

National Legislation on War Crimes in Indonesia

Yustina Trihoni Nalesti DEWI

Abstract— Indonesia, as the member of international community, is demanded to establish mechanisms to prosecute and punish individuals who commit the most serious violations of humanitarian law, termed war crime, in its national legislation. Punishment of war criminals has obligatory character so that Indonesia has the obligation to exercise its criminal jurisdiction to it. Although the laws of war had existed since the tribal war in Nusantara (Indonesia), the existing laws have not given adequate rules for prosecuting of war crimes so that it contributes to the occurrence of some impunities. By the time of the establishment of an independent state in 1945, Indonesia had committed to humanity with the qualification of just and civilized, having national and international dimension. The external dimension is the willingness to achieve the world peace and justice, and the internal dimension is the willingness to respect human rights in any conditions, peace and war.

Keywords— National Legislation, Indonesia, War Crimes.

I. INTRODUCTION

EVIL actions followed by excessive excesses and violence actions are very conducive in war situation.[1] The parties to the conflict on evil actions such as establishing concentration camp, genocide, prisoner execution, mass rape, city bombing, the experiment of biological weapon, and so forth that are called the war crimes, have many justifications. The justification frequently applied is the military necessity for achieving immediate goal of war.

The facts above causing the discourse of the war crimes are always actual from time to time. It can also be understood during the war that becomes the arena of crime, which has never been apart from the dynamics of human history and civilization. In the last decades, the war crimes has consumed the attention of international community who is getting aware on the importance of serious handling both preventive and repressive, through the making set of rules as one of the alternatives.[2]

The new development has occurred in international law of the criminal responsibility in relation with war crimes. At the beginning, only the state can be sued for their responsibilities before international court. Then, individuals are also punishable. Individual criminal responsibility prevailing in international law is meant to end impunity because domestic law systems are sometimes unable and unwilling to do investigation or prosecution to individuals committing war

crimes.[3]

Pressure from international community, to demand individual criminal responsibility, is affecting the view of states to enact their national legislation prohibiting and punishing of war crimes. The individual criminal responsibility of war crimes is necessary to assert, even it is not only limited for international armed conflicts but also for non-international armed conflict, since the bad effects occur for the both kinds of conflicts. In addition, in non-international armed conflicts, the cruelty committed by perpetrators and the suffering felt by victims are frequently greater than in international conflicts.[4]

The demand to comply with the obligations to enact legislation necessary to punish war crimes is also applied in Indonesia. It emerges because Indonesia is the member of international community which must give concern in the prevailing international norms and actively get involved in international attempts to prosecute war crimes. In addition, the attention of international society is much addressed to Indonesia, particularly to the problem of East Timor that caused more than 200,000 victims in the territory.[5] International society through the Security Council of the United Nations had issued a resolution on the importance of investigation to the presumption of violation occurred in the territory of East Timor when it was still under the administration of Republic of Indonesia. In addition, the obligation is also come from the ratification of several international agreements on war crimes, particularly the four Geneva Convention of 1949 on the Protection to the Victims of War. This ratification gives legal implication by the obligation to enact laws covering the war crimes and effective penal sanctions that can be applied for the perpetrators.

Unfortunately, recently the domestic laws containing prosecution and penal sanctions of war crimes is inadequate. Be that as it may, the law reinforcement to criminals still leaves the unresolved issues. The existing laws stipulations in Penal Code (KUHP), Military Penal Code (KUHPM), and the Law of Human Rights Court do not contain this offences and penal sanction.

The absence of the laws regulating war crimes can harm the national interests because in fact Indonesia often faces the problems of armed conflicts. Domestic Courts lose their guidance if they must prosecute cases related to war crimes. It will, certainly diminish the authority of domestic court institutions, which will possibly invite international intervention as it had been shown by the international trial on domestic cases such as in the ex-Yugoslavia, Rwanda, Sierra Leone, and Cambodia.

From the description above, it can be seen the urgency of

Yustina Trihoni Nalesti DEWI is with the Faculty of Law and Communication of Soegijapranata Catholic University, Semarang, Indonesia (e-mail: trihoni@unika.ac.id).

the laws for war crimes to complete Indonesian national law system emerges from the demand of international community on some incidents of humanity violation in the conflicts in Indonesia as well as the obligation as the state ratifying the Geneva Convention of 1949 and some international treaties on war crimes.

II. WAR CRIMES IN INTERNATIONAL LAW

In general context, the term of war crimes is defined as the violation against the law of war (international humanitarian law) or customary law of war, causing individual criminal responsibility. Individuals are responsible for war crimes committed by them, ordered by them, or assisting others to commit the crimes. The definition of individual is both own citizen and enemy's citizen (other countries) bound to obey the stipulations of international law on war crimes.

The law of war crime in international humanitarian law has developed very well both in customary law and in international treaty law. The development in customary international humanitarian law has existed since a long time as the needs of human civilization to develop rules regarding the war with the aim of minimizing violence. However, the rules in customary international humanitarian law is limited to only offences, which means only regarding what actions will be eligible qualified as a criminal act of war. The rules do not regulate about criminal responsibility and punishment.

Likewise, the law of war crime in international treaty law has existed since several centuries ago, that is among other the Geneva Conventions of 1868 and the Hague Convention of 1899 and 1907. However, as in customary international humanitarian law, the rules of war crime in these treaties are only concerns to what kinds of offences qualified as the criminal act of war. Achieving rapid development since the end of World War II and toward becoming its culmination the signing of the Rome Statute of 1998 by States, then the rules of war crimes is expanded not only a matter of qualification for the offences but also concerning criminal responsibility and punishment. Therefore, the wider coverage of war crimes rules have made international treaty law increasingly acting as a primary source of the law. International treaty law ultimately has important role to adapt to new circumstances and increase the humanitarian law enforcement in inter-state relations. The rules of war crimes under the treaty law inspite of providing protection to protected persons during war and restricting the means and methods of warfare that may be used, these are also providing effective penal sanctions for perpetrators to end impunity.

The law of war crimes in international treaty law will apply only to the States that have ratified them, therefore it needs the existence of customary international law that is applicable to all States, regardless of whether or not they have ratified the treaties on humanitarian law. Customary international humanitarian law is binding States as a general international law and can be a tool in interpreting of treaties.

In addition to the customary international humanitarian law and treaties, the jurisprudence and doctrin strengthen the development of war crimes rules. Therefore, the law of war already provides the complete rules for the punishment of war

crimes, both in the substantive and procedural law. The application of international humanitarian law has been supported by the international legal system through the mechanism of punishment of war crimes by international court. In addition, international institutions such as the General Assembly and the UN Security Council and the International Committee of the Red Cross, in their respective capacities have also been able to show their authority to support the application of international humanitarian law in response to the issue of war crimes committed in the international community. International humanitarian law is also able to establish compliance of States. It appears in a number of legislation made by several countries that has enacted war crimes rules as well as the practice of national courts in punishing war crime perpetrators. If a country does not have willingness or ability to punish war crimes, the international humanitarian law provides mechanism to the international community takes over punishment through international court.

III. WAR CRIMES IN INDONESIA LAW

History recorded that the trial for war crimes had ever been carried out in Indonesia. There was the trial in Ambon when World War II ended in 1945. There also were some Japanese troops as the perpetrators of war crimes that had been sentenced in Australia although there was no detail report about this except a script of *The Ambon War Crimes Trial*. [7] Similarly, to the other trials of war crimes after world war, the Allies conducted this trial as the victory of war. In addition, The Dutch Government in Indonesia had ever established several military trials to prosecute war criminals. In the period of three years, the trial had punished more than 1,000 (one thousand) Japanese. Sonei, the guard of prisoner camp who was known very cruel, was one of Japanese sentenced by dead punishment. [8]

In prosecuting war criminals, in 1946 Dutch Government had been enacted and implemented a War Crimes Ordinance, namely Staatsblaad Number 44 of 1946 on Definition of War Crimes (*Ordonnantie Begripsomschrijving Oorlogsmisdrijven*), Number 45 of 1946 on the Criminal Law of War Crimes (*Ordinance Strafrecht Oorlogsmisdrijve*), Number 46 of 1946 on the Authority of Criminal Justice for War (*Ordinance Rechtsmacht Oorlogsmisdrijven*), Number 47 of 1946 on the Jurisdiction of War Crime Trial (*Ordinance Rechtspleging Oorlogsmisdrijven*) and Number 48 of 1946 on the Victims of War (*Oorlogsslachtoffers*). It is seen that five Ordinances mentioned above has made a complete regulations regarding war crimes both material and procedural law.

On basis of the history record above, it seems that the foreign government carried out the war crime trial in Indonesia, and the law applied was foreigner's product.

However until recently, the domestic laws stating legal process and stating punishment on the actions of war criminals in Indonesian laws is inadequate so that the law reinforcement against criminals is still left unresolved issues. The Act Number 26 of 2000 on the Human Rights Court, that is some parts adopted Rome Statute 1998, does not included war crimes as one of its *rationae materiae*. The Act only has

adopted genocide and crime against humanity.[9] Therefore, there are no rules that can be applied during the war as it occurred in East Timor in 1999. The trial which tried the accused based on this Act did not employ war crimes rules. Furthermore, attempts to bring the alleged perpetrators to justice have been inadequate. Many perpetrators of serious crimes, including war crimes remain unpunished. Commitments to establish truth commissions have not been fulfilled, meanwhile victims have not been provided with full and effective reparation. Indonesia has yet to accede to the Rome Statute of the International Criminal Court, despite commitments to do so in the last two National Human Rights Action Plans (Rencana Aksi Nasional Hak Asasi Manusia) in 2004 and 2011.

International humanitarian law as part of international law must be obeyed by national law and it also restricts the field of material validity of the national legal order, so that a state can not arbitrarily regulate the matter of war crimes contrary to international humanitarian law. It means that national law does not have unlimited competence in regulating war crimes since it is limited by international humanitarian law. It does not negate the concept of the sovereignty of the state to create and implement the rule of law including on war crimes. The concept of sovereignty recently has shifted that it is not inalienable rights of sovereign nations but it is limited according to international law to respect the will of the people, democracy, and human rights.

The Geneva Convention 1949 stated that countries are obliged to make required laws providing effective punishment for those who commit or order to commit actions categorized into *grave breaches* (war crime) by Geneva Convention. Trial must be held for those who are suspected to commit it, except the suspect is handed to the third country, which is then willing to conduct prosecution on him. When becoming a party to an international treaty, state accepts to respect all obligations stipulated in the agreement. The willingness to respect all obligations under the agreement that has been made is one of the manifestation of state sovereignty, because as a legal personality in international law, the state has the ability to form a binding contract in international relations and therefore agreed to carry out the contract in good faith. The obligations have been confirmed by the Permanent Court of International Justice (PCIJ), which states, "... a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken." [10]

Pacta sunt servanda stated that the agreement must be adhered to, is a very fundamental principle in international law and become an imperative norm in the practice of international agreements. This principle is the answer to the question why the international agreements have binding force.[11] The binding force of the treaty was also based on customary international law as proposed by Oppenheim, "...treaties are legally binding, because there exists as a customary rule of International Law that treaties are binding." Article 26 of the Vienna Convention 1969 stipulated that, "Every treaty in force is binding upon the parties to it and must be performed by

them in good faith." It is asserted reasons binding international agreement that is due to the principle of *pacta sunt servanda* in international agreements that must be accompanied by the principle of good faith. Von GLAHN states, "If not duty of carrying out international treaty obligations in good faith existed, whatever there exist in the way of an international legal order would disappear and anarchy would be the normal condition of mankind..." [12] So according to von GLAHN, the obligation to abide by international agreements are based on good faith with respect to human dignity that hold international treaty itself. Good faith to carry out the obligations arising from international agreements is the basic motivation to enforce order in the international community. *Pacta sunt servanda* is often also juxtaposed with the principle that asserts state may not invoke the provisions of its internal law as justification for its failure to perform a treaty.[13] As a logic, it is unlikely states will approve the draft of a treaty which conflict with their national interest, so as the approval given to an international agreement is a manifestation of awareness of their national law.

War crimes is considered to one of international crimes so as it comes to the level of *jus cogens* that constitutes *obligatio erga omnes* which are inderogable. Sufficient legal basis have stated that war crimes are part of an international crime, namely:

- a. the international decision reflecting the recognition that war crimes are considered as part of customary international law;
- b. the preambles or other provisions of international agreements indicating that war crimes have the status of a high threat to the community and international law;
- c. a number of countries have ratified international agreements related to war crimes; and
- d. the investigation and prosecution in international ad hoc and permanent tribunal against the perpetrators have been committed.[14]

In addition, International Court of Justice has stated that the provisions of Article 1 of The Geneva Conventions of 1949, demanding for "respect and to ensure respect ... under all circumstances," indicates that provision has the character of *obligation erga omnes* for any other grave violations of international humanitarian law. Considering the basis, the impunity for war crimes is a rejection of a country against human solidarity for the victims of crime.

Legal obligations which arise from the higher status of such crimes include the duty to prosecute or extradite, the non-applicability of statutes of limitations for such crimes, the non-applicability of any immunities up to and including Heads of State, the non-applicability of the defense of obedience to superior orders (save as mitigation of sentence), the universal application of these obligations whether in time of peace or war, their non-derogation under states of emergency, and universal jurisdiction over perpetrators of such crimes. *Jus cogens* refers to the legal status that certain international crimes reach, and *obligatio erga omnes* pertains to the legal implications arising out of a certain crime's characterization as *jus cogens*. The implications of *jus cogens* are those of a duty and not of optional rights; otherwise *jus cogens* would not

constitute a peremptory norm of international law. Consequently, these obligations are non-derogable in times of war as well as peace. Thus, recognizing certain international crimes as *jus cogens* carries with it the duty to prosecute or extradite, the non-applicability of statutes of limitation for such crimes, and universality of jurisdiction over such crimes irrespective of where they were committed, by whom (including Heads of State), against what category of victims, and irrespective of the context of their occurrence (peace or war). Above all, the characterization of certain crimes as *jus cogens* places upon states the *obligatio erga omnes* not to grant impunity to the violators of such crimes.[15]

The absence of war crimes laws in Indonesian law denies Indonesia's commitment to full compliance with obligations under the Fourth Geneva Convention of 1949. Indonesia has explicitly recognized its human rights obligations through ratifying some international conventions. Therefore, Indonesia must comply to them. Indonesia has a duty upon the ratification of the 1949 Geneva Convention,[16] and shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed of war crimes and shall bring such persons, regardless of their nationality to national court. It may also, if it prefers, and in accordance with the provisions of national legislation, hand such persons over for trial to another states concerned, provided such states have made out a prima facie case.[17]

Recently the expectation on enacting the law emerged when war crime is formulated in the Draft of Penal Code Act, inspite of it is still preliminary effort. The response for the needs of laws regulating war crimes can be considered as a constructive efforts to end the impunity against perpetrator.

The Preamble to the 1945 Indonesian Constitution affirms that independence is the inalienable right of all nations, therefore, all colonialism must be abolished in this world as it is not in conformity with humanity and justice.[18] The statement contains a legal consequences that independence as the rights of all nations should also be manifested in the freedom of individuals who become members of society. It means independence is nothing if there is torture, murder, abuse, deprivation, restraint, or violations of the rights of individual freedom, even if it is done in an emergency situation such as an armed conflict. Respect for humanity and justice which must be upheld in all circumstances is the responsibility of the state to ensure. Humanitarian commitment in the Preamble to the Constitution of 1945 is included to bring all nations in order to achieve the goal of happiness both as a collective and individual rights.[19]

In addition, the obligations to enact war crimes rules is state responsibility to develop a moral and legal responsibility to uphold and implement the declaration of human rights established by the United Nations as well as various other international agreements which have been accepted by the Indonesia.

The core problem of legislation policy is the problem of criminalization policy. It means whether war crime is appropriate to criminalize, or to formulate as the actions that can be punished with penal sanction.[20] The criminalization of war crime is not a problem anymore in Indonesia.

Criminalization of war crimes is no doubt because the subject matter of various aspects of war crimes has been penal actions according to Indonesian Penal Code.[21] Besides, war crime includes one of crimes to humanity and peace, which is clearly conflicted with Indonesian legal system based on Pancasila. The other reason for criminalization of war crime in Indonesian law is also that international community had acknowledged war crime as international crime and many countries criminalizing it, in both Penal Code and Special Act out of Penal Code.[22]

In Indonesian Criminal Law, the policy in conducting criminalization (composing a new offence) is selected and oriented to socio-philosophical, socio-political, and socio-cultural values in the study and the interests of national goals as the background of policies which got the sources from:

- a. various scientific meetings
- b. various result of research and studies on the development of special offences and the development of science and technology.
- c. studies and observation to the new forms and dimension of new crimes in international meetings.
- d. various international conventions (both ratified and not ratified).
- e. comparison study results of foreign laws.[23]

Indonesia has amended its Criminal Code to fully incorporate war crimes rules.[24] The validity scope of the stipulation on war crime in the draft of Criminal Code can be found in the general and specific stipulation. In the Book One there is a general stipulation regulating the validity scope of offences in general, which is in the Book Two including war crime. The validity scope of penal stipulation can be specified according to the time, the place, the time of crime, and the place of crime.

On basis of general stipulation on the validity scope of war crime stipulation, the validity period of the principle of *nullum delictum nulla poena sine praevia lege poenali* or the principle of legality stating that someone only be convicted of a crime when the definition of that crime and its maximum sentence were put in a law before the crime was committed.[25] The stipulations formulated in the draft of Criminal Code above also assert the availability of non-retroactive principle. This principle is absolute, but when there is a change of penal law after someone commit crime, so the more beneficial stipulation is applied for the suspect or defendant.

In addition, in relation with war crime, the draft of Criminal Code also follows universal principle. This principle is explained in Article 5 stating that penal stipulation in Indonesian law is valid for every one out of Indonesian territory committing crime according to the international agreement or law formulated as crime in Indonesian law. Meanwhile, based on the special stipulation on the validity scope of war crime, it cannot be applied on the situations related to internal disturbance and strain such as riot, separated and sporadic violence, and other similar actions.

IV. CONCLUSION

War crimes is one of the international crime that is a violation of the protection of fundamental interests of the international community so as the entire community has responsibility in terms of its punishment.

Developing the legislation of war crimes is not only to protect the war victims but also military personnel from wrongful accusations of human right violations during wars. Military personnel is often blamed for being the perpetrator of human rights violence while on duty during conflict. This happens because there is no special regulation that protects it. The government of Indonesia has made a positive response to its international obligations by making penal law related to war crime. The response is manifested with formulating war crime rules in the draft of Penal Code Act, but it is still in the preliminary effort and need to be revised.

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Yustina Trihoni Nalesti DEWI was born at Yogyakarta, Indonesia on November 30, 1969. She graduated from Faculty of Law of Gajah Mada University, Yogyakarta, Indonesia (Undergraduate, Postgraduate, and Doctorate Programme) major in international human rights and humanitarian law.

She works at Faculty of Law and Communication of Soegijapranata Catholic University, Semarang, Indonesia. She wrote books, one of them is War Crime in International and National Law Perspectives (2012) and got published by Rajawali Grasindo. She was invited as visiting scholar at Flinders Law School, Adelaide, Australia (2010 and 2013) and as a guest researcher at Norwegian Center for Human Rights, Oslo University, Norway (2009). She was also actively invited as a speaker and resource person on human rights and humanitarian law issues in the workshops, seminars, and courses for the Indonesian lecturers and public officials.