdiction of any State, every State** may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of*

[102] Cassese, *op. cit.*, hlm. 284.

[103] *Ibid*, hlm. 38.

[104] Cassese, *loc. cit.*

pirates, and arrest the person and seize the property on board..."[105]

Contoh lain dari kejahatan yang melahirkan yurisdiksi universal adalah pelanggaran berat *Geneva Conventions 12 August 1949*. Masing-masing dari keempat Konvensi tersebut mengandung ketentuan sebagai berikut:

" *The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.*

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, ***regardless of their nationality, before its own courts...***

...Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: ***willful killing, torture or inhuman treatment,*** *including* ***biological experiments, willfully causing great suffering or serious injury to body or health,*** *and* ***extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.***"[106]

---

[105] United Nations Convention on the Law of the Sea, 10 Desember 1982, 1833 United Nations Treaty Series 3 ["UNCLOS"], art. 150. Cetak tebal oleh penulis.

[106] Geneva Convention I, art. 49, 50; Geneva Convention II, art. 50, 51; Geneva Convention III, art. 129, 130; Geneva Convention IV, art. 146, 147. Cetak tebal oleh penulis.

b. Yurisdiksi universal sebagai yurisdiksi terbatas

Walaupun konsep yurisdiksi universal telah ada sejak abad ke-17, implementasinya tidak dapat berjalan dengan mudah karena yurisdiksi tersebut dibatasi oleh beberapa hal:

(i) Hak untuk melaksanakan yurisdiksi universal harus ada dalam perjanjian internasional atau ketentuan hukum lain yang mengikat negara tersebut

Mahkamah Internasional dalam *South West Africa Cases* dihadapkan pada pertanyaan apakah Ethopia dan Liberia dapat membawa gugatan hukum melawan Afrika Selatan yang dituduh telah melanggar Mandat Liga Bangsa-Bangsa karena meneruskan pendudukan ilegalnya di Namibia. Ethiopia dan Liberia membawa sengketa tersebut walaupun mereka tidak mengalami kerugian material apapun dengan adanya pendudukan Afrika Selatan di Namibia.[107]

Mahkamah memutuskan bahwa:

---

[107] *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, ICJ Reports 1966.

> *"It may be said that a legal right or interest need not necessarily relate to anything material or "tangible", and can be infringed even though no prejudice of a material kind has been suffered... The Court simply holds that such rights or interests, in order to exist,* ***must be clearly vested in those who claim them, by some text or instrument, or rule of law.****"*[108]

Putusan Mahkamah tersebut tentunya berkaitan erat dengan konsep yurisdiksi universal, di mana sebuah negara berhak melakukan tuntutan hukum terhadap subyek hukum lain tanpa adanya kerugian material tertentu (*prejudice of a material kind*), atau tidak adanya kerugian langsung yang dialami oleh negara tersebut. Menurut Mahkamah, hak ini hanya dapat dilaksanakan jika hak tersebut ada dalam perjanjian internasional atau ketentuan hukum lain yang mengikat negara tersebut.

(ii) Yurisdiksi universal tidak boleh dilaksanakan dengan melanggar kedaulatan negara lain

Yurisdiksi universal hanya dapat dilaksanakan terhadap pelaku kejahatan internasional yang sedang berada di dalam wilayah

[108] *Ibid*, p. 6, par. 44. Cetak tebal oleh penulis.

negara yang hendak melaksanakan yurisdiksi tersebut,[109] atau di dalam wilayah lain di mana negara tersebut dapat secara sah melaksanakan yurisdiksinya (misalnya laut lepas).[110] Jika pelaku berada di dalam wilayah kedaulatan negara lain, maka negara yang hendak melaksanakan yurisdiksinya harus meminta persetujuan terlebih dahulu untuk memasuki wilayah negara di mana pelaku berada untuk menangkap dan kemudian mengadilinya.

Hal ini telah ditunjukkan oleh berbagai kasus internasional. Ketika Israel melaksanakan yurisdiksi universal atas Adolf Eichmann dengan menculiknya dari wilayah Argentina tanpa sepengetahuan dan persetujuan pemerintah Argentina, kompetensi pengadilan Israel dipertanyakan karena Israel dianggap telah melanggar kedaulatan Argentina.[111]

---

[109] Bassiouni, *loc. cit.*: 139.

[110] Lihat UNCLOS, art. 150, art. 101.

[111] Lihat *Attorney-General of the Government of Israel v. Eichmann*, District Court of Jerusalem, 36 ILR (1961) 5; UN Security Council Resolution 138, June 23, 1960 (Doc. S/ 4349).

Ketika Belgia melaksanakan yurisdiksi universal dengan mengeluarkan surat perintah penangkapan terhadap Menteri Luar Negeri Kongo yang masih memegang jabatannya dan masih berada di dalam wilayah Kongo, Mahkamah Internasional memutuskan bahwa aksi Belgia tersebut melanggar hukum internasional.[112]

(iii) Yurisdiksi universal hanya dapat berlaku sebagai yurisdiksi alternatif/ tambahan (auxiliary jurisdiction)[113]

Hal ini berarti, sebelum sebuah kejahatan ditangani oleh sebuah negara berdasarkan yurisdiksi universal, prioritas untuk menanganinya harus diserahkan kepada negara dengan kepentingan yang lebih besar (*weightier interests*) atas kejahatan tersebut.[114]

---

[112] Lihat *Case Concerning the Arrest Warrant of 11 April 2002* (Democratic Republic of Congo v. Belgium), ICJ Reports 14 February 2002 ["Arrest Warrant Case"], par. 59: "... *although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs*."

[113] Dickinson, "Introductory Comment to the Harvard Research Draft Convention on Jurisdiction with Respect to Crime 1935," *American Journal of International Law*, 29 A.J.I.L. Supp. 443 (1935).

[114] Bassiouni, *loc. cit.*: 87.

Negara-negara ini adalah negara yang: (i) merupakan tempat di mana kejahatan terjadi (asas *territoriality jurisdiction*), (ii) warga negaranya merupakan korban kejahatan (asas *passive nationality jurisdiction*), (iii) warganya merupakan pelaku kejahatan (asas *active nationality jurisdiction*), atau (iv) kepentingan vitalnya langsung terancam oleh kejahatan tersebut (asas *protective jurisdiction*). Jika keempat bentuk yurisdiksi ini tidak ada atau tidak dilaksanakan oleh negara yang seharusnya melaksanakannya, maka yurisdiksi universal dapat dilaksanakan oleh negara lain.[115]

Hal ini ditunjukkan antara lain oleh kasus *Pinochet*. Jenderal Augusto Pinochet dituduh telah melakukan serangkaian kejahatan terhadap kemanusiaan di Chile yang mencakup penyiksaan, penghilangan paksa, penangkapan ilegal, dan pembunuhan yang luas dan sistematis.[116] Ia kemudian

[115] Lihat Dickinson, *loc. cit.*

[116] Lihat GA Resolution 3448 (XXX) of 9 December 1975; UN Doc. A/31/253, 8 October 1976, par. 511; Inter-American Commission on Human

diadili oleh Inggris,[117] walaupun Inggris tidak memiliki kaitan apapun dengan kejahatan tersebut: (i) kejahatan tersebut tidak terjadi di Inggris, melainkan di Chile, (ii) pelakunya bukan warga negara Inggris, melainkan Chile, (iii) korbannya juga bukan warga negara Inggris, melainkan Chile, dan (iv) kejahatan tersebut tidak mengancam langsung kepentingan vital tertentu Inggris.

Hal ini dilakukan Inggris karena Chile, sebagai negara yang seharusnya memiliki kepentingan yang lebih besar untuk mengadili Pinochet berdasarkan asas *territoriality, active nationality, passive nationality,* dan *protective jurisdictions* tidak melaksanakan haknya tersebut untuk mengadili Pinochet. Chile pada waktu itu telah memberikan pengampunan atas kejahatan

---

Rights, Report No. 25/98, par. 76; lihat Inter-American Commission on Human Rights, Report No. 36/96.

[117] Lihat *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte* Pinochet Ugarte, [1998] 3 W.L.R. 1456 (H.L.), *reprinted in* 37 I.L.M. 1302 (1998); *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte* Pinochet Ugarte, [1999] 2 W.L.R. 272 (H.L.), *reprinted in* 38 I.L.M. 430 (1999); *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte* Pinochet Ugarte, [1999] 2 W.L.R. 827 (UK House of Lords).

Pinochet melalui Undang-undang Amnesti 1978,[118] yang kemudian dinyatakan konstitusional oleh Mahkamah Agung Chile pada 28 Agustus 1990. Mahkamah Agung mengambil putusan ini melalui Pasal 58 Undang Undang Dasar Chile yang memberikan kekebalan terhadap organ pemerintah dan para senator.[119]

Oleh karena itu kita dapat melihat bahwa hak sebuah negara untuk dapat melaksanakan yurisdiksi universal terhadap kejahatan internasional lahir setelah negara lain yang seharusnya memiliki kepentingan yang lebih besar untuk mengadili kejahatan yang dimaksud tidak melaksanakan yurisdiksinya tersebut. Di samping kejahatan terhadap kemanusiaan seperti yang terdapat dalam

---

[118] Chilean Amnesty Decree 2191 of 1978.

[119] *Constitución Política de la República de Chile,* Decreto Supremo N° 1.150, de 1980, Ministerio del Interior (Publicado en el Diario Oficial de 24 de octubre de 1980), <http://www.camara.cl/legis/constitucion/contitucion_politica.pdf>, diakses 12 Juni 2008, art. 58: "*Los diputados y senadores sólo son inviolables por las opiniones que manifiesten y los votos que emitan en el desempeño de sus cargos, en sesiones de sala o de comisión.* ***Ningún diputado o senador****, desde el día de su elección o designación, o desde el de su incorporación, según el caso,* ***puede ser procesado o privado de su libertad****, salvo el caso de delito flagrante, si el Tribunal de Alzada de la jurisdicción respectiva, en pleno, no autoriza previamente la acusación declarando haber lugar a formación de causa. De esta resolución podrá apelarse para ante la Corte Suprema.*" Cetak tebal oleh penulis.

kasus *Pinochet*, yurisdiksi universal atas pembajakan laut juga memiliki pembatasan yang serupa. Hal ini diatur oleh Pasal 150 *United Nations Convention on the Law of the Sea 1982*:

> "*On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, ... and may also determine the action to be taken with regard to the ships, aircraft or property,* ***subject to the rights of third parties acting in good faith***."[120]

3. Tindakan tersebut dapat diadili berdasarkan asas retroaktif

Hukum pidana mengenal adanya prinsip legalitas yang dipostulasikan dalam adegium *nullum crimen sine poena.* Dalam prinsip ini, sebuah tindakan yang dilakukan sebelum tindakan tersebut dikriminalisasi dalam hukum tidak dapat diadili.[121]

Karenanya, hukum pidana tidak berlaku surut untuk kejahatan-kejahatan yang terjadi sebelum hukum itu berlaku,

---

[120] UNCLOS, art. 150.

[121] "*The doctrine of strict legality postulates that a person may only be held criminally liable and punished if at the moment when he performed a certain act, the act was regarded as a criminal offense by the relevant legal order or, in other words, under the applicable law...*", Cassese, *op. cit.*, hlm. 141.

atau dengan kata lain hukum pidana mengenal asas non-retroaktif.[122] Prinsip ini telah berkembang menjadi prinsip umum hukum yang dicantumkan antara lain dalam Pasal 11 ayat (2) *Universal Declaration of Human Rights 1948*[123] dan Pasal 15 *International Covenant on Civil and Political Rights 1966*.[124]

Namun pengadilan-pengadilan internasional telah menempuh pendekatan yang berbeda dalam mengimplementasikan prinsip ini terhadap para pelaku kejahatan internasional. Pengadilan Militer Internasional Nuremberg yang didirikan setelah Perang Dunia berakhir memberikan justifikasi atas tindakannya mengaplikasikan asas retroaktif terhadap para penjahat perang Nazi Jerman.

Berdasarkan Pasal 6 *Nuremberg Charter*, Pengadilan memiliki kompetensi untuk mengadili 3 (tiga) jenis kejahatan, yaitu "kejahatan terhadap perdamaian", "kejahatan terhadap hukum atau kebiasaan perang", dan "kejahatan terhadap kemanusiaan". Masing-masing kejahatan

---

[122] *Ibid*, hlm. 147-153.

[123] Universal Declaration of Human Rights, UNGA Res 217A (III), 10 Desember 1948, art. 11 (2).

[124] International Covenant on Civil and Political Rights, 999 United Nations Treaty Series 171, 16 Desember 1966, art. 15.

didefinisikan oleh Pengadilan dalam *Charter*-nya tersebut.[125] Kejahatan terhadap perdamaian dan kejahatan terhadap kemanusiaan pada waktu itu merupakan konsep yang belum pernah ada sebelumnya dalam hukum internasional, dan baru didefinisikan dalam *Nuremberg Charter*.[126] Dalam menyikapi kritik atas pelanggaran prinsip legalitas, Pengadilan menyatakan bahwa:

> "*In the first place, it is to be observed that the maxim* 'nullum crimen sine lege' *is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those in defiance of treaties and assurances have attacked neighboring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and* ***so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished...***"[127]

Pendekatan yang sama juga diambil oleh Pengadilan Militer Internasional Timur-Jauh di Tokyo yang didirikan

---

[125] Lihat Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis signed at London (London Agreement), 82 United Nations Treaty Series 279, 8 Agustus 1945; Charter of the International Military Tribunal (annexed to the London Agreement) ["Nuremberg Charter"].

[126] Lihat Motion adopted by all Defence Counsel in *Trial of the Major War Criminals Before the International Military Tribunal*, 19 November 1945, *Nuremberg 14 November 1945-1 October 1946*, vol. I ["Nuremberg Trial"], at 168-169.

[127] *Göring and others*, Nuremberg Trial, 1 October 1946, at 219. Cetak tebal oleh penulis.

beberapa saat setelah Pengadilan Nuremberg didirikan, untuk mengadili penjahat Perang Dunia Kedua dari Jepang. Pengadilan ini disusun mengikuti model Pengadilan Nuremberg, dan karenanya juga memiliki yurisdiksi atas kejahatan terhadap perdamaian dan kejahatan terhadap kemanusiaan, konsep yang belum dikenal ketika kejahatan yang dituduhkan itu dilakukan.[128]

Dalam kasus *Araki and others*, Hakim B.V.A. Röling menyebutkan bahwa ketentuan *nullum crimen sine poena*:

> *"... valid only if expressly adopted, so as to protect citizens against arbitrariness of courts... as well as arbitrariness of legislators...**the prohibition of* ex post facto *law is an expression of political wisdom,** not necessarily applicable in present international relations. **This maxim of liberty may, if circumstances necessitate it, be disregarded** even by powers victorious in a war fought for freedom."*[129]

Hakim Röling kemudian menggunakan "pertimbangan keamanan" ("*security considerations*") dalam menjustifikasi aplikasi prinsip retroaktif terhadap kejahatan terhadap perdamaian. Menurutnya, kejahatan tersebut memiliki

---

[128] Lihat B.V.A. Röling and C.F. Rüter (eds.), *The Tokyo Judgment*, vol. I (University Press Amsterdam, 1977), chapter 1.

[129] *Ibid*, vol. II, at 1059. Cetak tebal oleh penulis.

karakter yang berbahaya berdasarkan pertimbangan keamanan dan karenanya harus dihukum.[130] Ia menyatakan:

> *"Crime in international law is applied to concepts with different meanings. Apart from those indicated above [war crimes], it can also indicate acts comparable to political crimes in domestic law,* ***where the decisive element is the danger rather than the guilt, where the criminal is considered an enemy rather than a villain, and where the punishment emphasizes the political measure rather than the judicial retribution.***"[131]

Aplikasi asas retroaktif juga telah dilakukan secara parsial oleh Pengadilan Pidana Internasional untuk Rwanda. Pengadilan Rwanda memiliki yurisdiksi atas 3 (tiga) kategori kejahatan: genosida, kejahatan terhadap kemanusiaan, dan pelanggaran serius atas hukum humaniter internasional yang berlaku dalam konflik bersenjata internal.[132] Definisi genosida dalam Pasal 2 Statuta Pengadilan Rwanda menginkorporasikan definisi yang sama dalam *The 1948 Convention on the Prevention and Punishment*

---

[130] Cassese, *op. cit.*, hlm. 144.

[131] Röling and Rüter, *loc. cit.*, at 1060. Cetak tebal oleh penulis.

[132] Statute of Rwanda Tribunal, arts. 2; 3; 4.

of the Crime of Genocide. Definisi ini telah sesuai dengan hukum kebiasaan internasional.[133]

Namun Pasal 3 Statuta mendefinisikan kejahatan terhadap kemanusiaan secara berbeda dalam beberapa hal dari *Nuremberg Charter*,[134] padahal konsep kejahatan terhadap kemanusiaan dalam *Nuremberg Charter* adalah satu-satunya konsep tentang kejahatan terhadap kemanusiaan yang telah disetujui secara bulat oleh masyarakat internasional sebelum Pengadilan Rwanda didirikan.[135] Oleh karena itu, dalam mengadili individu yang telah dituduh melakukan kejahatan terhadap kemanusiaan, Pengadilan Rwanda secara parsial menggunakan konsep baru tentang kejahatan terhadap kemanusiaan yang belum pernah ada ketika kejahatan itu dilakukan. Karenanya, Pengadilan Rwanda telah mengaplikasikan asas retroaktif secara parsial dalam hal kejahatan terhadap kemanusiaan.

---

[133] *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 1951, p. 23 ["Advisory Opinion on Genocide Convention"].

[134] Virginia Morris dan Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, vol. 1 (New York: Transnational Publishers, Inc., 1998), chapter 5.

[135] General Assembly Resolution 95, UN Doc. A/64/Add.1, at 188 (1947).

Kemudian, Pasal 4 Statuta Pengadilan Rwanda mengatur bahwa Pengadilan juga memiliki yurisdiksi atas pelanggaran serius terhadap *common Article 3 Geneva Conventions 1949* dan juga Protokol II *Geneva Conventions*. Walaupun *common Article 3* telah dinyatakan oleh Mahkamah Internasional sebagai bagian dari hukum kebiasaan internasional,[136] Protokol II *Geneva Conventions* belum dikenal sebagai bagian dari hukum kebiasaan tersebut.[137] Hal ini berarti, ketika Pengadilan Rwanda didirikan dengan mencantumkan bahwa yurisdiksinya mencakup "pelanggaran serius dalam konflik bersenjata internal" yang diatur dalam Protokol II tersebut, masyarakat internasional pada waktu itu belum mengenal konsep "pelanggaran serius" yang dimaksud sebagai kejahatan internasional.[138]

Karenanya, Pengadilan Rwanda untuk yang pertama kalinya mengkriminalisasi konsep pelanggaran serius terhadap hukum humaniter internasional dalam konflik bersenjata internal, sebuah konsep yang belum pernah

---

[136] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. U.S.), ICJ Reports, 27 Juni 1986, p. 14-150 ["Nicaragua Case"], par. 114.

[137] Lihat Morris dan Scharf, *op. cit.*, hlm. 126.

[138] *Ibid*, hlm. 127.

dikriminalisasi secara universal dalam hukum internasional sebelum Pengadilan berdiri. Hal ini kembali menunjukkan bahwa Pengadilan Rwanda telah memberlakukan asas retroaktif.

Namun, tidak semua pengadilan internasional memberlakukan asas ini. Pengadilan Pidana Internasional untuk Bekas Yugoslavia[139] dan Mahkamah Pidana Internasional[140] memberlakukan asas non-retroaktif.

C. BENTUK-BENTUK KEJAHATAN INTERNASIONAL

Komisi Hukum Internasional PBB telah membuat daftar kejahatan internasional melalui *Draft Articles on State Responsibility 1976*[141] dan *Draft Code of Crimes against the Peace and Security of Mankind 1996.*[142] Kejahatan-kejahatan internasional tersebut adalah:

1. Agresi.
2. Dominasi kolonial/ penjajahan.

---

[139] Lihat Cassese, *op. cit.*, hlm. 149.

[140] Lihat Rome Statute, arts. 22; 23; 24.

[141] ILC Draft 1976, art. 19 (3).

[142] *Draft Code of Crimes against the Peace and Security of Mankind 1996*, Diadopsi oleh Komisi Hukum Internasional pada sesi ke-48 pada 1996, dan diserahkan kepada Majelis Umum PBB (at para. 50), lihat *Yearbook of the International Law Commission*, vol. II (Part Two) (1996), arts. 16-20.

3. Perbudakan.

4. Genosida.

5. Apartheid.

6. Pencemaran lingkungan dalam skala besar.

7. Kejahatan terhadap kemanusiaan.

8. Kejahatan terhadap PBB dan *associated personnel*.

9. Kejahatan perang.

Meskipun demikian, ketentuan ini baru merupakan *draft*, sehingga tidak mempunyai kekuatan hukum mengikat.

Mahkamah Internasional pada tahun 1970 dalam kasus *Barcelona Traction* memperkenalkan konsep bahwa seluruh negara di dunia memiliki kewajiban *erga omnes* terhadap masyarakat internasional yang berasal dari prinsip-prinsip penghormatan terhadap hak asasi manusia.[143] Konsep ini memiliki konsekuensi bahwa seluruh negara di dunia berkewajiban untuk mengkriminalisasi (*outlawing*) tindakan-tindakan seperti: agresi, genosida, perbudakan, dan diskriminasi rasial.[144] Konsep dimana "seluruh negara di dunia" memiliki kewajiban terhadap "masyarakat

[143] *Barcelona Traction, Light, and Power Co. Case* (Belgium v. Spain), ICJ Reports 1970, p. 3, par. 33.

[144] *Ibid*, par. 34.

internasional" untuk mengkriminalisasi tindakan-tindakan tersebut dapat ditarik sebagai afirmasi Mahkamah bahwa tindakan-tindakan yang disebutkan di atas merupakan "kejahatan internasional".

Setelah Mahkamah Pidana Internasional resmi berfungsi pada 1 Juli 2002 sebagai satu-satunya pengadilan pidana internasional permanen di dunia, Mahkamah memiliki yurisdiksi untuk mengadili pelaku 4(empat) jenis kejahatan internasional, yaitu: genosida, kejahatan terhadap kemanusiaan, kejahatan perang, dan agresi.[145]

Dengan demikian dapat disimpulkan bahwa terdapat setidaknya 5 (lima) bentuk kejahatan internasional yang telah disetujui secara universal oleh masyarakat internasional: 4 (empat) kejahatan yang tercantum dalam Statuta Mahkamah Pidana Internasional dan 1 (satu) kejahatan internasional klasik, yaitu pembajakan laut.

1. Genosida

[145] Rome Statute, Art. 5 (1).

Definisi genosida sebagaimana diatur dalam Pasal 2 *Convention on the Prevention and Punishment of the Crime of Genocide 1948* adalah:

> *"...any of the following acts committed with intent to destroy, in whole or in part, a national, ethincal, racial, or religious groups, 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."*[146]

Ketentuan ini telah menjadi bagian dari hukum kebiasaan internasional[147] dan telah diadopsi secara utuh oleh Pengadilan Pidana Internasional untuk Bekas Yugoslavia,[148] Pengadilan Pidana Internasional untuk Rwanda,[149] dan Mahkamah Pidana Internasional.[150]

Dengan demikian, genosida telah secara nyata menjadi salah satu kejahatan internasional.

---

[146] Genocide Convention, art. 2.

[147] Advisory Opinion on Genocide Convention, *loc. cit.*

[148] Statute of Yugoslavia Tribunal, art. 4 (2).

[149] Statute of Rwanda Tribunal, art. 2 (2).

[150] Rome Statute, art. 6.

2. Kejahatan terhadap kemanusiaan

Konsep mengenai kejahatan terhadap kemanusiaan telah mengalami evolusi yang pesat sepanjang sejarah hukum pidana internasional. Konsep ini pertama kali diperkenalkan oleh Pengadilan Militer Internasional Nuremberg,[151] yang kemudian dikembangkan oleh Pengadilan Pidana Internasional untuk Bekas Yugoslavia[152] dan Pengadilan Pidana Internasional untuk Rwanda.[153]

Hari ini, konsep tersebut telah disempurnakan oleh Mahkamah Pidana Internasional melalui Pasal 7 ayat (1) Statutanya yang mendefinisikan kejahatan terhadap kemanusiaan sebagai:

> "*...any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:*
> *(a) Murder;*
> *(b) Extermination;*
> *(c) Enslavement;*
> *(d) Deportation or forcible transfer of population;*

[151] Nuremberg Charter, art. 6 (c).

[152] Statute of Yugoslavia Tribunal, art. 5.

[153] Statute of Rwanda Tribunal, art. 3.

(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... or other grounds that are universally recognized as impermissible under international law...*
(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."*[154]

3. Kejahatan perang

Kejahatan perang juga telah mengalami evolusi dalam sejarah hukum pidana internasional. Jauh sebelum Perang Dunia Pertama pecah, Presiden Abraham Lincoln dalam Perang Sipil Amerika (1861-1865) telah mengeluarkan Lieber Code yang berupaya mengkodifikasikan hukum-hukum perang.[155]

Setelah Perang Dunia Pertama berakhir, Traktat Versailles ditandatangani pada 28 Juni 1919 untuk mengadili individu-individu yang telah melakukan pelanggaran hukum-

[154] Rome Statute, art. 7 (1).

[155] Lieber Code (Instructions for the Government of Armies of the United States in the Field), General Orders No. 100, 24 April 1863.

hukum dan kebiasaan perang.[156] Kemudian setelah Perang Dunia Kedua berakhir, Pengadilan Nuremberg dibentuk untuk mengadili kejahatan perang yang dilakukan oleh Nazi Jerman.[157]

Hukum internasional hari ini mengenal 6 (enam) pembagian besar bidang di mana kejahatan perang diatur: (a) dalam perang di darat,[158] (b) dalam perang di laut,[159] (c) dalam bidang perlakuan terhadap tawanan perang,[160] (d) dalam bidang perlakuan terhadap warga sipil selama masa perang,[161] (e) dalam konflik bersenjata internasional,[162] dan (f) dalam

---

[156] Text in The Treaties of Peace 1919-1923, *Carnegie Endowment for International Peace*, vol. I, (New York, 1924), hlm. 121.

[157] Lihat Nuremberg Charter, art. 6 (b).

[158] Geneva Convention I (for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field), Geneva, 12 Agustus 1949.

[159] Geneva Convention II (for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea), Geneva, 12 Agustus 1949.

[160] Geneva Convention III (Relative to the Treatment of Prisoners of War), Geneva, 12 Agustus 1949.

[161] Geneva Convention IV (Relative to the Protection of Civilian Persons in Time of War), Geneva, 12 Agustus 1949.

[162] Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 Juni 1977.

konflik bersenjata internal.[163] Pengaturan dalam semua bidang ini telah dikodifikasi dalam empat *Geneva Conventions 1949* dan dua Protokol Tambahannya 1977.

Dalam Pasal 8 Statuta Mahkamah Pidana Internasional, kejahatan perang secara garis besar dikelompokkan ke dalam 4 (empat) jenis, yaitu: (a) Pelanggaran berat *Geneva Conventions 12 August 1949*,[164] (b) Kejahatan serius lainnya terhadap hukum-hukum dan kebiasaan yang berlaku dalam konflik bersenjata internasional,[165] (c) Kejahatan serius terhadap orang-orang yang tidak mengambil bagian aktif dalam konflik bersenjata internal (*hors de combat*),[166] dan (d) Kejahatan serius lainnya terhadap hukum-hukum dan kebiasaan yang berlaku dalam konflik bersenjata internal.[167]

Dalam mendefinisikan masing-masing kejahatan dalam Statuta maupun *Elements of Crimes*-nya, Mahkamah banyak

---

[163] Additional Protocol II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 Juni 1977.

[164] Rome Statute, art. 8 (2) (a)

[165] *Ibid*, art. 8 (2) (b).

[166] *Ibid*, art. 8 (2) (c).

[167] *Ibid*, art. 8 (2) (e).

menggunakan ketentuan-ketentuan yang berlandaskan pada *Geneva Conventions 1949* dan Protokol Tambahannya 1977.[168]

4. Agresi

Agresi pertama kali dikenal sebagai kejahatan internasional dalam *Nuremberg Charter* 8 Agustus 1945.[169] Ketika itu agresi masih dikenal sebagai konsep yang berada di bawah lingkup "kejahatan terhadap perdamaian". Pasal 6 (a) *Charter* ini menyatakan bahwa: "*... CRIMES AGAINST PEACE: namely planning, preparation, initiation or* ***waging of a war of aggression...***"[170] Para negara pemenang Perang Dunia Kedua yang mendirikan Pengadilan Nuremberg melalui *Charter* tersebut pada waktu itu sengaja tidak mendefinisikan agresi untuk menghindari pelanggaran intervensi terhadap kedaulatan negara sebagaimana diatur dalam Pasal 2 (4) *Charter* PBB 1945.[171]

Kurangnya definisi agresi dalam hukum internasional terjadi bahkan hingga hari ini. Mahkamah Pidana

---

[168] Lihat ICC Elements of Crimes, ICC-ASP/1/3 (part II-B), 9 September 2002, art. 8 (2) (a) (i)- 8 (2) (e) (xii).

[169] Cassese, *op. cit.*, hlm. 111.

[170] Nuremberg Charter, art. 6 (a). Cetak tebal oleh penulis.

[171] Cassese, *op. cit.*, hlm. 111-112.

Internasional misalnya, walaupun mengakui bahwa agresi adalah kejahatan internasional yang dapat diadili oleh Mahkamah sesuai dengan Pasal 5 (1) Statuta Mahkamah juga secara sengaja tidak mendefinisikan agresi.[172] Pasal 5 (2) Statuta menyebutkan bahwa agresi baru merupakan kejahatan yang akan diadili Mahkamah ketika telah ada definisi yang diadopsi oleh negara-negara anggota melalui amandemen atau revisi Statuta Mahkamah.[173]

Hal ini terjadi karena negara-negara belum sepakat akan suatu definisi baku agresi. Negara-negara menghendaki diskresi yang luas dalam mendefinisikan kejahatan tersebut.[174] Walaupun demikian, Majelis Umum PBB sebetulnya telah mendefinisikan agresi dalam Resolusi 3314 (XXIX) pada 14 Desember 1974. Pasal 1 Resolusi menyatakan bahwa:

> "*Aggression is the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.*"[175]

---

[172] Rome Statute, art. 5 (1)

[173] *Ibid*, art. 5 (2); lihat juga arts. 121 dan 123.

[174] Cassese, *op. cit.*, hlm. 112-113.

[175] UN General Assembly Resolution 3314 (XXIV) on the Definition of Agression, 14 Desember 1974.

Definisi ini sengaja dibuat dengan membuka kemungkinan akan adanya ketentuan tambahan (*not exhaustive*), karena Pasal 4 menyatakan bahwa Dewan Keamanan PBB memiliki diskresi untuk mengkualifikasi apakah sebuah tindakan adalah agresi.[176] Diskresi Dewan tersebut dapat dilihat dari Resolusi 573 pada 4 Oktober 1985, di mana Dewan mengkualifikasi serangan Israel terhadap PLO sebagai agresi, dan Resolusi 577 pada 6 Desember 1985, di mana Dewan mengkualifikasi serangan Afrika Selatan terhadap Angola sebagai agresi.[177]

Walaupun demikian, beberapa bentuk dari agresi telah secara nyata menjadi bagian dari hukum kebiasaan internasional. Mahkamah Internasional dalam kasus *Nicaragua* memutuskan bahwa tindakan suatu negara dalam mengirimkan pasukan bersenjata ke wilayah negara lain dalam bentuk serangan bersenjata (*armed attack*) dengan skala besar dan menimbulkan konsekuensi yang serius adalah definisi agresi yang telah diterima dalam hukum kebiasaan internasional.[178]

---

[176] *Ibid,* art. 4.

[177] Lihat Cassese, *op. cit.,* hlm. 112.

[178] Nicaragua Case, *loc. cit.,* par. 195.

Contoh dari bentuk agresi seperti ini adalah invasi Irak ke Kuwait pada 1990. Invasi ini bukan hanya merupakan pelanggaran terhadap Pasal 2 (4) *Charter* PBB yang tidak dapat dijustifikasi melalui bela diri (*self-defence*), namun ia juga merupakan kejahatan internasional dalam bentuk agresi.[179]

5. Pembajakan laut *jure gentium*

Pembajakan laut pertama kali dikenal sebagai kejahatan yang mengancam kepentingan masyarakat internasional pada tahun 1600-1800.[180] Istilah pembajakan laut (*piracy*) berasal dari kata Yunani, *peiretes*,[181] yang disebutkan dalam literatur-literatur Romawi sebagai *pirata* dan *praedones.* Istilah-istilah ini memiliki arti "predator" atau "bandit".[182]

---

[179] Cassese, *op. cit.*, hlm. 113.

[180] Bassiouni, *loc. cit*: 109-110.

[181] Homer, *The Iliad* (A.T. Murray Trans., 1971); Homer, *The Odyssey* (A.T. Murray Trans., 1960); Thucydides, *The Peleponnesian War* (C.M. Smith Trans., 1969).

[182] Cicero, *Contra Verres II* (L.H.G. Greenwood Trans., 1953); lihat Cicero, *De Officii* (L.H.G. Greenwood Trans., 1953); Cicero, *De Republica* (C.W. Keyes Trans., 1928).

Konsep pembajakan laut sebagai kejahatan internasional telah melahirkan perbedaan pendapat antara para sarjana hukum internasional. Alberigo Gentili[183] dan Balthazar de Ayala[184] mengadopsi pandangan bahwa pembajakan laut merupakan kejahatan internasional karena terdapat "kepentingan universal" masyarakat internasional dalam mencegah dan menanggulanginya. Oleh karena itu, pembajakan laut jelas diatur dalam hukum bangsa-bangsa (*jure gentium*). Pembajakan laut yang dimaksud hanya pembajakan yang terjadi di laut lepas, karena hanya pembajakan semacam ini yang dikenal dalam hukum bangsa-bangsa tersebut ("*piracy jure gentium*").[185]

Sementara itu, Antonio Cassese beranggapan bahwa pembajakan laut bukan merupakan kejahatan internasional karena dasar pemikiran tentang kejahatan tersebut tidak sama dengan konsep "mengancam kepentingan universal" yang harus dipenuhi oleh suatu tindakan agar dapat dikualifikasi

---

[183] Gentili, *De Iure Bellicis Libri Tres* (1612) (J.C. Rolfe Trans., 1933).

[184] Balthazar Ayala, *De Jure et Officiis Bellicis et Disciplina Militari* (1581) (J.P. Bate Trans., 1912); lihat Balthazar Ayala, *Three Books, on the Law of War, and on the Duties Connected with War, and on Military Discipline* 88 (1597) (J. P. Bate Trans., 1912).

[185] *Lihat* Bantekas dan Nash, *op. cit.*, hlm. 176; lihat juga definisi pembajakan laut dalam UNCLOS, art. 101.

sebagai kejahatan internasional. Cassese berpendapat bahwa negara-negara setuju untuk mencegah dan menanggulangi pembajakan laut *bukan* karena adanya "kepentingan universal" antara mereka, namun karena adanya "kepentingan bersama" (*joint interest*) untuk melawan bahaya yang dihadapi bersama dan kerugian yang ditimbulkan. Karena tidak adanya nilai-nilai "universal" yang dilindungi oleh masyarakat internasional melalui pencegahan dan penanggulangan kejahatan tersebut, pembajakan laut menurutnya bukan kejahatan internasional.[186]

Grotius melalui doktrin *Mare Liberum* mengambil pendekatan yang lebih pragmatis. Menurutnya, bendera kapal yang dibajak akan menjadi penentu negara yang akan melaksanakan yurisdiksinya terhadap pelaku pembajakan. Hanya negara yang benderanya terpasang di atas kapal tersebut yang dapat melaksanakan yurisdiksinya terhadap pelaku pembajakan atau kapal pelaku pembajakan, terlepas

[186] Cassese, *op. cit.*, hlm. 24; lihat juga Cassese, "When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium Case*", 13 *European Journal of International Law* (2002), at 857-858.

dari kewarganegaraan pelaku atau bendera kapal yang membajak.[187]

Bagaimanapun adanya, karena ia telah memenuhi unsur kejahatan internasional, yaitu dapat diadili berdasarkan yurisdiksi universal,[188] pembajakan laut *jure gentium* telah nyata menjadi salah satu kejahatan internasional.[189]

D. PERBANDINGAN KONSEP KEJAHATAN INTERNASIONAL DENGAN KONSEP-KONSEP LAIN YANG SERUPA

1. Perbandingan dengan Konsep Kejahatan Transnasional

Kejahatan transnasional lebih dikenal sebagai "kejahatan terorganisasi transnasional" (*transnational organized crime*). Konsep ini pertama kali lahir sebagai "kejahatan terorganisasi" (*organized crime*) pada akhir abad ke-19 di Amerika Serikat untuk menunjuk kepada kejahatan-kejahatan yang dilakukan oleh kelompok kriminal yang

---

[187] Lihat Hugo Grotius, *De Jure Belli ac Pacis*, pertama kali diterbitkan pada 1625 (Francis W. Kelsey Trans., 1925), seperti yang dikutip oleh Bassiouni, *loc. cit.*: 109.

[188] Lihat UNCLOS, art. 150.

[189] Lihat UNCLOS, art. 100-107 dan 110, seperti yang dikutip oleh Yoram Dinstein, "The Parameters and Content of International Criminal Law," *Touro Journal of Transnational Law,* 1 Touro J. Transnat'l L. 315 (1990): 316.

dilindungi oleh pejabat publik kala itu, seperti perjudian ilegal dan prostitusi.[190]

Konsep ini berkembang di negara-negara Eropa seperti Jerman,[191] Italia,[192] dan Inggris[193] untuk mencakup kejahatan-

---

[190] Michael Woodiwiss, "Transnational Organized Crime: The Strange Career of an American Concept" dalam *Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption*, edited by Margaret E. Beare, (Toronto; Buffalo; London: University of Toronto Press, 2005), hlm. 4-5.

[191] "*...**the pursuit of profit** or power by the **planned commission of crimes**, which looked at individually or in combination, are of a **serious nature**, involving co-operation by more than two persons **working as a team** over a long or indefinite period, where such co-operation involves:*
*a) the use of **commercial or quasi-commercial structures**;*
b) the use of violence or other methods of intimidation; or
c) the exercise of influence on the political process, the media, judicial authorities, or the functioninig of the economy,"
lihat P. Cullen, "Crime and Policing in Germany in the 1960s" dalam *Discussion Paper in German Studies, No. IGS 97/13*, (Birmingham: University of Birmingham, 1997), hlm. 17; W. Gropper; L. Schubert; dan M. Wörner, "Deutschland" dalam *Rechtliche Initiativen gegen organisierte Kriminalität*, edited by W. Gropp and B. Huber, (Freiburg: s.n., 2000); M. Levi, "Perspectives on 'Organized Crime': An Overview," *The Howard Journal 37(4)* (1998): 335; U. Sieber, "Logistik der Organisierten Kriminalität in der Bundesrepublik Deutschland," *Juristenzeitung 15/16* (1995): 760. Cetak tebal oleh penulis.

[192] "*Organized crime's goal of wealth accumulation is achieved by forms of mediation, by parasitic infiltration, by the **systematic use of violence and above all by contact with public power**;... notwithstanding the distinctions between the various clans that divide up territory and responsibilities, there exists a tacit agreement, a **criminal structure** which, in putting up an impenetrable wall to non-compromised authorities, operates for the support and protection of Mafia criminal activities: **a criminal structure which is not destroyed even by the cruel and ruthless struggles between the clans**,*" lihat A. Jamieson, *The Antimafia-Italy's Fight against Organized Crime*, (Basingstoke; London; New York: Macmillan and St. Martin's Press, 2000), hlm. 19. Cetak tebal oleh penulis.

[193] Sebuah "*organized crime*" harus dilakukan oleh "*organized crime groups*", yang harus memenuhi 4 (empat) kriteria berikut:
"*a) they contain at least three people;*

kejahatan serius menurut hukum nasional masing-masing negara yang dilakukan secara sistematis oleh sekelompok orang yang berada dalam struktur organisasional tertentu dengan tujuan mendapatkan keuntungan (*profit*). Dengan demikian, kejahatan-kejahatan semacam ini dapat mencakup: perdagangan narkotika, perdagangan barang-barang dan jasa ilegal, penyelundupan, penipuan, korupsi,[194] pencucian uang,[195] hingga perdagangan manusia.[196]

Seiring dengan berkembangnya kejahatan-kejahatan ini, mereka tidak lagi dilakukan di dalam batas sebuah negara, melainkan sudah melintasi batas antar negara. Hal tersebut melahirkan kepentingan transnasional negara-negara untuk mencegah dan menanggulangi kejahatan-kejahatan tersebut.

---

b) they engage in criminal activity that is prolonged or ongoing;
c) their members are motivated by profit or power;
d) they commit serious criminal offences,"
lihat National Criminal Intelligence Service (NCIS), "Annual Assesment of the Organized Crime Threat," <http://www.ncis.co.uk>, diakses 20 Mei 2008.

[194] Lihat Woodiwiss, *loc. cit.*, hlm. 3-9.

[195] R.T. Naylor, "Follow the Money Methods in Crime Control Policy," dalam *Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption*," edited by Margaret E. Beare, (Toronto; Buffalo; London: University of Toronto Press, 2005), hlm. 256.

[196] Vincenzo Ruggiero, "Global Markets and Crime," dalam *Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption*," edited by Margaret E. Beare, (Toronto; Buffalo; London: University of Toronto Press, 2005), hlm. 178-180.

Oleh karena itu, PBB melalui Resolusi Majelis Umum 55/25 pada 15 November 2000 mengadopsi *United Nations Convention against Transnational Organized Crime* di Palermo, Italia.[197] Pasal 3 ayat (1) Konvensi ini menggariskan ketentuan bahwa ruang lingkup keberlakuan Konvensi adalah terhadap:[198]

a. Kejahatan-kejahatan yang diatur dalam Pasal 5 (kejahatan yang dilakukan oleh kelompok terorganisasi),[199] Pasal 6 (pencucian uang),[200] Pasal 8 (korupsi),[201] dan Pasal 23 (perusakan atas proses peradilan)[202];
b. Kejahatan-kejahatan tersebut harus merupakan "kejahatan serius" (*serious crime*), yang berarti

---

[197] United Nations Convention against Trasnational Organized Crime, A/RES/55/25 of 15 November 2000, adopted at the 55th session of the General Assembly of the United Nations, open for signature by all States and by regional economic integration organizations from 12 to 15 December 2000 at the *Palazzi di Giustizia* in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002 ["TOC Convention"].

[198] *Ibid*, art. 3 (1).

[199] *Ibid*, art. 5.

[200] *Ibid*, art. 6.

[201] *Ibid*, art. 8.

[202] *Ibid*, art. 23.

pelakunya dapat dikenakan hukuman penjara selama 4 (empat) tahun atau lebih;[203] dan

c. Kejahatan tersebut harus bersifat transnasional dan melibatkan kelompok kriminal terorganisasi.

Pasal 3 ayat (2) Konvensi mengatur bahwa sebuah kejahatan bersifat transnasional jika:

> "... *(a) It is committed in more than one State;*
> *(b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;*
> *(c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or*
> *(d) It is committed in one State but has substantial effects in another State.*"[204]

Sedangkan yang dimaksud dalam Konvensi ini sebagai kelompok kriminal terorganisasi adalah:

> *"...a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit."*[205]

---

[203] *Ibid*, art. 2 (b).

[204] *Ibid*, art. 3 (2).

[205] *Ibid*, art. 2 (b).

Konvensi ini telah berlaku pada 29 September 2003, dan sampai dengan Mei 2008, Konvensi telah ditandatangani oleh 147 negara.[206] Konvensi ini juga dilengkapi dengan 3 (tiga) Protokol, yang masing-masing bertujuan untuk memberantas perdagangan manusia, khususnya wanita dan anak-anak; penyelundupan imigran melalui darat, laut, dan udara; serta produksi dan perdagangan gelap senjata api.[207] Hal ini menunjukkan tingginya kebutuhan dan komitmen masyarakat internasional untuk memerangi kejahatan terorganisasi transnasional.

Dengan demikian, dapat disimpulkan bahwa konsep kejahatan transnasional tidak sama dengan kejahatan internasional, karena berbeda dalam banyak aspek. Perbedaan-perbedaan tersebut adalah:

---

[206] "Signatories to the United Nations Convention against Transnational Crime and its Protocols", <http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>, diakses 13 Mei 2008.

[207] "The United Nations Convention against Transnational Organized Crime and its Protocols," <http://www.unodc.org/unodc/en/treaties/CTOC/index.html#Fulltext>, diakses 13 Mei 2008.

a. Kejahatan transnasional memiliki tujuan yang dititikberatkan pada keuntungan finansial (*profit*); sedangkan kejahatan internasional dilakukan untuk memenuhi kepentingan-kepentingan lain, seperti politik maupun ideologi.
b. Kejahatan transnasional merupakan rangkaian proses yang berlangsung di lebih dari satu negara: kejahatan tersebut dapat dilakukan di satu negara; namun persiapan, perencanaan, kontrol, dan efeknya dapat terjadi di negara lain. Sedangkan kejahatan internasional merupakan kejahatan yang dapat dilakukan hanya di satu negara dan hanya menimbulkan kerugian langsung terhadap negara tersebut, namun karena kejahatan tersebut telah diterima secara universal sebagai pelanggaran atas kaidah-kaidah hukum internasional, maka tindakan tersebut dianggap sebagai kejahatan terhadap masyarakat internasional secara keseluruhan.
c. Kejahatan transnasional bergantung pada pengaturan hukum nasional dari negara-negara yang terkena

dampak kejahatan tersebut.[208] Hal ini berarti, pelaku kejahatan transnasional akan diadili di forum pengadilan nasional. Sedangkan kejahatan internasional tidak selalu bergantung pada pengaturan hukum nasional, karena tindakan tersebut telah dikriminalisasi dalam hukum perjanjian internasional maupun hukum kebiasaan internasional. Karenanya, pelaku kejahatan internasional dapat diadili di forum pengadilan internasional.

---

[208] TOC Convention, art. 15:

*" 1. Each State Party shall adopt such measures as may be necessary to **establish its jurisdiction** over the offences established in accordance with articles 5, 6, 8 and 23 of this Convention when:*
*(a) The offence is **committed in the territory of that State Party;** or*
*(b) The offence is **committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party** at the time that the offence is committed.*
*2. Subject to article 4 of this Convention, a State Party may also **establish its jurisdiction** over any such offence when:*
*(a) The offence is **committed against a national of that State Party;***
*(b) The offence is **committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory;** or*
(c) The offence is:
*(i) One of those established in accordance with article 5, paragraph 1 of this Convention and is committed **outside its territory with a view to the commission of a serious crime within its territory;***
*(ii) One of those established in accordance with article 6, paragraph 1 (b) (ii), of this Convention and is **committed outside its territory with a view to the commission of an offence** established in accordance with article 6, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention **within its territory**..."*
Cetak tebal oleh penulis.

d. Karena kejahatan transnasional hanya merugikan kepentingan beberapa negara tertentu, maka pelaku kejahatan ini hanya dapat diadili oleh negara-negara yang kepentingannya dirugikan tersebut.[209] Sedangkan kejahatan internasional, karena dipandang sebagai kejahatan terhadap masyarakat internasional secara keseluruhan, maka pelakunya dapat diadili oleh negara apa saja berdasarkan prinsip yurisdiksi universal.

2. Perbandingan dengan Konsep Kejahatan Luar Biasa (*Extraordinary Crime*)

Kejahatan luar biasa adalah tindakan-tindakan yang memiliki karakteristik sebagai berikut:

[209] Tidak satupun dari ketentuan yang ada dalam TOC Convention memberikan hak kepada negara-negara anggota untuk melaksanakan yurisdiksi universal terhadap kejahatan yang diatur dalam Konvensi. Konvensi juga tidak mendirikan pengadilan internasional atau mekanisme yudisial internasional kolektif apapun untuk mengadili pelaku kejahatan yang terdapat dalam Konvensi. Konvensi justru menitikberatkan bahwa terdapat kewajiban negara-negara anggota untuk melaksanakan yurisdiksi nasionalnya terhadap pelaku kejahatan-kejahatan tersebut (Pasal 15, 34) tanpa adanya intervensi dari negara lain (Pasal 4), serta adanya kewajiban agar mereka saling bekerja sama dalam memerangi kejahatan-kejahatan tersebut (Pasal 13), termasuk dengan ekstradisi (Pasal 16), transfer pelaku (Pasal 17), bantuan hukum/ *mutual legal assistance* (Pasal 18), investigasi bersama (Pasal 19), transfer proses persidangan (Pasal 21), kerja sama dalam penegakan hukum (Pasal 27), dan pertukaran informasi (Pasal 28).

a. Tindakan yang dilakukan secara terencana, sistematis, dan terorganisasi terhadap individu dalam jumlah besar.[210]
b. Tindakan tersebut menyebabkan kerusakan massal (*mass atrocity*).[211]
c. Tindakan tersebut telah dikriminalisasi dalam hukum pidana internasional.[212]
d. Contoh-contohnya adalah genosida, kejahatan terhadap kemanusiaan, dan kejahatan perang.[213]
e. Merupakan kejahatan atas rasa kepercayaan global manusia (*global trust*).[214]
f. Tindakan tersebut dikutuk secara universal.[215]

---

[210] Mark A. Drumbl, *Atrocity, Punishment, and International Law*, (Cambridge, New York: Cambridge University Press, 2007), hlm. 4.

[211] *Ibid*, hlm. 8.

[212] Mark A. Drumbl, "The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, The Geneva Conventions, and International Criminal Law," (Symposium on the New Face of Armed Conflict: Enemy Combatants after Hamdan v. Rumsfeld), *George Washington Law Review*, 75 Geo. Wash. L. Rev. 1165 (Agustus 2007): 1181.

[213] *Ibid*.

[214] *Ibid*: 1199.

[215] Robert D. Sloane, Book Review on Mark A. Drumbl, *Atrocity, Punishment, and International Law,* (Cambridge, New York: Cambridge University Press, 2007), *American Journal of International Law*, 102 Am. J. Int'l L. 197 (Januari 2008): 205.

Dengan demikian, dapat disimpulkan bahwa konsep kejahatan luar biasa tidak memiliki perbedaan dengan kejahatan internasional, karena keduanya memiliki karakteristik yang sama. Oleh karena itu, konsep kejahatan luar biasa sama dengan kejahatan internasional.

3. Perbandingan dengan Konsep Pelanggaran Hak Asasi Manusia (HAM) yang Berat (*Gross Violation of Human Rights*)

Salah satu tujuan penanggulangan dan pencegahan kejahatan internasional adalah karena adanya perlindungan atas nilai-nilai HAM.[216] Kejahatan internasional jelas melanggar kebebasan, kemerdekaan, atau hak untuk hidup yang dinilai oleh masyarakat internasional telah melanggar HAM secara keseluruhan.[217] Oleh karena itu, kejahatan internasional merupakan bentuk pelanggaran HAM berat.

Karakteristik pelanggaran HAM berat adalah sebagai berikut:

---

[216] Geoffrey Robertson, *Kejahatan terhadap Kemanusiaan-Perjuangan untuk Mewujudkan Keadilan Global [Crime against Humanity-The Struggle for Global Justice]*, Edisi Indonesia (Jakarta: Komnas HAM, 2002), hlm. 407.

[217] *Ibid.*

a. Pelanggaran HAM yang dilakukan secara sistematis dan dalam skala besar.[218]
b. Merupakan ancaman yang paling serius terhadap masyarakat internasional.[219]
c. Merupakan bentuk kejahatan internasional.[220]
d. Adanya kewajiban negara-negara untuk menginvestigasi tuduhan adanya tindakan tersebut, dan jika terbukti, wajib menghukum pelakunya.[221]
e. Adanya kewajiban negara-negara untuk saling bekerja sama dalam mencegah dan menanggulangi tindakan tersebut.[222]
f. Adanya hak negara-negara untuk mengadili pelaku berdasarkan yurisdiksi universal.[223]

---

[218] Stanislav Chernichenko, "Definition of Gross and Large-scale Violations of Human Rights as an International Crime," Commission On Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-fifth Session, Item 4 of the provisional agenda, *Working Paper submitted in accordance with Sub-Commission decision 1992/109, Economic and Social Council*, E/CN.4/Sub.2/1993/10, 8 June 1999, par. 16.

[219] *Ibid*, par. 3.

[220] *Ibid*, par. 50, art. 1 (1).

[221] "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 International Humanitarian Law," adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, <http://www2.ohchr.org/english/law/remedy.htm>, diakses 13 Mei 2008, principle III (4).

[222] *Ibid*, principle III (5).

g. Contoh-contohnya adalah: genosida, perbudakan atau praktik-praktik serupa, eksekusi yang semena-mena, penyiksaan, penghilangan paksa, penahanan yang semena-mena, dan diskriminasi yang sistematis.[224]

Dengan demikian, sesungguhnya konsep pelanggaran HAM berat, kejahatan luar biasa, dan kejahatan internasional tidak berbeda satu sama lain karena ketiganya memiliki unsur-unsur dan karakteristik yang sama.

BAB III

ARGUMENTASI HUKUM YANG MENDUKUNG DAN MENENTANG TERORISME SEBAGAI KEJAHATAN INTERNASIONAL

---

[223] *Ibid.*

[224] Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Maastricht, 11-15 March 1992, Study and Information Centre of Human Rights of the Netherlands Institute of Human Rights, Special No. 12, p.17.

Sesuai dengan definisi terorisme yang telah diberikan dalam awal penulisan,[225] terdapat perbedaan pendapat dalam hukum internasional mengenai status terorisme sebagai kejahatan internasional. Oleh karena itu bab ini akan menguraikan argumentasi-argumentasi yang ada, baik yang mendukung terorisme sebagai kejahatan internasional, maupun yang menentangnya.

A. ARGUMENTASI YANG MENDUKUNG TERORISME SEBAGAI KEJAHATAN INTERNASIONAL

1. Terorisme Telah Diterima sebagai Kejahatan Internasional dalam Hukum Internasional

a. Terorisme telah diterima sebagai kejahatan internasional dalam perjanjian-perjanjian internasional

Hukum internasional hari ini mengenal setidaknya 25 perjanjian internasional yang mengkriminalisasi terorisme atau bentuk-bentuk terorisme. Perjanjian-perjanjian ini terdiri dari 14 perjanjian yang diadopsi oleh PBB,[226] 5 (lima) perjanjian regional,[227] dan 6

[225] Lihat hlm. 12-13 penulisan ini.

[226] Keempat belas konvensi tersebut adalah:

1. 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft;
2. 1970 Convention for the Suppression of Unlawful Seizure of Aircraft;
3. 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;
4. 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons;
5. 1979 International Convention against the Taking of Hostages;
6. 1980 Convention on the Physical Protection of Nuclear Material;
7. 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;
8. 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;
9. 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;
10. 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf;
11. 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection;
12. 1997 International Convention for the Suppression of Terrorist Bombings;
13. 1999 International Convention for the Suppression of the Financing of Terrorism;
14. 2005 International Convention for the Suppression of Acts of Nuclear Terrorism;

Lihat "UN Action to Counter Terrorism," <http://www.un.org/terrorism/instruments.shtml>, diakses pada 18 Maret 2008.

[227] Kelima perjanjian tersebut adalah:

1. Arab Convention for the Suppression of Terrorism 1998, <http://www.al-bab.com/arab/docs/league/terrorism98.htm>, diakses 12 Juni 2008;
2. Convention of the Organization of the Islamic Conference on Combating International Terrorism, 1 Juli 1999, <http://www.oic-oci.org/oicnew/english/convenion/terrorism_convention.htm>, diakses 12 Juni 2008;
3. Convention of the Organization of African Unity on the Prevention and Combating of Terrorism, 14 Juli 1999, <http://untreaty.un.org/English/Terrorism/oau_e.pdf>, diakses 12 Juni 2008;
4. Inter-American Convention Against Terrorism 2002, <http://www.oas.org/juridico/english/treaties/a-66.html>, diakses 12 Juni 2008;

(enam) perjanjian lainnya.[228] Perjanjian ini dapat terbagi menjadi: (i) perjanjian yang secara tegas menyatakan bahwa terorisme dilarang, dan (ii) perjanjian yang tidak secara tegas melarang terorisme, namun mengkriminalisasi bentuk-bentuk terorisme.

Perjanjian jenis pertama dapat dilihat dalam berbagai ketentuan dalam *Geneva Conventions* 12 Agustus 1949 maupun Protokol-protokolnya 8 Juni 1977. Pasal 33 (1) *Geneva Convention IV* menyatakan bahwa: "*...**all measures of** intimidation or of **terrorism** are **prohibited.***"[229] Pasal 4 (2) Protokol II menyatakan bahwa: "*...the following acts...are and **shall remain prohibited at any time and in any place** whatsoever: ...(d) **acts of terrorism**...*"[230] Sedangkan Pasal 51 (2) Protokol I maupun Pasal 13 (2) Protokol II menyatakan ketentuan yang sama, yaitu: "*...acts or threats of violence **the primary***

---

5. European Convention on the Suppression of Terrorism, 27 Januari 1977, <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=090&CM=8&DF=6/12/2008&CL=ENG>, diakses 12 Juni 2008.

[228] Empat *Geneva Conventions,* 12 Agustus 1949 beserta dua Protokolnya, 8 Juni 1977.

[229] Geneva Convention IV, art. 33 (1), cetak tebal oleh penulis.

[230] Additional Protocol II, art. 4 (2), cetak tebal oleh penulis.

purpose of which is to spread terror among the civilian population are prohibited."[231]

Sedangkan perjanjian jenis kedua dapat dilihat dalam Pasal 2 (1) *International Convention for the Suppression of Terrorist Bombings 1998* yang menyatakan bahwa:

> "*Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally* ***delivers, places, discharges, or detonates an explosive or other lethal device*** *in, into, or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility...*"[232]

Perjanjian jenis kedua lainnya dapat dilihat dalam Pasal 1 (1) *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention) 1971* yang menyatakan bahwa:

> "*Any person commits an offence if he unlawfully and intentionally:*

[231] Additional Protocol I, art. 51 (2); Additional Protocol II, art. 13 (2), cetak tebal oleh penulis.

[232] International Convention for the Suppression of Terrorist Bombings, UNGA A/Res/52/164, 15 Desember 1997 ["Terrorist Bombings Convention"], art. 2(1), cetak tebal oleh penulis.

(a) performs an act of violence against a person on board an aircraft in flight...
(b) destroys an aircraft in service...
(c) places or causes...by any means...a device or substance which is likely to destroy that aircraft...
(d) destroys or damages air navigation facilities...
(e) communicate information which he knows to be false, thereby endangering the safety of an aircraft in flight."[233]

b. Terorisme telah diterima sebagai kejahatan internasional dalam hukum kebiasaan internasional

Sesuai dengan putusan Mahkamah Internasional dalam *North Sea Continental Shelf Cases* dan *Asylum Case*, hukum kebiasaan internasional harus memenuhi 2 (dua) unsur, yaitu *state practice* dan *opinio juris*.[234]

State practice yang menunjukkan bahwa terorisme telah diterima sebagai kejahatan internasional dapat dilihat dari penerimaan negara-negara untuk terikat pada perjanjian-perjanjian internasional yang mengkriminalisasi terorisme, dan diinkorporasikannya ketentuan-ketentuan yang mengkriminalisasi terorisme di dalam peraturan perundang-undangan nasional negara-

[233] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), 974 United Nations Treaty Series 177, 23 September 1971, art. 1(1).

[234] Lihat hlm. 39-40 penulisan ini.

negara.[235] Sedangkan *opinio juris* ditunjukkan oleh pernyataan bahwa terorisme adalah tindakan terlarang melalui berbagai putusan pengadilan nasional dan internasional,[236] maupun pernyataan yang mengutuk terorisme oleh delegasi negara-negara yang disampaikan dalam berbagai forum internasional.[237]

Terorisme dan segala bentuknya juga telah secara tegas dilarang oleh PBB melalui berbagai resolusinya.[238]

---

[235] Amerika Serikat, *Iran and Libya Sanctions Act*, Public Law 104-172, 5 Agustus 1996; Amerika Serikat, *Antiterrorism Act*, 2000; Inggris, *Terrorism Act*, 2000; Australia, *Schedule to the Australian Security Legislation Amendment Terrorism Bill*, 2002, par. 100.1 (2); Kanada, *Antiterrorism Act*, Bill C-36, section 2 (2).

[236] Lihat hlm. 111-112 penulisan ini.

[237] Lihat diantaranya pernyataan Sheikha Haya Rashed Al Khalifa, Presiden Sesi ke-61 Majelis Umum PBB dalam Launching the UN Global Counter-Terrorism Strategy pada 19 September 2006: "*The passing of the resolution on the United Nations Global Counter-Terrorism Strategy with its annexed Plan of Action by 192 Member States represents a common testament that we, the United Nations, will face terrorism head on and that* ***terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, must be condemned and shall not be tolerated,***" "UN Action to Counter Terrorism," <http://www.un.org/terrorism/>, diakses pada 18 Maret 2008; lihat juga pernyataan yang dikeluarkan oleh Dewan Keamanan PBB dalam Outcome Document yang disampaikan dalam World Summit pada 14 September 2005: "*We strongly condemn terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes,* ***as it constitutes one of the most serious threats to international peace and security,***" lihat "UN Action to Counter Terrorism," <http://www.un.org/terrorism/makingadifference.shtml>, diakses 18 Maret 2008. Cetak tebal oleh penulis.

[238] Lihat antara lain: General Assembly Resolution 49/60 (1994); General Assembly Resolution 59/191 (2004); Security Council Resolution 1368 (2001); Security Council Resolution 1373 (2001); Security Council Resolution 1526 (2004); Security Council Resolution 1566 (2004); Security Council Resolution 1617 (2005).

PBB telah membentuk pula berbagai mekanisme untuk mencegah dan menanggulangi terorisme. Pada 8 September 2006, Majelis Umum PBB mengadopsi "*United Nations Global Counter-Terrorism Strategy*", sebuah program kerja yang bertujuan mencegah dan menanggulangi terorisme melalui kerjasama antar negara-negara anggota.[239] Pada 2001 dan 2005, Dewan Keamanan PBB membentuk *Counter-Terrorism Committee* dan melengkapinya dengan kompetensi yang luas untuk mewajibkan negara-negara mengambil tindakan-tindakan yang dibutuhkan untuk mencegah dan menanggulangi terorisme.[240] Pada 2004, Dewan Keamanan juga membentuk *Counter-Terrorism Committee Executive Directorate* untuk mewajibkan negara-negara menerima kunjungan delegasi Dewan Keamanan untuk memonitor

---

[239] "UN Action to Counter Terrorism," <http://www.un.org/terrorism/cttaskforce.shtml>, diakses pada 18 Maret 2008.

[240] United Nations Security Council Resolution 1373 (2001), S/Res/1373 (2001), adopted by the Security Council at its 4385th meeting on 28 September 2001; United Nations Security Council Resolution 1624 (2005), S/Res/1624 (2005) adopted by the Security Council at its 5261st meeting on 14 September 2005.

pelaksanaan kebijakan anti-terorisme di negara-negara tersebut.[241]

c. *Terorisme merupakan bentuk dari kejahatan-kejahatan internasional yang telah ada*

Disamping argumentasi-argumentasi yang menyatakan bahwa terorisme *per se* merupakan kejahatan internasional tersendiri, terdapat pula argumentasi-argumentasi yang menyatakan bahwa terorisme tiada lain merupakan bentuk-bentuk kejahatan internasional yang telah ada. Hal ini dikarenakan terorisme adalah fenomena yang dapat mengambil berbagai wujud dan manifestasi, atau juga dikenal dengan "karakter seperti bunglon" (*chameleon-like character*).[242] Oleh karena itu, terorisme dapat diklasifikasikan dalam berbagai kategori kejahatan yang berbeda, bergantung pada keadaan-keadaan dimana aksi tersebut dilakukan.[243]

---

[241] United Nations Security Council Resolution 1535 (2004), S/Res/1535 (2004), adopted by the Security Council at its 4936th meeting on 26 March 2004.

[242] A. Roberts, "Can We Define Terrorism?," *14 Oxford Today* (2002): 18.

[243] Yoram Dinstein, "Terrorism as an International Crime," *18 Israel Yearbook on Human Rights* (1989): 55-73.

(i) Terorisme sebagai kejahatan terhadap kemanusiaan

Seperti yang telah diuraikan dalam awal penulisan,[244] kejahatan terhadap kemanusiaan harus memenuhi unsur-unsur tertentu, seperti yang diatur dalam Pasal 7 ayat (1) Statuta Roma tentang Mahkamah Pidana Internasional.

Aksi-aksi terorisme tertentu dengan skala besar yang menelan jumlah korban yang sangat banyak dapat dikualifikasi sebagai kejahatan terhadap kemanusiaan. Contoh dari aksi terorisme semacam ini adalah serangan terhadap Menara Kembar *World Trade Center* (WTC) di New York, Amerika Serikat pada 11 September 2001, karena:

(i.i) Serangan ini bukan hanya merupakan serangan acak, namun dilakukan secara meluas dan sistematis.[245] Serangan ini meluas karena dilakukan dengan skala besar yang menghancurkan 2 (dua) pesawat udara sipil, 2 (dua) gedung

[244] Lihat hlm. 66-68 penulisan ini.

[245] James D. Fry, "Terrorism as a Crime Against Humanity and Genocide: The Backdoor to Universal Jurisdiction," *UCLA Journal of International Law and Foreign Affairs,* 7 UCLA J. Int'l L. & Foreign Aff. 169 (Spring/Summer 2002): 190.

pencakar langit, dan menelan setidaknya 3.000 korban jiwa.[246] Serangan ini juga sistematis karena dilakukan secara terstruktur, sebagai bagian dari rangkaian serangan terkoordinasi melawan Amerika Serikat. Rangkaian serangan ini dimulai dari serangan terhadap Menara WTC pada 1993, dilanjutkan oleh serangan terhadap Kedutaan Besar Amerika Serikat di Kenya dan Tanzania pada 1998, dan mencapai puncaknya pada serangan terhadap Menara WTC pada 2001 tersebut.[247] Investigasi yang dilakukan kemudian menunjukkan bahwa rangkaian serangan ini direncanakan dan dilakukan oleh pelaku yang sama, sehingga membuktikan bahwa serangan pada 2001 tersebut

[246] Vincent-Joël Proulx, "Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes against Humanity?," *American University International Law Review*, 19 Am. U. Int'l L. Rev. 1009 (2004): 1036.

[247] Fry, *loc. cit*; lihat juga "Ceremony Honors U.S. Embassy Bombing Victims," CNN, Sept. 11, 1998 ("[t]he U.S. embassies in Kenya and Tanzania were targets of twin car bombs August 7 that killed 257 people and wounded 5,500 others, mostly Kenyans"), <http://www.cnn.com/US/9809/11/embassy.bomb.memorial>.

merupakan serangan yang dilakukan secara sistematis.[248]

(i.ii) Serangan tersebut dilakukan terhadap warga sipil. Gedung *World Trade Center* adalah fasilitas umum yang merupakan salah satu pusat kegiatan ekonomi Amerika Serikat dan dunia. Gedung tersebut sama sekali bukan merupakan pusat kegiatan militer dan tidak menyediakan fasilitas militer apapun.[249] Oleh karena itu, pelaku dengan pasti telah memiliki niat untuk menyerang warga sipil dengan sengaja.

(i.iii) Bentuk dan akibat serangan dapat memenuhi beberapa elemen kejahatan terhadap kemanusiaan dalam Pasal 7 ayat (1) (a) dan (k) Statuta Roma, yaitu: pembunuhan (*murder*) dan tindakan-tindakan tidak manusiawi lainnya (*other inhumane acts*) yang menimbulkan penderitaan yang hebat (*great suffering*), atau luka fisik atau mental yang

[248] Fry, *ibid;* Laura Taylor Swain, "Liberty in the Balance: The Role of the Third Branch in a Time of Insecurity," *37 Suffolk U. L. Rev. 51* (2004): 51; Christopher L. Blakesley, "Ruminations on Terrorism and Anti-Terrorism Law & Literature," *57 U. Miami L. Rev. 1041* (2003):1047.

[249] Fry, *ibid*: 191.

serius (*serious injury to body or to mental or physical health*).[250]

(ii) Terorisme sebagai kejahatan perang

Pasal 8 (a) Statuta Roma menyebutkan bahwa salah satu bentuk kejahatan perang adalah pelanggaran berat terhadap *Geneva Conventions* 12 Agustus 1949. Bentuk pelanggaran berat ini diatur dalam masing-masing dari keempat Konvensi tersebut yang berbunyi:

> "*Grave breaches...shall be those involving any of the following acts,* ***if committed against persons or property protected by the Convention: willful killing,*** *torture or* ***inhuman treatment,...wilfully causing great suffering or serious injury to body or health...***"[251]

Sedangkan ruang lingkup "*persons or property protected by the Convention*" mencakup penduduk sipil[252] dan obyek-obyek penduduk sipil, seperti

---

[250] Proulx, *loc. cit.*: 1082; Blakesley, *loc. cit.*

[251] Geneva Convention I, art. 50; Geneva Convention II, art. 51; Geneva Convention III, art. 130; Geneva Convention IV, art. 147, cetak tebal oleh penulis.

[252] Lihat a.l. Pasal 51 (1) Additional Protocol I: "***The civilian population and individual civilians shall enjoy general protection against dangers*** *arising from military operations*"; Pasal 51 (2) Additional Protocol I: "*The* ***civilian population as such, as well as***

fasilitas makanan, minuman,[253] rumah sakit,[254] tempat-tempat budaya, dan rumah ibadah.[255] Oleh karena itu, dengan melakukan salah satu tindakan yang diatur dalam Pasal 130 di atas, termasuk melalui aksi terorisme terhadap penduduk sipil atau obyek-obyek sipil, maka pelaku dapat dianggap telah melakukan pelanggaran berat *Geneva Conventions* 1949, dan dengan demikian melakukan kejahatan perang dalam hukum internasional.

Lebih jauh lagi, *Geneva Conventions* 1949 dan Protokol-protokolnya 1977 juga secara tegas melarang bentuk-bentuk terorisme yang dilakukan

---

individual civilians, shall not be the object of attack"; Pasal 15 (1) Geneva Convention IV: "*Any party to the conflict may...propose to the adverse Party to establish... **neutralized zones intended to shelter**...the following persons, without distinction:...(b) **Civilian persons** who take no part in hostilities...*" Cetak tebal oleh penulis.

[253] Lihat a.l. Pasal 54 (2) Additional Protocol I: "*It is prohibited to attack, destroy, remove, or render useless objects indispensable to the survival of the civilian population, such as **foodstuffs**, agricultural areas for the production of foodstuffs, crops, livestock, **drinking water installations** and supplies and irrigation works...*" Cetak tebal oleh penulis.

[254] Pasal 18 (1) Geneva Convention IV: "***Civilian hospitals...may in no circumstances be the objeck of attack**, but shall at all times be respected and protected by the Parties to the conflict.*" Cetak tebal oleh penulis.

[255] Pasal 53 Additional Protocol I: "*...it is prohibited: (a) to commit any acts of hostility directed against the **historic monuments, works of art or places of worship** which constitute the cultural or spiritual heritage of peoples...*" Cetak tebal oleh penulis.

terhadap penduduk sipil di masa perang.[256] Karena itu, menurut Cassese, hukum humaniter internasional melarang dan mengkriminalisasi terorisme selama hal itu dilakukan terhadap warga sipil.[257] Menurut Komite Palang Merah Internasional, fakta bahwa beberapa ketentuan dalam *Geneva Conventions* dan Protokolnya melarang terorisme tanpa menspesifikasi bahwa tindakan tersebut harus dilakukan terhadap penduduk sipil harus ditafsirkan bahwa selama terorisme tersebut dilakukan terhadap obyek (sipil), maka ia juga dilarang dan dikriminalisasi.[258]

Terorisme sebagai kejahatan perang juga telah diangkat sebagai isu dalam salah satu proses persidangan Pengadilan Pidana Internasional untuk Bekas Yugoslavia. Dalam kasus *Galić*, Jaksa Penuntut Umum menuntut seorang mayor-jenderal Serbia yang dituduh telah melakukan kejahatan

[256] Geneva Convention IV, art. 33 (1); Additional Protocol II, art. 4 (2); Additional Protocol I, art. 51 (2); Additional Protocol II, art. 13 (2).

[257] Cassese, *op. cit.*, hlm. 127.

[258] Comité International de Croix Rouge, *Commentaire des Protocoles Additionnels* (Geneva: M. Nijhoff, 1986), at 1399 (§4538).

terorisme selama perang sipil di Sarajevo antara September 1992 dan Agustus 1994. Menurut Jaksa, ia harus bertanggungjawab karena telah melakukan kampanye untuk "membersihkan" penduduk sipil (*sniping and shelling*), sebagai bagian dari aksi terorisme yang ia lakukan.[259]

(iii)Terorisme sebagai genosida

Terorisme juga dapat dikualifikasi sebagai genosida jika ia memenuhi unsur-unsur kejahatan genosida yang diatur dalam Pasal 2 *Convention on the Prevention and Punishment of the Crime of Genocide*, yang telah diadopsi secara utuh dalam

---

[259] *Prosecutor v. Galić*, International Criminal Tribunal for the former Yugoslavia, Indictment (Case No. IT-98-29-I), 23 Oktober 2001. Dalam dakwaan yang ia ajukan, Jaksa Penuntut mengemukakan bahwa:

"*The principle objective of the campaign of sniping and shelling of civilians* ***was to terrorize the civilian population.*** *The intention to spread terror is evident, inter alia, from the widespread nature of civilian activities targeted, the manner in which the unlawful attacks were carried out, and the timing and the duration of the unlawful acts and threats of violence, which consisted of shelling and sniping. The nature of the civilian activities targeted demonstrates that the attacks were designed to strike at the heart, and be maximally disruptive, of civilian life.* ***By attacking when civilians were most vulnerable****, such as when seeking the necessities of life, visiting friends or relatives, engaging in burial rites or private prayer, or attending rare recreational events aimed precisely at countering the growing social malaise,* ***the attacks were intended to break the nerve of the population and to achieve the breakdown of the social fabric***" (§§22-25). Cetak tebal oleh penulis.

Pasal 6 Statuta Roma.[260] Contoh terorisme semacam ini adalah terorisme oleh pemerintah Rwanda di bawah rezim Presiden Habyarimana yang didominasi oleh suku Hutu, terhadap suku Tutsi di Rwanda pada 1993-1994.[261]

Sebagai bagian dari terorisme terhadap suku Tutsi, pemerintah Rwanda ketika itu memulai kampanye untuk menyebarkan teror dan rasa takut diantara suku Tutsi, diantaranya melalui radio semi-pemerintah, *Radio des Mille Collines*. Melalui radio ini, pemerintah Rwanda secara spesifik memerintahkan rakyat untuk "membunuh anggota suku Tutsi dan membuang mayat mereka di sungai-sungai Rwanda." Pembunuhan suku Tutsi selanjutnya terjadi secara besar-besaran, yang mengakibatkan hilangnya 500 ribu s.d. 1 juta nyawa di Rwanda sepanjang 1994.[262]

---

[260] Lihat hlm. 65-66 penulisan ini.

[261] Lihat Morris dan Scharf, *op. cit.*, hlm. 48-59: "The Historical Background of the Conflict in Rwanda" dan "The 1994 Genocide in Rwanda."

[262] *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, UN Doc. S/1994/1405 (1994), reprinted in Volume II, par. 63-64. Melalui *Radio des Mille Collines* pula, pemerintah Rwanda memberi label kepada suku Tutsi sebagai "musuh"

Di dalam proses persidangan terhadap para pelaku kejahatan ini di hadapan Pengadilan Pidana Internasional untuk Rwanda, banyak diantara mereka yang dituntut dan dihukum untuk kejahatan genosida, karena memenuhi unsur-unsur genosida, yaitu: (i) dilakukan secara sengaja, (ii) untuk menghancurkan kelompok etnis tertentu, yang dalam hal ini adalah suku Tutsi, dan (iii) dengan membunuh atau menimbulkan luka/ kerusakan serius terhadap fisik atau mental anggota kelompok tersebut. Salah satu persidangan ini dilakukan terhadap Jean Paul Akayesu, mantan Kepala Distrik Taba,[263] yang dihukum karena telah melakukan genosida terhadap setidaknya 2.000 anggota suku Tutsi di distriknya pada 7 April s.d akhir Juni 1994.[264]

---

dan "pengkhianat" yang "pantas untuk mati". Mereka juga menyuarakan propaganda agar "musuh" harus "dihabisi".

[263] Morris dan Scharf, *op. cit.*, hlm. 57.

[264] Lihat *Prosecutor v. Akayesu*, International Criminal Tribunal for Rwanda, 1998 I.C.T.R. P 12 (Sept. 2), <http://www.ictr.org/wwwroot/ENGLISH/cases/Akayesu/judgement/akay001.htm>.

2. Pelaku Terorisme Dapat Diadili Berdasarkan Yurisdiksi Universal

Hukum internasional hari ini mengenal setidaknya 10 perjanjian internasional yang memberikan hak kepada negara-negara anggota untuk melaksanakan yurisdiksi universal terhadap pelaku bentuk-bentuk terorisme. Empat diantaranya memiliki ketentuan yang secara sama berbunyi:

> "*The State Party in* ***the territory of which the alleged offender is found*** *shall,* ***if it does not extradite him,*** *be obliged,* ***without exception whatsoever and whether or not the offense was committed in its territory,*** *to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.*"[265]

Sedangkan 2 (dua) perjanjian lainnya memiliki ketentuan yang secara sama berbunyi:

> "*Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction*

[265] International Convention Against the Taking of Hostages, Dec. 4, 1979, 18 I.L.M. 1456, art. 8(1); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, art. 7; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), Sept. 23, 1971, 24 U.S.T. 564, art. 7; Hague Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641, art. 7, cetak tebal oleh penulis.

*over the offences set forth... **in cases where the alleged offender is present in its territory** and **it does not extradite that person** to any of the States Parties which have established their jurisdiction ...*"[266]

Sementara 4 (empat) perjanjian yang tersisa memberikan hak kepada negara-negara anggotanya untuk melaksanakan yurisdiksinya terhadap pelaku terorisme yang melakukan kejahatan perang berupa pelanggaran berat terhadap *Geneva Conventions* 12 Agustus 1949, terlepas dari kewarganegaraan pelaku.[267]

Ketiga ketentuan ini memiliki arti bahwa, selama pelaku kejahatan terorisme berada di wilayah suatu negara anggota Konvensi tersebut, dan jika negara tersebut tidak mengekstradisi pelaku ke negara lain, maka terlepas dari apakah kejahatan dilakukan di negara tersebut atau apakah pelaku merupakan warga negara tersebut, negara yang dimaksud berkewajiban untuk mengadili pelaku. Ketentuan ini

---

[266] Terrorist Bombings Convention, art. 6(4); International Convention for the Suppression of the Financing of Terrorism, 9 International Legal Materials 270, 9 Desember 1999 ["Terrorist Financing Convention"], art. 7(4), cetak tebal oleh penulis.

[267] Geneva Convention I, art. 49 (2); Geneva Convention II, art. 50 (2); Geneva Convention III, art. 129 (2); Geneva Convention IV, art. 146 (2) sama-sama berbunyi: "*Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such **grave breaches**, and shall bring such persons, **regardless of their nationality, before its own courts**...*" Cetak tebal oleh penulis.

tidak diragukan lagi memberikan kewenangan kepada negara-negara anggota Konvensi untuk melaksanakan yurisdiksi universal terhadap pelaku terorisme.

Yurisdiksi universal untuk mengadili pelaku terorisme terhadap fasilitas transportasi umum, seperti pembajakan dan penyanderaan penumpang di dalam pesawat udara,[268] pemasangan bahan peledak di dalam pesawat udara,[269] dan peledakan bus umum[270] juga telah secara tegas diakui dalam berbagai yurisprudensi pengadilan nasional. Ketentuan hukum nasional beberapa negara juga mengakui adanya yurisdiksi universal terhadap aksi-aksi atau sebagian aksi terorisme.[271]

---

[268] *United States v. Yunis,* 681 F. Supp. 896 (D.D.C. 1988), affirmed at 924 F. 2d 1086 (D.C. Cir. 1991): "*[a]ircraft hijacking may well be one of the few crimes so clearly condemned under the law of nations that states may assert universal jurisdiction to bring offenders to justice, even when the state has no territorial connection to the hijacking and its citizens are not involved. In light of the global efforts to punish aircraft piracy and hostage taking, international legal scholars unanimously agree that these crimes fit within the category of heinous *20 crimes for purposes of asserting universal jurisdiction*" (at 900- 901). Lihat juga *United States v. Rezaq.* 899 F.Supp 687, 709 (D.D.C. 1995) yang menegaskan kembali bahwa putusan Pengadilan dalam kasus *Yunis* yang menemukan: "*justification for universal jurisdiction over hijackers [to be] clear*."

[269] *United States v. Yousef*, 927 F.Supp. 673, 681-682 (S.D.N.Y. 1996).

[270] *Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1, 14 (D.D.C. 1998).

[271] Amerika Serikat, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1986) entitled "Universal Jurisdiction to Define and Punish

3. Pelaku Terorisme Dapat Diadili Berdasarkan Asas Retroaktif

Setelah dunia dikejutkan oleh bahaya dan kekejaman aksi-aksi terorisme yang semakin meningkat pada akhir abad ke-20, terjadi pergeseran dalam hukum pidana negara-negara untuk menanggapi kejahatan terorisme tersebut. Hukum pidana yang mengenal prinsip legalitas yang melarang penerapan asas retroaktif telah diberlakukan secara berbeda oleh negara-negara terhadap pelaku kejahatan terorisme. Hal ini tampak dari berbagai ketentuan hukum nasional dan internasional.

Kongres Amerika Serikat pada 2004 mengadopsi sebuah legislasi nasional yang memungkinkan korban atau keluarga korban terorisme yang dilakukan atau disponsori oleh suatu negara untuk menuntut pertanggungjawaban negara tersebut.[272]

Certain Offenses": "*A state has jurisdiction to define and prescribe punishment for certain offenses* ***recognized by the community of nations as of universal concern,*** *such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes and perhaps* ***certain acts of terrorism****...";* Spanyol, Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, art. 23 (4): "*Igualmente será competente la jurisdicción española para conocer de los hechos cometidos* ***por españoles o extranjeros fuera del territorio nacional*** *susceptibles de tipificarse, según la ley penal española, como alguno de los siguientes delitos:... (b)* ***Terrorismo***, lihat <http://noticias.juridicas.com/base_datos/Admin/lo6-1985.l1t1.html>, diakses 12 Juni 2008. Cetak tebal oleh penulis.

[272] Civil Liability for Acts of State Sponsored Terrorism, 28 U.S.C. § 1605(a)(7) (2004); lihat *Elahi v. Islamic Republic of Iran*,

Legislasi ini secara spesifik menyebutkan bahwa legislasi tersebut berlaku secara retroaktif terhadap aksi-aksi terorisme yang dilakukan sebelum legislasi tersebut berlaku.[273]

Sebelumnya pada 24 April 1996, pemerintah Amerika Serikat telah memberlakukan *Anti-Terrorism and Effective Death Penalty Act of 1996*,[274] sebagai bagian dari respons Amerika Serikat terhadap pengeboman teroris di Kota

---

124 F. Supp. 2d 97, D.D.C. (2000), at 106. Hukum internasional mengenal konsep yang bernama "State-sponsored terrorism", dimana sebuah negara dapat dianggap bertanggung jawab untuk mensponsori aksi terorisme, baik secara langsung maupun tidak langsung, yang dapat meliputi: (i) pengiriman agen negara atau orang lain yang dikontrol oleh negara tersebut; (ii) pengiriman kelompok atau individu yang bukan berasal dari negara tersebut, namun menerima bantuan keuangan, senjata, atau logistik dari negara tersebut; atau (iii) kelompok atau individu yang tidak menerima dukungan aktif negara, namun negara tersebut membiarkan (*acquiesce*) mereka untuk menggunakan wilayahnya dalam melakukan aksi terorisme. Negara yang telah dituduh menjalankan konsep ini adalah: Israel (seperti yang dituduhkan oleh negara-negara Arab sejak 1960-an), Kuba, Iran, dan Libya (seperti yang dituduhkan oleh Amerika Serikat dalam *Alejandre v. Republic of Cuba*, 996 F Supp 1239 (1997); *Flatow v. Islamic Republic of Iran*, 999 F.Supp. 1, 14 (D.D.C. 1998); *Cicippio v. Islamic Republic of Iran*, 18 F Supp. 2d 62 (1998); dan *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F 3d 748 (1998)). Untuk pembahasan lebih lanjut, lihat Bantekas dan Nash, *op. cit.*, hlm. 219; Cassese, *op. cit.*, hlm. 120-125; UN General Assembly Resolution 49/60 (adopted on 9 December 1994), Annex Declaration, par. 3: "*criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious, or any other nature that may be invoked to justify them.*"

[273] 28 U.S.C. § 1605(a)(7).

[274] Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. §§ 2241-2266 (1997)).

Oklahoma setahun sebelum legislasi tersebut diberlakukan.[275] Berbagai putusan pengadilan telah menyatakan bahwa legislasi ini berlaku pula secara retroaktif terhadap pelaku terorisme yang kejahatannya terjadi sebelum legislasi tersebut berlaku.[276] Rasio dari pemberlakuan legislasi tersebut adalah untuk "membuat jera teroris, menyediakan keadilan bagi korban, dan menjamin efektifitas hukuman mati."[277] Lebih lanjut, pemberlakuan asas retroaktif di Amerika Serikat dapat dilakukan selama kejahatan yang dimaksud adalah kejahatan internasional yang dapat diadili berdasarkan yurisdiksi universal dalam hukum kebiasaan internasional.[278]

Pemerintah Kanada pada 17 Januari 2002 memberlakukan *Bill C-36*, yang lebih umum dikenal sebagai *Anti Terrorism*

---

[275] Robin C. Trueworthy, "Retroactive Application Of The Anti-Terrorism And Effective Death Penalty Act Of 1996 To Pending Cases: Rewriting A Poorly Written Congressional Statute," *Washington University Law Quarterly*, 75 Wash. U. L.Q. 1707 (Winter 1997): 1707.

[276] *Lennox v. Evans*, 87 F.3d 431 (10th Cir. 1996); *Leavitt v. Arave*, 927 F. Supp. 394 (D. Idaho 1996); *Zuern v. Tate*, 938 F. Supp. 468 (S.D. Ohio 1996).

[277] 110 Stat. 1214; lihat Trueworthy, *loc. cit.*; lihat juga White House Fact Sheet on Terrorism, 1996 U.S. Newswire, Sept. 24, 1996, available in 1996 WL 12123033.

[278] Eric S. Kobrick, "The Ex Post Facto Prohibition and The Exercise of Universal Jurisdiction Over International Crimes," *Columbia Law Review*, 87 Colum. L. Rev. 1515 (November 1987): 1528-1529.

Act.[279] Legislasi ini sekaligus mengamendemen Kitab Undang-undang Hukum Pidana Kanada dengan menambahkan Bagian II.I.[280] Dalam Seksi 83.28 dari legislasi ini, pengadilan Kanada telah mengeluarkan sebuah *Order* yang memerintahkan legislasi ini diberlakukan secara retroaktif terhadap teroris yang telah meledakkan pesawat udara sipil *Air India* No. 182 ketika sedang terbang di atas wilayah Irlandia pada 1985.[281] Aksi terorisme yang telah merenggut 329 nyawa penumpang dan awak kabin ini, banyak diantaranya merupakan warga negara Kanada, adalah aksi terorisme terbesar dalam sejarah penerbangan sipil Kanada. Pada 23 Juli 2003, *British Columbia Superior Court* menyatakan bahwa *Order* tersebut sah secara konstitusional.[282]

Lebih lanjut, Pengadilan Pidana Internasional Rwanda juga telah memberlakukan ketentuan retroaktif secara parsial terhadap pelaku terorisme dalam Statutanya. Pasal 4

---

[279] Jeremy Millard, "Investigative Hearings under the Anti-Terrorism Act" 60(1) U.T.FAC.L. Rev 79-87 (2002).

[280] Criminal Code, R.S.C. 1985, c. C-46.

[281] Supreme Court of Canada, Press Release dated August 14, 2003; lihat Steven Skurka dan Margaret Bojanowska, "Canada's Response to Terrorism--The Investigative Hearing," *National Association of Criminal Defense Lawyers, Inc.*, 27-MAR Champion 36 (March, 2004).

[282] Skurka dan Bojanowska, *ibid.*

(d) Statuta mengatur bahwa yurisdiksi Pengadilan mencakup "*acts of terrorism*" yang dilakukan sebagai bentuk pelanggaran terhadap *Common Article 3 Geneva Conventions* dan *Additional Protocol II.*[283] Dalam pembahasan terdahulu, telah dikemukakan bahwa konsep "pelanggaran serius Protokol II" dalam Statuta Pengadilan Rwanda merupakan ketentuan yang bersifat retroaktif.[284] Oleh karena itu, hal tersebut menunjukkan bahwa Pengadilan Rwanda pun juga mengakui bahwa pelaku terorisme yang melakukan pelanggaran terhadap Protokol II dapat diadili berdasarkan asas retroaktif.

B. ARGUMENTASI YANG MENENTANG TERORISME SEBAGAI KEJAHATAN INTERNASIONAL

1. Terorisme Belum Diterima Secara Universal sebagai Kejahatan Internasional

a. *Masyarakat internasional belum sepakat akan definisi baku terorisme*

Walaupun terorisme telah dikutuk oleh masyarakat internasional secara luas, namun hingga hari ini masyarakat internasional masih memperdebatkan definisi

[283] Statute of Rwanda Tribunal, art. 4 (d).

[284] Lihat hlm. 59-62 penulisan ini.

terorisme itu sendiri. Dalam forum PBB khususnya, debat tersebut bahkan telah berlangsung lebih dari 30 tahun setelah Perang Dunia Kedua berakhir.[285]

Negara-negara maju menghendaki agar definisi terorisme mencakup tindakan terorisme yang dilakukan oleh rezim pemerintahan suatu negara,[286] sedangkan negara-negara berkembang menghendaki agar definisi terorisme tidak mencakup aksi-aksi kekerasan yang dilakukan oleh para "pejuang kebebasan" (*freedom fighters*), seperti individu atau kelompok yang memperjuangkan hak mereka untuk menentukan nasib sendiri (*right to self-determination*).[287]

Hal tersebut telah berakibat pada fakta bahwa hingga hari ini, hukum internasional belum mengenal suatu definisi baku terorisme yang diterima secara

---

[285] Cassese, *op. cit.*, hlm. 120.

[286] Boer Mauna, *Hukum Internasional- Pengertian, Peranan, dan Fungsi Dalam Era Dinamika Global*, Ed. 2, (Bandung: PT. Alumni, 2005), hlm. 655.

[287] Cassese, *loc. cit.*; lihat *Arab Convention for the Suppression of Terrorism 1998*, art. 2 (a); *Convention of the Organization of the Islamic Conference on Combating International Terrorism,* 1 Juli 1999, art. 2 (a); *Convention of the Organization of African Unity on the Prevention and Combating of Terrorism*, 14 Juli 1999, art. 3 (1).

universal oleh negara-negara.[288] Sebagian besar dari perjanjian-perjanjian internasional yang mengkriminalisasi terorisme atau bentuk-bentuk terorisme tidak mendefinisikan terorisme dalam bahasa yang lugas.[289] Hal ini berbeda dengan kejahatan-kejahatan internasional yang didefinisikan dengan tegas dalam berbagai perjanjian internasional atau instrumen hukum

---

[288] "*There has been a wide condemnation of terrorism, but international agreements to punish it have not,...been widely adhered to, principally because of inability to agree on a definition of the offense...,*" lihat Martin Dixon dan Robert McCorquodale, *Cases and Materials on International Law*, 4th Ed., (New York: Oxford University Press, 2003), hlm. 288.

[289] Misalnya, Pasal 4 *Statute of Rwanda Tribunal* menyebutkan bahwa Pengadilan memiliki yurisdiksi untuk menangani kejahatan terhadap *common Article 3 Additional Protocol II*, termasuk "*acts of terrorism*", tanpa mendefinisikan *acts of terrorism* itu sendiri atau menjabarkan tindakan-tindakan yang dapat dianggap sebagai *acts of terrorism*; Berbagai ketentuan dalam *Geneva Conventions* 1949 dan Protokolnya 1977 melarang terorisme untuk dilakukan kapan saja dan dimana saja (Pasal 33 (1) *Geneva Convention IV* dan Pasal 4 (2) *Additional Protocol II*), namun terorisme itu sendiri tidak didefinisikan, atau didefinisikan dengan tidak menyebutkan bahwa tindakan yang dimaksud merupakan "terorisme": "*...**acts or threats of violence the primary purpose of which is to spread terror among the civilian population**...*" (Pasal 51 (2) dan Pasal 13 (2) *Additional Protocol II,* cetak tebal oleh penulis); *Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971* (Pasal 1) dan *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents 1973* (Pasal 2) hanya menyebutkan tindakan-tindakan yang dilarang untuk dilakukan dan wajib dikriminalisasi oleh negara-negara anggota, tanpa menyebutkan bahwa tindakan-tindakan tersebut adalah "terorisme"; *Terrorist Bombing Convention* dan *Terrorist Financing Convention* secara menarik menyebutkan kata "*Terrorist*" atau "*Terrorism*" dalam namanya dan merujuk kepada berbagai instrumen hukum internasional yang mengutuk atau melarang terorisme dalam Mukadimahnya, namun tidak ada satupun ketentuan dalam kedua Konvensi tersebut yang mendefinisikan terorisme atau menyebutkan bahwa tindakan-tindakan yang dilarang dalam Pasal 2 masing-masing Konvensi merupakan "terorisme".

internasional lainnya.[290] Sebagian besar perjanjian internasional mengenai terorisme yang kini dikenal dalam hukum internasional hanya memiliki 2 (dua) karakterisktik, yaitu: (i) perjanjian yang melarang dan mengkriminalisasi terorisme tanpa mendefinisikan terorisme itu sendiri,[291] dan (ii) perjanjian yang melarang dan mengkriminalisasi bentuk-bentuk terorisme tanpa secara tegas menyebutkan bahwa tindakan-tindakan tersebut adalah terorisme.[292] Sedangkan

---

[290] Bandingkan ketentuan-ketentuan di atas dengan:

1. Pasal 2 *Convention on the Prevention and Punishment of the Crime of Genocide* 1948: "*In the present Convention,* ***genocide means*** *any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious groups, as such...*";
2. Pasal 7 (1) Rome Statute 1998: "*For the purpose of this Statute,* ***"crime against humanity" means*** *any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack...*";
3. Pasal 8 (2) Rome Statute 1998: "*For the purpose of this Statute,* ***"war crimes" mean****...*";
4. Pasal 1 Resolusi Majelis Umum PBB 3314 (XXIX), 14 Desember 1974: "***Aggression is*** *the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State...*";
5. Pasal 101 *United Nations Convention on the Law of the Sea* 1982: "***Piracy consists of*** *any of the following acts...*"

Cetak tebal oleh penulis.

[291] Lihat a.l.: Pasal 33 (1) *Geneva Convention IV* dan Pasal 4 (2) *Additional Protocol II*; Pasal 4 (d) *Statute of Rwanda Tribunal*.

[292] Lihat:

1. 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft;
2. 1970 Convention for the Suppression of Unlawful Seizure of Aircraft;
3. 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;

berbagai perjanjian yang mendefinisikan terorisme dengan tegas menunjukkan bahwa definisi tersebut tidak konsisten satu dengan yang lain.[293] Berbagai resolusi Dewan Keamanan PBB mengenai terorisme dari 1985 s.d.

---

4. 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons;
5. 1979 International Convention against the Taking of Hostages;
6. 1980 Convention on the Physical Protection of Nuclear Material;
7. 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;
8. 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;
9. 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;
10. 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf;
11. 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection;
12. 1997 International Convention for the Suppression of Terrorist Bombings;
13. 1999 International Convention for the Suppression of the Financing of Terrorism;
14. 2005 International Convention for the Suppression of Acts of Nuclear Terrorism;
15. European Convention on the Suppression of Terrorism, 27 Januari 1977;
16. Inter-American Convention Against Terrorism 2002.

[293] Lihat Pasal 2 *Convention of the Organization of the Islamic Conference on Combating International Terrorism*, 1 Juli 1999: "***All forms of international crimes,*** *including illegal trafficking in narcotics and human beings money laundering* ***aimed at financing terrorist objectives shall be considered terrorist crimes***." Ketentuan ini jauh lebih luas dari definisi dan ruang lingkup terorisme yang ada dalam Pasal 1 dan 2 *Arab Convention for the Suppression of Terrorism 1998*. Kedua Konvensi ini juga menganggap bahwa bentuk-bentuk terorisme yang telah dikriminalisasi dalam beberapa perjanjian PBB sebagai kejahatan terorisme (Pasal 1 (4) *Convention of the Organization of the Islamic Conference on Combating International Terrorism* dan Pasal 1 (3) *Arab Convention for the Suppression of Terrorism 1998*), hal mana tidak diatur dalam *Convention of the Organization of African Unity on the Prevention and Combating of Terrorism*, 14 Juli 1999. Cetak tebal oleh penulis.

2004 juga menunjukkan bahwa Dewan telah secara tidak tegas mendefinisikan terorisme atau tidak konsisten membedakan tindakan-tindakan yang merupakan terorisme dari tindakan-tindakan yang bukan merupakan terorisme.[294]

---

[294] Sebelum 1990, Dewan Keamanan memiliki kecenderungan untuk tidak menganggap aksi-aksi terorisme sebagai kejahatan yang dapat mengancam perdamaian dan keamanan internasional. Beberapa tindakan yang jelas merupakan serangan teroris seperti pembunuhan terhadap atlet Israel dalam Olimpiade Munich 1972 dan pembajakan pesawat Air France ke Entebbe pada 1976 tidak mendapatkan tanggapan Dewan sama sekali. Dewan untuk pertama kalinya menggunakan istilah "terorisme" dalam Resolusi 579 pada 1985 untuk mengacu pada serangkaian pembajakan pesawat udara sipil yang terjadi pada tahun itu, termasuk pembajakan Royal Jordanian Airlines, Egypt Air, dan maskapai penerbangan TWA. Setelah Perang Teluk pada 1991, Dewan mengeluarkan Resolusi 687 (1991) yang memerintahkan Irak untuk: "*...inform the Council that it will not commit or support any act of international terrorism or allow any organization directed towards the commission of such acts to operate within its territory and to condemn unequivocally and renounce all acts, methods and practices of terrorism* (par. 32)," tanpa menyebutkan aksi Irak manakah yang merupakan terorisme, dan hanya menyebutkan bahwa aksi penyanderaan dilarang dalam *1979 Hostages Convention*. Menyusul serangan teroris dalam kasus *Lockerbie,* Dewan memerintahkan Libya dalam Resolusi 748 (1992) untuk "*cease all forms of terrorist action and all assistance to terrorist groups*" dan untuk "*demonstrate its renunciation of terrorism*," namun Dewan tidak mendefinisikan terorisme itu sendiri dan juga tidak menyebutkan "*terrorist groups*" apakah yang dimaksud. Menyusul serangan teroris di Bali pada 2002, Dewan memandang serangan tersebut dalam Resolusi 1438: "*...like any act of international terrorism, as a threat to international peace and security*"; memanggil negara-negara untuk mengadili pelaku, perencana, dan sponsornya; dan juga mengekspresikan "*determination to combat all forms of terrorism*," (par. 1, 3-4), namun tidak menyebutkan definisi "*international terrorism*" atau "*forms of terrorism*" tersebut. Dalam Resolusi 1540 (2004), Dewan memerintahkan negara-negara untuk: "*...prohibit non-State actors from developing, acquiring, manufacturing, possessing, transporting, transferring or using nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes*." Istilah "*non-State actors*" dan "*means of delivery*" didefinisikan oleh Dewan dalam Resolusi ini, namun tidak demikian halnya dengan "*terrorist purposes*," yang sengaja dibiarkan tanpa definisi. Untuk keterangan lebih lanjut mengenai resolusi-resolusi lainnya, lihat Ben Saul, "Definition of Terrorism in the UN Security

Berbagai ketentuan perundang-undangan nasional negara-negara juga telah mendefinisikan terorisme secara berbeda satu sama lain.[295] Hal ini menunjukkan bahwa sampai hari ini, belum ada suatu definisi terorisme yang telah diterima sebagai bagian dari hukum kebiasaan internasional.

Belum adanya definisi baku terorisme dalam hukum internasional tersebut menunjukkan bahwa kualifikasi terorisme sebagai kejahatan internasional masih sukar dilaksanakan. Hal ini mengingat terorisme adalah suatu fenomena yang dapat mengambil berbagai wujud dan manifestasi yang berbeda-beda, dari pembunuhan, penyanderaan, hingga pembajakan alat transportasi umum. Oleh karena itu, negara-negara dapat dengan mudah

---

Council: 1985-2004," *Chinese Journal of International Law*, 4 Chinese J. Int'l L. 141 (June 2005).

[295] Bandingkan a.l., definisi terorisme dalam *Section 1 United Kingdom Terrorism Act 2000*, <http://www.legislation.hmso.gov.uk/acts2000> dan *New Zealand Terrorism Suppression Act 2002*, §§ 5(1)-(5) (N.Z.), <http://rangi.knowledge-basket.co.nz/gpacts/public/text/2002/an/034.html>, yang mensyaratkan bahwa terorisme harus menimbulkan kerugian (*injury*) yang serius, sementara dalam Section 2331 (1) *United States Federal Courts Administration Act of 1992*, Pub. L. No. 102- 572, *amended by USA Patriot Act 2001,* dan *India Prevention of Terrorism Act 2002*, § 3 (1), terorisme tidak harus menimbulkan kerugian yang serius, lihat Reuven Young, "Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation," *Boston College International and Comparative Law Review*, 29 B.C. Int'l & Comp. L. Rev. 23 (Winter 2006): 89.

menyatakan bahwa suatu tindakan adalah bentuk terorisme semata-mata sebagai bagian dari implementasi kepentingan politik mereka, dan bukan sebagai konsep hukum. Terorisme pun akhirnya telah menjadi kejahatan yang dipolitisasi[296] dan membuka kemungkinan akan adanya pelanggaran hak asasi manusia oleh negara-negara dengan alasan "perang melawan terorisme".[297]

Untuk mengatasi permasalahan tersebut, masyarakat internasional perlu mengadopsi suatu definisi baku terorisme yang secara universal diterima oleh negara-negara. Definisi ini harus lebih dari sekedar "apa yang terlihat, berbau, dan membunuh seperti terorisme adalah

---

[296] Lihat a.l. *Good Friday Agreement* antara Pemerintah Inggris dan *Irish Republican Army* (IRA) pada 10 April 1998, *reprinted in* 37 International Legal Materials (1998), 751, Strand 10 (1). Dalam perjanjian ini, Inggris sepakat untuk memberikan amnesti kepada anggota IRA yang ditawan Inggris di Irlandia Utara atas tuduhan terorisme. Pemberian amnesti menunjukkan bahwa Inggris menganggap terorisme sebagai kejahatan politik, lihat Bantekas dan Nash, *op. cit.*, hlm. 228.

[297] Lihat a.l. *Northern Ireland (Emergency Provisions) Act 1978*, *Chapter 5*, legislasi yang diberlakukan Inggris sebagai respons terhadap terorisme yang berakar dari konflik di Irlandia Utara. Legislasi ini menghapuskan beberapa hak tersangka terorisme, diantaranya hak atas pra-peradilan dan hak untuk diadili berdasarkan sistem juri. Lihat juga putusan *United States Supreme Court* dalam *Hamdan v. Rumsfeld*, 29 Juni 2006, 548 US (2006), pp. 62-68, dimana Pengadilan memutuskan bahwa tindakan Amerika Serikat dalam mengadili tersangka-tersangka terorisme di hadapan Komisi Militer dan bukan di Pengadilan Umum melanggar hukum federal Amerika Serikat dan melanggar *Geneva Conventions 1949*.

terorisme".[298] Diadopsinya definisi tersebut sangat penting, mengingat bahwa salah satu karakteristik yang harus dimiliki sebuah tindakan agar dapat dikualifikasi sebagai kejahatan internasional adalah tindakan tersebut harus telah diterima secara universal sebagai kejahatan internasional oleh masyarakat internasional, baik dalam hukum perjanjian internasional maupun hukum kebiasaan internasional.[299] Sementara itu, kenyataan yang ada dalam hukum internasional hari ini menunjukkan bahwa tiadanya definisi baku terorisme telah menyebabkan perbedaan pendapat antar negara-negara mengenai tindakan apa yang merupakan terorisme dan tindakan apa yang bukan merupakan terorisme, sehingga penerimaan universal terorisme sebagai kejahatan dalam hukum internasional masih sukar dilihat. Oleh karena itu, terorisme belum pasti diterima sebagai kejahatan internasional.

[298] Sir Jeremy Greenstock, KCMG Permanent Representative of the United Kingdom of Great Britain and Northern Ireland, General Assembly Debate on Terrorism, 1 October 2001, <http://www.un.org/terrorism/statements/ukE.html>.

[299] Lihat hlm. 36-43 penulisan ini.

b. *Masyarakat internasional belum mengakui secara tegas bahwa terorisme adalah kejahatan internasional*

Identifikasi sebuah tindakan sebagai kejahatan internasional dapat dilakukan dengan melihat apakah: (i) tindakan tersebut telah diterima secara tegas sebagai kejahatan internasional dalam instrumen hukum internasional,[300] atau (ii) tindakan tersebut dapat diadili melalui mekanisme yudisial kolektif yang didirikan oleh masyarakat internasional.[301]

Cara pertama ditunjukkan misalnya, oleh penerimaan genosida sebagai kejahatan internasional. Genosida telah secara tegas dinyatakan sebagai kejahatan dalam hukum internasional oleh Pasal 1 *Convention on the Prevention and Punishment of the Crime of Genocide 1948*. Fakta bahwa tidak hanya terdapat sejumlah besar negara-negara yang setuju untuk terikat oleh Konvensi ini,[302] namun juga bahwa Mahkamah Internasional telah mengakui

[300] *Ibid.*

[301] Lihat hlm. 33 penulisan ini.

[302] Sampai dengan 18 Juli 2007, *Convention on the Prevention and Punishment of the Crime of Genocide 1948* telah diratifikasi, diaksesi, atau disuksesi oleh 140 negara dan telah ditandatangani oleh 41 negara, lihat Office of the United Nations High Commissioner for Human Rights, <http://www2.ohchr.org/english/bodies/ratification/1.htm>, diakses 13 Juni 2008.

pelarangan genosida sebagai bagian dari hukum kebiasaan internasional[303] menunjukkan afirmasi bahwa masyarakat internasional telah menerima genosida sebagai kejahatan internasional.

Cara kedua ditunjukkan oleh penerimaan kejahatan terhadap kemanusiaan, kejahatan perang, kejahatan terhadap perdamaian, dan agresi sebagai kejahatan internasional. Masyarakat internasional telah sepakat untuk membentuk mekanisme yudisial kolektif berupa pengadilan-pengadilan internasional untuk mengadili pelaku masing-masing kejahatan tersebut. Kejahatan terhadap kemanusiaan dan kejahatan perang telah dapat diadili oleh Pengadilan Nuremberg,[304] Pengadilan Tokyo,[305] Pengadilan Yugoslavia,[306] Pengadilan Rwanda,[307] dan Mahkamah Pidana Internasional.[308] Sedangkan kejahatan terhadap perdamaian telah dapat diadili oleh

---

[303] Advisory Opinion on Genocide Convention, *loc. cit.*

[304] Nuremberg Charter, art. 6 (c) dan (b).

[305] Charter of the International Military Tribunal for the Far East sitting at Tokyo ["Tokyo Charter"], art. 5 (c) dan (b).

[306] Statute of Yugoslavia Tribunal, art. 5.

[307] Statute of Rwanda Tribunal, art. 3.

[308] Rome Statute, art. 7 (1).

Pengadilan Nuremberg[309] dan Pengadilan Tokyo,[310] sementara agresi dapat diadili oleh Pengadilan Nuremberg,[311] Pengadilan Tokyo,[312] dan Mahkamah Pidana Internasional.[313] Adanya mekanisme yudisial kolektif internasional tersebut menunjukkan bahwa masyarakat internasional mengakui secara tegas bahwa kejahatan-kejahatan yang disebutkan di atas memang merupakan kejahatan internasional, dan karenanya perlu ditangani melalui mekanisme yudisial internasional.

Sebaliknya dalam hal terorisme, terorisme belum dapat diidentifikasi sebagai kejahatan internasional melalui cara pertama ataupun kedua. Pertama, belum ada perjanjian internasional yang secara tegas mengakui bahwa terorisme merupakan kejahatan internasional, dan kedua, belum ada mekanisme yudisial kolektif yang didirikan masyarakat internasional untuk mengadili pelaku terorisme secara efektif. Hal ini ditunjukkan

[309] Nuremberg Charter, art. 6 (a).

[310] Tokyo Charter, art. 5 (a).

[311] Nuremberg Charter, art. 6 (a).

[312] Tokyo Charter, art. 5 (a).

[313] Rome Statute, art. 5 (1).

oleh fakta bahwa pelaku terorisme belum dapat diadili secara efektif oleh kelima pengadilan internasional yang didirikan oleh masyarakat internasional untuk menangani kejahatan-kejahatan internasional.[314]

c. *Terorisme telah ditolak untuk dicantumkan dalam ruang lingkup yurisdiksi Mahkamah Pidana Internasional*

Setelah Trinidad dan Tobago mengajukan usulan kepada Majelis Umum PBB pada 1989 untuk membentuk suatu pengadilan internasional permanen[315] yang dapat menangani pelaku kejahatan-kejahatan internasional, masyarakat internasional pun memulai rangkaian perundingan untuk menuangkan ide tersebut menjadi kenyataan. Ketika

[314] Terorisme tidak termasuk dalam ruang lingkup yurisdiksi Pengadilan Nuremberg, Pengadilan Tokyo, Pengadilan Yugoslavia, maupun Mahkamah Pidana Internasional. Satu-satunya pengadilan internasional yang mencantumkan terorisme dalam ruang lingkup yurisdiksinya adalah Pengadilan Rwanda. Pasal 4 (d) Statuta Pengadilan Rwanda mengenal yurisdiksi Pengadilan terhadap "*acts of terrorism*", sebagai bagian dari "*violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II*". Namun Statuta tersebut tidak mendefinisikan maupun menguraikan tindakan-tindakan apa saja yang dapat dianggap sebagai "*acts of terrorism*". Hal ini menunjukkan bahwa Pengadilan memiliki diskresi yang terlampau luas untuk menganggap sebuah tindakan sebagai "*acts of terrorism*", selama dilakukan dalam konteks pelanggaran terhadap *common Article 3 Geneva Conventions* dan *Additional Protocol II*. Oleh karena itu, efektifitas ketentuan ini dalam mengadili tersangka-tersangka "terorisme" patut dipertanyakan.

[315] Pada mulanya, Trinidad dan Tobago memulai inisiatif ini agar pengadilan internasional yang akan dibentuk dapat mengadili pedagang narkotika internasional. Lihat *Letter dated 21 August 1989 from the Permanent Representative of Trinidad and Tobago to the UN Secretary-General*, UN GAOR, 47th Session, Annex 44, Agenda Item 152, *UN Doc. A./44/195 (1989).*

Statuta Roma tentang Mahkamah Pidana Internasional resmi berlaku pada 2002, Mahkamah memiliki yurisdiksi untuk mengadili 4 (empat) jenis kejahatan internasional, yaitu genosida, kejahatan terhadap kemanusiaan, kejahatan perang, dan agresi.[316]

Dalam berbagai perundingan antar negara yang dilakukan sebelum Mahkamah berdiri, salah satunya dalam Konferensi Roma, terdapat perdebatan mengenai apakah terorisme juga harus dicantumkan sebagai salah satu kejahatan yang dapat diadili oleh Mahkamah. Walaupun beberapa negara menyetujui bahwa terorisme harus dicantumkan dalam ruang lingkup yurisdiksi Mahkamah,[317] pada akhirnya kejahatan tersebut tidak pernah dicantumkan sebagai kejahatan yang termasuk dalam ruang lingkup yurisdiksi Mahkamah.

Penolakan ini datang terutama dari Amerika Serikat, yang memberikan 4 (empat) alasan mengapa

[316] Rome Statute, art. 5 (1).

[317] Negara-negara tersebut adalah: Aljazair, Armenia, Kongo, India, Israel, Kirgistan, Libya, Macedonia, Rusia, Sri Langka, Tajikistan, dan Turki. Aljazair, India, Sri Langka, dan Turki secara khusus meminta "terorisme internasional" untuk dimasukkan ke dalam daftar salah satu tindakan yang merupakan "*crime against humanity*" pada pasal 7 (1) Statuta Roma. Lihat Kittichaisaree, *op. cit.*, hlm. 227; lihat pula *Doc. A/CONF.183/C.1/L.27/Corr. 1*, 29 Juni 1998.

terorisme harus tidak dicantumkan dalam ruang lingkup yurisdiksi Mahkamah Pidana Internasional:[318]

(i) Terorisme belum didefinisikan dengan baik dalam hukum internasional;

(ii) Pencantuman terorisme dalam yurisdiksi Mahkamah akan berakibat pada politisasi Mahkamah;

(iii) Terorisme bukan merupakan kejahatan yang cukup serius untuk dicantumkan dalam yurisdiksi Mahkamah; dan

(iv) Terorisme akan lebih efektif jika ditangani dalam level nasional, jika perlu, melalui kerja sama antar negara.

Kenyataan bahwa terorisme telah ditolak dari ruang lingkup kejahatan-kejahatan yang dapat ditangani Mahkamah Pidana Internasional menimbulkan keraguan yang mendalam bahwa terorisme merupakan kejahatan internasional. Hal ini terutama mengingat bahwa Mahkamah Pidana Internasional kini adalah satu-satunya pengadilan pidana internasional permanen di dunia yang memiliki

[318] Proulx, *loc. cit.*: 1023, mengacu kepada Cassese, *loc. cit.*, hlm. 125.

kompetensi untuk mengadili pelaku kejahatan-kejahatan internasional.

2. Pelaku Terorisme Tidak Dapat Diadili Berdasarkan Yurisdiksi Universal

Belum adanya penerimaan universal terorisme sebagai kejahatan internasional juga menjadi salah satu penyebab pelaku terorisme tidak dapat diadili berdasarkan yurisdiksi universal. Dalam kasus *Tel-Oren v. Libya* yang diputus oleh *Court of Appeals of the District of Columbia* pada 1984, orang-orang yang selamat dan beberapa wakil korban serangan teroris terhadap sebuah bus di Israel membawa gugatan hukum melawan Libya ke hadapan pengadilan Amerika Serikat.[319] Pengadilan memutuskan bahwa ia tidak memiliki kompetensi untuk menangani kasus tersebut karena terorisme belum terbukti menjadi kejahatan yang melahirkan yurisdiksi universal dalam hukum kebiasaan internasional. Pengadilan menyatakan bahwa:

> "*[w]hile this nation unequivocally condemns all terrorist attacks, that sentiment is not universal.*

[319] *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984).

> *Indeed, the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus.*"[320]

Hakim Edwards dalam kasus tersebut lebih lanjut menemukan bahwa tidak ada kesepakatan internasional yang mengutuk terorisme sebagai kejahatan terhadap "hukum bangsa-bangsa" (*law of nations*).[321] Hakim Edwards memberikan alasan bahwa:

> "*Unlike the issue of individual responsibility, which much of the world has never even reached, terrorism has evoked strident reactions and sparked strong alliances among numerous states. Given this division, I do not believe that under current law terrorist attacks amount to law of nations violations.*"[322]

Dalam memberikan dasar pertimbangannya tersebut, Hakim Edwards juga mengutip bahwa masyarakat internasional melalui berbagai Resolusi Majelis Umum PBB telah memberikan pendapat yang berbeda-beda mengenai apa saja tindakan yang

---

[320] *Ibid*, at 795.

[321] *Ibid*, seperti yang dikutip oleh Michael Rosetti, "Terrorism as a Violation of the Law of Nations after *Kadic v. Karadzic*," *Saint John's Journal of Legal Commentary*, 12 St. John's J. Legal Comment. 565 (Spring 1997): 585.

[322] *Ibid*, seperti yang dikutip oleh Proulx, *loc. cit.*: 1024.

dapat dianggap sebagai aksi teroris. Resolusi-resolusi ini berkaitan dengan apakah tindakan yang dilakukan untuk membebaskan diri dari dominasi asing dan penjajahan (*colonial and alien domination*) merupakan aksi terorisme.[323]

Pendapat pengadilan Amerika Serikat dalam kasus tersebut masuk akal mengingat bahwa masyarakat internasional bukan hanya belum mendefinisikan dengan jelas terorisme, namun juga belum menyamakan pendapat mengenai tindakan-tindakan apa saja yang dapat dianggap sebagai terorisme. Karena pendapat masing-masing negara mengenai terorisme masih banyak berbeda satu sama lain, maka prinsip yurisdiksi universal juga sukar dilaksanakan terhadap pelaku terorisme. Hal tersebut kembali menunjukkan bahwa terorisme belum terbukti merupakan kejahatan internasional.

Antonio Cassese mengadopsi pandangan yang dapat merupakan jalan tengah atas permasalahan ini. Ia berpendapat bahwa tidak selamanya aksi terorisme tidak dapat dikualifikasi sebagai kejahatan internasional. Aksi-aksi terorisme tertentu yang melibatkan otoritas negara dan menunjukkan dimensi antarnegara merupakan kejahatan

[323] G.A. Res. 3103, U.N. GAOR, Supp. No. 28 at 512, U.N. Doc. A/9102 (1973), seperti yang dikutip oleh Rosetti, *loc. cit.*

internasional. Sementara itu, aksi terorisme yang ruang lingkupnya terbatas dalam wilayah satu negara saja dan tidak membahayakan keamanan negara lain bukan merupakan kejahatan internasional.[324] Pendapatnya ini dapat diartikan bahwa selama terorisme memiliki ruang lingkup internasional, maka pelakunya dapat diadili berdasarkan yurisdiksi universal, karena telah merugikan banyak negara. Sedangkan terhadap pelaku terorisme yang murni merugikan sebuah negara saja, yurisdiksi universal tidak dapat diberlakukan karena terorisme semacam ini merupakan "terorisme domestik" yang hanya tunduk pada yurisdiksi negara yang menanggung kerugian akibat kejahatan tersebut.[325]

3. Asas Non-Retroaktif Tetap Harus Diberlakukan Terhadap Pelaku Terorisme

Hukum *ex post facto*, yang dikarakterisasikan oleh aplikasi asas retroaktif tidak boleh diberlakukan karena

[324] Cassese, *op. cit.*, hlm. 125-126.

[325] Terorisme semacam ini misalnya terorisme oleh ETA di Spanyol, IRA di Inggris, atau Red Brigades di Italia, lihat *ibid*, hlm. 128.

menyimpang dari keadilan dan membuka kesempatan untuk adanya penyelewengan.[326]

Dalam hukum internasional hari ini terdapat setidaknya 4 (empat) perjanjian hak asasi manusia dunia yang secara tegas melarang asas retroaktif untuk diberlakukan kepada siapapun.[327] Sebagian besar dari perjanjian-perjanjian tersebut bahkan secara spesifik mengatur bahwa hak seseorang untuk tidak dihukum berdasarkan hukum yang berlaku surut merupakan hak yang tidak dapat dikurangi dalam keadaan apapun (*non-derogable right*), termasuk dalam keadaan darurat negara (*public emergency*).[328] Terorisme tidak diragukan lagi merupakan salah satu bentuk keadaan darurat negara, seperti yang telah ditegaskan oleh *European Court of Human Rights* dalam berbagai yurisprudensinya.[329] Hal ini menunjukkan bahwa

---

[326] Bryant Smith, "Retroactive Laws and Vested Rights," *6 Tex. L. Rev. 409* (1928) at 412.

[327] International Covenant on Civil and Political Rights, 999 United Nations Treaty Series 171, 16 Desember 1966 ["ICCPR"], art. 15; (European) Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 5, 4 November 1950 ["ECHR"], art. 7; American Convention on Human Rights, OAS Treaty Series No. 36, 22 November 1969 ["AmCHR"], art. 9; African Charter on Human and Peoples' Rights, 1520 United Nations Treaty Series 363, 27 Juni 1981, art. 7 (2).

[328] ICCPR, art. 4 (2); ECHR, art. 15 (2); AmCHR, art. 27 (2).

[329] *Brannigan and McBride v. United Kingdom*, European Court of Human Rights, ECHR Series A (1993) No. 258-B, par. 47: "...*impact of*

pelaku terorisme sekalipun tidak dapat diadili berdasarkan asas retroaktif karena mereka tetap memiliki hak asasi untuk diperlakukan sama seperti pelaku kejahatan lainnya, yaitu diadili berdasarkan hukum yang telah ada pada saat mereka melakukan kejahatan.

Pengadilan-pengadilan Amerika Serikat juga telah mengadopsi pandangan bahwa asas non-retroaktif merupakan asas yang tetap harus dijunjung tinggi bahkan terhadap teroris. Hal ini ditunjukkan dari berbagai yurisprudensi pengadilan yang menentang pemberlakuan *Anti-Terrorism and Effective Death Penalty Act 1996* di Amerika Serikat secara retroaktif.[330] Sebelumnya pada 1986, Departemen Kehakiman Amerika Serikat juga telah menolak permintaan 44 senator untuk mendakwa Yaser Arafat atas tuduhan pembunuhan 2 (dua) diplomat Amerika Serikat di Khartoum, Sudan yang diduga dilakukan oleh sekelompok teroris yang bertindak atas

---

terrorist violence *in Northern Ireland and elsewhere in the United Kingdom...the Court considers* ***there can be no doubt that such a public emergency existed****...";* lihat *Lawless v. Ireland*, European Court of Human Rights, 1 Juli 1961, Series A No. 3, hlm. 56, par. 28; *Ireland v. United Kingdom*, European Court of Human Rights, Series A No. 25, hlm. 78, par. 205; lihat pula *Klass and Others v. Germany*, European Court of Human Rights, 6 September 1978, Series A No. 28, hlm. 23, par. 49. Cetak tebal oleh penulis.

[330] *United States v. Barnett*, No. 96 C 1274, 1996 WL 400016 (N.D. Ill. July 15, 1996); *Warner v. United States*, 926 F. Supp. 1387 (E.D. Ark. 1996); *United States v. Trevino*, No. 96 C 828 1996 WL 252570 (N.D. Ill. May 10, 1996).

perintahnya.[331] Alasan Departemen Kehakiman adalah legislasi yang akan digunakan untuk mendakwa Arafat ketika itu diamandemen pada 1976,[332] sedangkan pembunuhan diplomat tersebut terjadi pada 1973. Hal ini menunjukkan bahwa legislasi akan diaplikasikan secara retroaktif, padahal aplikasi asas retroaktif secara tegas dilarang oleh Konstitusi Amerika Serikat.[333]

---

[331] Legal Mechanisms to Combat Terrorism: Hearing before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 1-332 (1986), lihat Kobrick, *loc. cit.*: 1515.

[332] Legislasi yang dimaksud adalah 18 U.S.C. § 1116, yang mengenakan tanggung jawab pidana federal kepada: "*whoever kills or attempts to kill, a[n] ... internationally protected person.*" Yang dimaksud dengan "*internationally protected person*" dalam legislasi ini adalah: *(A) a Chief of State or the political equivalent, head of government, or Foreign Minister whenever such person is in a country other than his own and any member of his family accompanying him; or (B) any other representative, officer, employee, or agent of the United States Government, a foreign government, or international organization who at the time and place concerned is entitled pursuant to international law to special protection against attack upon his person, freedom, or dignity, and any member of his family then forming part of his household.*

[333] U.S. Constitution, art. I, § 9, cl. 3: "*No Bill of Attainder or ex post facto law shall be passed.*"

BAB IV

PERSPEKTIF INDONESIA TERHADAP TERORISME SEBAGAI KEJAHATAN INTERNASIONAL

Asia Tenggara menjadi fokus baru masyarakat internasional dalam perang melawan terorisme pasca-serangan teroris di Amerika Serikat pada 11 September 2001. Hal ini menyusul rangkaian serangan teroris dengan menggunakan bom berdaya ledak tinggi di Bali, Indonesia pada 12 Oktober 2002.[334] Serangan ini adalah yang terbesar dalam rangkaian serangan teroris di Indonesia sepanjang 2000 s.d. 2005.

[334] "Bombings Have JI Written All over Them", Straits Times (Singapore), 14 Oct 2002.

Fakta bahwa sejumlah besar warga negara asing turut menjadi korban dalam berbagai serangan teroris di Indonesia[335] telah mengundang perhatian utama masyarakat internasional dalam memonitor upaya pencegahan dan penanggulangan terorisme di Indonesia. Perhatian ini antara lain dimanifestasikan dalam Resolusi Dewan Keamanan PBB 1438 (2002) yang mengutuk sekeras-kerasnya peledakan bom di Bali pada 2002 dan menyerukan kepada semua negara untuk bekerja sama dan memberikan dukungan dan bantuan kepada pemerintah Indonesia untuk mengadili pelaku, perencana, dan sponsor aksi

[335] Dalam serangan teroris di Bali pada 2002, dari 202 korban tewas, 164 merupakan warga negara asing. Delapan puluh delapan diantaranya merupakan warga negara Australia, sedangkan sisanya antara lain merupakan warga negara Inggris, Selandia Baru, Amerika Serikat, Kanada, Perancis, Swiss, Brazil, Jerman, Belanda, Jepang, dan Ekuador, lihat "Remember Bali: Bali 12.10.2002 Memorial Site," <http://www.indo.com/bali121002/inmemoriam.html>, diakses 23 Juni 2008. Sedangkan dalam serangan teroris di Bali pada 2005, warga negara asing yang tewas maupun terluka berasal dari Australia, Jepang, Korea Selatan, Amerika Serikat, Kanada, dan Inggris, lihat: "Expats flee Bali after threats," <http://www.news.com.au/story/0,10117,16788455-2,00.html>, diakses 23 Juni 2008;
"1 Japanese Killed, 4 Injured in Bali Blasts," <http://news.xinhuanet.com/english/2005-10/02/content_3575384.htm>, diakses 23 Juni 2008;
"8 S. Korean Tourists Injured in Bali Bombings," <http://news.xinhuanet.com/english/2005-10/02/content_3574471.htm>, diakses 23 Juni 2008;
"Three Canadians Injured in Bali Bombings," <http://www.cbc.ca/story/world/national/2005/10/01/BaliCanadians20051001.html>, diakses 23 Juni 2008;
"Bali Terrorist Blasts Kill at Least 26," <http://edition.cnn.com/2005/WORLD/asiapcf/10/01/bali.blasts/index.html>, diakses 23 Juni 2008.

terorisme tersebut.[336] Sejumlah resolusi PBB lainnya juga secara tegas mewajibkan negara-negara, termasuk Indonesia, untuk menempuh langkah-langkah yang telah ditentukan PBB dalam upaya memerangi terorisme.[337]

Meningkatnya perhatian masyarakat internasional terhadap permasalahan terorisme di Indonesia menimbulkan pertanyaan mengenai perspektif Indonesia sendiri, sebagai salah satu korban terbesar terorisme di Asia Tenggara, terhadap kualifikasi terorisme sebagai kejahatan internasional. Perspektif tersebut akan dijabarkan dalam bab ini dengan mengacu pada berbagai ketentuan hukum positif dan yurisprudensi pengadilan Indonesia.

A. PERSPEKTIF INDONESIA TERHADAP TERORISME SEBAGAI TINDAKAN YANG TELAH DITERIMA MASYARAKAT INTERNASIONAL SEBAGAI KEJAHATAN INTERNASIONAL

Dalam kurun waktu kurang dari 1 (satu) minggu sejak peristiwa peledakan bom di Bali pada 2002, pemerintah

[336] United Nations Security Council Resolution 1438 (2002), S/Res/1438, adopted by the Security Council at its 4624th meeting, on 14 October 2002, par. 1 & 3.

[337] Security Council Resolution 1373 (2001), S/Res/1373, 28 September 2001; Security Council Resolution 1535 (2004), S/Res/1535, 26 March 2004; Security Council Resolution 1624 (2005), S/Res/1624, 14 September 2005.

Indonesia mengundangkan Peraturan Pemerintah Pengganti Undang-undang (Perpu) No. 1 Tahun 2002 tentang Pemberantasan Tindak Pidana Terorisme.[338] Perpu ini kemudian ditetapkan menjadi Undang-undang (UU) No. 15 Tahun 2003 pada 4 April 2003.[339] Dalam Mukadimah Penjelasan Perpu tersebut, pemerintah Indonesia mengakui bahwa terorisme merupakan kejahatan internasional. Pengakuan tersebut tampak dari Paragraf 3 dan 4 Mukadimah Penjelasan Perpu:

> " **Terorisme merupakan kejahatan terhadap kemanusiaan** dan peradaban serta merupakan salah satu ancaman serius terhadap kedaulatan setiap negara karena **terorisme sudah merupakan kejahatan yang bersifat internasional** yang menimbulkan bahaya terhadap keamanan, perdamaian dunia, serta merugikan kesejahteraan masyarakat...
>
> Komitmen masyarakat internasional dalam mencegah dan memberantas terorisme sudah diwujudkan dalam berbagai konvensi internasional yang menegaskan bahwa terorisme merupakan kejahatan yang mengancam perdamaian dan keamanan umat manusia, **sehingga seluruh anggota Perserikatan Bangsa-bangsa, termasuk Indonesia, wajib** mendukung dan melaksanakan resolusi Dewan Keamanan Perserikatan Bangsa-bangsa yang mengutuk dan menyerukan

[338] Peristiwa Bom Bali terjadi pada 12 Oktober 2002, sedangkan Perpu No. 1 Tahun 2002 diundangkan pada 18 Oktober 2002, lihat Indonesia, *Peraturan Pemerintah Pengganti Undang-undang tentang Pemberantasan Tindak Pidana Terorisme,* Perpu No. 1 Tahun 2002, LN No. 106 Tahun 2002, TLN No. 4232 ["Perpu No. 1/2002"].

[339] Indonesia, *Undang-undang tentang Penetapan Peraturan Pemerintah Pengganti Undang-undang No. 1 Tahun 2002 tentang Pemberantasan Tindak Pidana Terorisme Menjadi Undang-undang*, UU No. 15 Tahun 2003, LN No. 45 Tahun 2003, TLN No. 4284 ["UU No. 15/2003"].

seluruh anggota Perserikatan Bangsa-bangsa untuk **mencegah dan memberantas terorisme...**"[340]

Dari ketentuan di atas, tampak jelas bahwa pemerintah Indonesia mengkualifikasi terorisme sebagai kejahatan internasional dalam bentuk kejahatan terhadap kemanusiaan (*crime against humanity*). Kejahatan terhadap kemanusiaan sendiri didefinisikan dalam Pasal 9 Undang-undang (UU) No. 26 Tahun 2000 tentang Pengadilan Hak Asasi Manusia sebagai:

"...salah satu perbuatan yang dilakukan sebagai bagian dari serangan yang meluas atau sistematik yang diketahuinya bahwa serangan tersebut ditujukan secara langsung terhadap penduduk sipil berupa:

a. pembunuhan;
b. pemusnahan;
c. perbudakan;
d. pengusiran atau pemindahan penduduk secara paksa;
e. perampasan kemerdekaan atau perampasan kebebasan fisik lain secara sewenang-wenang yang melanggar (asas-asas) ketentuan pokok hukum internasional;
f. penyiksaan;
g. perkosaan, perbudakan seksual, pelacuran secara paksa, pemaksaan kehamilan, pemandulan atau sterilisasi secara paksa atau bentuk-bentuk kekerasan seksual lain yang setara;
h. penganiayaan terhadap suatu kelompok tertentu atau perkumpulan yang didasari persamaan paham politik, ras, kebangsaan, etnis, budaya, agama, jenis kelamin, atau alasan lain yang telah diakui secara universal sebagai hal yang dilarang menurut hukum internasional;

[340] Penjelasan Perpu No. 1/2002, Mukadimah, par. 3-4, cetak tebal oleh penulis.

i. penghilangan orang secara paksa; atau
j. kejahatan apartheid."[341]

Menurut Pasal 7 UU ini[342] beserta Penjelasan Pasal 104 ayat (1) UU No. 39 Tahun 1999 tentang Hak Asasi Manusia, kejahatan terhadap kemanusiaan digolongkan sebagai "pelanggaran hak asasi manusia yang berat".[343] Mukadimah Penjelasan UU No. 26 Tahun 2000 menyetarakan pengertian "pelanggaran hak asasi manusia yang berat" dengan "kejahatan luar biasa" (*extraordinary crimes*). Paragraf 9 Mukadimah menyatakan bahwa:

> "...1. **Pelanggaran hak asasi manusia yang berat merupakan "*extraordinary crimes*"** dan berdampak secara luas baik pada tingkat nasional maupun internasional dan bukan merupakan tindak pidana yang diatur di dalam Kitab Undang-undang Hukum Pidana serta menimbulkan kerugian baik materiil maupun imateriil yang mengakibatkan perasaan tidak aman baik terhadap perseorangan maupun masyarakat, sehingga perlu segera

[341] Indonesia, *Undang-undang tentang Pengadilan Hak Asasi Manusia*, UU No. 26 Tahun 2000, LN No. 208 Tahun 2000, TLN No. 4026 ["UU No. 26/2000"], ps. 9.

[342] *Ibid*, ps. 7.

[343] Indonesia, *Undang-undang tentang Hak Asasi Manusia*, UU No. 39 Tahun 1999, LN No. 165 Tahun 1999, TLN No. 3886 ["UU No. 39/1999"], Penjelasan, ps. 104 ayat (1): "Yang dimaksud dengan "pelanggaran hak asasi manusia yang berat" adalah pembunuhan massal (*genocide*), pembunuhan sewenang-wenang atau diluar putusan pengadilan (*arbitrary/ extrajudicial killing*), penyiksaan, penghilangan orang secara paksa, perbudakan, atau diskriminasi yang dilakukan secara sistematis (*systematic discrimination*). Lima tindakan terakhir senada dengan definisi "kejahatan terhadap kemanusiaan" dalam Pasal 9 UU No. 26/2000.

dipulihkan dalam mewujudkan supremasi hukum untuk mencapai kedamaian, ketertiban, ketentraman, keadilan, dan kesejahteraan bagi seluruh masyarakat Indonesia..."[344]

Lebih lanjut, dalam Perkara Permohonan Uji UU No. 16 Tahun 2003 terhadap Undang-undang Dasar (UUD) 1945 ("Perkara UU No. 16 Tahun 2003") yang diputus oleh Mahkamah Konstitusi pada 23 Juli 2004,[345] Pemerintah dan DPR menyampaikan *Fundamentum Petendi* (Keterangan Pemerintah), dimana keduanya mengakui secara tegas bahwa terorisme merupakan kejahatan luar biasa dan kejahatan terhadap kemanusiaan. Pemerintah dan DPR menyatakan:

"...mengingat peristiwa peledakan bom di Bali pada tanggal 12 [sic!][346] Tahun 2002, yang telah menimbulkan korban yang tidak sedikit jumlahnya dan menimbulkan dampak yang luas di bidang sosial, ekonomi, politik, dan hubungan internasional. Di samping itu, peristiwa tersebut **telah digolongkan sebagai kejahatan yang luar biasa (*extra-ordinary crime*) dan kejahatan terhadap kemanusiaan (*crime against humanity*)**..."[347]

---

[344] Penjelasan UU No. 26/2000, Mukadimah, par. 9, cetak tebal oleh penulis.

[345] Putusan Perkara Nomor 013/PUU-I/2003, diucapkan oleh Mahkamah Konstitusi Republik Indonesia pada 23 Juli 2004, dan dimuat dalam Berita Negara Republik Indonesia Nomor 61 Tahun 2004, terbit hari Jumat tanggal 30 Juli 2004 ["Putusan Perkara UU No. 16/2003"].

[346] Seharusnya tertulis: Oktober.

[347] Putusan Perkara UU No. 16/2003, *loc. cit.*, hlm. 17-18, poin (f), cetak tebal oleh penulis.

Selain itu, dalam keterangan tertulis Pemerintah dan DPR yang merupakan bagian tak terpisahkan dari Keterangan di atas,[348] Pemerintah yang diwakili oleh Menteri Kehakiman dan Hak Asasi Manusia Indonesia, Dr. Yusril Ihza Mahendra, S.H. pada 2 Januari 2004 menyampaikan:

> "Bahwa terorisme kini tidak lagi dipandang sebagai kejahatan biasa, tetapi telah dikategorikan sebagai "kejahatan luar biasa (*extra ordinary crime*)", dan bahkan dapat dikategorikan pula sebagai "kejahatan terhadap kemanusiaan (*crime against humanity*)"."[349]

Alasannya adalah:

> "Terorisme selalu menggunakan ancaman atau kekerasan serta mengakibatkan hilangnya begitu banyak nyawa tanpa memandang siapa yang akan menjadi korban, penghancuran dan pemusnahan harta benda, lingkungan hidup, sumber-sumber ekonomi, menimbulkan kegoncangan kehidupan sosial dan politik, dan bahkan pada tingkat tertentu dapat menjadi ancaman terhadap keberadaan dan kelangsungan hidup suatu bangsa dan negara."[350]

---

[348] *Ibid*, hlm. 9, poin (1).

[349] *Ibid*, hlm. 11, poin (9).

[350] *Ibid*.

Dalam awal penulisan telah diuraikan bahwa konsep "pelanggaran hak asasi manusia yang berat" dan "kejahatan luar biasa" sama dengan konsep "kejahatan internasional".[351] Dengan demikian, berdasarkan pandangan Pemerintah dan DPR di atas,[352] dapat ditarik kesimpulan bahwa terorisme telah terbukti sebagai kejahatan yang dikualifikasi sebagai kejahatan internasional.

Walaupun demikian, pendapat ini tidak disetujui oleh 5 (lima) dari 9 (sembilan) Hakim Mahkamah Konstitusi[353] yang menangani Perkara UU No. 16 Tahun 2003, yaitu: Prof. Dr. Jimly Asshiddiqie, S.H., Prof. Dr. H.M. Laica Marzuki, S.H., Prof. H.A. Mukthie Fadjar, S.H., M.S., H. Achmad Rustandi, S.H., dan Soedarsono, S.H. Mereka berpendapat bahwa:

> "...sementara itu, yang dikategorikan sebagai pelanggaran HAM berat menurut Statuta Roma Tahun 1998 adalah kejahatan genosida, kejahatan terhadap kemanusiaan, kejahatan perang, dan kejahatan agresi;

---

[351] Lihat hlm. 86-90 penulisan ini.

[352] Putusan Perkara UU No. 16/2003, *loc. cit.*, hlm. 25-26.

[353] Empat Hakim lainnya yang mengajukan Pendapat Berbeda (*Dissenting Opinion*) adalah: Maruarar Siahaan, S.H., I Dewa Gede Palguna, S.H., M.H., Prof. H.A.S. Natabaya, S.H., LL.M., dan Dr. Harjono, S.H., MCL.

> sedangkan menurut Pasal 7 Undang-undang No. 39 Tahun 1999 tentang Hak Asasi Manusia [sic!][354] yang dikategorikan sebagai pelanggaran HAM berat adalah hanya kejahatan genosida dan kejahatan terhadap kemanusiaan. Dengan demikian, baik merujuk kepada Statuta Roma Tahun 1998, maupun Undang-undang No. 39 Tahun 1999 [sic!][355], peristiwa peledakan bom di Bali tanggal 12 Oktober 2002 **belumlah dapat dikategorikan sebagai kejahatan yang luar biasa (*extra-ordinary crime*)...melainkan masih dapat dikategorikan sebagai kejahatan biasa (*ordinary crime*) yang sangat kejam..."**[356]

Terlepas dari pandangan kelima Hakim Mahkamah Konstitusi tersebut, pemerintah Indonesia 2 (dua) tahun kemudian kembali mengakui bahwa terorisme merupakan kejahatan internasional. Hal ini ditegaskan dalam pengesahan *International Convention for the Suppression of Terrorist Bombings 1997* dan *International Convention for the Suppression of the Financing of Terrorism 1999* sebagai bagian dari ketentuan hukum positif Indonesia. Konvensi yang disebutkan lebih awal disahkan melalui UU No. 5 Tahun

---

[354] Seharusnya tertulis: Undang-undang No. 26 Tahun 2000 tentang Pengadilan Hak Asasi Manusia.

[355] *Ibid.*

[356] Putusan Perkara UU No. 16/2003, *loc. cit.*, hlm. 43-44, cetak tebal oleh penulis. Sebaliknya, 4 (empat) Hakim yang mengajukan *Dissenting Opinion* tidak mengajukan sanggahan terhadap pendapat yang memandang terorisme bukan sebagai kejahatan luar biasa tersebut. Mereka mengajukan pendapat yang lebih erat kaitannya dengan tuduhan pelanggaran asas non-retroaktif dalam UU No. 16/2003. Untuk pembahasan selengkapnya lihat hlm. 168-171 penulisan ini.

2006, sedangkan konvensi yang disebutkan belakangan disahkan melalui UU No. 6 Tahun 2006.

Mukadimah UU No. 5 Tahun 2006 menyatakan bahwa:

> "...terorisme merupakan kejahatan terhadap kemanusiaan dan peradaban serta merupakan salah satu ancaman serius terhadap kedaulatan setiap negara karena **terorisme merupakan kejahatan internasional**..."[357]

Sedangkan Mukadimah UU No. 6 Tahun 2006 menyatakan bahwa: "...tindak pidana **terorisme merupakan kejahatan internasional** yang menimbulkan bahaya terhadap keamanan dan perdamaian dunia serta kemanusiaan dan peradaban..."[358]

B. PERSPEKTIF INDONESIA TERHADAP TERORISME SEBAGAI KEJAHATAN YANG DAPAT DITANGANI BERDASARKAN YURISDIKSI UNIVERSAL

---

[357] Indonesia, *Undang-undang tentang Pengesahan International Convention for the Suppression of Terrorist Bombings, 1997 (Konvensi Internasional Pemberantasan Pengeboman oleh Teroris, 1997)*, UU No. 5 Tahun 2006, LN No. 28 Tahun 2006, TLN No. 4616, Mukadimah, poin (b), cetak tebal oleh penulis.

[358] Indonesia, *Undang-undang tentang Pengesahan International Convention for the Suppression of the Financing of Terrorism, 1999 (Konvensi Internasional Pemberantasan Pendanaan Terorisme, 1999)*, UU No. 6 Tahun 2006, LN No. 29 Tahun 2006, TLN No. 4617, Mukadimah, poin (b), cetak tebal oleh penulis.

Yurisdiksi Indonesia terhadap pelaku terorisme diatur dalam Pasal 3 dan 4 Perpu No. 1 Tahun 2002. Pasal 3 menunjukkan bahwa pada dasarnya, Indonesia menganut yurisdiksi teritorial terhadap pelaku terorisme:

> "Peraturan Pemerintah Pengganti Undang-undang ini berlaku terhadap setiap orang yang melakukan atau bermaksud melakukan tindak pidana terorisme **di wilayah negara Republik Indonesia...**"[359]

Namun Pasal tersebut tidak menutup kemungkinan untuk adanya: "...negara lain juga mempunyai yurisdiksi dan menyatakan maksudnya untuk melakukan penuntutan terhadap pelaku tersebut."[360] Pasal 4 lebih lanjut menggariskan ketentuan bahwa Indonesia juga memiliki yurisdiksi atas pelaku terorisme jika:

1. Korban merupakan warga negara Indonesia, sekalipun kejahatan terjadi di luar Indonesia;

[359] Perpu No. 1/2002, ps. 3, cetak tebal oleh penulis.

[360] *Ibid.* Penjelasan Pasal ini menyatakan bahwa: "Tuntutan yurisdiksi negara lain tidak serta-merta ada keterikatan Pemerintah Republik Indonesia untuk menerima tuntutan dimaksud sepanjang belum ada perjanjian ekstradisi atau bantuan hukum timbal balik dalam masalah pidana, kecuali Pemerintah Republik Indonesia menyetujui diberlakukannya asas resiprositas."

2. Kejahatan tersebut dilakukan terhadap fasilitas negara Indonesia di luar negeri;
3. Kejahatan itu dilakukan untuk memaksa pemerintah Indonesia atau organisasi internasional di Indonesia melakukan atau tidak melakukan sesuatu;
4. Kejahatan itu dilakukan di atas kapal berbendera Indonesia atau pesawat udara yang terdaftar berdasarkan undang-undang Indonesia; dan
5. Kejahatan itu dilakukan oleh orang yang tidak memiliki kewarganegaraan (*stateless person*) dan bertempat tinggal di Indonesia.[361]

Penjelasan Pasal ini menyatakan bahwa:

> "Pasal ini bertujuan untuk melindungi warga negara Republik Indonesia, Perwakilan Republik Indonesia, dan harta kekayaan Pemerintah Republik Indonesia di luar negeri."[362]

Dari ketentuan-ketentuan di atas, dapat disimpulkan bahwa berdasarkan Perpu No. 1 Tahun 2002, Indonesia hanya dapat mengadili pelaku terorisme berdasarkan *territoriality jurisdiction*, *passive nationality jurisdiction*, dan

[361] Perpu No. 1/2002, ps. 4.

[362] Penjelasan Perpu No. 1/2002, ps. 4.

protective jurisdiction.[363] Indonesia juga dapat mengadili pelaku terorisme berdasarkan *active nationality jurisdiction* hanya jika pelaku kejahatan yang berkewarganegaraan Indonesia melakukan tindak pidana terorisme di dalam wilayah Indonesia; kapal atau pesawat udara Indonesia; atau jika kejahatan tersebut dilakukan di luar negeri, hanya terbatas pada fasilitas negara Indonesia. Hal ini telah ditegaskan dalam Mukadimah Penjelasan Perpu yang menyatakan bahwa:

> "Peraturan Pemerintah Pengganti Undang-undang ini memuat ketentuan tentang yurisdiksi yang didasarkan kepada asas teritorial, asas ekstrateritorial, dan asas nasional aktif sehingga diharapkan dapat secara efektif memiliki daya jangkau terhadap tindak pidana terorisme sebagaimana dimaksud dalam Peraturan Pemerintah Pengganti Undang-undang ini yang melampaui batas-batas teritorial Negara Republik Indonesia..."[364]

Walaupun demikian, Perpu tersebut sama sekali tidak mengatur apakah Indonesia dapat mengadili berdasarkan *active nationality jurisdiction*, pelaku terorisme berkewarganegaraan Indonesia yang melakukan kejahatannya di

[363] Untuk pembahasan mengenai jenis-jenis yurisdiksi, lihat hlm. 51-55 penulisan ini.

[364] Penjelasan Perpu No. 1/2002, par. 14 poin (6).

luar Indonesia tidak terhadap salah satu dari ketentuan-ketentuan yang disebutkan dalam Pasal 4 Perpu. Perpu juga tidak mengatur apakah Indonesia dapat mengadili pelaku terorisme jika: (1) ia bukan merupakan warga negara Indonesia yang melakukan kejahatannya tidak terhadap salah satu dari ketentuan dalam Pasal 4 Perpu, (2) korbannya bukan merupakan warga negara Indonesia yang tidak dilindungi oleh ketentuan dalam Pasal 4 Perpu, (3) kejahatan tersebut tidak secara langsung mengancam kepentingan vital Indonesia, dan (4) kejahatan tersebut tidak dilakukan di Indonesia, kapal atau pesawat udara Indonesia, dan tidak merugikan warga negara Indonesia atau fasilitas negara Indonesia. Dengan kalimat lain, Perpu No. 1 Tahun 2002 tidak mengatur apakah Indonesia dapat mengadili pelaku terorisme berdasarkan yurisdiksi universal.

Dasar hukum yang memberikan kewenangan kepada Indonesia untuk melaksanakan yurisdiksi universal dalam hukum pidana sebetulnya telah diatur dalam Pasal 4 ayat (4) Kitab Undang-undang Hukum Pidana (KUHP). Pasal tersebut, sebagaimana telah diubah melalui UU No. 4 Tahun 1976 menyatakan bahwa:

"Aturan pidana dalam perundang-undangan Indonesia berlaku bagi **setiap orang yang di luar Indonesia** melakukan:...
(4). Salah satu kejahatan yang tersebut dalam pasal-pasal 438, 444 sampai dengan pasal 446 tentang **pembajakan laut**, dan pasal 447 tentang **penyerahan kendaraan air kepada kekuasaan bajak laut** dan pasal 479 huruf j tentang **penguasaan pesawat udara secara melawan hukum**, pasal 479 huruf l, m, n, dan o tentang **kejahatan yang mengancam keselamatan penerbangan sipil.**"[365]

Walaupun ketentuan tersebut tidak mengatur secara tegas mengenai yurisdiksi universal Indonesia terhadap pelaku terorisme, ketentuan tersebut tetap dapat ditafsirkan untuk memberikan kewenangan kepada Indonesia untuk mengadili pelaku terorisme, selama tindakan terorisme tersebut dilakukan dalam bentuk pembajakan laut, penguasaan pesawat udara secara tidak sah, dan kejahatan-kejahatan lain yang mengancam keselamatan penerbangan sipil.

Ketentuan dalam hukum Indonesia ini sejalan dengan ketentuan-ketentuan dalam hukum internasional yang memberikan hak kepada negara-negara untuk melaksanakan yurisdiksi universal terhadap bajak laut dan teroris yang

[365] *Kitab Undang-undang Hukum Pidana [Wetboek van Strafrecht]*, diterjemahkan oleh Moeljatno, cet. 22, (Jakarta: Bumi Aksara, 2003), ps. 4 ayat (4), cetak tebal oleh penulis.

melakukan kejahatannya dalam penerbangan pesawat udara sipil. Hak untuk melaksanakan yurisdiksi universal terhadap bajak laut diatur dalam Pasal 150 *United Nations Convention on the Law of the Sea 1982*,[366] sedangkan hak atas yurisdiksi universal terhadap pelaku kejahatan yang mengancam keselamatan penerbangan sipil diatur dalam berbagai perjanjian internasional.[367] Indonesia telah menjadi anggota perjanjian-perjanjian tersebut.[368] Lebih jauh, hak atas yurisdiksi universal terhadap pelaku terorisme yang membahayakan penerbangan sipil telah diakui pula oleh pengadilan-pengadilan Amerika Serikat dalam berbagai yurisprudensinya.[369]

---

[366] UNCLOS, art. 150.

[367] Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), Sept. 23, 1971, 24 U.S.T. 564, art. 7; Hague Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641, art. 7.

[368] *UNCLOS* ditandatangani Indonesia pada 10 Desember 1982 dan diratifikasi pada 3 Februari 1986, lihat <http://www.un.org/Depts/los/reference_files/status2008.pdf>, diakses pada 23 Juni 2008; *Hague Convention 1970* ditandatangani Indonesia pada 16 Desember 1970 dan instrumen ratifikasinya didepositkan pada 27 Agustus 1976, lihat <http://www.icao.int/icao/en/leb/Hague.pdf>, diakses pada 23 Juni 2008; *Montreal Convention 1971* didepositkan instrumen ratifikasinya pada 27 Agustus 1976, lihat <http://www.icao.int/icao/en/leb/Mtl71.pdf>, diakses pada 23 Juni 2008.

[369] *United States v. Yunis,* 681 F. Supp. 896 (D.D.C. 1988), affirmed at 924 F. 2d 1086 (D.C. Cir. 1991); *United States v. Rezaq.* 899 F.Supp 687, 709 (D.D.C. 1995); *United States v. Yousef*, 927 F.Supp. 673, 681-682 (S.D.N.Y. 1996).

Walaupun demikian, ketentuan mengenai yurisdiksi tersebut dalam KUHP tampak tidak memiliki ruang lingkup yang terlalu luas, yakni hanya terbatas pada kejahatan pembajakan laut dan kejahatan-kejahatan yang mengancam keselamatan penerbangan sipil. Hal ini berbeda dari praktik negara-negara lain yang memperluas yurisdiksi universal mereka hingga ke pelanggaran HAM berat, seperti genosida, kejahatan terhadap kemanusiaan, kejahatan perang, dan bahkan kejahatan seksual terhadap anak dibawah umur. Hal ini tampak dari praktik di:

1. Austria, yang melaksanakan yurisdiksi universal pada Maret 1995 dengan mengadili Dusko Cvjetkovic, seorang Serbia yang didakwa telah melakukan genosida di Bosnia dan Herzegovina pada Juli 1992;[370]
2. Denmark, yang melaksanakan yurisdiksi universal terhadap Refik Saric, yang telah melakukan pelanggaran berat terhadap *Geneva Convention* III

[370] Lihat Axel Marschik, "The Politics of Prosecution: European National Approaches to War Crimes", dalam *The Law of War Crimes*, Timothy L.H. McCormack & Gerry J. Simpson, eds. (1997), pp. 65, 79-81.

dan IV dengan melakukan penyiksaan terhadap seorang tawanan perang Bosnia;[371]

3. Jerman, yang melaksanakan yurisdiksi universal dengan mengadili orang-orang yang didakwa melakukan kejahatan terhadap kemanusiaan di wilayah bekas Yugoslavia;[372]
4. Perancis, yang melaksanakan yurisdiksi universal dengan menginvestigasi Wenceslas Munyeshyaka, seorang pendeta Rwanda yang dituduh telah terlibat dalam genosida dan kejahatan terhadap kemanusiaan di Rwanda pada 1994;[373]
5. Israel, yang melaksanakan yurisdiksi universal dengan mengadili Adolf Eichmann atas tuduhan

---

[371] *Prosecutor v. Refik Saric*, Danish High Court, Third Chamber, Eastern Division, 25 November 1994.

[372] *Prosecutor v. Dusko Tadic*, the Supreme Court of Germany (*Bundesgerichtshof*), 13 February 1994; *Public Prosecutor v. Djajic*, No. 20/96 (Sup. Ct. Bavaria, 3d Strafsenat, 23 May 1997), reported in 92 Am. J. Int'l L. (1998), pp. 528-532; *Public Prosecutor v. Jorgic*, *Oberlandesgericht Düsseldorf*, 26 September 1997.

[373] Lihat Amnesty International, "Universal Jurisdiction and Absence of Immunity for Crimes Against Humanity," <http://www.globalpolicy.org/intljustice/universal/0199pinochet.htm>, January 1, 1999, hlm.19.

kejahatan terhadap kemanusiaan yang ia lakukan di Jerman selama Perang Dunia Kedua;[374] dan

6. Belgia, yang memiliki ketentuan bahwa ia berhak melaksanakan yurisdiksi universal atas pelaku kejahatan seksual terhadap anak dibawah umur.[375]

Adanya perkembangan progresif hukum internasional dimana negara-negara mulai memperluas yurisdiksi universal mereka untuk menjangkau lebih banyak bentuk-bentuk pelanggaran HAM berat sepatutnya dipertimbangkan oleh pemerintah Indonesia untuk mengakui bahwa terorisme juga dapat dikualifikasi sebagai kejahatan yang pelakunya dapat diadili berdasarkan yurisdiksi universal, dan dengan demikian, memodifikasi Pasal 4 ayat (4) KUHP. Hal ini

---

[374] *Attorney General of Israel v. Eichmann*, 36 Int'l L. Rep. 18, 50 (Isr. Dist. Ct. - Jerusalem 1961), affirmed, 36 Int'l L. Rep. 277 (Isr. Sup. Ct. 1962). Mahkamah Agung Israel menyatakan bahwa: *"[T]here is full justification for applying here the principle of universal jurisdiction since the international character of 'crimes against humanity'...dealt with in this case is no longer in doubt..."* Perlu diingat bahwa Israel tidak dapat serta-merta dipersamakan dengan agama Yahudi dalam kasus ini. Hubungan Israel sebagai bangsa Yahudi dengan para korban yang beragama Yahudi mungkin dapat dikemukakan sebagai salah satu alasan untuk tidak mengkualifikasi yurisdiksi Israel ini sebagai yurisdiksi universal, karena masih ada "*link*" antara Israel dan para korban. Namun, Israel dalam hal ini dianggap melaksanakan yurisdiksi universal karena: (i) kejahatan tersebut tidak terjadi di Israel, (ii) korban kejahatan bukan merupakan warga negara Israel, mereka adalah warga Eropa yang beragama Yahudi, (iii) pelaku kejahatan juga bukan merupakan warga negara Israel, dan (iv) kejahatan tersebut tidak secara langsung mengancam kepentingan vital Israel.

[375] Belgia, *Loi du 13 avril 1995, loi relative aux abus sexuels à l'égard des mineurs*, art. 8.

terutama karena: (1) berbagai ketentuan perundang-undangan nasional Indonesia sendiri, didukung dengan pernyataan-pernyataan resmi Pemerintah, telah mengakui secara tegas bahwa terorisme merupakan bentuk "pelanggaran HAM berat", "kejahatan terhadap kemanusiaan", "kejahatan luar biasa", atau "kejahatan internasional";[376] dan (2) jika kita melihat praktik di negara-negara lain, terorisme juga telah dikualifikasi sebagai kejahatan yang dapat ditangani berdasarkan yurisdiksi universal. Hal ini tampak dari ketentuan perundang-undangan di beberapa negara, seperti Amerika Serikat dan Spanyol, yang telah secara tegas mengakui adanya yurisdiksi universal atas pelaku terorisme atau beberapa bentuk terorisme.[377]

C. PERSPEKTIF INDONESIA TERHADAP TERORISME SEBAGAI KEJAHATAN YANG DAPAT DITANGANI BERDASARKAN PEMBERLAKUAN ASAS RETROAKTIF

[376] Lihat hlm. 144-152 penulisan ini.

[377] Amerika Serikat, *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1986) entitled "Universal Jurisdiction to Define and Punish Certain Offenses"*; Spanyol, *Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial*, art. 23 (4), <http://noticias.juridicas.com/base_datos/Admin/lo6-1985.l1t1.html>, diakses 12 Juni 2008.

Pada hari yang sama dimana Pemerintah mengundangkan Perpu No. 1 Tahun 2002, Pemerintah juga mengundangkan Perpu No. 2 Tahun 2002 tentang Pemberlakuan Perpu No. 1 Tahun 2002 pada Peristiwa Peledakan Bom di Bali Tanggal 12 Oktober 2002.[378] Perpu ini diberlakukan berdasarkan ketentuan dalam Pasal 46 Perpu No. 1 Tahun 2002 yang menyatakan:

> "Ketentuan dalam Peraturan Pemerintah Pengganti Undang-undang ini dapat diperlakukan surut untuk tindakan hukum bagi kasus tertentu sebelum mulai berlakunya Peraturan Pemerintah Pengganti Undang-undang ini, yang penerapannya ditetapkan dengan Undang-undang atau Peraturan Pemerintah Pengganti Undang-undang tersendiri."[379]

Oleh karena itu, Perpu No. 1 Tahun 2002 diberlakukan secara retroaktif terhadap pelaku terorisme di Bali pada 12 Oktober 2002 oleh Perpu No. 2 Tahun 2002. Perpu No. 2 Tahun

[378] Lihat Indonesia, *Peraturan Pemerintah Pengganti Undang-undang tentang Pemberlakuan Peraturan Pemerintah Pengganti Undang-undang No. 1 Tahun 2002 tentang Pemberantasan Tindak Pidana Terorisme, pada Peristiwa Peledakan Bom di Bali Tanggal 12 Oktober 2002*, Perpu No. 2 Tahun 2002, LN No. 107 Tahun 2002, TLN No. 4233, diundangkan pada 18 Oktober 2002 ["Perpu No. 2/2002"].

[379] Perpu No. 1/2002, ps. 46.

2002 ini kemudian ditetapkan menjadi UU No. 16 Tahun 2003 pada 4 April 2003.[380]

Pada 15 Oktober 2003, Masykur Abdul Kadir, salah seorang terdakwa peristiwa peledakan bom Bali 2002, mendaftarkan permohonan uji UU No. 16 Tahun 2003 terhadap UUD 1945 kepada Mahkamah Konstitusi. Tim kuasa hukum Masykur menyatakan bahwa hak konstitusional Masykur telah dirugikan dengan diberlakukannya UU No. 16 Tahun 2003 terhadap dirinya. Alasannya adalah UU tersebut menerapkan asas retroaktif untuk mengadili Masykur, sedangkan UUD 1945 telah melarang pemberlakuan asas tersebut dalam keadaan apapun.[381] Pasal 28I ayat (1) Amandemen Kedua UUD 1945 menyatakan bahwa:

> "Hak untuk hidup, hak untuk disiksa, hak kemerdekaan pikiran dan hati nurani, hak beragama, hak untuk tidak diperbudak, hak untuk diakui sebagai pribadi di hadapan hukum, dan **hak untuk tidak dituntut atas dasar hukum**

[380] Indonesia, *Undang-undang tentang Penetapan Peraturan Pemerintah Pengganti Undang-undang No. 2 Tahun 2002 tentang Pemberlakuan Peraturan Pemerintah Pengganti Undang-undang No. 1 Tahun 2002 tentang Pemberantasan Tindakan Pidana Terorisme, pada Peristiwa Peledakan Bom di Bali tanggal 12 Oktober 2002, Menjadi Undang-undang*, UU No. 16 Tahun 2003, LN No. 46 Tahun 2003, TLN No. 4285 ["UU No. 16/2003"].

[381] Putusan Perkara UU No. 16/2003, hlm. 1-4.

yang berlaku surut adalah hak asasi manusia yang tidak dapat dikurangi dalam keadaan apapun."[382]

Dalam Putusan yang diucapkan Mahkamah pada 23 Juli 2004, 5 (lima) dari 9 Hakim mengabulkan permohonan Masykur dan menyatakan bahwa UU No. 16 Tahun 2003 bertentangan dengan UUD 1945, dan karenanya tidak mempunyai kekuatan hukum mengikat.[383] Alasan-alasan Mahkamah antara lain:

1. Pada dasarnya, hukum harus berlaku ke depan (*prospectively*). Adalah tidak adil jika seseorang dihukum berdasarkan hukum yang belum berlaku ketika ia melakukan perbuatannya. Tidak adil pula jika seseorang dihukum berdasarkan ancaman hukuman yang lebih berat yang belum berlaku ketika ia melakukan kejahatan;
2. Asas non-retroaktif lebih mengacu kepada filosofi pemidanaan atas dasar pembalasan (*retributive*), padahal dasar tersebut sudah tidak lagi dikenal dalam filosofi pemidanaan Indonesia yang kini lebih mengacu pada dasar preventif dan edukatif;

---

[382] Indonesia, *Undang-undang Dasar 1945 (Amandemen Kedua)*, ps. 28I ayat (1), cetak tebal oleh penulis.

[383] Putusan Perkara UU No. 16/2003, hlm. 47-48.

3. Asas retroaktif membuka peluang bagi pemerintah untuk menggunakan hukum sebagai sarana balas dendam (*revenge*) terhadap lawan-lawan politiknya;
4. Asas retroaktif bertentangan dengan upaya penegakan hukum (*rule of law*), termasuk penegakan peradilan yang *fair*;
5. Memang benar asas retroaktif pernah diberlakukan oleh Pengadilan Nuremberg, namun hal tersebut merupakan pengecualian karena didasari oleh dorongan emosional yang kuat untuk memberikan hukuman kepada Nazi yang telah melakukan pemusnahan peradaban. Tetapi pada kenyataannya, setelah pengadilan tersebut berakhir, masyarakat internasional selalu menekankan kembali bahwa asas non-retroaktif tidak boleh dilanggar. Hal ini tampak dari berbagai rumusan dalam instrumen HAM yang dibuat setelahnya, antara lain: Pasal 11 ayat (2) *Universal Declaration of Human Rights*, Pasal 7 *European Convention for the Protection of Human Rights*, Pasal 4 jo. 15 *International Convention on Civil and Political Rights*, dan Pasal 22-24 Statuta Roma 1998;

6. Asas non-retroaktif juga telah dianut dalam ketentuan hukum positif Indonesia untuk waktu yang sangat panjang. Hal ini terbukti dengan dimuatnya pelarangan asas retroaktif dalam Pasal 6 *Algemene Bepalingen* (AB) *Staatsblad 1847 No. 23*, Pasal 1 ayat (1) KUHP, Pasal 4 jo. 18 ayat (2) UU No. 39 Tahun 1999 tentang HAM, dan Pasal 28I ayat (1) UUD 1945;
7. Penggunaan asas retroaktif karena didasari oleh pemikiran bahwa terorisme merupakan pelanggaran HAM berat juga tidak benar, karena terorisme belum terbukti sebagai kejahatan luar biasa (*extraordinary crime*). Hal ini dikarenakan terorisme tidak termasuk dalam ruang lingkup yurisdiksi Mahkamah Pidana Internasional berdasarkan Pasal 5 (1) Statuta Roma 1998 maupun yurisdiksi Pengadilan HAM berdasarkan Pasal 4 jo. Pasal 7 UU No. 26 Tahun 2000; dan
8. Terorisme merupakan kejahatan biasa (*ordinary crime*) yang masih dapat ditangani dengan ketentuan hukum pidana yang sudah ada. Apabila terorisme dipandang bertentangan dengan HAM, namun ketentuan

untuk memberantasnya sendiri juga tidak dapat bertentangan dengan HAM, sebab di Amerika Serikat sendiri juga terdapat pandangan bahwa *Terrorism Law is major setback for civil liberties*.[384]

Tetapi, putusan Mahkamah ini bukannya tidak mendapat tantangan. Empat Hakim lainnya, yaitu Maruarar Siahaan, S.H., I Dewa Gede Palguna, S.H., M.H., Prof. H.A.S. Natabaya, S.H., LL.M., dan Dr. Harjono, S.H., MCL. mengajukan Pendapat Berbeda (*Dissenting Opinion*). Mereka berpendapat bahwa UU No. 16 Tahun 2003 tidak seharusnya dibatalkan, karena pemberlakuan asas retroaktif dalam kasus terorisme tidak bertentangan dengan UUD 1945. Alasan-alasan mereka antara lain:

1. Pasal 28I ayat (1) UUD 1945 sebetulnya tidak berlaku mutlak, karena Pasal 28J ayat (2) menyatakan bahwa:

> "Dalam menjalankan hak dan kebebasannya, **setiap orang wajib tunduk kepada pembatasan yang ditetapkan dengan undang-undang** dengan maksud semata-mata untuk menjamin pengakuan serta penghormatan hak dan kebebasan orang lain dan **untuk memenuhi tuntutan yang adil sesuai dengan**

[384] *Ibid*, hlm. 38-44.

pertimbangan moral, nilai-nilai agama, keamanan, dan ketertiban umum dalam suatu masyarakat demokratis;"[385]

2. Dalam penerapan asas non-retroaktif haruslah dilihat apakah dengan menerapkan asas tersebut secara kaku, akan menimbulkan ketidakadilan, merongrong nilai-nilai agama, keamanan, dan ketertiban umum. Jika hal tersebut terjadi, maka maksud perlindungan bagi seorang individu secara demikian bukan menjadi tujuan hukum;
3. Dengan memperhatikan metode dilakukannya kejahatan terorisme di Bali pada 2002 dalam skala yang besar dan menimbulkan jumlah korban yang sangat besar, serta menimbulkan akibat-akibat yang luar biasa terhadap Indonesia secara sosial, ekonomi, dan politik, maka kepentingan umum yang perlu dilindungi sangat besar dibandingkan bobot HAM secara individual dari pemohon;
4. Asas non-retroaktif tidak boleh diberlakukan kepada pelanggar HAM, apabila hal tersebut justru berakibat pada bebasnya pelanggar HAM dari hukuman

[385] Indonesia, *Undang-undang Dasar 1945 (Amandemen Kedua)*, ps. 28J ayat (2), cetak tebal oleh penulis.

(*impunity*). Hal ini terutama karena sudah merupakan suatu norma dasar (*jus cogens*) dalam hukum pidana, bahwa setiap kejahatan tidak boleh dibiarkan berlalu tanpa hukuman (*aut punere aut dedere*);

5. Pemberlakuan asas retroaktif tidak bertentangan dengan Pasal 1 ayat (1) dan (2) KUHP, karena:
   - Perbuatan yang dinyatakan oleh Perpu No. 1 Tahun 2002 sebagai tindak pidana, sebelumnya juga telah dipandang sebagai tindak pidana atau kejahatan berdasarkan hukum positif yang telah ada, dan
   - Ancaman hukuman maksimum yang diatur dalam Perpu No. 1 Tahun 2002 tidak lebih berat daripada ancaman hukuman maksimum yang diatur oleh ketentuan hukum positif yang telah ada sebelumnya, yaitu hukuman mati.[386]

Terlepas dari putusan Mahkamah Konstitusi dalam Perkara UU No. 16 Tahun 2003 tersebut, perlu diuraikan beberapa hal:

[386] *Ibid*, hlm. 48-59.

1. Mahkamah Konstitusi hanya menyatakan bahwa UU No. 16 Tahun 2003 tidak memiliki kekuatan hukum mengikat. Dengan demikian, UU No. 15 Tahun 2003 yang menetapkan Perpu No. 1 Tahun 2002 menjadi UU tetap berlaku.[387]
2. Berdasarkan Pasal 58 UU No. 24 Tahun 2003 tentang Mahkamah Konstitusi, UU yang diuji oleh Mahkamah tetap berlaku, sebelum ada putusan yang menyatakan bahwa UU tersebut bertentangan dengan UUD 1945.[388] Hal ini berarti, putusan Mahkamah Konstitusi dalam Perkara UU No. 16 Tahun 2003 tidak berpengaruh pada perkara-perkara bom Bali yang telah diputus sebelum putusan Mahkamah tersebut diucapkan.[389]

---

[387] "Yusril: Putusan Mahkamah Konstitusi Hanya untuk Bom Bali," <http://antiteror.polkam.go.id/berita.asp?id=72>, Senin, 26 Juli 2004, 12:57.

[388] Indonesia, *Undang-undang tentang Mahkamah Konstitusi*, UU No. 24 Tahun 2003, LN No. 98 Tahun 2003, TLN No. 4316, ps. 58.

[389] Pernyataan oleh Menteri Kehakiman dan HAM, Dr. Yusril Ihza Mahendra, S.H., "Yusril: Putusan Mahkamah Konstitusi Hanya untuk Bom Bali," *loc. cit.;* pernyataan oleh Dirjen Hukum dan Perundang-undangan Departemen Kehakiman dan HAM, Abdul Gani Abdullah, "MK Nyatakan UU Terorisme Tidak Mempunyai Kekuatan Mengikat," <http://hukumonline.com/detail.asp?id=10800&cl=Berita>, 23 Juli 2004.

3. Oleh karena itu, legalitas putusan pengadilan dalam kasus-kasus bom Bali yang telah berkekuatan hukum tetap dan diputus sebelum adanya putusan Mahkamah Konstitusi tersebut, dimana UU No. 16 Tahun 2003 diberlakukan terhadap para terdakwa, tidak dapat diganggu gugat. Menurut Menteri Kehakiman dan HAM, Dr. Yusril Ihza Mahendra, S.H. pada Juli 2004, terdapat 25 kasus bom Bali yang telah berkekuatan hukum tetap sebelum diucapkannya putusan Mahkamah Konstitusi pada 23 Juli 2004. Kasus-kasus ini telah diputus oleh Pengadilan Negeri Denpasar, Pengadilan Negeri Lamongan, Pengadilan Tinggi Bali, dan Mahkamah Agung dengan memberlakukan asas retroaktif dalam Perpu No. 2 Tahun 2002 maupun UU No. 16 Tahun 2003.[390]
4. Selain Perpu No. 1 Tahun 2002 maupun Perpu No. 2 Tahun 2002, peraturan perundang-undangan Indonesia sebetulnya memperbolehkan pemberlakuan asas retroaktif dalam keadaan tertentu. Pasal 4 UU No. 39 Tahun 1999 tentang HAM, walaupun memiliki

[390] "Menkeh: Putusan MK Tidak Bisa Dijadikan Novum," <http://hukumonline.com/detail.asp?id=10813&cl=Berita>, 27 Juli 2004.

ketentuan senada dengan Pasal 28I ayat (1) UUD 1945, menyebutkan dalam Penjelasannya:

> "Hak untuk tidak dituntut atas dasar hukum yang berlaku surut dapat dikecualikan dalam hal pelanggaran berat terhadap hak asasi manusia yang digolongkan ke dalam kejahatan terhadap kemanusiaan."[391]

Disamping itu, asas retroaktif juga dikenal dalam berbagai ketentuan dalam UU No. 26 Tahun 2000 tentang Pengadilan HAM. Pasal 43 ayat (1) UU ini menyatakan bahwa: "Pelanggaran hak asasi manusia yang berat yang terjadi sebelum diundangkannya Undang-undang ini, diperiksa dan diputus oleh Pengadilan HAM ad hoc."[392] Penjelasan Pasal 43 ayat (2) lebih lanjut mengatur bahwa:

> "Dalam hal Dewan Perwakilan Rakyat Republik Indonesia mengusulkan dibentuknya Pengadilan HAM ad hoc, Dewan Perwakilan Rakyat...mendasarkan pada dugaan telah terjadinya pelanggaran hak asasi manusia yang berat yang dibatasi pada *locus* dan *tempos delicti* tertentu yang terjadi sebelum diundangkannya Undang-undang ini."[393]

---

391 Penjelasan UU No. 39/1999, ps. 4.

392 UU No. 26/2000, ps. 43 ayat (1).

393 Penjelasan UU No. 26/2000, ps. 43 ayat (2).

Kemudian Pasal 47 ayat (1) juga menyatakan bahwa:

"Pelanggaran hak asasi manusia yang berat yang terjadi sebelum berlakunya Undang-undang ini tidak menutup kemungkinan penyelesaiannya dilakukan oleh Komisi Kebenaran dan Rekonsiliasi."[394]

Semua ketentuan yang ada ini menunjukkan bahwa asas non-retroaktif tidak sepenuhnya mutlak berlaku dalam ketentuan hukum positif Indonesia, melainkan dapat dikecualikan dalam kasus pelanggaran HAM berat, khususnya dalam kasus kejahatan terhadap kemanusiaan. Walaupun terorisme belum secara tegas dianggap sebagai kejahatan terhadap kemanusiaan dalam UU No. 39 Tahun 1999 maupun UU No. 26 Tahun 2000, namun ketentuan perundang-undangan yang berlaku setelah itu, yaitu UU No. 15 Tahun 2003, UU No. 5 Tahun 2006, dan UU No. 6 Tahun 2006 secara tegas mengakui bahwa terorisme merupakan kejahatan terhadap kemanusiaan, pelanggaran HAM berat,

[394] UU No. 26/2000, ps. 47 ayat (1).

kejahatan luar biasa, atau kejahatan internasional.[395]

5. Hukum internasional pun tidak sepenuhnya mengenal pemberlakuan asas non-retroaktif secara absolut. *International Covenant on Civil and Political Rights 1966*, yang telah diaksesi Indonesia melalui UU No. 12 Tahun 2005,[396] dan *European Convention for the Protection of Human Rights 1950* memang mengenal bahwa hak seseorang untuk tidak dituntut berdasarkan hukum yang berlaku surut tidak dapat dikecualikan dalam keadaan apapun (*non-derogable right*).[397] Namun, Pasal 15 ayat (2) *International Covenant on Civil and Political Rights*, yang mengandung ketentuan yang senada dengan Pasal 7 ayat (2) *European Convention for the Protection of Human Rights* menyatakan:

---

[395] Lihat hlm. 144-152 penulisan ini.

[396] Indonesia, *UU tentang Pengesahan International Covenant on Civil and Political Rights (Kovenan Internasional tentang Hak-hak Sipil dan Politik)*, UU No. 12 Tahun 2005, LN No. 119 Tahun 2005, TLN No. 4558.

[397] Lihat ICCPR, art. 4 (2); ECHR, art. 15 (2).

"*Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which,* ***at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.***"[398]

Jika ketentuan ini dikaitkan dengan permasalahan terorisme, terorisme sebenarnya telah dikriminalisasi berdasarkan prinsip-prinsip umum hukum bangsa-bangsa jauh sebelum Perpu No. 2 Tahun 2002 yang ditetapkan menjadi UU No. 16 Tahun 2003 berlaku. Sejak 1963 PBB telah mengadopsi berbagai perjanjian internasional yang bertujuan melarang dan mengkriminalisasi bentuk-bentuk terorisme, yang terkulminasi dalam *International Convention for the Suppression of Terrorist Bombings 1997* dan *International Convention for the Suppression of the Financing of Terrorism 1999*. Komitmen masyarakat internasional untuk mengutuk dan mengkriminalisasi terorisme lebih dipertebal lagi setelah serangan teroris terhadap Gedung WTC di Amerika Serikat pada

[398] ICCPR, art. 15 (2). Ketentuan ini serupa dalam ECHR, art. 7 (2), hanya saja kata-kata "the community of nations" diganti menjadi "civilized nations", cetak tebal oleh penulis.

11 September 2001.[399] Semua hal ini menunjukkan bahwa telah ada prinsip umum bangsa-bangsa yang mengakui bahwa terorisme merupakan suatu kejahatan, bahkan sebelum berlakunya Perpu No. 2 Tahun 2002 dan UU No. 16 Tahun 2003.

Ketentuan yang tidak mengakui adanya asas retroaktif terhadap pelaku kejahatan-kejahatan yang telah dikriminalisasi berdasarkan prinsip umum hukum bangsa-bangsa ketika kejahatan itu dilakukan, juga merupakan alasan mengapa masyarakat internasional tidak menganggap ketentuan-ketentuan dalam Statuta Pengadilan Yugoslavia dan sebagian ketentuan dalam Pengadilan Rwanda merupakan ketentuan yang bersifat retroaktif, walaupun kedua Statuta ini dibentuk setelah kejahatan-kejahatan di wilayah bekas Yugoslavia dan wilayah Rwanda terjadi.[400]

---

[399] Lihat hlm. 92-103 penulisan ini.

[400] Untuk pembahasan mengenai Pengadilan Rwanda, lihat hlm. 59-62 penulisan ini. Sedangkan Pengadilan Yugoslavia dianggap tidak mengaplikasikan asas retroaktif karena konsep keempat kejahatan dalam yurisdiksinya (pelanggaran berat terhadap Geneva Conventions 1949, pelanggaran terhadap hukum-hukum atau kebiasaan perang, genosida, dan kejahatan terhadap kemanusiaan) sudah dikriminalisasi dalam hukum internasional ketika Pengadilan dibentuk. Dalam *UN Secretary-General's Report on the Statute of the ICTY,* §§29 & 34, dapat dilihat bahwa

Satu hal yang patut disayangkan adalah, lima Hakim Mahkamah Konstitusi dalam Putusan Perkara UU No. 16 Tahun 2003 tidak membahas mengenai hal ini, yaitu mengenai kemungkinan kuat bahwa UU No. 16 Tahun 2003 tidak melanggar asas non-retroaktif karena terorisme sendiri sudah dianggap sebagai tindak pidana dalam prinsip-prinsip umum hukum bangsa-bangsa jauh sebelum UU tersebut diberlakukan.[401]

Pengadilan Yugoslavia memang dimaksudkan untuk tidak mengaplikasikan asas retroaktif, lihat *Cassese, op. cit.*, hlm. 149.

[401] Secara menarik, argumentasi mengenai Pasal 15 (2) ICCPR dan Pasal 7 (2) ECHR justru dikemukakan oleh 4 (empat) Hakim Mahkamah yang menyatakan *Dissenting Opinion* dalam Putusan Perkara UU No. 16/2003. Lihat Putusan Perkara UU No. 16/2003, hlm. 53-54.

BAB V

KESIMPULAN DAN SARAN

A. KESIMPULAN

Walaupun konsep tentang terorisme telah dikenal sejak 1937, kesadaran masyarakat internasional untuk mencegah dan menanggulanginya baru tampak secara signifikan pada akhir abad ke-20, dimana frekuensi terjadinya serangan teroris di berbagai belahan dunia meningkat secara dramatis. Terorisme pun menjadi kejahatan yang sangat membahayakan karena dapat dimanifestasikan dalam berbagai bentuk: penyanderaan, pembajakan transportasi umum, penculikan, hingga pembunuhan dalam skala besar dengan menggunakan bahan peledak berdaya tinggi. Kekejaman teroris yang ditunjukkan oleh fakta bahwa serangan teroris menargetkan korban secara acak (*indiscriminate attack*) juga telah menarik perhatian serius masyarakat internasional untuk memperkuat komitmennya dalam memerangi terorisme.

Namun pada kenyataannya, pencegahan dan penanggulangan terorisme dalam level internasional masih menemui berbagai kendala. Kendala-kendala ini antara lain berkaitan dengan apakah hukum internasional dapat ditegakan dalam: (1)

mengkriminalisasi terorisme secara universal; (2) menjangkau pelaku terorisme di luar batas-batas wilayah suatu negara; dan (3) menjangkau pelaku terorisme di luar batas waktu. Oleh karena itu, timbul pemikiran apakah terorisme telah dikualifikasi sebagai kejahatan internasional dalam hukum internasional.

Terhadap pemikiran ini, penulis telah berupaya membuktikan 3 (tiga) pokok permasalahan, yaitu:

1. Apa kualifikasi sebuah tindakan sebagai kejahatan internasional dalam hukum internasional?
2. Apa argumentasi hukum yang mendukung dan menentang kualifikasi terorisme sebagai kejahatan internasional dalam hukum internasional?
3. Apakah Indonesia mengkualifikasi terorisme sebagai kejahatan internasional?

Sesuai dengan penelitian yang telah dilakukan, maka ketiga permasalahan tersebut telah terjawab sebagai berikut:

I. Kualifikasi Suatu Tindakan sebagai Kejahatan Internasional dalam Hukum Internasional

Suatu tindakan dikualifikasi sebagai kejahatan internasional dalam hukum internasional jika memenuhi setidaknya 3 (tiga) karakteristik:

1. Tindakan tersebut telah diterima secara universal oleh negara-negara sebagai kejahatan internasional. Hal ini dapat dilihat dari apakah negara-negara menerima tindakan tersebut sebagai kejahatan internasional dalam hukum perjanjian internasional maupun hukum kebiasaan internasional;
2. Pelaku tindakan tersebut dapat diadili berdasarkan yurisdiksi universal; dan
3. Pelaku tindakan tersebut dapat diadili berdasarkan hukum yang berlaku surut (asas retroaktif).

II. Argumentasi Hukum yang Mendukung dan Menentang Terorisme sebagai Kejahatan Internasional

Argumentasi yang **mendukung** terorisme sebagai kejahatan internasional dapat terbagi sebagai berikut:

1. Terorisme telah diterima sebagai kejahatan internasional dalam hukum internasional

   Hal ini dikarenakan:

   a. Terorisme telah diterima sebagai kejahatan internasional dalam hukum perjanjian internasional;

b. Terorisme telah diterima sebagai kejahatan internasional dalam hukum kebiasaan internasional; dan

c. Terorisme dapat merupakan bentuk dari kejahatan-kejahatan internasional yang telah ada, yaitu: kejahatan terhadap kemanusiaan, kejahatan perang, atau genosida.

2. Pelaku terorisme dapat diadili berdasarkan yurisdiksi universal

   Hal ini dikarenakan, hukum internasional mengenal bahwa pelaku terorisme dapat diadili berdasarkan yurisdiksi universal dalam berbagai perjanjian internasional, yurisprudensi pengadilan nasional, dan ketentuan perundang-undangan nasional negara-negara.

3. Pelaku terorisme dapat diadili berdasarkan asas retroaktif

   Hal ini disebabkan telah terjadi pergeseran dalam sistem hukum pidana negara-negara. Negara-negara seperti Amerika Serikat dan Kanada telah memberlakukan asas retroaktif terhadap pelaku terorisme melalui berbagai yurisprudensi pengadilan nasional dan ketentuan perundang-undangannya.

Sedangkan argumentasi yang **menentang** terorisme sebagai kejahatan internasional adalah sebagai berikut:

1. Terorisme belum diterima secara universal sebagai kejahatan internasional

   Hal ini dikarenakan:

   a. Masyarakat internasional belum sepakat akan definisi baku terorisme;
   b. Masyarakat internasional belum mengakui secara tegas bahwa terorisme adalah kejahatan internasional; dan
   c. Terorisme telah ditolak untuk dicantumkan dalam ruang lingkup yurisdiksi Mahkamah Pidana Internasional.

2. Pelaku terorisme tidak dapat diadili berdasarkan yurisdiksi universal

   Belum adanya penerimaan universal terorisme sebagai kejahatan internasional juga menjadi salah satu penyebab pelaku terorisme tidak dapat diadili berdasarkan yurisdiksi universal. Hal ini telah ditegaskan oleh yurisprudensi pengadilan nasional yang mendasarkan putusannya pada norma-norma hukum internasional.

3. Pelaku terorisme tetap harus diadili berdasarkan asas non-retroaktif

Hal ini dikarenakan prinsip legalitas dalam hukum pidana, yang melarang pemberlakuan asas retroaktif, tetap harus dijunjung tinggi bahkan terhadap pelaku terorisme. Terdapat 3 (tiga) perjanjian HAM dunia yang dengan tegas mengatur bahwa hak seseorang untuk tidak dituntut berdasarkan hukum yang berlaku retroaktif merupakan HAM yang tidak dapat dikurangi dalam keadaan apapun (*non-derogable right*), termasuk dalam hal adanya terorisme.

III. Indonesia Sudah Mengkualifikasi Terorisme sebagai Kejahatan Internasional

Hal ini didasarkan pada alasan-alasan sebagai berikut:

1. Indonesia mengakui bahwa terorisme merupakan tindakan yang telah diterima masyarakat internasional sebagai kejahatan internasional

   Hal ini tampak dari berbagai ketentuan hukum positif Indonesia mengenai terorisme, seperti: UU No. 15 Tahun 2003 yang menetapkan Perpu No. 1 Tahun 2002 menjadi UU, UU No. 5 Tahun 2006, dan UU No. 6 Tahun 2006. Hal ini juga ditunjukkan dari pernyataan resmi Pemerintah yang disampaikan dalam berbagai kesempatan. Dalam berbagai ketentuan perundang-undangan dan pernyataan Pemerintah ini, Indonesia mengkualifikasi terorisme

sebagai "kejahatan terhadap kemanusiaan", "pelanggaran HAM berat", "kejahatan luar biasa", atau "kejahatan internasional".

2. Indonesia dapat mengadili pelaku terorisme berdasarkan yurisdiksi universal, sepanjang terorisme tersebut dilakukan dalam bentuk pembajakan laut, penguasaan pesawat udara secara melawan hukum, atau kejahatan yang mengancam keselamatan penerbangan sipil

   Fakta bahwa Perpu No. 1 Tahun 2002 tidak mengatur mengenai yurisdiksi universal Indonesia terhadap pelaku terorisme tidak dapat serta-merta ditafsirkan bahwa Indonesia tidak dapat mengadili pelaku terorisme berdasarkan yurisdiksi universal. Hal ini dikarenakan Pasal 4 ayat (4) KUHP telah menjadi landasan yuridis bagi pemberlakuan yurisdiksi universal oleh Indonesia, yaitu terhadap pelaku: pembajakan laut, penguasaan pesawat udara secara melawan hukum, atau kejahatan yang mengancam keselamatan penerbangan sipil.

3. Indonesia dapat mengadili pelaku terorisme berdasarkan asas retroaktif

   Walaupun dalam Perkara UU No. 16 Tahun 2003 Mahkamah Konstitusi menyatakan bahwa UU tersebut tidak memiliki kekuatan hukum mengikat karena mengandung asas retroaktif, Indonesia sebetulnya dapat mengadili

pelaku terorisme berdasarkan asas retroaktif. Berdasarkan Penjelasan Pasal 4 UU No. 39 Tahun 1999, asas non-retroaktif dapat dikecualikan dalam hal kejahatan terhadap kemanusiaan. Sebagaimana ditunjukkan oleh UU No. 15 Tahun 2003, UU No. 5 Tahun 2006, dan UU No. 6 Tahun 2006, tidak diragukan lagi bahwa Indonesia telah mengkualifikasi terorisme sebagai kejahatan terhadap kemanusiaan.

B. SARAN

1. Permasalahan mengenai definisi terorisme selalu menjadi kendala utama dalam penegakan hukum internasional terhadap pelaku terorisme. Tanpa adanya definisi yang baku dan diterima secara universal, hukum internasional tidak akan dapat secara efektif mencegah dan menanggulangi terorisme. Hal ini terutama karena: (a) terorisme sukar diidentifikasi karena dapat diwujudkan dalam berbagai bentuk kejahatan yang berbeda-beda, (b) terorisme merupakan kejahatan yang rentan terhadap politisasi oleh negara-negara, dan (c) terorisme yang tidak didefinisikan dengan baik dapat

membuka peluang akan adanya pelanggaran hak asasi manusia oleh negara-negara. Untuk mengatasi permasalahan-permasalahan tersebut, sebaiknya masyarakat internasional, dengan dikoordinasikan oleh PBB, secepatnya mengadopsi definisi baku terorisme. Definisi ini akan sangat menentukan pergerakan hukum internasional selanjutnya dalam perang melawan teroris.

2. Sebaiknya terorisme dicantumkan dalam ruang lingkup yurisdiksi Mahkamah Pidana Internasional. Hal tersebut dapat dilakukan dengan mencantumkan terorisme sebagai kejahatan tersendiri, atau dapat juga dilakukan dengan mencantumkannya ke dalam ruang lingkup "kejahatan terhadap kemanusiaan", seperti yang telah diusulkan oleh berbagai negara. Pencantuman terorisme sebagai kejahatan yang dapat diadili oleh Mahkamah akan menjamin efektifitas hukum dalam mengadili teroris, karena memberikan kesempatan untuk berlakunya baik yurisdiksi domestik negara yang menderita kerugian, maupun yurisdiksi Mahkamah sendiri ("prinsip komplementaritas").

3. Indonesia harus bersatu dalam mempertegas sikapnya untuk mengkualifikasi terorisme sebagai kejahatan internasional. Hal ini dikarenakan masih terdapat pertentangan pendapat antara organ eksekutif dan legislatif di satu sisi, dan organ yudikatif di sisi lain. Hal ini patut disayangkan, mengingat terorisme telah menimbulkan akibat-akibat yang luar biasa terhadap berbagai aspek kehidupan berbangsa dan bernegara, sehingga pencegahan dan penanggulangannya membutuhkan dukungan dari seluruh lapisan masyarakat.

DAFTAR PUSTAKA

Buku

----------. Text in The Treaties of Peace 1919-1923. *Carnegie Endowment for International Peace*. Vol. I. New York, 1924. P.121.

----------. *Yearbook of the International Law Commission.* Vol. II (Part Two). 1996. Arts. 16-20.

Ayala, Balthazar. *De Jure et Officiis Bellicis et Disciplina Militari* (1581). J.P. Bate Trans., 1912.

Ayala, Balthazar. *Three Books, on the Law of War, and on the Duties Connected with War, and on Military Discipline* 88 (1597). J. P. Bate Trans., 1912.

Bantekas, Ilias dan Susan Nash. *International Criminal Law*. 3rd ed. London dan New York: Routledge-Cavendish, 2007.

Bassiouni, M. Cherif. *International Criminal Law.* New York: Transnational Publishers Inc., 1986.

Bogdan, Robert dan Steven J. Taylor. *Introduction to Qualitative Research Methods*. New York: John Willey & Sons, Inc., 1975.

Cassese, Antonio. *International Criminal Law*. 1st ed. New York: Oxford University Press, 2003.

Cicero. *Contra Verres II*. L.H.G. Greenwood Trans., 1953.

Cicero. *De Officii*. L.H.G. Greenwood Trans., 1953.

Cicero. *De Republica*. C.W. Keyes Trans., 1928.

Comité International de Croix Rouge. *Commentaire des Protocoles Additionnels*. Geneva: M. Nijhoff, 1986.

Delmas-Marty, M. "Les Crimes Internationaux Peuvent-ils Contribuer au Débat entre Universalisme et Relativisme des Valeurs?" dalam *Crimes Internationaux*. Edited by Cassese dan Delmas-Marty. At 67.

Dixon, Martin dan Robert McCorquodale. *Cases and Materials on International Law*. 4th Ed. New York: Oxford University Press, 2003.

Drumbl, Mark A. *Atrocity, Punishment, and International Law*. Cambridge; New York: Cambridge University Press, 2007.

Gentili. *De Iure Bellicis Libri Tres* (1612). J.C. Rolfe Trans., 1933.

Gropper, W.; L. Schubert; dan M. Wörner. "Deutschland" dalam *Rechtliche Initiativen gegen organisierte Kriminalität*. Edited by W. Gropp and B. Huber. Freiburg: s.n., 2000.

Grotius, Hugo. *De Jure Belli ac Pacis*. Pertama kali diterbitkan pada 1625. Francis W. Kelsey Trans., 1925.

Harris, D.J. *Cases and Materials on International Law*. 5th Ed. London: Sweet & Maxwell, 1998.

Holsti, Ole R. *Content Analysis for the Social Sciences and Humanities*. Tanpa tempat: Addision-Wesley, 1969.

Homer. *The Iliad*. A.T. Murray Trans., 1971.

Homer. *The Odyssey.* A.T. Murray Trans., 1960.

Jamieson, A. *The Antimafia-Italy's Fight against Organized Crime.* Basingstoke; London; New York: Macmillan and St. Martin's Press, 2000.

Janesick, Valerie J. "The Dance of Qualitative Research Design, Methapor, Methodology, and Meaning" dalam *Handbook of Qualitative Research.* Edited by Norman K. Denzin dan Yvonne S. Lincoln. Tanpa tempat: Sage Publication, Inc., 1994. P. 212.

Kittichaisaree, Kriangsak. *International Criminal Law*. New York: Oxford University Press, 2001.

Knutson, Jeanne N. "Social and Psychodynamic Pressures Toward a Negative Identity" dalam *Behavioral and Quantitative Perspectives on Terrorism.* Edited by Yonah Alexander and John M. Gleason. New York: Pergamon, 1981. Pp. 105-152.

Luckabaugh, Robert. *Et al.* "Terrorist behavior and US foreign policy: Who Is the Enemy? Some Psychological and Political Perspectives" dalam *Psychology.* 34 (2). 1997. Pp. 1-15.

Marschik, Axel. "The Politics of Prosecution: European National Approaches to War Crimes" dalam *The Law of War Crimes.* Edited by Timothy L.H. McCormack & Gerry J. Simpson. 1997. Pp. 65, 79-81.

Mauna, Boer. *Hukum Internasional- Pengertian, Peranan, dan Fungsi Dalam Era Dinamika Global*. Ed. 2. Bandung: PT. Alumni, 2005.

Morris, Virginia dan Michael P. Scharf. *The International Criminal Tribunal for Rwanda*. Vol. 1. New York: Transnational Publishers, Inc., 1998.

Naylor, R.T. "Follow the Money Methods in Crime Control Policy," dalam *Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption.*

Edited by Margaret E. Beare. Toronto; Buffalo; London: University of Toronto Press, 2005.

Robertson, Geoffrey. *Kejahatan terhadap Kemanusiaan-Perjuangan untuk Mewujudkan Keadilan Global [Crime against Humanity-The Struggle for Global Justice]*. Edisi Indonesia Jakarta: Komnas HAM, 2002.

Röling, B.V.A. dan C.F. Rüter (eds.). *The Tokyo Judgment.* Vol. I. University Press Amsterdam, 1977.

Ruggiero, Vincenzo. "Global Markets and Crime," dalam *Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption*. Edited by Margaret E. Beare. Toronto; Buffalo; London: University of Toronto Press, 2005.

Schwartzenberger, G. *The Law of Armed Conflict, International Law as Applied by International Courts and Tribunals.* Vol. II. London: Stevens, 1968.

Soekanto, Soerjono dan Sri Mamudji. *Penelitian Hukum Normatif- Suatu Tinjauan Singkat.* Jakarta: PT Raja Grafindo Persada, 2006.

Soekanto, Soerjono. *Pengantar Penelitian Hukum.* Cet. 3. Jakarta: UI Press, 2006.

Spinedi, M. "Crimes of State: The Legislative History" in *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*. Edited by J.H.H. Weiler; Antonio Cassese; dan M. Spinedi. Walter de Gruyter, 1989. At 11-12.

Thucydides. *The Peleponnesian War.* C.M. Smith Trans., 1969.

Woodiwiss, Michael. "Transnational Organized Crime: The Strange Career of an American Concept" dalam *Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption*. Edited by Margaret E. Beare. Toronto; Buffalo; London: University of Toronto Press, 2005.

Artikel

"1 Japanese Killed, 4 Injured in Bali Blasts." <http://news.xinhuanet.com/english/2005-10/02/content_3575384.htm>. Diakses 23 Juni 2008.

"8 S. Korean Tourists Injured in Bali Bombings." <http://news.xinhuanet.com/english/2005-10/02/content_3574471.htm>. Diakses 23 Juni 2008.

"1972: Olympic Hostages Killed in Gun Battle." <http://news.bbc.co.uk/onthisday/hi/dates/stories/september/6/newsid_2500000/2500769.stm>. Diakses 18 Maret 2008.

"Bali Bombings: Horror in Paradise." <http://edition.cnn.com/SPECIALS/2002/bali/>. Diakses 18 Maret 2008.

"Bali Terrorist Blasts Kill at Least 26." <http://edition.cnn.com/2005/WORLD/asiapcf/10/01/bali.blasts/index.html>. Diakses 23 Juni 2008.

"Bombers Target London." <http://edition.cnn.com/SPECIALS/2005/london.bombing/>. Diakses 18 Maret 2008.

"Bombings Have JI Written All over Them." Straits Times (Singapore). 14 Oct 2002.

"Church Bombings Prompt Calls for Calm." <http://news.bbc.co.uk/2/hi/asia-pacific/1086892.stm>. 25 Desember 2000.

"Death Toll Hits 15 in Jakarta Stock Exchange Bomb." <http://edition.cnn.com/2000/ASIANOW/southeast/09/13/indonesia.explosion.04/>. 14 September 2000.

"Dozens Killed in Egypt Bomb Blast." <http://news.bbc.co.uk/onthisday/hi/dates/stories/july/23/newsid_4947000/4947674.stm>. Diakses 18 Maret 2008.

"Expats flee Bali after threats."

<http://www.news.com.au/story/0,10117,16788455-2,00.html>. Diakses 23 Juni 2008.

"International Law Commission."
<http://www.un.org/law/ilc/>. Diakses 23 April 2008.

"Marriott Blast Suspects Named."
<http://edition.cnn.com/2003/WORLD/asiapcf/southeast/08/19/indonesia.arrests.names/>. 19 Agustus 2003.

"Massacre in Madrid."
<http://edition.cnn.com/SPECIALS/2004/madrid.bombing/>. Diakses 18 Maret 2008.

"Menkeh: Putusan MK Tidak Bisa Dijadikan Novum."
<http://hukumonline.com/detail.asp?id=10813&cl=Berita>. 27 Juli 2004.

"MK Nyatakan UU Terorisme Tidak Mempunyai Kekuatan Mengikat."
<http://hukumonline.com/detail.asp?id=10800&cl=Berita>. 23 Juli 2004.

"Remember Bali: Bali 12.10.2002 Memorial Site."
<http://www.indo.com/bali121002/inmemoriam.html>. Diakses 23 Juni 2008.

"Security Tightened after Bali Suicide Bombings."
<http://edition.cnn.com/2005/WORLD/asiapcf/10/02/bali.blasts/>. 2 Oktober 2005.

"Signatories to the United Nations Convention against Transnational Crime and its Protocols."
<http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>. Diakses 13 Mei 2008.

"Terror blasts rock Casablanca."
<http://news.bbc.co.uk/2/hi/africa/3035803.stm>. 17 Mei 2003.

"Text Warned of Jakarta Bomb."
<http://edition.cnn.com/2004/WORLD/asiapcf/09/10/indone

sia.blast/index.html?iref=newssearch>. 10 September 2004.

"Thai Blast Tourist Undeterred." <http://news.bbc.co.uk/2/hi/uk_news/england/southern_counties/6222545.stm>. 1 Januari 2007.

"The Offenses Clause: Congress' International Penal Power." 8 COLUM. J. TRANSNAT'L L. 279. 1969.

"The United Nations Convention against Transnational Organized Crime and its Protocols." <http://www.unodc.org/unodc/en/treaties/CTOC/index.html#Fulltext>. Diakses 13 Mei 2008.

"Three Canadians Injured in Bali Bombings." <http://www.cbc.ca/story/world/national/2005/10/01/BaliCanadians20051001.html>. Diakses 23 Juni 2008.

"UN Action to Counter Terrorism." <http://www.un.org/terrorism/>. Diakses pada 18 Maret 2008.

"UN Action to Counter Terrorism." <http://www.un.org/terrorism/cttaskforce.shtml>. Diakses pada 18 Maret 2008.

"UN Action to Counter Terrorism." <http://www.un.org/terrorism/instruments.shtml>. Diakses pada 18 Maret 2008.

"UN Action to Counter Terrorism." <http://www.un.org/terrorism/makingadifference.shtml>. Diakses 18 Maret 2008.

"World: Europe Lockerbie History." <http://news.bbc.co.uk/2/hi/europe/228813.stm>. 6 Desember 1998.

"Yusril: Putusan Mahkamah Konstitusi Hanya untuk Bom Bali." <http://antiteror.polkam.go.id/berita.asp?id=72>. Senin, 26 Juli 2004. 12:57.

<http://www.icao.int/icao/en/leb/Hague.pdf>. Diakses pada 23 Juni 2008.

<http://www.icao.int/icao/en/leb/Mtl71.pdf>. Diakses pada 23 Juni 2008.

<http://www.un.org/Depts/los/reference_files/status2008.pdf>. Diakses pada 23 Juni 2008.

Amnesty International. "Universal Jurisdiction and Absence of Immunity for Crimes Against Humanity." <http://www.globalpolicy.org/intljustice/universal/0199pinochet.htm>. January 1, 1999.

Bassiouni, M. Cherif. "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice." *Virginia Journal of International Law.* 42 Va. J. Int'l L. 81 (2001).

Baumeister, R.F. dan M.R. Leary. "The Need to Belong: Desire for Interpersonal Attachments as A Fundamental Human Motivation." *Psychological Bulletin*, 117 (1995): 497-529.

Blakesley, Christopher L. "Ruminations on Terrorism and Anti-Terrorism Law & Literature." *57 U. Miami L. Rev. 1041* (2003):1047.

Cassese, Antonio. "When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium Case*." 13 *European Journal of International Law* (2002): 857-858.

CNN. "Ceremony Honors U.S. Embassy Bombing Victims." Sept. 11, 1998. <http://www.cnn.com/US/9809/11/embassy.bomb.memorial>.

Cullen, P. "Crime and Policing in Germany in the 1960s." *Discussion Paper in German Studies, No. IGS 97/13* (Birmingham: University of Birmingham, 1997): 17.

Dickinson. "Introductory Comment to the Harvard Research Draft Convention on Jurisdiction with Respect to Crime

1935." *American Journal of International Law*. 29 A.J.I.L. Supp. 443 (1935).

Dinstein, Yoram. "Terrorism as an International Crime." *18 Israel Yearbook on Human Rights* (1989): 55-73.

Dinstein, Yoram. "The Parameters and Content of International Criminal Law." *Touro Journal of Transnational Law.* 1 Touro J. Transnat'l L. 315 (1990): 316.

Drumbl, Mark A. "The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, The Geneva Conventions, and International Criminal Law" (Symposium on the New Face of Armed Conflict: Enemy Combatants after Hamdan v. Rumsfeld). *George Washington Law Review*. 75 Geo. Wash. L. Rev. 1165 (Agustus 2007): 1181-1199.

Fry, James D. "Terrorism as a Crime Against Humanity and Genocide: The Backdoor to Universal Jurisdiction." *UCLA Journal of International Law and Foreign Affairs*. 7 UCLA J. Int'l L. & Foreign Aff. 169 (Spring/Summer 2002): 190.

Greppi, Edoardo. "The Evolution of Individual Criminal Responsibility under International Law." <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JQ2X>. 30 September 1999.

Horgan, J. dan M. Taylor. "The Making of A Terrorist." *Jane's Intelligence Review* 13 (12) (2001):16-18.

Kobrick, Eric S. "The Ex Post Facto Prohibition and The Exercise of Universal Jurisdiction Over International Crimes." *Columbia Law Review*. 87 Colum. L. Rev. 1515 (November 1987): 1528-1529.

Levi, M. "Perspectives on 'Organized Crime': An Overview." *The Howard Journal 37(4)* (1998): 335.

Mann, F.A. "The Doctrine of Jurisdiction in International Law." 113-1 Recueil des Cours (1964): 9, 95.

Millard, Jeremy. "Investigative Hearings under the Anti-Terrorism Act." 60(1) U.T.FAC.L. Rev 79-87 (2002).

Office of the United Nations High Commissioner for Human Rights. <http://www2.ohchr.org/english/bodies/ratification/1.htm>. Diakses 13 Juni 2008.

Oots, Kent Layne dan Thomas C. Wiegele. "Terrorist and Victim: Psychiatric and Physiological Approaches from a Social Science Perspective." *Terrorism: An International Journal* 8, No. 1 (1985): 1-32.

Proulx, Vincent-Joël. "Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes against Humanity?." *American University International Law Review*. 19 Am. U. Int'l L. Rev. 1009 (2004): 1036.

Randall, Kenneth C. "Universal Jurisdiction under International Law." *Texas Law Review*. 66 Tex. L. Rev. 785 (Maret 1988).

Roberts, A. "Can We Define Terrorism?." *14 Oxford Today* (2002): 18.

Rosetti, Michael. "Terrorism as a Violation of the Law of Nations after *Kadic v. Karadzic*." *Saint John's Journal of Legal Commentary*. 12 St. John's J. Legal Comment 565 (Spring 1997): 585.

Ross, Jeffrey. "Structural Causes of Oppositional Political Terrorism." *Journal of Peace Research* 30 (1993): 317-329.

Saul, Ben. "Definition of Terrorism in the UN Security Council: 1985-2004." *Chinese Journal of International Law*. 4 Chinese J. Int'l L. 141 (June 2005).

Sieber, U. "Logistik der Organisierten Kriminalität in der Bundesrepublik Deutschland." *Juristenzeitung 15/16* (1995): 760.

Skurka, Steven dan Margaret Bojanowska. "Canada's Response to Terrorism-The Investigative Hearing." *National Association of Criminal Defense Lawyers, Inc.* 27-MAR Champion 36 (Maret 2004).

Sloane, Robert D. "Book Review on Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge, New York: Cambridge University Press, 2007)." *American Journal of International Law.* 102 Am. J. Int'l L. 197 (Januari 2008): 205.

Smith, Bryant. "Retroactive Laws and Vested Rights." *6 Tex. L. Rev. 409* (1928): 412.

Swain, Laura Taylor. "Liberty in the Balance: The Role of the Third Branch in a Time of Insecurity." *37 Suffolk U. L. Rev. 51* (2004): 51.

Trueworthy, Robin C. "Retroactive Application Of The Anti-Terrorism And Effective Death Penalty Act Of 1996 To Pending Cases: Rewriting A Poorly Written Congressional Statute." *Washington University Law Quarterly.* 75 Wash. U. L.Q. 1707 (Winter 1997): 1707.

Young, Reuven. "Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation." *Boston College International and Comparative Law Review.* 29 B.C. Int'l & Comp. L. Rev. 23 (Winter 2006): 89.

Dokumen Hukum dan Referensi Lain

1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft.

1970 Convention for the Suppression of Unlawful Seizure of Aircraft.

1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.

1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons.

1979 International Convention against the Taking of Hostages.

1980 Convention on the Physical Protection of Nuclear Material.

1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.

1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf.

1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.

1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection.

2005 International Convention for the Suppression of Acts of Nuclear Terrorism.

2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.

Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts. 8 Juni 1977.

Additional Protocol II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts. 8 Juni 1977.

Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. ICJ Reports 1951.

African Charter on Human and Peoples' Rights. 1520 United Nations Treaty Series 363. 27 Juni 1981.

Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis signed at London (London Agreement). 82 United Nations Treaty Series 279. 8 Agustus 1945.

Aksoy v. Turkey. European Court of Human Rights (18 Desember 1996).

Alejandre v. Republic of Cuba. 996 F Supp 1239 (1997).

American Convention on Human Rights. OAS Treaty Series No. 36. 22 November 1969.

Amerika Serikat. 10 U.S.C.

Amerika Serikat. 18 U.S.C.

Amerika Serikat. *Antiterrorism Act*. 2000.

Amerika Serikat. Genocide Convention Implementation Act of 1987. Pub. L. 100-606, 102 Stat. 3045. Enacted on November 5, 1988.

Amerika Serikat. *Iran and Libya Sanctions Act*. Public Law 104-172. 5 Agustus 1996.

Amerika Serikat. Pub. L. No. 104-132, 110 Stat. 1214. Codified as amended at 28 U.S.C. §§ 2241-2266 (1997).

Amerika Serikat. Restatement (Third) Of Foreign Relations Law § 404 (1986). "Universal Jurisdiction to Define and Punish Certain Offenses".

Amerika Serikat. U.S. Constitution.

Amerika Serikat. *United States Federal Courts Administration Act of 1992*. Pub. L. No. 102- 572.

Arab Convention for the Suppression of Terrorism 1998. <http://www.al-bab.com/arab/docs/league/terrorism98.htm>. Diakses 12 Juni 2008.

Asylum Case (Colombia v. Peru). ICJ Reports 1950.

Attorney-General of the Government of Israel v. Eichmann. District Court of Jerusalem. 36 ILR (1961) 5.

Australia. Genocide Convention Act (1949).

Australia. *Schedule to the Australian Security Legislation Amendment Terrorism Bill*. 2002.

Australia. War Crimes Act (1945).

Australia. War Crimes Amendment Act (1988).

Barcelona Traction, Light, and Power Co. Case (Belgium v. Spain). ICJ Reports 1970.

"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 International Humanitarian Law." Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005. <http://www2.ohchr.org/english/law/remedy.htm>. Diakses 13 Mei 2008.

Bassiouni, M. Cherif. *A Draft International Criminal Code and Draft Statute for an International Criminal Court* (1987): 28-29.

Belgia. *Loi du 13 avril 1995. Loi relative aux abus sexuels à l'égard des mineurs.*

Belgia. *Loi du 16 juin 1993 relative à la répression des infractions graves aux conventions internationales de*

Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces conventions.

Belgia. *Loi relative à la répression des violations graves de droit international humanitaire. 10 février 1999.*

Brannigan and McBride v. United Kingdom. European Court of Human Rights. ECHR Series A (1993) No. 258-B.

Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.). ICJ Reports. 27 Juni 1986.

Case Concerning the Arrest Warrant of 11 April 2002 (Democratic Republic of Congo v. Belgium). ICJ Reports 14 February 2002.

Charter of the International Military Tribunal (annexed to the London Agreement).

Charter of the International Military Tribunal for the Far East sitting at Tokyo.

Chernichenko, Stanislav. "Definition of Gross and Large-scale Violations of Human Rights as an International Crime." Commission On Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities. Forty-fifth Session. Item 4 of the provisional agenda. *Working Paper submitted in accordance with Sub-Commission decision 1992/109, Economic and Social Council*. E/CN.4/Sub.2/1993/10. 8 June 1999.

Chilean Amnesty Decree 2191 of 1978.

Cicippio v. Islamic Republic of Iran. 18 F Supp. 2d 62 (1998).

Civil Liability for Acts of State Sponsored Terrorism. 28 U.S.C. § 1605 (2004).

Constitución Política de la República de Chile. Decreto Supremo N° 1.150, de 1980. Ministerio del Interior

(Publicado en el Diario Oficial de 24 de octubre de 1980).

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 10 December 1984. 1465 United Nations Treaty Series 85.

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949. 96 United Nations Treaty Series 271.

Convention of the Organization of African Unity on the Prevention and Combating of Terrorism. 14 Juli 1999. <http://untreaty.un.org/English/Terrorism/oau_e.pdf>. Diakses 12 Juni 2008.

Convention of the Organization of the Islamic Conference on Combating International Terrorism. 1 Juli 1999. <http://www.oic-oci.org/oicnew/english/convenion/terrorism_convention.htm>. Diakses 12 Juni 2008.

Convention on the Prevention and Punishment of the Crime of Genocide. 1 January 1948. 78 United Nations Treaty Series 277.

Doc. A/CONF.183/C.1/L.27/Corr. 1. 29 Juni 1998.

Draft Code of Crimes against the Peace and Security of Mankind 1996. Diadopsi oleh Komisi Hukum Internasional pada sesi ke-48 pada 1996, dan diserahkan kepada Majelis Umum PBB (at para. 50).

Elahi v. Islamic Republic of Iran. 124 F. Supp. 2d 97, D.D.C. (2000).

(European) Convention for the Protection of Human Rights and Fundamental Freedoms. ETS No. 5. 4 November 1950.

European Convention on the Suppression of Terrorism. 27 Januari 1977.

<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=090&CM=8&DF=6/12/2008&CL=ENG>. Diakses 12 Juni 2008.

Filartiga v. Peña-Irala. United States Court of Appeals. Second Circuit (30 Juni 1980).

Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994). UN Doc. S/1994/1405 (1994). Reprinted in Volume II.

Flatow v. Islamic Republic of Iran. 999 F. Supp. 1, 14 (D.D.C. 1998).

Flatow v. Islamic Republic of Iran. 999 F.Supp. 1, 14 (D.D.C. 1998).

G.A. Res. 3103. U.N. GAOR, Supp. No. 28 at 512. U.N. Doc. A/9102 (1973).

GA Resolution 3448 (XXX) of 9 December 1975.

General Assembly Resolution 49/60 (1994).

General Assembly Resolution 59/191 (2004).

General Assembly Resolution 95, UN Doc. A/64/Add.1. at 188 (1947).

Geneva Convention I (for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field). Geneva, 12 Agustus 1949.

Geneva Convention II (for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea). Geneva, 12 Agustus 1949.

Geneva Convention III (Relative to the Treatment of Prisoners of War). Geneva, 12 Agustus 1949.

Geneva Convention IV (Relative to the Protection of Civilian Persons in Time of War). Geneva, 12 Agustus 1949.

Good Friday Agreement. 10 April 1998. *Reprinted in* 37 International Legal Materials (1998). 751, Strand 10 (1).

Göring and others. Nuremberg Trial. 1 October 1946: 219.

Hamdan v. Rumsfeld. United States Supreme Court. 29 Juni 2006. 548 US (2006). Pp. 62-68.

Hostages Trial. US Military Tribunal at Nuremberg. 19 Feb. 1948 (1953). 15 Annual Digest and Reports of Public International Law Cases. Vols. 1-16 (1932-1955). 632 at 636.

ICC Elements of Crimes. ICC-ASP/1/3 (part II-B). 9 September 2002.

India. *Prevention of Terrorism Act 2002*.

Indonesia. *Peraturan Pemerintah Pengganti Undang-undang tentang Pemberlakuan Peraturan Pemerintah Pengganti Undang-undang No. 1 Tahun 2002 tentang Pemberantasan Tindak Pidana Terorisme, pada Peristiwa Peledakan Bom di Bali Tanggal 12 Oktober 2002*. Perpu No. 2 Tahun 2002. LN No. 107 Tahun 2002. TLN No. 4233. Diundangkan pada 18 Oktober 2002.

Indonesia. *Peraturan Pemerintah Pengganti Undang-Undang tentang Pemberantasan Tindak Pidana Terorisme*. Perpu No. 1 Tahun 2002. LN No. 106 Tahun 2002. TLN No. 4232.

Indonesia. *Undang-undang Dasar 1945 (Amandemen Kedua).*

Indonesia. *Undang-undang tentang Hak Asasi Manusia*. UU No. 39 Tahun 1999. LN No. 165 Tahun 1999. TLN No. 3886.

Indonesia. *Undang-undang tentang Mahkamah Konstitusi*. UU No. 24 Tahun 2003. LN No. 98 Tahun 2003. TLN No. 4316.

Indonesia. *Undang-undang tentang Penetapan Peraturan Pemerintah Pengganti Undang-undang No. 1 Tahun 2002 tentang Pemberantasan Tindak Pidana Terorisme Menjadi*

Undang-undang. UU No. 15 Tahun 2003. LN No. 45 Tahun 2003. TLN No. 4284.

Indonesia. *Undang-undang tentang Penetapan Peraturan Pemerintah Pengganti Undang-undang No. 2 Tahun 2002 tentang Pemberlakuan Peraturan Pemerintah Pengganti Undang-undang No. 1 Tahun 2002 tentang Pemberantasan Tindakan Pidana Terorisme, pada Peristiwa Peledakan Bom di Bali tanggal 12 Oktober 2002, Menjadi Undang-undang*. UU No. 16 Tahun 2003. LN No. 46 Tahun 2003. TLN No. 4285.

Indonesia. *Undang-undang tentang Pengadilan Hak Asasi Manusia*. UU No. 26 Tahun 2000. LN No. 208 Tahun 2000. TLN No. 4026.

Indonesia. *Undang-undang tentang Pengesahan International Convention for the Suppression of Terrorist Bombings, 1997 (Konvensi Internasional Pemberantasan Pengeboman oleh Teroris, 1997)*. UU No. 5 Tahun 2006. LN No. 28 Tahun 2006. TLN No. 4616.

Indonesia. *Undang-undang tentang Pengesahan International Convention for the Suppression of the Financing of Terrorism, 1999 (Konvensi Internasional Pemberantasan Pendanaan Terorisme, 1999)*. UU No. 6 Tahun 2006. LN No. 29 Tahun 2006. TLN No. 4617.

Indonesia. *UU tentang Pengesahan International Covenant on Civil and Political Rights (Kovenan Internasional tentang Hak-hak Sipil dan Politik)*. UU No. 12 Tahun 2005. LN No. 119 Tahun 2005. TLN No. 4558.

Inggris. *Northern Ireland (Emergency Provisions) Act 1978*.

Inggris. *Terrorism Act*. 2000.

Inter-American Commission on Human Rights. Report No. 25/98.

Inter-American Commission on Human Rights. Report No. 36/96.

Inter-American Convention Against Terrorism 2002. <http://www.oas.org/juridico/english/treaties/a-66.html>. Diakses 12 Juni 2008.

International Convention for the Suppression of Terrorist Bombings. UNGA A/Res/52/164. 15 Desember 1997.

International Covenant on Civil and Political Rights. 999 United Nations Treaty Series 171. 16 Desember 1966.

International Law Commission. Fifth Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur-the Internationally Wrongful Act of the State, Source of International Responsibility (continued). A/CN.4/291 and Add.1 & 2 and Corr.1, 1976.

Ireland v. United Kingdom. European Court of Human Rights. Series A No. 25.

Jeremy Greenstock. KCMG Permanent Representative of the United Kingdom of Great Britain and Northern Ireland. General Assembly Debate on Terrorism. 1 October 2001. <http://www.un.org/terrorism/statements/ukE.html>.

Kanada. *Antiterrorism Act*. Bill C-36.

Kanada. Criminal Code, R.S.C. 1985. C-46.

Kitab Undang-undang Hukum Pidana [Wetboek van Strafrecht]. Diterjemahkan oleh Moeljatno. Cet. 22. Jakarta: Bumi Aksara, 2003.

Klass and Others v. Germany. European Court of Human Rights. 6 September 1978. Series A No. 28.

Lawless v. Ireland. European Court of Human Rights. 1 Juli 1961. Series A No. 3.

Leavitt v. Arave. 927 F. Supp. 394 (D. Idaho 1996).

Legal Mechanisms to Combat Terrorism: Hearing before the Subcommission on Security and Terrorism of the Senate

Comm. on the Judiciary. 99th Cong. 2d Sess. 1-332 (1986).

Lennox v. Evans. 87 F.3d 431 (10th Cir. 1996).

Letter dated 21 August 1989 from the Permanent Representative of Trinidad and Tobago to the UN Secretary-General. UN GAOR, 47th Session. Annex 44. Agenda Item 152. *UN Doc. A./44/195 (1989).*

Lieber Code (Instructions for the Government of Armies of the United States in the Field). General Orders No. 100. 24 April 1863.

Motion adopted by all Defence Counsel in *Trial of the Major War Criminals Before the International Military Tribunal.* 19 November 1945. *Nuremberg 14 November 1945-1 October 1946*. Vol. I: 168-169.

National Criminal Intelligence Service (NCIS). "Annual Assesment of the Organized Crime Threat." <http://www.ncis.co.uk>. Diakses 20 Mei 2008.

North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. the Netherlands). ICJ Reports 1969.

Office of High Commissioner for Human Rights. <http://www2.ohchr.org/english/bodies/ratification/9.htm>. Last updated 18 April 2008.

Prosecutor v. Akayesu. International Criminal Tribunal for Rwanda. 1998 I.C.T.R. P 12 (Sept. 2). <http://www.ictr.org/wwwroot/ENGLISH/cases/Akayesu/judgement/akay001.htm>.

Prosecutor v. Dusko Tadic. Supreme Court of Germany (*Bundesgerichtshof*). 13 February 1994.

Prosecutor v. Furundžija. International Criminal Tribunal for the Former Yugoslavia (10 December 1998).

Prosecutor v. Galić. International Criminal Tribunal for the former Yugoslavia. Indictment (Case No. IT-98-29-I). 23 Oktober 2001.

Prosecutor v. Refik Saric. Danish High Court. Third Chamber. Eastern Division. 25 November 1994.

Public Prosecutor v. Djajic. No. 20/96 (Sup. Ct. Bavaria, 3d Strafsenat, 23 May 1997). Reported in 92 Am. J. Int'l L. (1998). Pp. 528-532.

Public Prosecutor v. Jorgic. Oberlandesgericht Düsseldorf. 26 September 1997.

Putusan Perkara Nomor 013/PUU-I/2003. Diucapkan oleh Mahkamah Konstitusi Republik Indonesia pada 23 Juli 2004, dan dimuat dalam Berita Negara Republik Indonesia Nomor 61 Tahun 2004. Terbit hari Jumat tanggal 30 Juli 2004.

Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte. [1998] 3 W.L.R. 1456 (H.L.). *Reprinted in* 37 I.L.M. 1302 (1998).

Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte. [1999] 2 W.L.R. 272 (H.L.). *Reprinted in* 38 I.L.M. 430 (1999).

Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte. [1999] 2 W.L.R. 827.

Rein v. Socialist People's Libyan Arab Jamahiriya. 162 F 3d 748 (1998).

Rome Statute of the International Criminal Court. 17 July 1998. UN Doc. A/CONF.183/9.

Security Council Resolution 1368 (2001).

Security Council Resolution 1526 (2004).

Security Council Resolution 1540 (2004).

Security Council Resolution 1566 (2004).

Security Council Resolution 1617 (2005).

Security Council Resolution 579 (1985).

Security Council Resolution 687 (1991).

Selandia Baru. *Terrorism Suppression Act 2002*. <http://rangi.knowledge-basket.co.nz/gpacts/public/text/2002/an/034.html>.

Selmouni v. France. European Court of Human Rights (7 Juli 1999).

Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms. Maastricht, 11-15 March 1992. Study and Information Centre of Human Rights of the Netherlands Institute of Human Rights. Special No. 12.

Siderman de Blake v. Argentina. 965 F 2d 699 (1992).

South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa). Second Phase. ICJ Reports 1966.

Spanyol. Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial. <http://noticias.juridicas.com/base_datos/Admin/lo6-1985.l1t1.html>. Diakses 12 Juni 2008.

Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the

Territory of the Former Yugoslavia since 1991. UN Security Council Resolution 827 (1993). 25 May 1993.

Supreme Court of Canada. Press Release dated August 14, 2003.

Suresh Case. Supreme Court of Canada. 11 January 2002.

Tel-Oren v. Libyan Arab Republic. 726 F.2d 774, 781 (D.C. Cir. 1984).

UN Doc. A/31/253, 8 October 1976, par. 511.

UN General Assembly Resolution 3314 (XXIV) on the Definition of Agression. 14 Desember 1974.

UN Secretary-General's Report on the Statute of the ICTY. §§29 & 34.

UN Security Council Resolution 138. June 23, 1960 (Doc. S/ 4349).

United Nations Convention against Trasnational Organized Crime. A/RES/55/25 of 15 November 2000. Adopted at the 55th session of the General Assembly of the United Nations, open for signature by all States and by regional economic integration organizations from 12 to 15 December 2000 at the *Palazzi di Giustizia* in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.

United Nations Convention on the Law of the Sea. 10 Desember 1982. 1833 United Nations Treaty Series 3.

United Nations Security Council Resolution 1373 (2001). S/Res/1373 (2001). Adopted by the Security Council at its 4385th meeting on 28 September 2001.

United Nations Security Council Resolution 1438 (2002). S/Res/1438. Adopted by the Security Council at its 4624th meeting, on 14 October 2002.

United Nations Security Council Resolution 1535 (2004). S/Res/1535 (2004). Adopted by the Security Council at its 4936th meeting on 26 March 2004.

United Nations Security Council Resolution 1624 (2005). S/Res/1624 (2005). Adopted by the Security Council at its 5261st meeting on 14 September 2005.

United Nations. *International Convention for the Supression of the Financing of Terrorism*. GA Res 54/109. 9 Desember 1999.

United States of America. Department of State. Office of the Coordinator for Counterterrorism. "Patterns of Global Terrorism 2001." <http://www.state.gov/s/ct/rls/crt/2001/html/10235.htm>. 21 Mei 2002.

United States of America. Department of State. Office of the Coordinator for Counterterrorism. "Patterns of Global Terrorism 2003." <http://www.state.gov/s/ct/rls/crt/2003/33777.htm>. 22 Juni 2004.

United States of America. National Counterterrorism Center, "Report on Terrorist Incidents 2006." <wits.nctc.gov/reports/crot2006nctcannexfinal.pdf>. 30 April 2007.

United States of America. National Counterterrorism Center. "2007 Report on Terrorism." <http://wits.nctc.gov/reports/crot2007nctcannexfinal.pdf>. 30 April 2008.

United States v. Barnett. No. 96 C 1274. 1996 WL 400016 (N.D. Ill. July 15, 1996).

United States v. Rezaq. 899 F.Supp 687, 709 (D.D.C. 1995).

United States v. Trevino. No. 96 C 828 1996 WL 252570 (N.D. Ill. May 10, 1996).

United States v. Yousef. 927 F.Supp. 673, 681-682 (S.D.N.Y. 1996).

United States v. Yunis. 681 F. Supp. 896 (D.D.C. 1988). Affirmed at 924 F. 2d 1086 (D.C. Cir. 1991).

Universal Declaration of Human Rights. UNGA Res 217A (III). 10 Desember 1948.

Warner v. United States. 926 F. Supp. 1387 (E.D. Ark. 1996).

White House Fact Sheet on Terrorism. 1996 U.S. Newswire. Sept. 24, 1996. Available in 1996 WL 12123033.

Zuern v. Tate. 938 F. Supp. 468 (S.D. Ohio 1996).

INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM

UNITED NATIONS
1999

International Convention for the Suppression of the Financing of Terrorism

Preamble

The States Parties to this Convention,

Bearing in mind the purposes and principles of the Charter of the United Nations concerning the maintenance of international peace and security and the promotion of good-neighbourliness and friendly relations and cooperation among States,

Deeply concerned about the worldwide escalation of acts of terrorism in all its forms and manifestations,

Recalling the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, contained in General Assembly resolution 50/6 of 24 October 1995,

Recalling also all the relevant General Assembly resolutions on the matter, including resolution 49/60 of 9 December 1994 and its annex on the Declaration on Measures to Eliminate International Terrorism, in which the States Members of the United Nations solemnly reaffirmed their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States,

Noting that the Declaration on Measures to Eliminate International Terrorism also encouraged States to review urgently the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism in all its forms and manifestations, with the aim of ensuring that there is a comprehensive legal framework covering all aspects of the matter,

Recalling General Assembly resolution 51/210 of 17 December 1996, paragraph 3, subparagraph (f), in which the Assembly called upon all States to take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organizations, whether such financing is direct or indirect through organizations which also have or claim to have charitable, social or cultural goals or which are also engaged in unlawful activities such as illicit arms trafficking, drug dealing and racketeering, including the exploitation of persons for purposes of funding terrorist activities, and in particular to consider, where appropriate, adopting regulatory measures to prevent and counteract movements of funds suspected to be intended for terrorist purposes without impeding in any way the freedom of legitimate capital movements and to intensify the exchange of information concerning international movements of such funds,

Recalling also General Assembly resolution 52/165 of 15 December 1997, in which the Assembly called upon States to consider, in particular, the implementation

of the measures set out in paragraphs 3 (a) to (f) of its resolution 51/210 of 17 December 1996,

Recalling further General Assembly resolution 53/108 of 8 December 1998, in which the Assembly decided that the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 should elaborate a draft international convention for the suppression of terrorist financing to supplement related existing international instruments,

Considering that the financing of terrorism is a matter of grave concern to the international community as a whole,

Noting that the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain,

Noting also that existing multilateral legal instruments do not expressly address such financing,

Being convinced of the urgent need to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators,

Have agreed as follows:

Article 1

For the purposes of this Convention:

1. AFunds@ means assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit.

2. AA State or governmental facility@ means any permanent or temporary facility or conveyance that is used or occupied by representatives of a State, members of Government, the legislature or the judiciary or by officials or employees of a State or any other public authority or entity or by employees or officials of an intergovernmental organization in connection with their official duties.

3. AProceeds@ means any funds derived from or obtained, directly or indirectly, through the commission of an offence set forth in article 2.

Article 2

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

2. (a) On depositing its instrument of ratification, acceptance, approval or accession, a State Party which is not a party to a treaty listed in the annex may declare that, in the application of this Convention to the State Party, the treaty shall be deemed not to be included in the annex referred to in paragraph 1, subparagraph (a). The declaration shall cease to have effect as soon as the treaty enters into force for the State Party, which shall notify the depositary of this fact;

(b) When a State Party ceases to be a party to a treaty listed in the annex, it may make a declaration as provided for in this article, with respect to that treaty.

3. For an act to constitute an offence set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1, subparagraphs (a) or (b).

4. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this article.

5. Any person also commits an offence if that person:

(a) Participates as an accomplice in an offence as set forth in paragraph 1 or 4 of this article;

(b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 4 of this article;

(c) Contributes to the commission of one or more offences as set forth in paragraphs 1 or 4 of this article 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 an offence as set forth in paragraph 1 of this article; or

(ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article.

Article 3

This Convention shall not apply where the offence is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State and no other State has a basis under article 7, paragraph 1, or article 7, paragraph 2, to exercise jurisdiction, except that the provisions of articles 12 to 18 shall, as appropriate, apply in those cases.

Article 4

Each State Party shall adopt such measures as may be necessary:

(a) To establish as criminal offences under its domestic law the offences set forth in article 2;

(b) To make those offences punishable by appropriate penalties which take into account the grave nature of the offences.

Article 5

1. Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative.

2. Such liability is incurred without prejudice to the criminal liability of individuals having committed the offences.

3. Each State Party shall ensure, in particular, that legal entities liable in accordance with paragraph 1 above are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include monetary sanctions.

Article 6

Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

Article 7

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:

(a) The offence is committed in the territory of that State;

(b) The offence is committed on board a vessel flying the flag of that State or an aircraft registered under the laws of that State at the time the offence is committed;

(c) The offence is committed by a national of that State.

2. A State Party may also establish its jurisdiction over any such offence when:

(a) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), in the territory of or against a national of that State;

(b) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), against a State or government facility of that State abroad, including diplomatic or consular premises of that State;

(c) The offence was directed towards or resulted in an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), committed in an attempt to compel that State to do or abstain from doing any act;

(d) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State;

(e) The offence is committed on board an aircraft which is operated by the Government of that State.

3. Upon ratifying, accepting, approving or acceding to this Convention, each State Party shall notify the Secretary-General of the United Nations of the jurisdiction it has established in accordance with paragraph 2. Should any change take place, the State Party concerned shall immediately notify the Secretary-General.

4. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is

present in its territory and it does not extradite that person to any of the States Parties that have established their jurisdiction in accordance with paragraphs 1 or 2.

5. When more than one State Party claims jurisdiction over the offences set forth in article 2, the relevant States Parties shall strive to coordinate their actions appropriately, in particular concerning the conditions for prosecution and the modalities for mutual legal assistance.

6. Without prejudice to the norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

Article 8

1. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in article 2 as well as the proceeds derived from such offences, for purposes of possible forfeiture.

2. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of funds used or allocated for the purpose of committing the offences set forth in article 2 and the proceeds derived from such offences.

3. Each State Party concerned may give consideration to concluding agreements on the sharing with other States Parties, on a regular or case-by-case basis, of the funds derived from the forfeitures referred to in this article.

4. Each State Party shall consider establishing mechanisms whereby the funds derived from the forfeitures referred to in this article are utilized to compensate the victims of offences referred to in article 2, paragraph 1, subparagraph (a) or (b), or their families.

5. The provisions of this article shall be implemented without prejudice to the rights of third parties acting in good faith.

Article 9

1. Upon receiving information that a person who has committed or who is alleged to have committed an offence set forth in article 2 may be present in its territory, the State Party concerned shall take such measures as may be necessary under its domestic law to investigate the facts contained in the information.

2. Upon being satisfied that the circumstances so warrant, the State Party in whose territory the offender or alleged offender is present shall take the appropriate measures under its domestic law so as to ensure that person=s presence for the purpose of prosecution or extradition.

3. Any person regarding whom the measures referred to in paragraph 2 are being taken shall be entitled to:

(a) Communicate without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person=s rights or, if that person is a stateless person, the State in the territory of which that person habitually resides;

(b) Be visited by a representative of that State;

(c) Be informed of that person=s rights under subparagraphs (a) and (b).

4. The rights referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the territory of which the offender or alleged offender is present, subject to the provision that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

5. The provisions of paragraphs 3 and 4 shall be without prejudice to the right of any State Party having a claim to jurisdiction in accordance with article 7, paragraph 1, subparagraph (b), or paragraph 2, subparagraph (b), to invite the International Committee of the Red Cross to communicate with and visit the alleged offender.

6. When a State Party, pursuant to the present article, has taken a person into custody, it shall immediately notify, directly or through the Secretary-General of the United Nations, the States Parties which have established jurisdiction in accordance with article 7, paragraph 1 or 2, and, if it considers it advisable, any other interested States Parties, of the fact that such person is in custody and of the circumstances which warrant that person=s detention. The State which makes the investigation contemplated in paragraph 1 shall promptly inform the said States Parties of its findings and shall indicate whether it intends to exercise jurisdiction.

Article 10

1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 7 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

2. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State to serve the sentence imposed as a result of the trial or proceeding for which the extradition or surrender of the person was sought, and this State and the State seeking the extradition of the person agree with this option and other terms they may deem appropriate,

such a conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 1.

Article 11

1. The offences set forth in article 2 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties before the entry into force of this Convention. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be subsequently concluded between them.

2. When a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in article 2. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in article 2 as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.

4. If necessary, the offences set forth in article 2 shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with article 7, paragraphs 1 and 2.

5. The provisions of all extradition treaties and arrangements between States Parties with regard to offences set forth in article 2 shall be deemed to be modified as between States Parties to the extent that they are incompatible with this Convention.

Article 12

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings in respect of the offences set forth in article 2, including assistance in obtaining evidence in their possession necessary for the proceedings.

2. States Parties may not refuse a request for mutual legal assistance on the ground of bank secrecy.

3. The requesting Party shall not transmit nor use information or evidence furnished by the requested Party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party.

4. Each State Party may give consideration to establishing mechanisms to share with other States Parties information or evidence needed to establish criminal, civil or administrative liability pursuant to article 5.

5. States Parties shall carry out their obligations under paragraphs 1 and 2 in conformity with any treaties or other arrangements on mutual legal assistance or information exchange that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their domestic law.

Article 13

None of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a fiscal offence. Accordingly, States Parties may not refuse a request for extradition or for mutual legal assistance on the sole ground that it concerns a fiscal offence.

Article 14

None of the offences set forth in article 2 shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

Article 15

Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person=s race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person=s position for any of these reasons.

Article 16

1. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences set forth in article 2 may be transferred if the following conditions are met:

(a) The person freely gives his or her informed consent;

(b) The competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

2. For the purposes of the present article:

(a) The State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;

(b) The State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;

(c) The State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person;

(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred.

3. Unless the State Party from which a person is to be transferred in accordance with the present article so agrees, that person, whatever his or her nationality, shall not be prosecuted or detained or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts or convictions anterior to his or her departure from the territory of the State from which such person was transferred.

Article 17

Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law.

Article 18

1. States Parties shall cooperate in the prevention of the offences set forth in article 2 by taking all practicable measures, *inter alia*, by adapting their domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories, including:

(a) Measures to prohibit in their territories illegal activities of persons and organizations that knowingly encourage, instigate, organize or engage in the commission of offences set forth in article 2;

(b) Measures requiring financial institutions and other professions involved in financial transactions to utilize the most efficient measures available for the identification of their usual or occasional customers, as well as customers in whose interest accounts are opened, and to pay special attention to unusual or suspicious transactions and report transactions suspected of stemming from a criminal activity. For this purpose, States Parties shall consider:

(i) Adopting regulations prohibiting the opening of accounts the holders or beneficiaries of which are unidentified or unidentifiable, and measures to ensure that such institutions verify the identity of the real owners of such transactions;

(ii) With respect to the identification of legal entities, requiring financial institutions, when necessary, to take measures to verify the legal existence and the structure of the customer by obtaining, either from a public register or from the customer or both, proof of incorporation, including information concerning the customer's name, legal form, address, directors and provisions regulating the power to bind the entity;

(iii) Adopting regulations imposing on financial institutions the obligation to report promptly to the competent authorities all complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose, without fear of assuming criminal or civil liability for breach of any restriction on disclosure of information if they report their suspicions in good faith;

(iv) Requiring financial institutions to maintain, for at least five years, all necessary records on transactions, both domestic or international.

2. States Parties shall further cooperate in the prevention of offences set forth in article 2 by considering:

(a) Measures for the supervision, including, for example, the licensing, of all money-transmission agencies;

(b) Feasible measures to detect or monitor the physical cross-border transportation of cash and bearer negotiable instruments, subject to strict safeguards to ensure proper use of information and without impeding in any way the freedom of capital movements.

3. States Parties shall further cooperate in the prevention of the offences set forth in article 2 by exchanging accurate and verified information in accordance with their domestic law and coordinating administrative and other measures taken, as appropriate, to prevent the commission of offences set forth in article 2, in particular by:

(a) Establishing and maintaining channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning all aspects of offences set forth in article 2;

(b) Cooperating with one another in conducting inquiries, with respect to the offences set forth in article 2, concerning:

(i) The identity, whereabouts and activities of persons in respect of whom reasonable suspicion exists that they are involved in such offences;

(ii) The movement of funds relating to the commission of such offences.

4. States Parties may exchange information through the International Criminal Police Organization (Interpol).

Article 19

The State Party where the alleged offender is prosecuted shall, in accordance with its domestic law or applicable procedures, communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other States Parties.

Article 20

The States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

Article 21

Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions.

Article 22

Nothing in this Convention entitles a State Party to undertake in the territory of another State Party the exercise of jurisdiction or performance of functions which are exclusively reserved for the authorities of that other State Party by its domestic law.

Article 23

1. The annex may be amended by the addition of relevant treaties that:

(a) Are open to the participation of all States;

(b) Have entered into force;

(c) Have been ratified, accepted, approved or acceded to by at least twenty-two States Parties to the present Convention.

2. After the entry into force of this Convention, any State Party may propose such an amendment. Any proposal for an amendment shall be communicated to the depositary in written form. The depositary shall notify proposals that meet the requirements of paragraph 1 to all States Parties and seek their views on whether the proposed amendment should be adopted.

3. The proposed amendment shall be deemed adopted unless one third of the States Parties object to it by a written notification not later than 180 days after its circulation.

4. The adopted amendment to the annex shall enter into force 30 days after the deposit of the twenty-second instrument of ratification, acceptance or approval of such amendment for all those States Parties having deposited such an instrument. For each State Party ratifying, accepting or approving the amendment after the deposit of the twenty-second instrument, the amendment shall enter into force on the thirtieth day after deposit by such State Party of its instrument of ratification, acceptance or approval.

Article 24

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court.

2. Each State may at the time of signature, ratification, acceptance or approval of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1. The other States Parties shall not be bound by paragraph 1 with respect to any State Party which has made such a reservation.

3. Any State which has made a reservation in accordance with paragraph 2 may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 25

1. This Convention shall be open for signature by all States from 10 January 2000 to 31 December 2001 at United Nations Headquarters in New York.

2. This Convention is subject to ratification, acceptance or approval. The instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Convention shall be open to accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 26

1. This Convention shall enter into force on the thirtieth day following the date of the deposit of the twenty-second instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 27

1. Any State Party may denounce this Convention by written notification to the Secretary-General of the United Nations.

2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations.

Article 28

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention, opened for signature at United Nations Headquarters in New York on 10 January 2000.

Annex

1. Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970.

2. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971.

3. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.

4. International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.

5. Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980.

6. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988.

7. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988.

8. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988.

9. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.

PRESIDEN
REPUBLIK INDONESIA

PENJELASAN

ATAS

PERATURAN PEMERINTAH PENGGANTI UNDANG-UNDANG REPUBLIK INDONESIA

NOMOR 1 TAHUN 2002

TENTANG

PEMBERANTASAN TINDAK PIDANA TERORISME

UMUM

Sejalan dengan Pembukaan Undang-Undang Dasar 1945, maka Negara Republik Indonesia adalah negara kesatuan yang berlandaskan hukum dan memiliki tugas dan tanggung jawab untuk memelihara kehidupan yang aman, damai, dan sejahtera serta ikut serta secara aktif memelihara perdamaian dunia.

Untuk mencapai tujuan tersebut di atas pemerintah wajib memelihara dan menegakkan kedaulatan dan melindungi setiap warga negaranya dari setiap ancaman atau tindakan destruktif baik dari dalam negeri maupun dari luar negeri.

Terorisme merupakan kejahatan terhadap kemanusiaan dan peradaban serta merupakan salah satu ancaman serius terhadap kedaulatan setiap negara karena terorisme sudah merupakan kejahatan yang bersifat internasional yang menimbulkan bahaya terhadap keamanan, perdamaian dunia serta merugikan kesejahteraan masyarakat sehingga perlu dilakukan pemberantasan secara berencana dan berkesinambungan sehingga hak asasi orang banyak dapat dilindungi dan dijunjung tinggi.

Komitmen masyarakat internasional dalam mencegah dan memberantas terorisme sudah diwujudkan dalam berbagai konvensi internasional yang menegaskan bahwa terorisme merupakan kejahatan yang mengancam perdamaian dan keamanan umat manusia sehingga seluruh anggota Perserikatan Bangsa-bangsa termasuk Indonesia wajib mendukung dan melaksanakan resolusi Dewan Keamanan Perserikatan Bangsa-bangsa yang mengutuk dan menyerukan seluruh anggota Perserikatan Bangsa-bangsa untuk mencegah dan memberantas terorisme melalui pembentukan peraturan perundang-undangan nasional negaranya.

Pemberantasan tindak pidana terorisme di Indonesia merupakan kebijakan dan langkah antisipatif yang bersifat proaktif yang dilandaskan kepada kehati-hatian dan bersifat jangka panjang karena :

Pertama, Masyarakat Indonesia adalah masyarakat multi-etnik dengan beragam dan mendiami ratusan ribu pulau-pulau yang tersebar di seluruh wilayah nusantara serta ada yang letaknya berbatasan dengan negara lain.

Kedua, dengan karakteristik masyarakat Indonesia tersebut seluruh komponen bangsa Indonesia berkewajiban memelihara dan meningkatkan kewaspadaan menghadapi segala bentuk kegiatan yang merupakan tindak pidana terorisme yang bersifat internasional.

Ketiga, konflik-konflik yang terjadi akhir-akhir ini sangat merugikan kehidupan berbangsa dan bernegara serta merupakan kemunduran peradaban dan dapat dijadikan tempat yang subur berkembangnya tindak pidana terorisme yang bersifat internasional baik yang dilakukan oleh warga negara Indonesia maupun yang dilakukan oleh orang asing.

Terorisme yang bersifat internasional merupakan kejahatan yang terorganisasi, sehingga pemerintah dan bangsa Indonesia wajib meningkatkan kewaspadaan dan bekerja sama memelihara keutuhan Negara Kesatuan Republik Indonesia.

Pemberantasan tindak pidana terorisme di Indonesia tidak semata-mata merupakan masalah hukum dan penegakan hukum melainkan juga merupakan masalah sosial, budaya, ekonomi yang berkaitan erat dengan masalah ketahanan bangsa sehingga kebijakan dan langkah pencegahan dan pemberantasannyapun ditujukan untuk memelihara keseimbangan dalam kewajiban melindungi kedaulatan negara, hak asasi korban dan saksi, serta hak asasi tersangka/terdakwa.

Pemberantasan tindak pidana terorisme dengan ketiga tujuan di atas menunjukkan bahwa bangsa Indonesia adalah bangsa yang menjunjung tinggi peradaban umat manusia dan memiliki cita perdamaian dan mendambakan kesejahteraan serta memiliki komitmen yang kuat untuk tetap menjaga keutuhan wilayah Negara Kesatuan Republik Indonesia yang berdaulat di tengah-tengah gelombang pasang surut perdamaian dan keamanan dunia.

Peraturan Pemerintah Pengganti Undang-undang tentang Pemberantasan Tindak Pidana Terorisme merupakan ketentuan khusus dan spesifik karena memuat ketentuan-ketentuan baru yang tidak terdapat dalam peraturan perundang-undangan yang ada, dan menyimpang dari ketentuan umum sebagaimana dimuat dalam Kitab Undang-undang Hukum Pidana dan Kitab Undang-undang Hukum Acara Pidana.

Peraturan Pemerintah Pengganti Undang-undang ini secara spesifik juga memuat ketentuan tentang lingkup yurisdiksi yang bersifat transnasional dan internasional serta memuat ketentuan khusus terhadap tindak pidana terorisme yang terkait dengan kegiatan terorisme internasional. Ketentuan khusus ini bukan merupakan wujud perlakuan yang diskriminatif melainkan merupakan komitmen pemerintah untuk mewujudkan ketentuan Pasal 3 Convention Against Terrorist Bombing (1997) dan Convention on the Suppression of Financing Terrorism(1999).

Kekhususan lain dari Peraturan Pemerintah Pengganti Undang-undang ini antara lain sebagai berikut:

1. Peraturan Pemerintah Pengganti Undang-undang ini merupakan ketentuan payung terhadap peraturan perundang-undangan lainnya yang berkaitan dengan pemberantasan tindak pidana terorisme.

2. Peraturan Pemerintah Pengganti Undang-undang ini merupakan ketentuan khusus yang diperkuat sanksi pidana dan sekaligus merupakan Peraturan Pemerintah Pengganti Undang-undang yang bersifat koordinatif (coordinating act) dan berfungsi memperkuat ketentuan-ketentuan di dalam peraturan perundang-undangan lainnya yang berkaitan dengan pemberantasan tindak pidana terorisme.

3. Peraturan Pemerintah Pengganti Undang-undang ini memuat ketentuan khusus tentang perlindungan terhadap hak asasi tersangka/terdakwa yang disebut "safe guarding rules". Ketentuan tersebut antara lain memperkenalkan lembaga hukum baru dalam hukum acara pidana yang disebut dengan "hearing" dan berfungsi sebagai lembaga yang melakukan "legal audit" terhadap seluruh dokumen atau laporan intelijen yang disampaikan oleh penyelidik untuk menetapkan diteruskan atau tidaknya suatu penyidikan atas dugaan adanya tindakan terorisme.

4. Di dalam Peraturan Pemerintah Pengganti Undang-undang ini ditegaskan bahwa tindak pidana terorisme dikecualikan dari tindak pidana politik atau tindak pidana yang bermotif politik atau tindak pidana yang bertujuan politik sehingga pemberantasannya dalam wadah kerjasama bilateral dan multilateral dapat dilaksanakan secara lebih efektif.

5. Di dalam Peraturan Pemerintah Pengganti Undang-undang ini dimuat ketentuan yang memungkinkan Presiden membentuk satuan tugas anti teror. Eksistensi satuan tersebut dilandaskan kepada prinsip transparansi dan akuntabilitas publik (sunshine principle) dan/atau prinsip pembatasan waktu efektif (sunset principle) sehingga dapat segera dihindarkan kemungkinan penyalahgunaan wewenang yang dimiliki oleh satuan dimaksud.

6. Peraturan Pemerintah Pengganti Undang-undang ini memuat ketentuan tentang yurisdiksi yang didasarkan kepada asas teritorial, asas ekstrateritorial, dan asas nasional aktif sehingga diharapkan dapat secara efektif memiliki daya jangkau terhadap tindak pidana terorisme sebagaimana dimaksud dalam Peraturan Pemerintah Pengganti Undang-undang ini yang melampaui batas-batas teritorial Negara Republik Indonesia. Untuk memperkuat yurisdiksi tersebut Peraturan Pemerintah Pengganti Undang-undang ini memuat juga ketentuan mengenai kerjasama internasional.

7. Peraturan Pemerintah Pengganti Undang-undang ini memuat ketentuan tentang pendanaan untuk kegiatan teroris sebagai tindak pidana terorisme sehingga sekaligus juga memperkuat Undang-undang Nomor 15 Tahun 2002 tentang Tindak Pidana Pencucian Uang.

8. Ketentuan dalam Peraturan Pemerintah Pengganti Undang-undang ini tidak berlaku bagi kemerdekaan menyampaikan pendapat di muka umum, baik melalui unjuk rasa, protes, maupun kegiatan-kegiatan yang bersifat advokasi. Apabila dalam kemerdekaan menyampaikan pendapat tersebut terjadi tindakan yang mengandung unsur pidana, maka diberlakukan Kitab Undang-undang Hukum Pidana dan ketentuan peraturan perundang-undangan di luar Kitab Undang-undang Hukum Pidana.

9. Di dalam Peraturan Pemerintah Pengganti Undang-undang ini tetap dipertahankan ancaman sanksi pidana dengan minimum khusus untuk memperkuat fungsi penjeraan terhadap para pelaku tindak pidana terorisme.

Penggunaan Peraturan Pemerintah Pengganti Undang-undang untuk mengatur Pemberantasan Tindak Pidana Terorisme didasarkan pertimbangan bahwa terjadinya terorisme di berbagai tempat telah menimbulkan kerugian baik materiil maupun immateriil serta menimbulkan ketidakamanan bagi masyarakat, sehingga mendesak untuk dikeluarkan Peraturan Pemerintah Pengganti Undang-undang guna segera dapat diciptakan suasana yang kondusif bagi pemeliharaan ketertiban dan keamanan tanpa meninggalkan prinsip-prinsip hukum.

PASAL DEMI PASAL

Pasal 1

Cukup jelas

Pasal 2

Cukup jelas

Pasal 3

Tuntutan yurisdiksi negara lain tidak serta-merta ada keterikatan Pemerintah Republik Indonesia untuk menerima tuntutan dimaksud sepanjang belum ada perjanjian ekstradisi atau bantuan hukum timbal balik dalam masalah pidana, kecuali Pemerintah Republik Indonesia menyetujui diberlakukannya asas resiprositas.

Pasal 4

Pasal ini bertujuan untuk melindungi warga negara Republik Indonesia, Perwakilan Republik Indonesia dan harta kekayaan Pemerintah Republik Indonesia di luar negeri.

Pasal 5

Ketentuan ini dimaksudkan agar tindak pidana terorisme tidak dapat berlindung di balik latar belakang, motivasi, dan tujuan politik untuk menghindarkan diri dari penyidikan, penuntutan, pemeriksaan di sidang pengadilan dan penghukuman terhadap pelakunya. Ketentuan ini juga untuk meningkatkan efisiensi dan efektifitas perjanjian ekstradisi dan bantuan hukum timbal balik dalam masalah pidana antara Pemerintah Republik Indonesia dengan pemerintah negara lain.

Pasal 6

Yang dimaksud dengan "kerusakan atau kehancuran lingkungan hidup" adalah tercemarnya atau rusaknya kesatuan ruang dengan semua benda, daya, keadaan, dan makhluk hidup termasuk manusia dan perilakunya, yang mempengaruhi kelangsungan perikehidupan dan kesejahteraan manusia serta makhluk lainnya.

Termasuk merusak atau menghancurkan adalah dengan sengaja melepaskan atau membuang zat, energi, dan/atau komponen lain yang berbahaya atau beracun ke dalam tanah, udara, atau air permukaan yang membahayakan terhadap orang atau barang.

Pasal 7

Yang dimaksud dengan "kerusakan atau kehancuran lingkungan hidup" lihat penjelasan Pasal 6.

Pasal 8

Ketentuan ini merupakan penjabaran dari tindak pidana tentang kejahatan penerbangan dan kejahatan terhadap sarana/prasarana penerbangan sebagaimana dimaksud dalam Pasal XXIXA Kitab Undang-undang Hukum Pidana.

Pasal 9

Yang dimaksud dengan "bahan yang berbahaya lainnya" adalah termasuk gas beracun dan bahan kimia yang berbahaya.

Pasal 10

Ketentuan ini diambil dari Convention on the Physical Protection of Nuclear Material, Vienna, 1979 yang telah diratifikasi dengan Keputusan Presiden Nomor 49 Tahun 1986.

Pasal 11

Cukup jelas

Pasal 12

Cukup jelas

Pasal 13

Yang dimaksud dengan "bantuan" adalah tindakan memberikan bantuan baik sebelum maupun pada saat tindak pidana dilakukan.

Yang dimaksud dengan "kemudahan" adalah tindakan memberikan bantuan setelah tindak pidana dilakukan.

Pasal 14

Ketentuan ini ditujukan terhadap auctor intelectualis.

Yang dimaksud dengan merencanakan termasuk mempersiapkan baik secara fisik, finansial, maupun sumber daya manusia.

Yang dimaksud dengan "menggerakkan" adalah melakukan hasutan dan provokasi, pemberian hadiah atau uang atau janji-janji.

Pasal 15

Pembantuan dalam Pasal ini adalah pembantuan sebelum, selama, dan setelah kejahatan dilakukan.

Pasal 16

Yang dimaksud dengan "bantuan" dan "kemudahan" lihat penjelasan Pasal 13.

Pasal 17

Cukup jelas

Pasal 18

Cukup jelas

Pasal 19

Cukup jelas

Pasal 20

Cukup jelas

Pasal 21

Cukup jelas

Pasal 22

Ketentuan dalam Pasal ini bermaksud mempidana pelaku yang melakukan tindakan yang ditujukan kepada penyidik, penuntut umum, dan hakim.

Pasal 23

Cukup jelas

Pasal 24

Cukup jelas

Pasal 25

Ayat (1)

Cukup jelas

Ayat (2)

Jangka waktu 6 (enam) bulan yang dimaksud dalam ketentuan ini terdiri dari 4 (empat) bulan untuk kepentingan penyidikan dan 2 (dua) bulan untuk kepentingan penuntutan.

Pasal 26

Ayat (1)

Yang dimaksud dengan "laporan intelijen" adalah laporan yang berkaitan dan berhubungan dengan masalah-masalah keamanan nasional. Laporan intelijen dapat diperoleh dari Departemen Dalam Negeri, Departemen Luar Negeri, Departemen

Pertahanan, Departemen Kehakiman dan HAM, Departemen Keuangan, Kepolisian Negara Republik Indonesia, Tentara Nasional Indonesia, Kejaksaan Agung Republik Indonesia, Badan Intelijen Negara, atau instansi lain yang terkait.

Ayat (2)

Yang dimaksud dengan "Pengadilan Negeri" dalam ketentuan ini adalah pengadilan negeri tempat kedudukan instansi penyidik atau pengadilan negeri di luar kedudukan instansi penyidik. Penentuan pengadilan negeri dimaksud didasarkan pada pertimbangan dapat berlangsungnya pemeriksaan dengan cepat dan tepat.

Ayat (3)

Cukup jelas

Ayat (4)

Cukup jelas

Pasal 27

Cukup jelas

Pasal 28

Cukup jelas

Pasal 29

Ayat (1)

Cukup jelas

Ayat (2)

Cukup jelas

Ayat (3)

Cukup jelas

Ayat (4)

Cukup jelas

Ayat (5)

Cukup jelas

Ayat (6)

Sanksi administratif dalam ketentuan ini misalnya tindakan pembekuan atau pencabutan izin.

Pasal 30

Cukup jelas

Pasal 31

Cukup jelas

Pasal 32

Cukup jelas

Pasal 33

Cukup jelas

Pasal 34

Cukup jelas

Pasal 35

Ayat (1)

Cukup jelas

Ayat (2)

Cukup jelas

Ayat (3)

Cukup jelas

Ayat (4)

Cukup jelas

Ayat (5)

Perampasan harta kekayaan adalah perampasan harta kekayaan yang berkaitan dengan kegiatan terorisme.

Ayat (6)

Cukup jelas

Ayat (7)

Ketentuan ini bertujuan untuk melindungi pihak ketiga yang beritikad baik.

Pasal 36

Ayat (1)

Yang dimaksud dengan "kompensasi" adalah penggantian yang bersifat materiil dan immateriil.

Ayat (2)

Cukup jelas

Ayat (3)

Yang dimaksud dengan "ahli waris" adalah ayah, ibu, istri/suami, dan anak.

Ayat (4)

Cukup jelas

Pasal 37

Rehabilitasi dalam Pasal ini adalah pemulihan pada kedudukan semula, misalnya kehormatan, nama baik, jabatan, atau hak-hak lain termasuk penyembuhan dan pemulihan fisik atau psikis serta perbaikan harta benda.

Pasal 38

Cukup jelas

Pasal 39

Cukup jelas

Pasal 40

Cukup jelas

Pasal 41

Cukup jelas

Pasal 42

Cukup jelas

Pasal 43

Ketentuan dalam Pasal ini dimaksudkan untuk efisiensi dan efektivitas penyidikan, penuntutan, dan pemeriksaan tindak pidana terorisme.

Pasal 44

Cukup jelas

Pasal 45

Cukup jelas

Pasal 46

Cukup jelas

Pasal 47

Cukup jelas

TAMBAHAN LEMBARAN NEGARA REPUBLIK INDONESIA NOMOR 4232

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*

PREAMBLE

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows

PART 1. ESTABLISHMENT OF THE COURT

Article 1
The Court

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. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 2
Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

Article 3
Seat of the Court

1. The seat of the Court shall be established at The Hague in the Netherlands ("the host State").

2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.

3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

Article 4
Legal status and powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5
Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6
Genocide

For the purpose of this Statute, "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.

Article 7
Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack 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 paragraph 3, 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 Court;

(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.

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "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;

(c) "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;

(d) "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;

(e) "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;

(f) "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;

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

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized 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;

(i) "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.

3. For the purpose of this Statute, it is understood that 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.

Article 8
War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "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, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

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

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), 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) Paragraph 2 (c) 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 article 7, paragraph 2 (f), 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) Paragraph 2 (e) 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.

3. Nothing in paragraph 2 (c) and (e) 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.

Article 9
Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority;

(c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Article 10

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Article 11
Jurisdiction ratione temporis

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12
Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 13
Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 14
Referral of a situation by a State Party

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Article 15
Prosecutor

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or

she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 16
Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Article 17
Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 18
Preliminary rulings regarding admissibility

1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.

4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.

5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.

6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.

7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances.

Article 19
Challenges to the jurisdiction of the Court

or the admissibility of a case

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

(a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;

(b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or

(c) A State from which acceptance of jurisdiction is required under article 12.

3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.

6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.

7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.

8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:

(a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;

(b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and

(c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.

11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the

Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

Article 20
Ne bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court 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 Court; 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.

Article 21
Applicable law

1. The Court shall apply:
(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 22
Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

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.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 23
Nulla poena sine lege

A person convicted by the Court may be punished only in accordance with this Statute.

Article 24
Non-retroactivity ratione personae

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

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.

Article 25
Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court 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 Court; 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 this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 26
Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 27
Irrelevance of official capacity

1. This Statute 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 this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

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 Court from exercising its jurisdiction over such a person.

Article 28
Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 29
Non-applicability of statute of limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

Article 30
Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, 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.

3. For the purposes of this article, "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.

Article 31
Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, 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 Court;

(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 Court 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.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 32
Mistake of fact or mistake of law

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

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court 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 article 33.

Article 33

Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

PART 4. COMPOSITION AND ADMINISTRATION OF THE COURT

Article 34
Organs of the Court

The Court shall be composed of the following organs:

(a) The Presidency;

(b) An Appeals Division, a Trial Division and a Pre-Trial Division;

(c) The Office of the Prosecutor;

(d) The Registry.

Article 35
Service of judges

1. All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.

2. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected.

3. The Presidency may, on the basis of the workload of the Court and in consultation with its members, decide from time to time to what extent the remaining judges shall be required to serve on a full-time basis. Any such arrangement shall be without prejudice to the provisions of article 40.

4. The financial arrangements for judges not required to serve on a full-time basis shall be made in accordance with article 49.

Article 36
Qualifications, nomination and election of judges

1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.

2. (a) The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.

(b) Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article 112. The proposal shall be considered adopted if approved at the meeting by a vote of two thirds of the members of the Assembly of States Parties and shall enter into force at such time as decided by the Assembly of States Parties.

(c) (i) Once a proposal for an increase in the number of judges has been adopted under subparagraph (b), the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 8, and article 37, paragraph 2;

(ii) Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs (b) and (c) (i), it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs (a) and (b). In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached.

3. (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.

(b) Every candidate for election to the Court shall:

(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;

(c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either:

(i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or

(ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.

Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

(b) Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.

(c) The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties.

5. For the purposes of the election, there shall be two lists of candidates:

List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and

List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii).

A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

6. (a) The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 112. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.

(b) In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph (a) until the remaining places have been filled.

7. No two judges may be nationals of the same State. A person who, for the purposes of membership of the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

8. (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

(i) The representation of the principal legal systems of the world;

(ii) Equitable geographical representation; and

(iii) A fair representation of female and male judges.

(b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.

9. (a) Subject to subparagraph (b), judges shall hold office for a term of nine years and, subject to subparagraph (c) and to article 37, paragraph 2, shall not be eligible for re-election.

(b) At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.

(c) A judge who is selected to serve for a term of three years under subparagraph (b) shall be eligible for re-election for a full term.

10. Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already

commenced before that Chamber.

Article 37
Judicial vacancies

1. In the event of a vacancy, an election shall be held in accordance with article 36 to fill the vacancy.

2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under article 36.

Article 38
The Presidency

1. The President and the First and Second Vice-Presidents shall be elected by an absolute majority of the judges. They shall each serve for a term of three years or until the end of their respective terms of office as judges, whichever expires earlier. They shall be eligible for re-election once.

2. The First Vice-President shall act in place of the President in the event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or disqualified.

3. The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for:

(a) The proper administration of the Court, with the exception of the Office of the Prosecutor; and

(b) The other functions conferred upon it in accordance with this Statute.

4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

Article 39
Chambers

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 34, paragraph (b). The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.

2. (a) The judicial functions of the Court shall be carried out in each division by Chambers.

(b) (i) The Appeals Chamber shall be composed of all the judges of the Appeals Division;

(ii) The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;

(iii) The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence;

(c) Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.

3. (a) Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned.

(b) Judges assigned to the Appeals Division shall serve in that division for their entire term of office.

4. Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

Article 40
Independence of the judges

1. The judges shall be independent in the performance of their functions.

2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.

4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

Article 41
Excusing and disqualification of judges

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.

2. (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, inter alia, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

(b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.

(c) Any question as to the disqualification of a judge shall be decided by an absolute majority of

the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

Article 42
The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.

5. Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They shall not engage in any other occupation of a professional nature.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor, at his or her request, from acting in a particular case.

7. Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, inter alia, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.

8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber.

(a) The person being investigated or prosecuted may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this article;

(b) The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter;

9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.

Article 43
The Registry

1. The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42.

2. The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court.

3. The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The judges shall elect the Registrar by an absolute majority by secret ballot, taking into account any recommendation by the Assembly of States Parties. If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner, a Deputy Registrar.

5. The Registrar shall hold office for a term of five years, shall be eligible for re-election once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar shall be called upon to serve as required.

6. 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 shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

Article 44
Staff

1. The Prosecutor and the Registrar shall appoint such qualified staff as may be required to their respective offices. In the case of the Prosecutor, this shall include the appointment of investigators.

2. In the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency, competency and integrity, and shall have regard, mutatis mutandis, to the criteria set forth in article 36, paragraph 8.

3. The Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties.

4. The Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.

Article 45
Solemn undertaking

Before taking up their respective duties under this Statute, the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously.

Article 46
Removal from office

1. A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person:

(a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or

(b) Is unable to exercise the functions required by this Statute.

2. A decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor under paragraph 1 shall be made by the Assembly of States Parties, by secret ballot:

(a) In the case of a judge, by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges;

(b) In the case of the Prosecutor, by an absolute majority of the States Parties;

(c) In the case of a Deputy Prosecutor, by an absolute majority of the States Parties upon the recommendation of the Prosecutor.

3. A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges.

4. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this Statute is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence. The person in question shall not otherwise participate in the consideration of the matter.

Article 47
Disciplinary measures

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 46, paragraph 1, shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.

Article 48
Privileges and immunities

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.

2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.

3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.

4. Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.

5. The privileges and immunities of:

(a) A judge or the Prosecutor may be waived by an absolute majority of the judges;

(b) The Registrar may be waived by the Presidency;

(c) The Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor;

(d) The Deputy Registrar and staff of the Registry may be waived by the Registrar.

Article 49
Salaries, allowances and expenses

The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties. These salaries and allowances shall not be reduced during their terms of office.

Article 50
Official and working languages

1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgements of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph.

2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.

3. At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified.

Article 51
Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Rules of Procedure and Evidence may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority; or

(c) The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.

4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.

5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

Article 52
Regulations of the Court

1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.

2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.

3. The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.

PART 5. INVESTIGATION AND PROSECUTION

Article 53
Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 17; and

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

(a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;

(b) The case is inadmissible under article 17; or

(c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;

the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

3. (a) At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

(b) In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

Article 54
Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:

(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;

(b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and

(c) Fully respect the rights of persons arising under this Statute.

2. The Prosecutor may conduct investigations on the territory of a State:

(a) In accordance with the provisions of Part 9; or

(b) As authorized by the Pre-Trial Chamber under article 57, paragraph 3 (d).

3. The Prosecutor may:

(a) Collect and examine evidence;

(b) Request the presence of and question persons being investigated, victims and witnesses;

(c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;

(d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;

(e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and

(f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Article 55
Rights of persons during an investigation

1. In respect of an investigation under this Statute, a person:

(a) Shall not be compelled to incriminate himself or herself or to confess guilt;

(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;

(c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and

(d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;

(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Article 56
Role of the Pre-Trial Chamber in relation to a unique investigative opportunity

1. (a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.

(b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.

(c) Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph (a), in order that he or she may be heard on the matter.

2. The measures referred to in paragraph 1 (b) may include:

(a) Making recommendations or orders regarding procedures to be followed;

(b) Directing that a record be made of the proceedings;

(c) Appointing an expert to assist;

(d) Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;

(e) Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;

(f) Taking such other action as may be necessary to collect or preserve evidence.

3. (a) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.

(b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.

4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

Article 57
Functions and powers of the Pre-Trial Chamber

1. Unless otherwise provided in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.

2 . (a) Orders or rulings of the Pre-Trial Chamber issued under articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7, and 72 must be concurred in by a majority of its judges.

(b) In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.

3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:

(a) At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;

(b) Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;

(c) Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;

(d) Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.

(e) Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.

Article 58
Issuance by the Pre-Trial Chamber of a warrant of arrest
or a summons to appear

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:

(a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and

(b) The arrest of the person appears necessary:

(i) To ensure the person's appearance at trial,

(ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or

(iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

2. The application of the Prosecutor shall contain:

(a) The name of the person and any other relevant identifying information;

(b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;

(c) A concise statement of the facts which are alleged to constitute those crimes;

(d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and

(e) The reason why the Prosecutor believes that the arrest of the person is necessary.

3. The warrant of arrest shall contain:

(a) The name of the person and any other relevant identifying information;

(b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and

(c) A concise statement of the facts which are alleged to constitute those crimes.

4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.

6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.

7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain:

(a) The name of the person and any other relevant identifying information;

(b) The specified date on which the person is to appear;

(c) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and

(d) A concise statement of the facts which are alleged to constitute the crime.

The summons shall be served on the person.

Article 59
Arrest proceedings in the custodial State

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.

2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

(a) The warrant applies to that person;

(b) The person has been arrested in accordance with the proper process; and

(c) The person's rights have been respected.

3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.

4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b).

5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.

6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.

7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

Article 60
Initial proceedings before the Court

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this

Statute, including the right to apply for interim release pending trial.

2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.

3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.

5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

Article 61
Confirmation of the charges before trial

1. Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.

2. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:

(a) Waived his or her right to be present; or

(b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held.

In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

3. Within a reasonable time before the hearing, the person shall:

(a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and

(b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any

charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.

5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.

6. At the hearing, the person may:

(a) Object to the charges;

(b) Challenge the evidence presented by the Prosecutor; and

(c) Present evidence.

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:

(a) Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;

(b) Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;

(c) Adjourn the hearing and request the Prosecutor to consider:

(i) Providing further evidence or conducting further investigation with respect to a particular charge; or

(ii) Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.

8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.

9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.

10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.

11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

PART 6. THE TRIAL

Article 62
Place of trial

Unless otherwise decided, the place of the trial shall be the seat of the Court.

Article 63
Trial in the presence of the accused

1. The accused shall be present during the trial.

2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Article 64
Functions and powers of the Trial Chamber

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

(a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;

(b) Determine the language or languages to be used at trial; and

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.

5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.

6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:

(a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;

(b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;

(c) Provide for the protection of confidential information;

(d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;

(e) Provide for the protection of the accused, witnesses and victims; and

(f) Rule on any other relevant matters.

7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

8. (a) At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.

(b) At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.

9. The Trial Chamber shall have, inter alia, the power on application of a party or on its own motion to:

(a) Rule on the admissibility or relevance of evidence; and

(b) Take all necessary steps to maintain order in the course of a hearing.

10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

Article 65
Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether:

(a) The accused understands the nature and consequences of the admission of guilt;

(b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and

(c) The admission of guilt is supported by the facts of the case that are contained in:

(i) The charges brought by the Prosecutor and admitted by the accused;

(ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and

(iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.

2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.

3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:

(a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or

(b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

Article 66
Presumption of innocence

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.

2. The onus is on the Prosecutor to prove the guilt of the accused.

3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Article 67
Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

(c) To be tried without undue delay;

(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks 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. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;

(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;

(h) To make an unsworn oral or written statement in his or her defence; and

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Article 68
Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and 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. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair

and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

Article 69
Evidence

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.

2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.

6. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.

7. Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

(a) The violation casts substantial doubt on the reliability of the evidence; or

(b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

Article 70
Offences against the administration of justice

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

(a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;

(b) Presenting evidence that the party knows is false or forged;

(c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;

(d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;

(e) Retaliating against an official of the Court on account of duties performed by that or another official;

(f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.

2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.

3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.

4. (a) Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals;

(b) Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

Article 71
Sanctions for misconduct before the Court

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.

2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

Article 72
Protection of national security information

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 56, paragraphs 2 and 3, article 61, paragraph 3, article 64, paragraph 3, article 67, paragraph 2, article 68, paragraph 6, article 87, paragraph 6 and article 93, as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.

2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.

3. Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54, paragraph 3 (e) and (f), or the application of article 73.

4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.

5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. Such steps may include:

(a) Modification or clarification of the request;

(b) A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;

(c) Obtaining the information or evidence from a different source or in a different form; or

(d) Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.

7. Thereafter, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions:

(a) Where disclosure of the information or document is sought pursuant to a request for cooperation under Part 9 or the circumstances described in paragraph 2, and the State has invoked the ground for refusal referred to in article 93, paragraph 4:

(i) The Court may, before making any conclusion referred to in subparagraph 7 (a) (ii), request further consultations for the purpose of considering the State's representations, which may include, as appropriate, hearings in camera and ex parte;

(ii) If the Court concludes that, by invoking the ground for refusal under article 93, paragraph 4, in the circumstances of the case, the requested State is not acting in accordance with its obligations under this Statute, the Court may refer the matter in accordance with article 87, paragraph 7, specifying the reasons for its conclusion; and

(iii) The Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or

(b) In all other circumstances:

(i) Order disclosure; or

(ii) To the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

Article 73
Third-party information or documents

If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72. If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

Article 74
Requirements for the decision

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.

2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.

3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.

4. The deliberations of the Trial Chamber shall remain secret.

5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

Article 75
Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Article 76
Sentencing

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.

2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.

3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.

4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

PART 7. PENALTIES

Article 77
Applicable penalties

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:

(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

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

Article 78
Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

Article 79
Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

Article 80
Non-prejudice to national application of
penalties and national laws

Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

PART 8. APPEAL AND REVISION

Article 81
Appeal against decision of acquittal or conviction
or against sentence

1. A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:

(a) The Prosecutor may make an appeal on any of the following grounds:

(i) Procedural error,

(ii) Error of fact, or

(iii) Error of law;

(b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:

(i) Procedural error,

(ii) Error of fact,

(iii) Error of law, or

(iv) Any other ground that affects the fairness or reliability of the proceedings or decision.

2. (a) A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence;

(b) If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 81, paragraph 1 (a) or (b), and may render a decision on conviction in accordance with article 83;

(c) The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under paragraph 2 (a).

3. (a) Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;

(b) When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph (c) below;

(c) In case of an acquittal, the accused shall be released immediately, subject to the following:

(i) Under exceptional circumstances, and having regard, inter alia, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;

(ii) A decision by the Trial Chamber under subparagraph (c) (i) may be appealed in accordance with the Rules of Procedure and Evidence.

4. Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

Article 82
Appeal against other decisions

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(a) A decision with respect to jurisdiction or admissibility;

(b) A decision granting or denying release of the person being investigated or prosecuted;

(c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3;

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

2. A decision of the Pre-Trial Chamber under article 57, paragraph 3 (d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.

3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

4. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

Article 83
Proceedings on appeal

1. For the purposes of proceedings under article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber.

2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

(a) Reverse or amend the decision or sentence; or

(b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.

4. The judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgement shall state the reasons on which it is based. When there is no unanimity, the judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.

5. The Appeals Chamber may deliver its judgement in the absence of the person acquitted or convicted.

Article 84
Revision of conviction or sentence

1. The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that:

(a) New evidence has been discovered that:

(i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and

(ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;

(b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;

(c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46.

2. The Appeals Chamber shall 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 original Trial Chamber;

(b) Constitute a new Trial Chamber; or

(c) Retain jurisdiction over the matter,

with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgement should be revised.

Article 85
Compensation to an arrested or convicted person

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.

3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

PART 9. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

Article 86
General obligation to cooperate

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

Article 87
Requests for cooperation: general provisions

1. (a) The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.

Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

(b) When appropriate, without prejudice to the provisions of subparagraph (a), requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.

2. Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of the working

languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession.

Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.

3. The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.

4. In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.

5. (a) The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.

(b) Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.

6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.

7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

Article 88
Availability of procedures under national law

States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.

Article 89
Surrender of persons to the Court

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.

2. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of ne bis in idem as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the

requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.

3. (a) A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender.

(b) A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain:

(i) A description of the person being transported;

(ii) A brief statement of the facts of the case and their legal characterization; and

(iii) The warrant for arrest and surrender;

(c) A person being transported shall be detained in custody during the period of transit;

(d) No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;

(e) If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph (b). The transit State shall detain the person being transported until the request for transit is received and the transit is effected, provided that detention for purposes of this subparagraph may not be extended beyond 96 hours from the unscheduled landing unless the request is received within that time.

4. If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.

Article 90
Competing requests

1. A State Party which receives a request from the Court for the surrender of a person under article 89 shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.

2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court if:

(a) The Court has, pursuant to article 18 or 19, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or

(b) The Court makes the determination described in subparagraph (a) pursuant to the requested State's notification under paragraph 1.

3. Where a determination under paragraph 2 (a) has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 (b), proceed to deal with the request

for extradition from the requesting State but shall not extradite the person until the Court has determined that the case is inadmissible. The Court's determination shall be made on an expedited basis.

4. If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.

5. Where a case under paragraph 4 has not been determined to be admissible by the Court, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.

6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:

(a) The respective dates of the requests;

(b) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and

(c) The possibility of subsequent surrender between the Court and the requesting State.

7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:

(a) The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;

(b) The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.

8. Where pursuant to a notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.

Article 91
Contents of request for arrest and surrender

1. A request for arrest and surrender shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, the request shall contain or be supported by:

(a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

(b) A copy of the warrant of arrest; and

(c) Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain or be supported by:

(a) A copy of any warrant of arrest for that person;

(b) A copy of the judgement of conviction;

(c) Information to demonstrate that the person sought is the one referred to in the judgement of conviction; and

(d) If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.

4. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (c). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

Article 92
Provisional arrest

1. In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in article 91.

2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain:

(a) Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;

(b) A concise statement of the crimes for which the person's arrest is sought and of the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;

(c) A statement of the existence of a warrant of arrest or a judgement of conviction against the person sought; and

(d) A statement that a request for surrender of the person sought will follow.

3. A person who is provisionally arrested may be released from custody if the requested State has not received the request for surrender and the documents supporting the request as specified in article 91 within the time limits specified in the Rules of Procedure and Evidence. However, the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the person to the Court as soon as possible.

4. The fact that the person sought has been released from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and surrender of that person if the request for surrender and the documents supporting the request are delivered at a later date.

Article 93
Other forms of cooperation

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:

(a) The identification and whereabouts of persons or the location of items;

(b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;

(c) The questioning of any person being investigated or prosecuted;

(d) The service of documents, including judicial documents;

(e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;

(f) The temporary transfer of persons as provided in paragraph 7;

(g) The examination of places or sites, including the exhumation and examination of grave sites;

(h) The execution of searches and seizures;

(i) The provision of records and documents, including official records and documents;

(j) The protection of victims and witnesses and the preservation of evidence;

(k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and

(l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.

2. The Court shall have the authority to provide an assurance to a witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested State.

3. Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.

4. In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.

5. Before denying a request for assistance under paragraph 1 (l), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.

6. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.

7. (a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:

(i) The person freely gives his or her informed consent to the transfer; and

(ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.

(b) The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.

8. (a) The Court shall ensure the confidentiality of documents and information, except as required for the investigation and proceedings described in the request.

(b) The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.

(c) The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 and in accordance with the Rules of Procedure and Evidence.

9. (a) (i) In the event that a State Party receives competing requests, other than for surrender or extradition, from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request.

(ii) Failing that, competing requests shall be resolved in accordance with the principles established in article 90.

(b) Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization.

10. (a) The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.

(b) (i) The assistance provided under subparagraph (a) shall include, inter alia:

a. The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and

b. The questioning of any person detained by order of the Court;

(ii) In the case of assistance under subparagraph (b) (i) a:

a. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;

b. If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.

(c) The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not a Party to this Statute.

Article 94
Postponement of execution of a request in respect of ongoing investigation or prosecution

1. If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone, the requested State should consider whether the assistance may be immediately provided subject to certain conditions.

2. If a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to article 93, paragraph 1 (j).

Article 95
Postponement of execution of a request in respect of an admissibility challenge

Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19.

Article 96
Contents of request for other forms of assistance under article 93

1. A request for other forms of assistance referred to in article 93 shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 (a).

2. The request shall, as applicable, contain or be supported by the following:

(a) A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;

(b) As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;

(c) A concise statement of the essential facts underlying the request;

(d) The reasons for and details of any procedure or requirement to be followed;

(e) Such information as may be required under the law of the requested State in order to execute the request; and

(f) Any other information relevant in order for the assistance sought to be provided.

3. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 (e). During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

4. The provisions of this article shall, where applicable, also apply in respect of a request for assistance made to the Court.

Article 97
Consultations

Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, inter alia:

(a) Insufficient information to execute the request;

(b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or

(c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

Article 98
Cooperation with respect to waiver of immunity
and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Article 99
Execution of requests under articles 93 and 96

1. Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.

2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.

3. Replies from the requested State shall be transmitted in their original language and form.

4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:

(a) When the State Party requested is a State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to article 18 or 19, the Prosecutor may directly execute such request following all possible consultations with the requested State Party;

(b) In other cases, the Prosecutor may execute such request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.

5. Provisions allowing a person heard or examined by the Court under article 72 to invoke restrictions designed to prevent disclosure of confidential information connected with national security shall also apply to the execution of requests for assistance under this article.

Article 100
Costs

1. The ordinary costs for execution of requests in the territory of the requested State shall be borne by that State, except for the following, which shall be borne by the Court:

(a) Costs associated with the travel and security of witnesses and experts or the transfer under article 93 of persons in custody;

(b) Costs of translation, interpretation and transcription;

(c) Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court;

(d) Costs of any expert opinion or report requested by the Court;

(e) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and

(f) Following consultations, any extraordinary costs that may result from the execution of a request.

2. The provisions of paragraph 1 shall, as appropriate, apply to requests from States Parties to the Court. In that case, the Court shall bear the ordinary costs of execution.

Article 101
Rule of speciality

1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.

2. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with article 91. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

Article 102
Use of terms

For the purposes of this Statute:

(a) "surrender" means the delivering up of a person by a State to the Court, pursuant to this Statute.

(b) "extradition" means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

PART 10. ENFORCEMENT

Article 103
Role of States in enforcement of
sentences of imprisonment

1. (a) A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.

(b) At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.

(c) A State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation.

2. (a) The State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under paragraph 1, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days' notice of any such known or foreseeable circumstances. During this period, the State of enforcement shall take no action that might prejudice its obligations under article 110.

(b) Where the Court cannot agree to the circumstances referred to in subparagraph (a), it shall notify the State of enforcement and proceed in accordance with article 104, paragraph 1.

3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following:

(a) The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence;

(b) The application of widely accepted international treaty standards governing the treatment of prisoners;

(c) The views of the sentenced person;

(d) The nationality of the sentenced person;

(e) Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.

4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.

Article 104
Change in designation of State of enforcement

1. The Court may, at any time, decide to transfer a sentenced person to a prison of another State.

2. A sentenced person may, at any time, apply to the Court to be transferred from the State of enforcement.

Article 105
Enforcement of the sentence

1. Subject to conditions which a State may have specified in accordance with article 103, paragraph 1 (b), the sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it.

2. The Court alone shall have the right to decide any application for appeal and revision. The State of enforcement shall not impede the making of any such application by a sentenced person.

Article 106

Supervision of enforcement of sentences and
conditions of imprisonment

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.

2. The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.

3. Communications between a sentenced person and the Court shall be unimpeded and confidential.

Article 107
Transfer of the person upon completion of sentence

1. Following completion of the sentence, a person who is not a national of the State of enforcement may, in accordance with the law of the State of enforcement, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless the State of enforcement authorizes the person to remain in its territory.

2. If no State bears the costs arising out of transferring the person to another State pursuant to paragraph 1, such costs shall be borne by the Court.

3. Subject to the provisions of article 108, the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to a State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.

Article 108
Limitation on the prosecution or punishment of other offences

1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.

2. The Court shall decide the matter after having heard the views of the sentenced person.

3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.

Article 109
Enforcement of fines and forfeiture measures

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.

2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.

3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.

Article 110
Review by the Court concerning reduction of sentence

1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.

2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.

3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.

4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:

(a) The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;

(b) The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or

(c) Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.

5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.

Article 111
Escape

If a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender, in accordance with Part 9. It may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designated by the Court.

PART 11. ASSEMBLY OF STATES PARTIES

Article 112

Assembly of States Parties

1. An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed this Statute or the Final Act may be observers in the Assembly.

2. The Assembly shall:

(a) Consider and adopt, as appropriate, recommendations of the Preparatory Commission;

(b) Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;

(c) Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;

(d) Consider and decide the budget for the Court;

(e) Decide whether to alter, in accordance with article 36, the number of judges;

(f) Consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation;

(g) Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.

3. (a) The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.

(b) The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.

(c) The Bureau shall meet as often as necessary, but at least once a year. It shall assist the Assembly in the discharge of its responsibilities.

4. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.

5. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau.

6. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in this Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.

7. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:

(a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;

(b) Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.

8. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.

9. The Assembly shall adopt its own rules of procedure.

10. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

PART 12. FINANCING

Article 113
Financial Regulations

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

Article 114
Payment of expenses

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

Article 115
Funds of the Court and of the Assembly of States Parties

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

(a) Assessed contributions made by States Parties;

(b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

Article 116
Voluntary contributions

Without prejudice to article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

Article 117
Assessment of contributions

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.

Article 118
Annual audit

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

PART 13. FINAL CLAUSES

Article 119
Settlement of disputes

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.

2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

Article 120
Reservations

No reservations may be made to this Statute.

Article 121
Amendments

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.

2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The

Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.

3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.

4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

Article 122
Amendments to provisions of an institutional nature

1. Amendments to provisions of this Statute which are of an exclusively institutional nature, namely, article 35, article 36, paragraphs 8 and 9, article 37, article 38, article 39, paragraphs 1 (first two sentences), 2 and 4, article 42, paragraphs 4 to 9, article 43, paragraphs 2 and 3, and articles 44, 46, 47 and 49, may be proposed at any time, notwithstanding article 121, paragraph 1, by any State Party. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties who shall promptly circulate it to all States Parties and to others participating in the Assembly.

2. Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a two-thirds majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.

Article 123
Review of the Statute

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.

2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference.

3. The provisions of article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference.

Article 124
Transitional Provision

Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1.

Article 125
Signature, ratification, acceptance, approval or accession

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.

2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 126
Entry into force

1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 127
Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

Article 128
Authentic texts

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

DONE at Rome, this 17th day of July 1998.