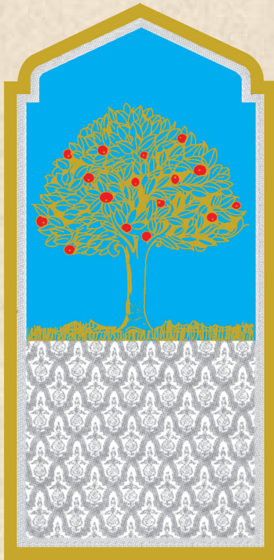

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APPLYING CUSTOMARY INTERNATIONAL LAW IN THE INDONESIAN HUMAN RIGHTS COURT: AN ISLAMIC SOLUTION OF THE CONUNDRUM

Fajri Matahati Muhammadin
Muhammad Awfa
Kirana Anjani

Abstract

Through Act No. 26 of 2000, Indonesia has established a Human Rights Court to put alleged perpetrators of genocide and crimes against humanity on trial. However, one problem seems to elude attention namely, customary international law is binding in international law. However, the Indonesian legal system particularly in the criminal justice system has no formal legal platform to justify the use of customary international law as legal basis. Be that as it may, the Human Rights Court has, in practice, applied customary international law on the basis of necessity to genocide and crimes against humanity. The aforementioned problem has thus been ignored. Using a doctrinal research method, this article finds that the crux of the problem is the strict formal legality principle applied in the Indonesian criminal justice system. This article argues that a solution can be found in the Islamic legal system which is not entirely foreign to Indonesia. Islamic criminal law recognizes the importance of certainty and legality but provides some room for limited flexibility parallel to what a material legality principle would dictate. It is argued that adopting the Islamic system would solve the main crux of the problem that is, the type of legality principle used.

Keywords: Indonesia, Human rights court, Customary international law, Islamic law, *Ta'zīr*

Introduction

The fall of President Soeharto's dictatorship after 32 years of office was used by pro-democracy factions as a momentum for the new government to take concrete measures in the protection of human rights specifically, the closure for past gross violation of human rights cases[1] such as those that occurred in East Timor and Tanjung Priok.[2] In response to the growing interest, the Human Rights Court (HRC) was established as a specialized court[3] with authority over gross violation of human rights crimes[4] classified as crimes against humanity and genocide.[5]

Act No. 26 of 2000 concerning the Human Rights Court (HRC Act) which established the HRC, substantially adopts the concepts commonly found in international criminal law. A prominent example of this is the inclusion of the Rome Statute as a 'source' of the HRC Act by virtue of the Explanation of Article 7 which states that the meaning of genocide and crimes against humanity under this Act corresponds to that of the Rome Statute.[6] Additionally, the court often resorted to interpretation and consideration of international criminal tribunals in its practice,[7] such as in relation to individual responsibility[8] as well as the notion of command and superior responsibility.[9]

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[1] Suparman Marzuki, *Pengadilan HAM Di Indonesia: Melanggengkan Impunity* (Jakarta: Erlangga, 2012), 2.

[2] Priyambudi Sulistiyanto, "Politics of Justice and Reconciliation in Post-Suharto Indonesia," *Journal of Contemporary Asia* 37, no. 1 (2007): 76.

[3] Act No, 26 of 2000 on Human Rights Court, Art. 2.

[4] Act No. 26 of 2000 on Human Rights Court, Art. 4.

[5] Act No. 26 of 2000 on Human Rights Court, Art. 7.

[6] Explanation of Art. 7 of HRC Act: "Genocide and crimes against humanity" referred in this Act are in accordance with the Rome Statute of the International Criminal Court (Article 6 and Article 7)".

[7] See for example: "Prosec v. Guterres, Judgment, No. 04/PID.HAM/AD.HOC/2002/PH.JKT.PST. (HRCI)" (Jakarta, Indonesia: Human Rights Ad-Hoc Court at Central Jakarta District Human Rights Court, February 18, 2002), http://www.worldcourts.com/hrahc/eng/decisions/2002.02.18_Prosecutor_v_Guterres.htm.

[8] Ibid.; "Prosec v. Damiri, Judgment, No. 09/PID.HAM/AD.HOC/2002/PH.JKT/PST. (HRCI)" (Jakarta, Indonesia: Human Rights Ad-Hoc Court at Central Jakarta District Human Rights Court, August 15,

The lacuna in existing national laws and precedents on this matter resulted in the use of international law norms and sources in the attempt to avoid a legal vacuum. Henceforth, the sources of International Law referred to by the HRC come in different forms such as International Treaty and Customary International Law (CIL).

As Human Rights Courts were non-existent in Indonesia prior to the enactment of the present HRC Act,[10] there were virtually no laws and precedents under the Indonesian legal system with respect to gross violation of human rights. This resulted in the HRC judges resorting to various sources of law for instance, case laws of past international tribunals.[11] Yet if international case laws reflect customary laws, then they are binding sources of International Law which certainly is not subjected to discretion in its applicability. However, within the legal system of Indonesia, especially that of criminal law, there are strict requirements in applying the law. The principle of legality bars a criminal court from applying laws that have not yet been adopted at the time the alleged crime was committed.[12] While Indonesian law has its own mechanisms in adopting international treaties into the national legislation, it will be shown that the same cannot be said for CIL. In fact, there is no national law mechanism to adopt CIL and it is argued in the following sections that using CIL in a criminal court including the HRC is a breach of the principle of legality.

This brings us to the conundrum this paper wishes to explore to what extent is the HRC obliged to accept CIL both from the perspective of International Law and national law? Can the domestic courts use CIL as a basis for its judgments?

2003), http://www.worldcourts.com/hrahc/eng/decisions/2003.07.31_Prosecutor_v_Damiri.htm.

[9] *Pedoman Unsur-Unsur Tindak Pidana Pelanggaran Hak Asasi Manusa Yang Berat Dan Pertanggungjawaban Komando* (Jakarta: Mahkamah Agung Republik Indonesia, 2016), 2.

[10] See Explanation of the HRC Act, in the Introduction Section.

[11] See Prosec v. Damiri, Judgment, No. 09/PID.HAM/AD.HOC/2002/PH.JKT/PST. (HRCI), which will be explored later in this paper.

[12] Eddy O.S. Hiariej, *Prinsip-Prinsip Hukum Pidana* (Yogyakarta: Cahaya Atma Pustaka, 2014), 56–57. See also Article 1(1) of the Criminal Code and Article 18(2) Human Rights Act.

This paper will first explore the International Law perspective of the matter, arguing that CIL is indeed binding to Indonesia and that the concepts of ‘crimes against humanity’ and ‘genocide’ cannot be understood without CIL. The paper will continue by exploring the national law context where it will be found that although the reference to CIL in courts is materially inevitable, there are no formal justifications to do so. However, the apparent solution to amend the provisions of law to include CIL has not been successful. It will be suggested that it is the structure, especially the basic understanding of the principle of ‘legality’ which needs to be reformed.

It is argued that the structure of Islamic criminal law can be used as a model. As a matter of reference, Islam is an integral part of Indonesian society, the state ideology and the national legal system, despite not being officially an Islamic state.[13] It is found that the limited flexibility that Islamic criminal law provides can be used as a model to help in fixing the problem of the HRC in adopting CIL.

International Law Perspective

1. Customary International Law: Origins and Forms

CIL is probably the oldest source of International Law now crystallized under Article 3(1) (b) of the statute of the International Court of Justice (ICJ). Essentially, CIL is derived from a uniformity of state practice as well as *opinio juris.*[14]

Abdul Ghafur Hamid notes that the first element - uniformity of state practice - means that there should be a “*common and widespread practice among a significant number of states*.”[15] This is not to be understood as an *“absolutely rigorous conformity with the*

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[13] Fajri Matahati Muhammadin and Hanindito Danusatya, “De-Secularizing Legal Education in Indonesian Non-Islamic Law Schools: Examining The ‘Introduction to Jurisprudence’ Textbooks On The ‘Norm Classification’ Chapter,” *Ulul Albab: Jurnal Studi Dan Penelitian Hukum Islam* 1, no. 2 (2018): 139–42.

[14] Robert McCorquodale and Martin Dixon, *Cases and Materials on International Law* (New York: Oxford University Press, 2011), 28. See also Nicaragua v. USA (Merits), ICJ, 1986, para. 183-184 and Continental Shelf (Libyan Arab Jamahiriya Malta), ICJ Reports 1985 para. 27.

[15] Abdul Ghafur Hamid @ Khin Maung Sein, *Public International Law: A Practical Approach* (Selangor: Thomson Reuters Malaysia Sdn Bhd, 2012), 27.

rule,"[16] but rather a general compliance to the practice is sufficient.[17]

The second element - *opinio juris* - cannot be separated from the first. It distinguishes the practice as not just any kind of state activity but reflects a belief that they are obligated in such act by virtue of law.[18] The lack of *opinio juris* of a state or group of states combined with a contrary practice may constitute as persistent objection to be excluded from the application of CIL.[19]

However, modern development may show different ways to indicate CIL. CIL may be codified and developed in and therefore take the form of treaties[20] such as the international humanitarian law treaties.[21] Some other international legal documents and *soft law* can also be a codification of CIL such as the International Criminal Court (ICC), Elements of Crime (EoC)[22] and United Nations (UN) General Assembly Resolutions.[23] CIL can also be found in case laws as one of the roles of courts, particularly international courts, is to clarify CIL and apply it as a source of law for their judgments.[24]

2. Customary International Law within the Rome Statute

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[16] Military and Paramilitary Activities in and against Nicaragua (US v. Nicaragua) (Merits) (1986) ICJ Rep 14 at para 186.

[17] *Ibid*.

[18] O. Schachter, "New Custom: Power, Opinio Juris and Contrary Practice," in *Theory of International Law at the Threshold of the 21st Century*, ed. Jerzy Makarcyzk (The Hague/London/Boston: Kluwer Law, 1996), 531–32.

[19] David A Colson, "How Persistent Must the Persistant Objector Be," *Wash. L. Rev.* 61 (1986): 957. See also Ted L Stein, "The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law," *Harv. Int'l. LJ* 26 (1985): 457.

[20] Alan Boyle and Christine Chinkin, *The Making of International Law* (New York: Oxford University Press, 2007), 234–37.

[21] See generally: Jean-Marie Henckaerts, Louise Doswald-Beck and Carolin Alvermann, *Customary International Humanitarian Law*, vol. 1 (Cambridge University Press, 2005); Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 2 (Cambridge: Cambridge University Press, 2005).

[22] See generally: Knut Dormann, Louise Doswald-Beck and Robert Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Cambridge: Cambridge University Press, 2004).

[23] Nicaragua Case, paras 188, 191-193, and 195.

[24] Boyle and Chinkin, *The Making of International Law*, 278–84.

This subsection will examine certain parts which are not well defined in the Rome Statute but nonetheless are needed by the Court. In interpreting these elements the court must therefore refer to CIL which is reflected in various types of international instruments.

Case laws or past judicial decisions can be evidence of CIL.[25] Further, case laws are also among the bases from which the ICC Elements of Crime were derived from. This subsection illustrates how CIL is reflected through the case laws becoming components of the Elements of Crime which are inseparable from the Rome Statute itself.

The first illustration is the 'widespread and systematic' element of crimes against humanity as required by Article 7 of the Rome Statute and elaborated further by the Elements of Crime. Such a requirement was adopted from the precedence of the ICTY and ICTR[26] to distinguish crimes against humanity from isolated crimes.[27] The ICTY also explains that the 'attack directed against civilian population' requirement as per Article 7 (2) (a) means that the alleged crimes shall not be one particular act but instead, a course of conduct.[28]This is further endorsed in the *Bemba Case* to further complement the Elements of Crime.[29] The Rome Statute instructs that, as an element in crimes against humanity, multiple attacks must be proven to be pursuant to or in furtherance of a state or organizational policy". It was the *Tadic Case* that extended this 'organisational policy requirement' to continue beyond states to cover non-government forces with *de facto* control but not including crimes by isolated individuals.[30]This was included in the 1996

[25] Ibid., 278–85.

[26] The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, respectively.

[27] *Tadic*, Opinion and Judgment, ICTY, No. IT-94-I-T paras. 251 and 648, para. 251; *Kunarac*, Judgment para. 413, and *Akayesu,* Judgment, ICTR, ICTR-96-4-T, para. 579. See also Stefan Kirsch, "Two Kinds of Wrong: On the Context Element of Crimes against Humanity," *Leiden Journal of International Law* 22, no. 3 (2009): 537. See also *Bemba*, Trial, para. 164, and Margaret McAuliffe deGuzman, "The Road from Rome: The Developing Law of Crimes against Humanity," *Human Rights Quarterly* 22, no. 2 (2000): 368.

[28] *Tadic*, Form of Indictment, para. 11.

[29] Bemba, Trial, para. 150.

[30] Tadic, Opinion and Judgment, para. 654-655. See also Darryl Robinson,

version of the International Law Commission (ILC) Draft Code,[31]and later adopted into the Rome Statute by the states at the Rome Conference.

Other than using precedence from the tribunals case laws, sometimes the tribunals statutes are taken as evidence of CIL. For example, Article 7(1)(h) of the Rome Statute adopts a definition of the crime of persecution from the development of the charters and statutes of the International Military Tribunal, ICTY and ICTR. The end result is a definition of persecution to include grounds combining what was written in those previous instruments that is, "*... political, racial, national, ethnic, cultural, and religious grounds.*"

CIL can also be derived from international conventions and *soft law*. For example, the concept of 'civilian population' to indicate a larger body of victims is visualized and that single or isolated acts against individuals may be considered to fall outside the scope of the concept, was first set in *soft law* in 1948 by the UN War Crimes Commission.[32] Also, the definition of 'rape' was expanded to include the terms 'forced pregnancy' and 'sexual slavery' based on *soft law* that is, the Platform of Action annexed to the resolution of the Fourth World Conference on Women.[33] The crime of genocide in Article 6 of the Rome Statute is also taken from the 1948 Genocide Convention.[34]

Additionally, the Crime of Apartheid in Article 7(2)(h) of the Rome Statute clearly adopts from the International Convention on the Suppression and Punishment of the Crime of Apartheid 1973. The Crime of Enforced Disappearance in Article 7(2)(i) also adopts from

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"Defining 'Crimes against Humanity' at the Rome Conference," *American Journal of International Law* 93, no. 1 (1999): 50.

[31] ILC Draft Code of Crimes against the Peace and Security of Mankind with commentaries, para. 5 Commentaries of Art. 18, p. 47.

[32] *1948 History of the United Nations War Crimes Commission and the Development of the Laws of War* (United Nations War Crimes Commission, 1948), 193, http://www.unwcc.org/wp-content/uploads/2017/04/UNWCC-history.pdf.

[33] "Report of the Fourth World Conference on Woman" (New York: United Nations, September 1995), 114, http://www.un.org/womenwatch/daw/beijing/pdf/Beijing full report E.pdf.

[34] Christine H Chung, "The Punishment and Prevention of Genocide: The International Criminal Court as a Benchmark of Progress and Need," *Case W. Res. J. Int'l L.* 40 (2007): 227.

the Inter-American Convention on The Forced Disappearance of Persons 1994. With respect to the Crime of Enslavement, Article 7(1)(c) of the Rome Statute adopts from the 1926 Slavery Convention, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (slavery and servitude), the International Covenant on Civil and Political Rights (slavery and servitude), and the International Labour Organization (ILO) Convention No. 29 concerning Forced or Compulsory Labour (forced labour).[35]

For the purpose of the following sections, it shall be noted that the aforementioned illustrations of CIL derived from treaties or conventions have only referred to treaties or conventions to which Indonesia is not a party. In addition, as *soft laws* are documents which are not formally binding[36] it must also be noted that these legal documents in themselves are not binding to Indonesia, but when considered as CIL their contents become binding. This becomes a problem as the following section shows.

Indonesian National Law Perspective

1. Human Rights Court

Not long after Indonesia's 1998 reformation, the East Timor conflict erupted and escalated into one of the darkest entries in Indonesia's history of human rights violations.[37] Upon international pressure[38]

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[35] Draft Code of Crimes against the Peace and Security of Mankind with commentaries, 1996, International Law Commission para. 10. Note that ILC drafts are also *soft laws*.

[36] Bryan A. Gardner, ed., *Blacks Law Dictionary*, 9th ed. (Minnesota: West, 2009), 1519.

[37] Eddy O.S. Hiariej, *Pengadilan Atas Beberapa Kejahatan Serius Terhadap HAM* (Jakarta: Erlangga, 2010), 84; Nicholas J Wheeler and Tim Dunne, "East Timor and the New Humanitarian Interventionism," *International Affairs* 77, no. 4 (2001): 816; Shawn Donnan, "Evidence Grows Over Jakarta Hand in Violence," *Financial Times*, November 25, 1999.

[38] UN Security Council, S/Res/1264, 1999, Adopted by the Security Council at its 4045th meeting, UN Office of the High Commissioner for Human Rights, 'Situation of human rights in East Timor', Commission on Human Rights Resolution 1999/S-4/1, adopted at its 4th special session.

the Indonesian government ended up establishing an Ad-Hoc Human Rights Court (Ad-Hoc HRC)[39] which was replaced by the HRC after the HRC Act was enacted.

Generally, the HRC holds jurisdiction over grave violations of human rights[40] including genocide and crimes against humanity.[41] As mentioned in the introduction, the HRC Act stipulates that the terms 'genocide' and 'crimes against humanity' refer to Articles 6 and 7 of the Rome Statute.[42]

2. Adopting International Law into Indonesian National Law

To adopt international laws into national laws, the Constitution requires an approval by the Indonesian House of Representatives and the President for a treaty to take effect.[43] Further regulation regarding the adoption of treaties[44] are later regulated by Act No. 24 year 2000 on Treaties where treaties are to be transformed into a national law instrument either by Statutory Act or Presidential Regulation.[45]

The HRC Act may have added an interesting twist to this. From the Explanation to Article 7 it seems that International Law can be adopted through means other than ratification which is by legislation of an Act that refers to an international treaty (in this case the Rome Statute Articles 6 and 7).

In regard to the need for implementing regulations, although Indonesia normatively seems to be dualist[46] (although some scholars disagree)[47] Indonesia has a rather inconsistent practice.[48] Article

[39] Presidential Decree No. 53 year 2001.
[40] Article 4, HRC Act.
[41] Article 7, HRC Act.
[42] Article 7 Explanation of HRC Act.
[43] Article 11(2) of the Constitution.
[44] Article 11(3) of the Constitution.
[45] Article 10, 11 Act No 24 year 2000 concerning International Treaties.
[46] Act No 24 of 2000 on International Treaty, Art. 9 (2).
[47] Damos Dumoli Agusman, "Indonesia Dan Hukum Internasional: Dinamika Posisi Indonesia Terhadap Hukum Internasional," *Jurnal Opinio Juris* 15, no. Januari-April (2014): 26.
[48] Simon Butt, "The Position of International Law Within the Indonesian Legal System," *Emory Int'l L. Rev.* 28 (2014): 27.

7(2) of Act No. 39 of 1999 on Human Rights however stipulates that accepted international human rights norms specifically would be incorporated directly as national law.[49] This explanation seems to only accommodate the adoption of International Law via treaties. What legal platform can then be used to justify the use of CIL from the perspective of domestic laws?

This sub-section first explores the Indonesian criminal law system and its principle of legality, seeing where CIL might or might not fit in. It then continues to explain how the Ad-Hoc HRC uses and justifies CIL in its judgments especially in the East Timor cases.

3. Indonesian Criminal Law and the Principle of Legality

The principle of legality is the cardinal principle of criminal law where one may not be punished for an act not regulated in positive law (*lexscripta*).[50] The interpretation is that it must be strict and without analogy (*lex stricta*) and not ambiguous (*lexcerta*).[51] This principle is central to Indonesian criminal law. For example, the 1945 Constitution mentioned that no one shall be prosecuted retroactively[52] and that in exercising their human rights, every person shall do it within the limitations set forth by the law.[53] This principle is manifested also in the Criminal Code[54] and is in line with the Rome Statute[55] which the HRC Act adopts as mentioned in the Explanation of Article 6 of HRC Act.

However, this principle of legality and non-retroactivity is not without an exception. The HRC Act has faced challenges with regard to this matter. Abilio Soares, one of the defendants in the East Timor case, challenged the Act at the Constitutional Court. Soares's claims are mainly concerning how Article 43(1) of the HRC Act which

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[49] Art. 7(2) of Act No. 39 of 1999 on Human Rights.

[50] Hiariej, *Prinsip-Prinsip Hukum Pidana*, 56–57. See also Article 1(1) of the Criminal Code and and Article 18(2) Human Rights Act.

[51] Ibid. 57–58. See also Jan Remmelink, *Hukum Pidana: Komentar Atas Pasal-Pasal Terpenting Dari KUHP Belanda Dan Padanannya Adlam KUHP Indonesia* (Jakarta: Gramedia, 2003), 355.

[52] Art 28I (1) of the Constitution.

[53] Art 28J (2) of the Constitution.

[54] Article 1(1) of the Criminal Law Code.

[55] Article 24 of the Rome Statute.

allows the Ad-Hoc HRC to operate retroactively, violates the principle of legality and basic human rights provided in the 1945 Constitution.

The judges declined[56] his claims, citing that the right not to be prosecuted retroactively regulated by the 1945 Constitution *may* be circumvented as per several specific limitations regulated by the Constitution itself, such as limiting one's right for the sake of moral, religious, security and public order regulated by other statutory acts.[57] This decision gives us the understanding that materially, gross violations of human rights can be criminalized even retroactively as the 1945 Constitution set forth a limitation to the right to not be prosecuted retroactively. As per Article 28J (2) of the Constitution, human rights can be limited via the legislation of an Act as a formal requirement for such a limitation to be done. This is the small but nonetheless important detail which will become central to the problem highlighted in this paper.

However, the aforementioned is what is known in Indonesian terms as 'formal legality' which considers strictly only formal laws enacted through statutory regulations. The Indonesian legal system, to some extent, also recognizes the concept of 'material legality'. Unlike the formal legality concept, material legality generally gives room (and even obligations) for judges to explore the living law within the society too.[58] Does this apply to criminal law? As a matter of law, it can be argued that it is provided in the Emergency Act No. 1 of 1951 in Article 5(3) (b) which has yet to be revoked. However, the strict formal legality applied in the Criminal Code seems to have made the law enforcers choose to abandon material legality altogether as a matter of judicial practice.[59] Article 2 of the 2015 Draft Criminal Code provides clear recognition to material legality, recognizing the living law. The Article allows the punishment of conducts not regulated under specific instruments, provided that it

[56] Constitutional Court Decision No. 065/PUU-II/2004.
[57] Article 28J of the Constitution.
[58] Article 27(1), Act No. 14 of 1970 concerning the Fundamental Provisions regarding the Power of the Judiciary.
[59] Ramadan Tabiu and Eddy O.S. Hiariej, "Pertentangan Asas Legalitas Formil Dan Materiil Dalam Rancangan Undang-Undang KUHP," *Jurnal Penelitian Hukum-Fakultas Hukum Universitas Gadjah Mada* 2, no. 1 (2015): 30.

does not contradict the values contained under the Pancasila, 1945 Constitution, human rights and general principles of law recognized by the civilized society. As such, this provision does allow the inclusion of CIL as part of the law living in the international society. The concept of material legality itself, however, is under great debate.[60]

One side of the debate raises the question that allowing the punishment of conducts that are not strictly regulated amounts to a direct contradiction of the formal legality principle generally recognized by the Indonesian criminal law system.[61] The counter argument points out that recognizing the principle of material legality allows law enforcers, particularly the court, to accentuate justice as opposed to solely relying on legal certainty, thus providing a better balance in applying the principle of legality in general.[62] Another argument even addresses the issue of how the principle of legality bears a certain degree of influence on the concept of separation of power. Considering the judicative body enforces the law by punishing criminal acts through their judgments based on the law made by the legislative body, then every single provision made the legislative body, especially the provisions qualifying what conduct would amount to criminal act, influences the said judgments.[63]

This vigorous debate inevitably puts the Draft and therefore the application of material legality principle on hold. The Draft is still undergoing revision and has yet to be enacted even up until early 2019 (as this paper was concluded). Further, this concept of material legality speaks of the incorporation of living laws within the Indonesian society and not International Law, which is also central to

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[60] Tabiu and Hiariej, "Pertentangan Asas Legalitas Formil Dan Materiil Dalam Rancangan Undang-Undang KUHP"; Prianter Jaya Hairi, "Kontradiksi Pengaturan 'Hukum Yang Hidup Di Masyarakat' Sebagai Bagian Dari Asas Legalitas Hukum Pidana Indonesia," *Negara Hukum* 7, no. 1 (2016): 89–110.

[61] Article 1(1) Indonesian Criminal Code. See also Article 1 Draft Criminal Code.

[62] Tabiu and Hiariej, "Pertentangan Asas Legalitas Formil Dan Materiil Dalam Rancangan Undang-Undang KUHP," 30.

[63] Ibid., 33–34. See also Cessare Beccaria, *Perihal Kejahatan Dan Hukuman* (Yogyakarta: Genta Publishing, 2011), 10; Eddy O.S. Hiariej, "Pemikiran Remmelink Mengenai Asas Legalitas," *Jentera: Jurnal Hukum* 16, no. April-June (2007), 127.

the problem discussed in this paper. However, the general line of reasoning within the concept of material legality may provide a solution to this problem.

4. Customary International Law in the Ad-Hoc Human Rights Court: The East Timor Case

The Ad-Hoc HRC has applied CIL as discussed before in their judgments. One of the most well-known cases brought before the Ad-Hoc HRC is the East Timor case. As explained the HRC Act refers to the definition of genocide and crime against humanity set forth in the Rome Statute but the Rome Statute itself does not provide the explanation, elements and legal standards for such crimes. Inevitably the Ad-Hoc HRC is required to look into other sources of law especially case laws which may assist the judges further in their deliberations and considerations.

For example, the court has referred to the standards on the widespread and systematic elements of crimes against humanity mentioned in the Akayesu,[64] Kayishema, and Ruzinanda cases of ICTR.[65] To establish the defendants' individual criminal responsibilities the court looked into the standards established in different case laws, such as the Blaskic case of ICTY regarding command responsibility and its requisite *mens rea*.[66] The court also made a comparison to the Tadic case of ICTY regarding "...a civilian who is put on trial as a perpetrator of crimes against humanity".[67]

The court justified the use of CIL for several reasons. Firstly, the fact that International Law was adopted into national laws is a reason to apply CIL. The judges deemed that since the Explanation of

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64 "Prosec v. Damiri, Judgment, No. 09/PID.HAM/AD.HOC/2002/PH.JKT/PST. (HRCI)."

65 "Prosec v. Guterres, Judgment, No. 04/PID.HAM/AD.HOC/2002/PH.JKT.PST. (HRCI)."

66 "Prosec v. Damiri, Judgment, No. 09/PID.HAM/AD.HOC/2002/PH.JKT/PST. (HRCI)"; "Prosec v. Silaen, Judgment, No. 02/PID.HAM/AD.Hoc/2002/ PN.JKT.PST. (HRCI)" (Jakarta, Indonesia: Human Rights Ad-Hoc Court at Central Jakarta District Human Rights Court, August 15, 2002), http://www.worldcourts.com/hrahc/eng/decisions/2002.08.15_Prosecutor_v_Silaen.htm.

67 "Prosec v. Guterres, Judgment, No. 04/PID.HAM/AD.HOC/2002/PH.JKT.PST. (HRCI)."

HRC Act mentioned that genocide and crime against humanity are adapted from the Rome Statute therefore "...law-makers and the Government had been *adopting the International Law principles into national laws*, so that applying the International Law principles, conventions and judicial practices on the perpetrators of the crimes against humanity shall be applied in the court of Grave Human Rights Violation in our Country, *as in this case is valid as long as there is any relevancies* in the case of Grave Human Rights Violation in East Timor";[68] secondly, there is an issue of a gap of legal basis as the judges considered that because the law "...does not give any clear definition..." on the elements of the crimes, therefore the "Assembly will refer to International Court practice as well as International Law terminology";[69] thirdly, the judges deemed that based on the 'doctrine' of those court practices, no one is 'allowed to depend only on the national law' and that "…each individual shall obey international obligation more than obligation toward his/her national law";[70] and lastly, because the cases involve gross violations of human rights the judges deemed it necessary to "point out some general principles in International Law concerning the crimes against humanity that have universal characteristics".[71]

Nonetheless, the judges of the Ad-Hoc HRC have used CIL as part of their considerations ultimately leading to their judgement on whether the defendants are legally and convincingly proven guilty as charged[72] or not.[73]

Critical Examination

[68] Ibid. "Prosec v. Damiri, Judgment, No. 09/PID.HAM/AD.HOC/2002/PH.JKT/PST. (HRCI)."
[69] "Prosec v. Silaen, Judgment, No. 02/PID.HAM/AD.Hoc/2002/PN.JKT.PST. (HRCI)."
[70] "Prosec v. Guterres, Judgment, No. 04/PID.HAM/AD.HOC/2002/PH.JKT.PST. (HRCI)."
[71] "Prosec v. Damiri, Judgment, No. 09/PID.HAM/AD.HOC/2002/PH.JKT/PST. (HRCI)."
[72] "Prosec v. Guterres, Judgment, No. 04/PID.HAM/AD.HOC/2002/PH.JKT.PST. (HRCI)."
[73] "Prosec v. Silaen, Judgment, No. 02/PID.HAM/AD.Hoc/2002/PN.JKT.PST. (HRCI)."

1. Formal and Material Law

Before embarking on a critical analysis of the judgments of the East Timor case in analysing the application of CIL, it is essential to first discuss the matter of material (substantive) law and formal (procedural) law. Material law, generally known as substantive law, essentially contains the norms of law and contains rules providing the rights and responsibilities of those who are subject to the law.[74] In the context of criminal law it draws up the requirements needed to criminalize and penalize a person, and identifies who can be punished and the punishments for criminal acts.[75]

Formal law, generally known as procedural law, contains rules providing the mechanisms of how to enforce the material laws.[76] In the criminal law context, formal law is understood as the set of rules to apply material law in arriving at a judge's verdict and how to enforce the judge's verdict.[77]

The principle of legality and its derivatives are generally included in material law as it is in itself a human right as mentioned in the previous section. However, when we speak of the use of this principle as a limitation on the judge in applying and enforcing the laws, it is part of formal law.[78] It logically follows that the failure to fulfil formal law would mean that the material law cannot be applied.[79] This logic is also recognized in International Law as shown by the ICJ in the *Jurisdictional Immunities Case* which asserts that even *jus cogens,* which is the highest norm of International Law that cannot be derogated and any laws against it are rendered null and void,[80] cannot be applied when formal law prevents it.[81]

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[74] Sudikno Mertokusumo, *Mengenal Hukum (Suatu Pengantar)*, 3rd ed. (Yogyakarta: Liberty, 1991), 108.
[75] Laden Marpaung, *Asas-Asas, Teori, Praktik Hukum Pidana* (Jakarta: Sinar Grafika, 2005), 2.
[76] Mertokusumo, *Mengenal Hukum (SuatuPengantar)*, 108.
[77] Marpaung, *Asas-Asas, Teori, Praktik Hukum Pidana*, 2.
[78] Hiariej, *Prinsip-Prinsip Hukum Pidana*, 61–62.
[79] Mertokusumo, *Mengenal Hukum (SuatuPengantar)*, 108–9.
[80] M Cherif Bassiouni, "International Crimes: Jus Cogens and Obligatio Erga Omnes," *Law & Contemporary Problems* 59 (1996): 67.
[81] See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012,* p. 99.

2. Flaw in Judgement Reasoning

Judges justify adopting CIL because they are relevant and necessary when the government has adopted International Law but on the point of necessity and relevance, there is no question of its truth. Indonesia does not have enough domestic legal material to construct an entire legal body of law on international crimes[82] which creates a legal vacuum necessitating judges to search for relevant practices elsewhere[83] (from CIL *etc.*). In such a case, as a matter of material law, justification to use CIL can be found. The problem however lies in formal law for instance, which source of law can be used and which of the formal laws are required in order to implement the material law.

The judgments of the East Timor cases as cited in the previous section usually claim that they use international norms already accepted by Indonesia. However, one may question the basis on which Indonesia accepted the use of CIL scattered in case laws from international tribunals. It is very difficult to find any evidence of this. After all, Law No. 24 of 2000 concerning International Agreements in Article 3 notes that acceptance of international treaties are done *via* signatory, ratification, exchange of documents or notes and other means agreed upon by the parties involved in the treaties. These are the only instruments available to indicate how international laws are accepted by Indonesia but CIL cannot be subjected to this mechanism as it does not always take the form of treaties as shown in the previous sections. It is therefore difficult to justify the use of CIL from the perspective of the adoption of International Law into national law.

Can it be argued that CIL can be used as a means to understand or interpret the applicable laws namely, the HRC Act? One of the known methods in the making of judicial law is to compare the implementation of a treaty in different states to establish a view on how to apply the said treaty.[84] However, Indonesian judges are

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[82] Abdul Hakim G. Nusantara, "Penerapan Hukum Internasional Dalam Kasus Pelanggaran Hak Asasi Manusia Berat Di Indonesia," *Indonesian Journal of International Law* I, no. 4 (2004): 761–62.

[83] Mertokusumo, *Mengenal Hukum (SuatuPengantar)*, 136–37.

[84] Ibid. 149.

merely 'mouthpieces' of the statutory regulations and are unable to be creative as common law judges[85] which leads to a bigger problem namely, the principle of legality.

The HRC Act does refer to a definition in the Rome Statute but to expand this to the assumed adoption of a non-ratified treaty (i.e. the Rome Statute) and extending it even further to the entire bulk of CIL may be stretching it too far in the criminal law context. Case laws and not 'positive laws' *per se* are also used in the Indonesian legal system which are not only non-binding,[86] but CIL also has an international comparative character. Analogy is prohibited in criminal law as explained in the previous section, which makes the use of CIL a *prima facie*a breach of the principle of legality.

However, there may be exceptions. The ICCPR in Article 15(2) allows retroactive criminal laws for crimes of CIL, and this has been used controversially to criminalize terrorists.[87] Genocide and crimes against humanity are crimes of CIL; this exception however shows criminalization of CIL crimes through national positive laws, not in adopting foreign sources of law in criminal proceedings. Such a limitation to a fundamental right as per Article 28J(2) of the Indonesian Constitution must be *via* an Act or Government Regulation in Lieu of Law and no such Act or Government Regulation in Lieu of Law exists in this case, except the HRC Act specifically referring to definitions of crimes against humanity and genocide. This exception cannot therefore be applied.

In conclusion the HRC *should* apply CIL. It may be materially justified as to why CIL is absolutely needed as the concepts of genocide and crimes against humanity cannot be understood properly without it - which is why the East Timor judgment had to refer to it. What seems to be lacking is the formal platform from which CIL may be introduced as a legitimate source of law.

3. Apparent but Incomplete Solution

Taken at face value, the apparent solution to create a legal

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[85] Ibid. 138.

[86] Ibid. 91–95.

[87] Agus Raharjo, "Problematika Asas Retroaktif Dalam Hukum Pidana Indonesia," *Jurnal Dinamika Hukum* 8, no. 1 (2008): 76–78.

platform to formally justify the usage of CIL in the Ad-Hoc HRC sessions seems simple. This can be done by making adjustments in the relevant statutory regulations to include CIL. It is recommended that the HRC Act Explanation of Article 7 should be amended so that it does not only refer to Articles 6 and 7 of the Rome Statute for definition, but includes "*... and relevant rules of CIL*".This legal platform can be introduced by adjusting the relevant statutory regulations via two possible means namely:

- Legislation process through the House of Representatives
- Judicial review at the Constitutional Court which may conduct 'positive legislation' through its rulings[88]

With such adjustments in the legislation to now clearly recognize CIL as a source in understanding genocide and crimes against humanity it would seem that the problem is solved. However, it seems that there is one more issue and a deeper understanding of the principle of legality will show that the problem has yet to be solved.

The principle of legality is very much related to legal certainty and rule of law,[89] and one of the purposes is so that "... subjects can rely on the law and can foresee application of state power".[90] A further understanding of the *lexscripta* principle is relevant to this because the idea is that other than to ensure that the law is validly made, it must also be publicly promulgated.[91] Without this the legal principle *presumptioiures de iure* meaning 'everybody is presumed to know the law'[92] would be nothing but injustice.

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[88] See generally: Mohammad Mahrus Ali, Meyrinda Rahmawaty Hilipito and Syukri Asy'ari, "Tindak Lanjut Putusan Mahkamah Konstitusi Yang Bersifat Konstitusional Bersyarat Serta Memuat Norma Baru," *Jurnal Konstitusi* 12, no. 3 (2015): 631–62.

[89] Hwian Christianto, "Pembaharuan Makna Asas Legalitas," *Jurnal Hukum & Pembangunan* 39, no. 3 (2009): 348–53, 355.

[90] Randall Peerenboom, "Varieties of Rule of Law: An Introduction and Provisional Conclusions," in *Asian Discources of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US*, ed. Randall Peerenboom (London and New York: Routledge, 2004), 3.

[91] Randall Peerenboom, "A Government of Laws: Democracy, Rule of Law and Administrative Law Reform in the PRC," *Journal of Contemporary China* 12, no. 34 (2003): 51.

[92] Sudikno Mertokusumo, *Mengenal Hukum: Suatu Pengantar* (Yogyakarta: Liberty

It can be seen how, although technically the law would allow CIL to be cited, the greater purpose of the principle of legality is not fulfilled. As explained much earlier, all these rules and details of CIL are scattered in numerous instruments existing in foreign jurisdictions. However, with a strict formal legality in the legal structure and legal culture,[93] this solution would seem out of place.

Lessons from Islam

1. Why Learn from Islam: A Post-Colonial Necessity

The Islamic legal tradition of *fiqh* and *uṣūl al-fiqh* is one of the branches of Islamic sciences that has been well developed throughout the ages and best represents the spirit of Islamic thought as a 'legal religion'.[94] In pre-colonial Indonesia the Islamic legal system was one of the established systems used within the society and kingdoms throughout the archipelago until the Dutch came, eroding the Islamic law system and *adat* or customary laws and replacing them with a 'unified' legal system.[95]

Upon independence the Indonesian founding fathers did not establish Indonesia as an Islamic state, but rather a non-secular religious nation accommodating the Indonesian character as a religious society. Indonesia's state ideology Pancasila has 'the belief in the One and Only God' as the very first principle which is embedded in the other principles.[96] It is relevant to mention that Pancasila was largely a contribution of the majority Muslims.[97] This

Press, 2006), 33.

[93] Tabiu and Hiariej, "Pertentangan Asas Legalitas Formil Dan Materiil Dalam Rancangan Undang-Undang KUHP," 30. See also generally Sub-Sections IIIc and IVb.

[94] Nirwan Syafrin, "Konstruk Epistemologi Islam: Telaah Bidang Fiqih Dan Ushul Fiqih," in *Filsafat Ilmu: Perspektif Barat Dan Islam*, ed. Adian Husaini and Dinar Dewi Kania (Jakarta: Gema Insani Press, 2013), 128.

[95] Ramlah, "Implikasi Pengaruh Politik Hukum Kolonial Belanda Terhadap Badan Peradilan Agama Di Indonesia," *Jurnal Kajian Hukum Islam* 12, no. 1 (2012): 47–50.

[96] See Constitutional Court Judgement No. 140/PUU-VII/2009, Para. 3.34.1.

[97] M. Saifullah Rohman, "Kandungan Nilai-Nilai Syariat Islam Dalam Pancasila," *Jurnal Studi Agama Millah* 13, no. 1 (2013): 209–11.

is further reflected in the legal system. The Constitution provides in Article 29(1) that Indonesia is founded on the belief in God and, as Hazairin noted, this means that the law should not contradict religious norms and is the basis to implement religious laws.[98] From this numerous Islamic law legislations are passed, *inter alia* the Act No. 7 of 1989 Concerning the Religious Court which is essentially an Islamic court, Act No. 21 of 2008 concerning *Sharīʻah* banking and many more.

However, the scholarship of Indonesian jurisprudence itself is largely secular. From the most basic of the Indonesian legal education law students are even taught that religious norms are separate from legal norms, the former having 'weaknesses' such as 'non-implementable in the material world' and 'only providing obligations and no rights': they thus need to be 'reinforced' by the latter.[99] This is further reinforced by the insertion of mostly Western legal theories and zero Islamic law theories into the curriculum, resulting in Indonesian Muslims being unaware of their vastly rich legal scholarship.[100] All this contributes to the shifting of the colonial hegemony of knowledge away from an age of colonialism to an age of neo-colonialism: an assumption that 'Western knowledge' is by default superior to 'Eastern knowledge'.[101]

Even when the first line of the Preamble emphasizes that "…colonialism must be erased from the world," it means very little

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[98] Hazairin, *Demokrasi Pancasila* (Jakarta: Bina Aksara, 1981), 18.

[99] This is clearly a statement of ignorance towards the nature of Islam and its legal tradition. See Muhammadin and Danusatya, "De-Secularizing Legal Education in Indonesian Non-Islamic Law Schools: Examining The 'Introduction to Jurisprudence' Textbooks On The 'Norm Classification' Chapter."

[100] See for example Vina Berliana Kimberly, Novita Dwi Lestari and Fajri Matahati Muhammadin, "Incorporating Qawaidh Fiqhiyyah to the 'Principles of Law' Chapter in the Introduction to Jurisprudence Course in Indonesia's Legal Education," in *International Conference on Research in Islamic Education 2018 Conference Proceeding, Fakulti Tamadun Islam, Universiti Teknologi Malaysia* (Kuala Lumpur: Springer, 2019), (upcoming).

[101] Wan Mohd Nor Wan Daud, *Islamization of Contemporary Knowledge and the Role of the University in the Context of De-Westernization and Decolonialization* (Johor Baru: UTM Press, 2013), 6–7, and generally. Further on the Post-Colonial dilemma in the intellectual tradition: Syed Muhammad Naquib Al-Attas, *Risalah Untuk Kaum Muslimin* (Kuala Lumpur: ISTAC, 2001).

when the intellectual product of colonialism that is incompatible with the nation's ideology is still used. The problem lies in the legacy of colonialism where formal legality comes from, and the solution can best be found in Islamic law sources which existed prior to colonialism and still thrive in the society. Further, the fact that 87.2% Indonesians or 209 million people are Muslims[102] makes it all the more important for Islamic legal scholarship to be part of the discourse of Indonesian law.

2. Islamic 'Principle of Legality'

Islam is more than just a 'religion' as understood by the 'West' which only includes the man-God relationship in a theological context.[103] Rather it is an *al-Dīn* usually translated as 'religion' but whose derivative meaning includes not just 'religion' but also 'indebtedness', 'a way/course/manner of conducting/acting' which is most relevant in the current discussion on 'a particular law/statute'.[104] Along these lines the scholars of Islam rule that to appoint a ruler is a collective obligation towards Muslims,[105] and one of the duties of the ruler is to implement the *Sharīʻah* which includes criminal law.[106] Islamic criminal law is therefore a branch of Islamic law with a very rich body of scholarship.[107]

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[102] Drew Desilver and David Masci, "World's Muslim Population More Widespread than You Might Think," *Pew Research Center*, 2017, http://www.pewresearch.org/fact-tank/2017/01/31/worlds-muslim-population-more-widespread-than-you-might-think/.

[103] Dictionary Oxford, "Religion," *Oxford*, 2017, https://en.oxforddictionaries.com/definition/religion.

[104] Edward William Lane, *An Arabic-English Lexicon: In Eight Parts*, vol. 3 (Beirut: Librairie du Liban, 1968), 942–47; Aḥmad Mukhtār, *Muʻjam Al-Lughah Al-ʻArabiyyah Muʻaṣirah* (Cairo: ʻAlam al-Kutub, 2008), 796.

[105] Imām Al-Mawardi, *Al-Aḥkam Al-Sulṭāniyyah* (Beirut: Dar al-Kutub al-ʻIlmiyyah, 1996), 4; Imām Ibn Taymiyyah, *Majmuʻ Al-Fatāwa*, vol. 28 (Madīnah: Majmaʻ Mālik Fahd Li Ṭibāʻah Al-Muṣḥaf Al-Sharīf, 1995), 40.

[106] Musthafa Al-Khin and Musthafa Al-Bugha, *Konsep Kepemimpinan Dan Jihad Dalam Islam: Menurut Madzhab Syafiʼi* (Jakarta: Darul Haq, 2014), 111; Al-Mawardi, *Al-Aḥkam Al-Sulṭāniyyah*, 24.

[107] See for example: ʻAbd Al-Qādir ʻAwdah, *Al-Tashriʻ Al-Jināʼi Al-Islāmī Muqāranan Bi Al-Qānūn Al-Waḍʻ I* (Bayrūt: Dar al-Kutub ʼIlmiya, 2009); Imran Ahsan Khan Nyazee, *General Principles of Criminal Law: Islamic and Western*

As mentioned earlier, Indonesia is not an Islamic state and does not apply the *Sharī'ah* except in some limited legislations such as the aforementioned religious court[108] and in the special region of Aceh which implements some Islamic criminal laws. [109] Nevertheless, the principles of Islamic criminal law may provide some lessons from which Indonesia can learn and adopt.

Islamic criminal law provides two kinds of criminalization concepts:[110]

i. Fixed criminalization namely, *ḥudūd* with clear and unambiguous criminal provisions in the Qur'ān and Sunnah, *qiṣāṣ-diyāt* or retaliation and blood money, and *kafārat* which includes other religious non-criminal sanctions
ii. Flexible punishments namely, *ta'zīr* which are prescribed through the authority of the government

An important consideration should be given to the concept of *ta'zīr as* it is a form of criminalization which is prescribed not by the Qur'ān or Sunnah but by the discretion of the judge or government in order to achieve justice and *maṣlaḥat*.[111] For example, there are no provisions in the Qur'ān or Sunnah to explicitly criminalize the act of producing and distributing narcotics, but *Majelis Ulama Indonesia* issued a ruling that such acts are punishable by death.[112]

This however is not to be understood to mean that the government or judge has absolute discretion to do anything rather, there are rules to be followed too. Firstly, *ta'zīr* is a matter of *ijtihād* which means that there are no clear and direct provisions of

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(Islamabad: Advanced Islamic Studies Institute, 2000); Al-Yasa Abubakar, *Hukum Pidana Islam Di Aceh: Penafsiran Dan Pedoman Pelaksanaan Qanun Tentang Perbuatan Pidana* (Banda Aceh: Dinas Syariat Islam Aceh, 2011).

[108] This court can only judge matters of family law and Sharia economics.

[109] See Article 125(2) of Act No. 11 of 2006 on the Governance of Aceh.

[110] Abubakar, *Hukum Pidana Islam Di Aceh: Penafsiran Dan Pedoman Pelaksanaan Qanun Tentang Perbuatan Pidana*, 36.

[111] Teuku Abdul Manan, *Mahkamah Syar'iyah Aceh Dalam Politik Hukum Nasional* (Jakarta: Prenadamedia Group, 2018), 151.

[112] "Fatwa Majelis Ulama Indonesia Nomor: 10/Munas VII/MUI/14/2005 Tentang Hukuman Mati Dalam Tindak Pidana Tertentu" (Majelis Ulama Indonesia, 2005), 498, http://muijatim.org/wp-content/uploads/2016/09/Hukuman-Mati-dalam-Tindak-Pindana-Tertentu_2005.pdf.

criminalization from the Qur'ān or Sunnah but rulings must still be derived from the Qur'ān and Sunnah.[113] *Tta'zīr* may only be applied to actions which are clearly condemned by the Qur'ān or Sunnah [114] because of the general rule that an Islamic government or judge may not use other than what Allah reveals. There are numerous bases for this *inter alia* Sūrah Al-Mā'idah verse 44:

. . . وَمَن لَّمْ يَحْكُم بِمَا أَنزَلَ اللَّهُ فَأُولَٰئِكَ هُمُ الْكَافِرُونَ

> "... And whoever does not judge by what Allah has revealed - then it is those who are the disbelievers."[115]

Secondly, *maṣlaḥat* which is essential to *ta'zīr* and the governing rule over Islamic law in general[116] also has its rules. *Maṣlaḥat* means the attainment of benefits and rejection of harm,[117] but the 'harm' and 'benefit' acknowledged are only those found in the Qur'ān and Sunnah.[118] The concept of *maṣlaḥat* is further developed and understood in consideration of numerous items such as the five essential elements to be preserved,[119] levels of urgency,[120] and

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[113] Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* (Selangor: The Other Press, 2003), 20; Wahbah al-Zuḥaylī, *Uṣūl Al-Fiqh Al-Islāmī*, vol. 1 (Tehran: Dar Ihsan, 1997), 19; 'Abd al-Karim Zaydan, *Synopsis on the Elucidation of Legal Maxims in Islamic Law*, trans. Md. Habibur Rahman and Azman Ismail (Kuala Lumpur: IBFIM, 2015), 29.

[114] Albeit no clear criminal sanction prescribed in the Qur'an or Sunnah.

[115] This also means that those who refuse to use the Sharia because they believe there are other guidance better than the Sharia, are apostates. See Shalih bin Fauzan Al-Fauzan, *Syarah Nawaaqidhul Islam* (Jakarta: Akbar Media, 2017); Abū Ṣuhayb 'Abd Al-'Azīz ibn Ṣuhayb Al-Mālikī, *Aqwālu Al-Ā'immah Wa Al-Du'āt Fī Bayāni Riddati Man Baddala Sharī'ah Min Al-Ḥukkam Al-Ṭughāt* (Ilmway (Online), 2000), http://www.ilmway.com/site/maqdis/MS_9234.

[116] Nurizal Ismail, *Maqashid Syariah Dalam Ekonomi Islam* (Yogyakarta: Smart WR, 2014), 5–6.

[117] Abū Ḥāmid Muḥammad Al-Ghazālī, *Al-Muṣtaṣfa Min 'Ilm Al-Uṣūl*, vol. 1 (Cairo: Al-Amiriya Press, 1324), 286.

[118] Although human reason and *Shari'ah* reasons are always seen as not contradictory. Nyazee, *Islamic Jurisprudence*, 197.

[119] *Al-Diin*, life, lineage, intellect, and wealth, in this order of importance. See Al-Ghazālī, *Al-Muṣtaṣfa Min 'Ilm Al-Uṣūl*, 1:174. See also Nyazee, *Islamic Jurisprudence*, 202.

[120] Tertiary needs (*tahsīnāt*), secondary needs (*ḥājat*), and primary needs (*ḍarūrat*).

private versus public interest.[121]

For example, although there are no provisions in the Qur'ān or Sunnah to explicitly criminalize the act of producing and distributing narcotics, the *Majelis Ulama Indonesia* (MUI) ruled that such crimes are punishable by death.[122] They observed that causing death and destruction upon earth are prohibited and considered as heinous acts, thus they are punishable by death as explicated in the Qur'ān and Sunnah.[123] MUI concluded that some crimes, including the production and distribution of narcotics, would fall under the aforementioned category,[124] and also considered this as a manifestation of *maṣlaḥat* albeit not mentioning the term in particulat but emphasizing the need for public order.[125] It is also important to note that this MUI ruling was endorsing state legislations including Act No. 35 of 2009 concerning narcotics[126] which does not include anything Islamic *per se* in its considerations,[127] noting that *ta'zīr* may consider non-Islamic legislations when they are necessary.

What is shown here is how generally Islamic law does have its principle of legality. No laws including criminal laws may be used unless they originate from the Qur'ān;[128] however, the implementation of this principle of legality in the context of criminal law is not constricted. On the one hand, there are parts of Islamic

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See Nyazee, *Islamic Jurisprudence*, 203.

[121] Ibid., 211–12.

[122] "Fatwa Majelis Ulama Indonesia Nomor: 10/Munas VII/MUI/14/2005 Tentang Hukuman Mati Dalam Tindak Pidana Tertentu," 498.

[123] The MUI cited numerous verses of the Qur'ān including *Surah Al-Mā'idah* verses 32-33 and others, as well as numerous *ḥadīth* from Prophet Muḥammad (PBUH). See also Ibid.

[124] Ibid.

[125] Avoiding destruction is essentially an important part of *maṣlaḥat*, as per one of the major Islamic legal maxims '*al-ḍararuyuzāl'* (harm must be avoided). See Zaydan, *Synopsis on the Elucidation of Legal Maxims in Islamic Law*, 101–2.

[126] See "Fatwa Majelis Ulama Indonesia Nomor: 10/Munas VII/MUI/14/2005 Tentang Hukuman Mati Dalam Tindak Pidana Tertentu," 498.

[127] See the perambulatory clauses of Act No. 35 of 2009, showing that the Act was based on Indonesian statutory regulations as well as an international convention i.e. the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.

[128] And, by extension, the Sunnah.

criminal law which are very strict for example, *ḥudūd* where there are strict limitations and an exhaustive list on what the criminal offenses are and what their penalties entail.[129] There is *ta'zīr* which allows some limited flexibility in determining criminal offences and sanctions while still requiring them to be products of *ijtihād* which is guided by the Qur'ān and Sunnah.

This is how Islam balances between the need of certainty of law and the need to have flexibility to adapt to the dynamic nature of societies. In the context of Islamic criminal law, this balance is manifested in a principle of legality which parallels material legality.

3. Incorporating the Islamic Solution

From the perspective of Indonesian jurisprudence, scholars have identified three purposes of law which are to achieve justice, certainty of law, and *kemanfaatan* which means benefit or utility.[130] While the principle of legality in criminal law is heavily related to the purpose of law to achieve certainty,[131] a balance with the other purposes must be considered including 'benefit'. Noting that one of the main purposes of criminal law is to protect the society,[132] which is a 'benefit' consideration, 'certainty' can be cast aside for this reason. Common practices that reflect this include the setting aside of prosecution for rebels to achieve greater peace[133] or the terminating

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[129] 'Awdah, *Al-Tashri' Al-Jinā'i Al-Islāmī Muqāranan Bi Al-Qānūn Al-Waḍ'I*, 127.
[130] Mertokusumo, *Mengenal Hukum: Suatu Pengantar*, 78–81; Achmad Ali, *Menguak Tabir Hukum*, 2nd Edition (Jakarta: Penerbit Kencana, 2015), 89–100; Peter Mahmud Marzuki, *Pengantar Ilmu Hukum* (Jakarta: Prenadamedia Group, 2008), 117–40.
[131] Amir Ilyas, *Asas-Asas Hukum Pidana: Memahami Tindak Pidana Dan Pertanggungjawaban Pidana Sebagai Syarat Pemidanaan* (Yogyakarta: Mahakarya Rangkang Offset Yogyakarta, 2012), 14.
[132] Protecting the society, or some form of utility, has always found its way into most theories of purposes of criminal law throughout the ages. See Hiariej, *Prinsip-Prinsip Hukum Pidana*, 24–37.
[133] Offering amnesty was a major part in the peace deal between *Gerakan Aceh Merdeka* and the Government of Indonesia. See Reza Maulana, "Komunikasi Politik GAM-RI Pada Perundingan Helsinki," *Studi Komunikasi* 2, no. 3 (2018): 374.

of prosecution by the Attorney General on the basis of public interest.[134]

However, when confronted with the principle of legality in the context of criminal law it seems that 'benefit' has been too often set aside. The legality principle is the cardinal principle of the criminal law system adopted by Indonesia and the law prescribes a very strict formal legality. While most of the discussion on this principle focuses on formal and material legality with regard to the application of *adat* or customary criminal law,[135] this paper has shown that there is also a problem in the context of International Law and the HRC. While the problem with *adat* law relates to the difficulty of implementation due to formal legality principles, the HRC completely disregards the principle in the first place.

As explained in the previous sections, the necessity to refer to CIL mentioned by the HRC judges clearly brushes aside the strict formal legality principle. However, amendment of laws does not immediately fix the situation since the core of the problem is in fact the legality principle itself and its implementation in the Indonesian legal system.

The discourse on formal versus material law among scholars of criminal law are usually sociological. They speak of the origins of formal legality from the Dutch legal system which originates from a homogenous society, which is incompatible but was forcefully transplanted into a highly diverse heterogeneous Indonesian society.[136] Consequently, it fails to see that in reality Islamic legal scholarship does provide an answer to this issue.

It has been shown that there is a parallel between Islam and the general Indonesian jurisprudence. Both of these legal traditions recognize the benefit or utility of Indonesian jurisprudence and *maṣlaḥat* as an important purpose of the legal system. As explained

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[134] Article 35(c), Act No. 16 of 2004 concerning the Attorney of the Republic of Indonesia.

[135] Hairi, "Kontradiksi Pengaturan 'Hukum Yang Hidup Di Masyarakat' Sebagai Bagian Dari Asas Legalitas Hukum Pidana Indonesia."

[136] See for example Tabiu and Hiariej, "Pertentangan Asas Legalitas Formil Dan Materiil Dalam Rancangan Undang-Undang KUHP"; Hairi, "Kontradiksi Pengaturan 'Hukum Yang Hidup Di Masyarakat' Sebagai Bagian Dari Asas Legalitas Hukum Pidana Indonesia."

earlier, *maṣlaḥat* is essentially 'benefit' in Islam. Not a single Indonesian jurisprudence textbook can be found to include the Islamic concept of *maṣlaḥat* in explaining 'benefit' as a purpose of law,[137] and this is all the more reason to include it.

The judges of the HRC's argument 'because it was necessary' (a 'benefit' or *maṣlaḥat* based argument) is actually unacceptable in the current Indonesian criminal law construct. However, it is perfectly acceptable in Islamic criminal law as long as it is still guided by the higher laws. This is because the Islamic criminal law structure does not limit itself to a strict principle of legality as Indonesian criminal law does. While the current Indonesian criminal law construct is hesitant to apply 'necessity', Islamic criminal law has no problem in applying *maṣlaḥat*. As also explained earlier, Islam provides a principle of legality concept similar to material legality. There are parts of the criminal law system that is set in stone, while there are other parts which would allow some flexibility for the judges to explore the law.

Surely some adjustments must be made also based on *maṣlaḥat*. For example, Islamic law can also codify *ta'zīr* when *maṣlaḥat* dictates so. Scholars have called for general codification of Islamic law,[138] and some Muslim-majority states such as Indonesia, Malaysia and Brunei Darussalam have codified some parts of Islamic law including *ta'zīr*.[139] However, as *maṣlaḥat* is the rule in *ta'zīr,* it is possible for some parts to be codified so that the judges can refer to it while other parts should be left open for a more flexible exploration, depending on what is necessary and beneficial for the case at hand.

If the Indonesian criminal code could start adopting the Islamic principle of legality for it to be then applied to the HRC problem, judges will certainly have to refer to the HRC Act that is, the codified

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[137] See for example Mertokusumo, *Mengenal Hukum (Suatu Pengantar)*, 80; Marzuki, *Pengantar Ilmu Hukum*, 119, 121, and 131; Ali, *Menguak Tabir Hukum*, 92–95, 99–100.

[138] Muhammad Asad, *The Principles of State and Government in Islam* (Kuala Lumpur: Islamic Book Trust, 2009), 100–103.

[139] See Qanun No. 6 of 2014 Concerning Islamic Criminal Law in the Province of Aceh (Indonesia), Syariah Penal Code Order 2013 (Brunei Darussalam), and Syariah Criminal Offences (Federal Territories) Act 1997 (Malaysia).

law in judging a case. When there are legal vacuums necessitating them to cite CIL, the judges would be able to rule the case properly without breaching the Indonesian criminal law construct because it now adopts the more flexible Islamic principle of legality.

The end product would be similar, as the Islamic principle of legality is alike material legality. The Islamic construction of the concept would therefore provide an alternative strong justification to enrich the scholarly discourse within the topic.

Conclusion

CIL under the current structure of Indonesian criminal law, may not formally be referred to in courts albeit it is of material necessity. Although the judges of the HRC have done this the basis on which they do so is weak. The main argument given, 'that it was necessary', is actually a breach of the formal legality principle used by the Indonesian criminal law system.

To revise the HRC Act to include a reference to CIL in the explanation is not sufficient because the problem lies more on the strict principle of formal legality. It is important to note that the currently used concept of criminal law and formal legality is a legacy of the Dutch colonialists[140] who imposed their legal system upon the Indonesian society through colonialism, eroding the pre-existing Islamic law institutions[141] despite the fact that Islamic teachings are still entrenched in the Indonesian society.

The Islamic legal system provides a model criminal law which strictly requires reference to its primary sources of law that is, the Qur'ān and Sunnah but provides just enough leeway for some limited flexibility. The element of *maṣlaḥat* under the concept of *ta'zīr* provides the proper ground on which a judge can be more flexible in searching for legal basis, while providing limitations. It allows the judge to look into CIL due to its beneficial nature for the rigid criminal law regime while providing sufficient guidelines on incorporating CIL. This is something that Indonesia should adopt so

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[140] Hairi, "Kontradiksi Pengaturan 'Hukum Yang Hidup Di Masyarakat' Sebagai Bagian Dari Asas Legalitas Hukum Pidana Indonesia," 108.

[141] Ramlah, "Implikasi Pengaruh Politik Hukum Kolonial Belanda Terhadap Badan Peradilan Agama di Indonesia," 47–50.

that references to CIL can now be made in the HRC when it is necessary under a criminal law structure that allows it.

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TRANSLITERATION TABLE

CONSONANTS

Ar=Arabic, Pr=Persian, OT=Ottoman Turkish, Ur=Urdu

	Ar	Pr	OT	UR		Ar	Pr	OT	UR		Ar	Pr	OT	UR
ء	’	’	’	’	ز	z	z	z	z	گ	–	g	g	g
ب	b	b	b	b	ڑ	–	–	–	ṛ	ل	l	l	l	l
پ	–	p	p	p	ژ	–	zh	j	zh	م	m	m	m	m
ت	t	t	t	t	س	s	s	s	s	ن	n	n	n	n
ٹ	–	–	–	ṭ	ش	sh	sh	ş	sh	ه	h	h	h[1]	h[1]
ث	th	th	th	th	ص	ṣ	ṣ	ṣ	ṣ	و	w	v/u	v	v/u
ج	j	j	c	j	ض	ḍ	ẓ	ż	ż	ى	y	y	y	y
چ	–	ch	çh	ch	ط	ṭ	ṭ	ṭ	ṭ	ة	-ah			-a[2]
ح	ḥ	ḥ	ḥ	ḥ	ظ	ẓ	ẓ	ẓ	ẓ	ال	al[3]			
خ	kh	kh	kh	kh	ع	‘	‘	‘	‘					
د	d	d	d	d	غ	gh	gh	ğ	gh					
ڈ	–	–	–	d	ف	f	f	f	f					
ذ	dh	dh	dh	dh	ق	q	q	k	q					
ر	r	r	r	r	ك	k	k/g	k/ñ	k					

[1] – when not final
[2] – at in construct state
[3] – (article) al - or l-

VOWELS

		Arabic and Persian	Urdu	Ottoman Turkish
Long	ا	ā	ā	ā
	آ	Ā	Ā	–
	و	ū	ū	ū
	ي	ī	ī	ī
Doubled	يّ	iyy (final form ī)	iy (final form ī)	iyy (final form ī)
	وّ	uww (final form ū) uvv (for Persian)	uv	uvv
Diphthongs	و	au or aw	au	ev
	ى	ai or ay	ay	ey
Short	َ	a	a	a or e
	ُ	u	u	u or ü o or ö
	ِ	i	i	i

URDU ASPIRATED SOUNDS

For aspirated sounds not used in Arabic, Persian, and Turkish add h after the letter and underline both the letters e.g. جھ jh گھ gh

For Ottoman Turkish, modern Turkish orthography may be used.

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