



## **DECISION**

**Case Number 065/PUU-II/2004**

**FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD**

**THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA**

Examining, hearing, and deciding upon constitutional cases at the first and final level, has passed a decision in a case of petition for judicial review of the Law of the Republic of Indonesia Number 26 Year 2000 regarding Human Rights Court (hereinafter referred to as the Human Rights Court Law) against the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution), filed by:

**ABILIO JOSE OSORIO SOARES**, in this case represented by his Attorneys-In-

Facts who are members of the TEAM OF ATTORNEYS-IN-FACT for ABILIO JOSE OSORIO SOARES (former Governor of East Timor Province), having their secretariat office at Jalan Majapahit Permai Block B 122-123 and C 101, Central Jakarta, comprising:

1. O.C. KALIGIS, S.H., M.H.
2. Y.B. PURWANING M. YANUAR, S.H, MCL, CN.
3. PROF. DR. INDRIYANTO SENO ADJI, S.H., M.H.

4. LUCAS, S.H., CN.
5. JUAN FELIX TAMPUBOLON, S.H., M.H.
6. WIMBOYONO SENO ADJI, S.H., M.H.
7. NOVATRA SORAYA, S.H., LL.M
8. RACHMAWATI, S.H., M.H.
9. MARINI SULAEMAN, S.H.
10. DANIEL ALFREDO, S.H.
11. NATHALIE ELIZABETH, S.H., M.H.
12. NARISQA, S.H.
13. INGRID PAAT, S.H.
14. JOSHUA SATYAGRAHA, S.H.
15. A.A. ARYA YUDHISTIRA, S.H.
16. FENNY FEBRIANTY, S.H.
17. R. ALIF AKBAR, S.H.
18. RETNI NATALIA BYA, S.H.
19. FICKY FIHER ACHMAD, S.H.

based on a Special Power of Attorney dated August 25, 2004,  
hereinafter referred to as the Petitioner

Having read the petition of the Petitioner;

Having heard the statement of the Petitioner in the hearing;

Having heard the oral statement and read the written statement of the  
Government and the People's Legislative Assembly of the Republic of Indonesia

presented in the hearing and submitted through the registry office of the Constitutional Court of the Republic of Indonesia;

Having examined the evidence presented by the Petitioner in the hearing;

### **LEGAL CONSIDERATIONS**

Considering whereas the purpose and objective of the Petitioner's petition are as mentioned above;

Considering whereas prior to examining the principal issue of the case, the Constitutional Court must first take the following matters into account;

1. Whether the Court has the authority to examine, hear and decide upon the petition for judicial review of Law Number 26 Year 2000 regarding Human Rights Court enacted on November 23, 2000;
2. Whether the *a quo* Petitioner has the legal standing to file the petition for judicial review of Law Number 26 Year 2000 regarding Human Rights Court (Human Rights Court Law) against the 1945 Constitution.

In respect of the above mentioned two issues, the Constitutional Court is of the following opinion:

#### **1. Authorities of the Court;**

Whereas based on the provision of Article 24C Paragraph (1) of the 1945 Constitution *juncto* Article 10 Paragraph (1) of Law Number 24 Year

2003 Regarding the Constitutional Court, one of the Court's authorities is to review laws against the 1945 Constitution;

Whereas based on the provisions of Article 50 of Law Number 24 Year 2003 and its elucidation, laws which can be petitioned for review are laws enacted following the first amendment to the 1945 Constitution dated 19 October 1999, whereas Law Number 26 Year 2000 was enacted on November 23, 2000 with the State Gazette of the Republic of Indonesia Number 208;

Based on the foregoing, the Court is authorized to examine, hear and decide upon the *a quo* petition;

## **2. Legal Standing of the Petitioner**

Whereas that pursuant to the provision of Article 51 Paragraph (1) of the Constitutional Court Law, Parties that can file a petition for judicial review of laws against the 1945 Constitution are parties who claim that their constitutional rights and/or authorities have been impaired by the coming into effect of a law, namely individual Indonesian Citizens, units of customary law communities insofar as they are still in existence and in accordance with the development of the community and the principle of the Unitary State of the Republic of Indonesia as regulated in laws, public or private legal entities or state institutions;

Whereas the Petitioner, Abilio Jose Osorio Soares (former Governor of East Timor Province), is an Indonesian Citizen who has gone through the process as a Defendant in the case of gross human rights violation at the Ad Hoc Human Rights Court of the Central Jakarta Human Rights Court who considers that his constitutional rights have been impaired by Article 43 Paragraph (1) of the Human Rights Court Law namely the rights regulated in Article 28I Paragraph (1) of the 1945 Constitution which reads, " *The right to life, the right not to be tortured, the right of freedom of thought and conscience, the right to have a religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted under retroactive laws shall constitute human rights which cannot be reduced under any circumstances whatsoever*". Article 43 Paragraph (1) of the Human Rights Court Law, which provides that gross human rights violation which occurred prior to the enactment of the Human Rights Court Law shall be examined and decided by the Adhoc Human Rights Court, has been applied to the Petitioner;

Therefore, the *a quo* Petitioner has the legal standing to file the petition for judicial review of Article 43 Paragraph (1) of the Human Rights Court Law;

Considering whereas that the Court has the authority to examine, hear and decide upon the *a quo* petition filed by the Petitioner having the

legal standing, hence the Court will further consider the principal issue of the petition argued by the Petitioner;

**Principal Issue of the Case;**

Considering whereas the principal issue of the *a quo* petition concerns the application of Article 43 Paragraph (1) of the Human Rights Court Law which regulates the Ad Hoc Human Rights Court having the authority to examine gross human rights violations occurring prior to the enactment of the *a quo* law, on the basis of which the Petitioner has been tried and sentenced, thus the Petitioner claims that that his constitutional rights have been impaired since he has been tried and sentenced based on legal provisions which apply retroactively. According to the Petitioner, this is contradictory to Article 28I Paragraph (1) of the 1945 Constitution which states, "*The right to life, the right not to be tortured, the right of freedom of thought and conscience, the right to have a religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted under retroactive laws shall constitute human rights which cannot be reduced under any circumstances whatsoever*". Therefore, Article 43 Paragraph (1) of the *a quo* law is petitioned to the Court to be declared as having no binding legal force;

Considering whereas Article 43 Paragraph (1) of the Human Rights Court Law states," *gross human rights violation which occurred prior to the enactment of this law, shall be examined and decided by an ad hoc*

*Human Rights Court'*, unarguably has a legal provision that applies retroactively. However the legal problem that must be considered and decided by the court in the *a quo* petition is whether such provision is automatically contradictory to Article 28I Paragraph (1) of the 1945 Constitution;

Considering whereas prior to further considering the petition of the Petitioner, the background of the establishment of the Human Rights Court must first be known. For that purpose, the Court has heard the oral and written statements of the Government and has also requested the written statement of the of the People's Legislative Assembly, from which the followings are identified:

- that the issue of Human Rights Court with all of its aspects is highly relevant to the international community for the fact that the problem of recognition and enforcement of human rights have become the determination of national and international communities. Furthermore, the demand coming from the public for the formation of a Human Rights Court is extremely strong;
- that human rights indicated in the 1945 Constitution, the Universal Declaration of Human Rights, Stipulation of the People's Consultative Assembly of the Republic of Indonesia Number XVII/MPR/1998 regarding Human Rights, and Law Number 39 Year 1999 on Human Rights must be carried out with full responsibility. The Stipulation of

the People's Consultative Assembly of the Republic of Indonesia Number XVII/MPR/1998, applicable at that time, assigned high level state institutions and all government apparatus to respect, uphold and disseminate the interpretation of human rights to the general public and to immediately ratify various UN Human Rights Instruments as long as they are not contradictory to Pancasila and the 1945 Constitution;

- that from the view point of legal development, as seen in terms of both National and international interest, to resolve the problem of gross human rights violations and to restore safety and peace in Indonesia it was deemed necessary to form a Human Rights Court which is a special court for gross human rights violations. Even though Government Regulation in Lieu of Law Number 1 Year 1999 regarding Human Rights Court has been formulated, however, due to the fact that it is considered inadequate, the People's Legislative Assembly of the Republic of Indonesia (DPR RI) did not approve the Government Regulation in Lieu of Law (PERPU) to be ratified as a law;
- that the establishment of the Human Rights Court set forth in Law Number 26 Year 2000, was also based on the following considerations, *Firstly*, to address a number of recurring human rights problems which have been faced by the Indonesian Nation from time to time in a relatively long period of time hence the Human Rights



Court is expected to be able to resolve a number of human rights problems in the past so that they will not become unfinished problems which always pose obstacles. Secondly, to address a number of problems which are contemporary or which arise as “burning issues” with broad dimension considering that Indonesia can not isolate itself from a number of human rights problems faced by the international community as contemporary collective human rights issues, and Thirdly, to empower human rights institutions in addressing current and future human rights issues;

- that the retroactive application of a law in Article 43 Paragraph (1) is the Government’s effort to respectfully resolve gross human rights violations occurring prior to the enactment of the Human Rights Law without the intervention of the international community by means of civilized ways and by using applicable standards in handling extraordinary crimes;
- that the establishment of the Ad Hoc Human Rights Court is far from the intent of granting “impunity” and/or creating sham proceeding, but rather, it is inspired only by the spirit and the willingness and to show the ability to respectfully and professionally resolve allegations of gross human rights violation through domestic mechanism as a primary forum with the adoption of Rome Statute of International Criminal

Court 1998, as far as it concerns elements of crimes related to genocide and crimes against humanity;

Considering whereas the background of the establishment of the Human Rights Court is as described above and what has to be considered by the court now is: whether the establishment of the Ad Hoc Human Rights Court with retroactive legal provisions is contradictory to Article 28I of the 1945 Constitution, as petitioned by the *a quo* Petitioner. To answer this question, firstly it needs to be answered: whether the right not to be prosecuted by any law which applies retroactively is an absolute right, as textually formulated in Article 28I Paragraph (1) of the 1945 Constitution;

Considering whereas the provision of Article 28I Paragraph (1) of the 1945 Constitution states that the right not to be prosecuted under retroactive law shall constitute human rights which cannot be reduced under any circumstances whatsoever. Although such literal formulation creates an impression as if the right not to be prosecuted under a retroactive law is absolute, in accordance with the history of its formulation, Article 28I Paragraph (1) can not be interpreted as standing in its own, but rather, it must be read together with Article 28J Paragraph (2). As such, it will be clear that, systematically, human rights-including the right not to be prosecuted under a retroactive law –is not absolute, because in exercising his right and freedom, every person must respect the human rights of others and must submit to the limitation stipulated in

laws with the sole purpose of guaranteeing the respect for and enforcement of the rights and freedom of others, as well as to “meet fair demand in accordance with the consideration of morality, religious values security and, public order in a democratic society as provided for in Article 28 Paragraph (2). By reading Article 28 I Paragraph (1) together with Article 28 J Paragraph (2) it is noticeable that the right not to be prosecuted retroactive laws is not absolute, and in order to “meet the fair demand in accordance with considerations of morality, religious values, security and order” and such right can be set aside.

Considering that in applying the principle of non-retroactivity, it must also be considered whether the rigid application of the principle will create injustice, undermine religious values, public security and order, because if that happens, such protection of an individual is not the purpose of the law. A balance must be found between legal certainty and justice by interpreting Article 28I Paragraph (1) of the 1945 Constitution not only based on its text but by also studying the meaning of the principle according to its history, practice and comprehensive interpretation;

Considering whereas the standard for determining the balance between legal certainty and justice, particularly in upholding the principle of non-retroactivity must be carried out by considering three tasks/objectives of law which affect one another (*spannungsverhältnis*) namely legal certainty (*rechtssicherheit*), legal justice (*gerechtigkeit*) and

legal usefulness (*zweckmassigkeit*). With equal consideration of the three legal objectives, the limited retroactive application of a law, particularly for extraordinary crimes, is legally justifiable;

Also considering that a retroactive application of a law does not immediately make the law contradictory to the Constitution and instantly loses its binding legal force. Such application also does not immediately constitute human rights violation, instead it must be assessed based on two factors or requirements that must be met in the retroactive application of laws;

*Firstly*, the magnitude of public interest that must be protected by the law;

*Secondly*, the weight and nature of the rights violated as a result of such application of law is smaller than the violated public interest;

Considering whereas crimes for which the principle of non-retroactivity can be overridden as provided for in Article 43 Paragraph (1) of the Human Rights Court are “ gross violations of human rights” namely genocide and crimes against humanity (*vide* Article 7 of the Human Rights Court Law). Genocide crime is every action intended to destroy or annihilate all or part of a nation, race, ethnic group, religious group, by: (a) killing the group members; (b) causing severe physical or mental suffering to the group members; (c) creating living condition for the group which will result in total or partial annihilation; (d) forcing actions with the

intent of preventing birth in the group or (e) moving children by force from a certain group to other group (*vide* Article 8 of the Human Rights Court Law). Whereas a crime against humanity is one of the actions carried out as part of a broad or systematic attack with the knowledge that the attack is directly targeted at civilians in the form of: (a) murder; (b) annihilation; (c) slavery; (d) eviction or removal of civilians by force; (e) arbitrary deprivation of freedom or other physical freedom which violate the principles of international law; (f) torture; (g) rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilisation or other similar forms of sexual violence; (h) cruel treatment to a certain group or organisation on the basis of equality of political beliefs, race, nationality, ethnicity, culture, religion, sex, or other reasons universally recognized to be prohibited by international laws; (i) forced disappearance of a person; or (j) *apartheid* crime (*vide* Article 9 of Human Rights Court Law);

Considering whereas the above mentioned crimes are contradictory to the spirit to enforce and highly uphold humanity and justice, which are clearly stated in the preamble of the 1945 Constitution, and at the same time they are also contradictory to the general principles of law recognized by civilized nations. Therefore, the overriding of the principle of non-retroactivity on such crimes is not contradictory to the 1945 Constitution; as the constitution of a civilized nation, the spirit of the 1945 Constitution in fact mandated the enforcement of humanity and justice; hence the above described crimes against humanity must be eradicated. When the

demand to uphold humanity and justice is hindered by the principle of non-retroactivity-which historically and initially had the background of the intent to protect individual human beings' interest from arbitrary actions of absolute rulers - hence the overriding of the principle of non-retroactivity becomes an unavoidable action because the interest which are to be saved through such overriding is the interest of human beings as a whole whose value exceeds the interest of an individual human being;

Considering whereas although the Court is of the opinion that the overriding of the principle of non-retroactivity is justifiable, it is not the intent of the Court to state that such overriding can be undertaken at any time without any limitations. The 1945 Constitution itself, Article 28J Paragraph (2), as described above, has affirmed the limitation, namely that the principle of non-retroactivity can only be overridden only to guarantee the recognition and respect on the rights and freedom of others and to fulfill fair demand in accordance with considerations of morality, religious values, security and public order in a democratic society;

Considering whereas although the 1945 Constitution provides the possibility of overriding the principle of non-retroactivity, it does not mean that the 1945 Constitution does not prioritize the principle of non-retroactivity. The principle of non-retroactivity is still prioritized, however, it is not intended to be interpreted as an absolute. The spirit of the 1945

Constitution in this matter is in line with the spirit of a number of national and international legal instruments, among others:

- Article 29 Paragraph (2) of the *Universal Declaration of Human Rights* which states, *“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in democratic society”*. This limitation is almost entirely similar to the limitation formulated in Article 28J Paragraph (2) of the 1945 Constitution;
- Article 15 Paragraph (1) of the International Covenant on Civil and Political Rights states *“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed...”* however the provision is accompanied by a clause, as affirmed in Paragraph (2) which states, *“Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations”*. Article 4 of this Covenant even firmly allows member states to take necessary steps in an emergency situation which threatens the life of its nation even if it results in the leniency of

the member states's obligations to the covenant as long as those steps are not contradictory to the states' obligations to international law and do not include discrimination solely based on race, skin color, sex, language, religion, or social origins (*"in time of public emergency which threatens the life of the nation, and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin"*);

- Article 7 of the European Convention on Human Rights which firmly prohibits the retroactive application of laws also has an exception which provides the possibility for a retroactive application of laws by stating that the prohibition of the retroactive application of laws *"shall not prejudice trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations"*;

Considering that aside from the limitations of the overriding of the principle of non-retroactivity as constitutionally affirmed by Article 28J



Paragraph (2) of the 1945 Constitution, which is in fact in line with the general limitations recognized by various international legal instruments described above, in relation to “gross violations” as regulated in Article 43 Paragraph (1) of the Human Rights Court Law, the legislators also set stringent requirements for the overriding of the principle of non-retroactivity, which can be viewed in the formulation of Article 43 Paragraph (2) of the Human Rights Court Law which states, “ *the ad hoc human rights court referred to in Paragraph (1) was formed on the basis of the recommendation of the People’s Legislative Assembly of the Republic of Indonesia based on a certain event by a Presidential Decree*”. With the provision of Article 43 Paragraph (2) of the Human Rights Court Law it is clear that although the 1945 Constitution within certain limitations justifies the overriding of the principle of non-retroactivity, the legislators have been very careful in explaining the intent of the constitution, namely that:

- i. The Ad hoc Human Rights Court has been formed only for certain events, namely not for all events but only for events whose *locus delicti* and *tempus delicti* are limited as stated in the Elucidation of Article 43 Paragraph (2) of the Human Rights Court Law;
- ii. a certain event which is alleged to contain gross human rights violation must first be assessed by the People’s Legislative Assembly before it can be alleged to contain gross human rights violations;

- iii. the President can issue a Presidential Decision to form an ad hoc Human Rights Court only if there is a recommendation from the People's Legislative Assembly with the opinion that gross human rights violation is suspected to have taken place in a certain event;

Such prudence which are substantially measures to limit the overriding of the principle of non-retroactivity, shows two points: **Firstly**, that basically Human Rights Court Law prioritizes the principle of non-retroactivity and that, exception to override the principle can be made only in certain circumstances by forming an ad hoc Human Rights Court; **Secondly**, that the ad hoc Human Rights Court can only be formed upon recommendation of the People's Legislative Assembly because according to the 1945 Constitution, the People's Legislative Assembly is a representation of the Indonesian people, which means that basically the Indonesian people are the ones who are entitled to decide when a gross human rights violation has occurred before the *a quo* Law becomes applicable, hence the legal need arises to form the ad hoc Human Rights Court;

Considering whereas the establishment of the ad hoc Human Rights Court, as a forum to adjudicate perpetrators of crimes categorized as "the most serious crimes of concern to the international community as a whole", as regulated in in Article 43 Paragraph (1) of the Human Rights

Court Law, aside from being justifiable according to the 1945 Constitution, it is also justifiable by international legal practice and development, which among others is shown by the establishment of the ad hoc Criminal Tribunal in the former Yugoslavia, namely the International Criminal Tribunal for the former Yugoslavia (ICTY) and in Rwanda, namely the International Criminal Tribunal for Rwanda (ICTR). The ICTY was formed (in 1993) with the jurisdiction to adjudicate perpetrators of war crimes and crimes against humanity, whose *tempus delicti* was limited after January 1, 1991 and its *locus delicti* being the territory of former Yugoslavia. Meanwhile ICTR was formed (in 1994) with the jurisdiction to adjudicate perpetrators of genocide crime and other serious crimes against international humanitarian law, whose *tempus delicti* was as from January 1 to December 31, 1994, whereas its *locus delicti* being Rwanda and its neighbouring states. The two ad hoc courts, ICTY and ICTR, were both set up based on the Resolution of the United Nations Security Council, even though formed after the occurrence of the event, substantially with the jurisdiction actually being on violations which are considered as crimes under international law (*vide* Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, page 324). Such is also the case with the ad hoc Human Rights Court formed based on Article 43 Paragraph (1) of the Human Rights Court Law, even though formed after the occurrence of the incident or violation, the types of violations which are under its jurisdictions

(*ratione materiae*) are actually violations which were crimes prior to the establishment of the ad hoc Human Rights Court, namely genocide and crimes against humanity in this case;

Considering further that the Human Rights Court Law only includes two types of crimes with respect to which the principle of non-retroactivity can be overridden, namely genocide and crimes against humanity. The *a quo* law does not include war crimes and aggression crimes, although according to international customary law these two types of crimes are also categorized as the most serious crimes of concern to the international community as a whole. This can be understood because at that time, there was no legal need to regulate the two types of crimes in the *a quo* law, particularly Article 43 Paragraph (1), because it was not relevant to the context of the intent and purpose of the establishment of the ad hoc Human Rights Court;

Considering whereas gross violation of human rights are different from terrorism crimes which, according to some experts, are also crimes categorized under the most serious crimes of concern to the international community as a whole. However, up to now there has been no accurate and objective definition of terrorism which can be accepted in general (*communis opinio juris sive necessitatis*). This is also in line with what has been stated by Omer Y. Elagab: "*As concerns terrorism, it is extremely difficult to offer a precise and objective definition which can be*

*universally accepted” (vide Omer Y. Elagab, International Law Documents Relating to Terrorism, Cavendish Publishing Limited, 2000, page xix).* Therefore, there has been no general custom accepted as a law in judiciary practice relating to terrorism, hence it can not be said yet that international customary law has been formed, which is one of the primary sources of international law as referred to in Article 38 Paragraph (1) of Statute of the International Court of Justice. Whereas, such situation is a condition that must be met for the establishment of an ad hoc court in accordance with the practice and development of international law;

Considering whereas based on the above description, some of the arguments of the Petitioner which are used as the basis for the refusal of the overriding of the principle of non-retroactivity are justifiable as long as they concern ordinary crimes or extraordinary crimes which can be sufficiently tried through a regular court forum without overriding the non-retroactivity principle. However, the arguments can not be used to develop axiomatic legal construction leading to a conclusion that the right not to be prosecuted based on a retroactive law is an absolute human right. Because, if such thought construction is used, actions categorized as extraordinary crimes which are universally considered as the most serious crimes of concern to the international community as a whole, including crimes regulated in the *a quo* law, are very likely to escape legal prosecution if the law does not firmly regulate such actions as crimes. If that happens, violations have occurred on a fundamental principle

universally accepted as a legal principle namely “there shall be no crimes allowed to pass without punishment” (*aut punere aut de dere*). Axiomatic legal construction which makes the principle of non-retroactivity absolute, rationally, must also be interpreted as a rejection of the transitional justice mechanism which is the resolution mechanism for violations of law occurring in the past, especially gross human rights violations. Because, the transitional justice mechanism, regardless of the extent, is certain to contain the element of the overriding of the principle of non-retroactivity;

Considering that from all of the above descriptions, it is clear that Article 43 Paragraphs (1) and (2) of the Law of the Republic of Indonesia Number 26 Year 2000 regarding Human Rights Court (State Gazette of the Republic of Indonesia Year 2000 Number 208, Supplement to the State Gazette of the Republic of Indonesia Number 4026) as petitioned by the Petitioner, is not proven to be contradictory to the 1945 Constitution of the State of the Republic of Indonesia, and therefore the petition of the Petitioner must be declared as rejected;

In view of Article 56 Paragraph (5) of Law Number 24 Year 2003 regarding the Constitutional Court;

#### **PASSING THE DECISION:**

**To declare to reject the Petitioners’ petition;**

#### **DISSENTING OPINION**

With respect to the above decision there are 3 (three) Constitutional Court Justices having dissenting opinions, respectively as follows:

**1. H. Achmad Roestand, S.H.**

Justice H. Achmad Roestand, S.H. is of the opinion that the petition of the Petitioner should be granted for the following reasons:

- a. The application of the retroactivity principle is contradictory to the legal principle adopted by almost all criminal law systems in the world. The principle of retroactivity, has indeed been applied in court, however the courts that have done it are international courts such as the courts in Nuremberg, Tokyo, Rwanda and Yugoslavia. Even though in international law, in certain situation and state of emergency, the principle of retroactivity has been applied, in the end it always returned to the stand not to apply the principle. In the national scope, even the most advanced and “civilized” country, such as the United States of America, still maintains the principle of non-retroactivity as indicated in Article I Section 9 of its Constitution which reads: *“No bill of attainder or ex post facto law shall be passed”*;
- b. The principle of retroactivity includes both material criminal law (substance) and formal criminal law (procedural), because material and formal criminal law constitutes one unity. The existence of formal

criminal law is a consequence the existence of material crime. Aside from that, the provision of a new formal criminal law can be more severe than the previous formal criminal law. (For example: length of detainment, investigation actions, evidence, forms of punishment execution);

c. The principle of retroactivity is contradictory to one of the minimum standards in guaranteeing a fair trial which are pillars of the enforcement of rule of law (constitutional state). Such minimum standards consist of:

- 1) equal opportunities for the parties;
- 2) pronouncement of decisions open to public;
- 3) the principle of presumption of innocence;
- 4) no rule of double jeopardy (*ne bis in idem*);
- 5) the application of laws with lighter sentences, for defendants in the event of any change in the field of law;
- 6) prohibition of the application of the principle of retroactivity;

d. Allowing the violation of non-retroactivity principle, is analogous to letting the enemy conquer the beach head which will be used as a base to conquer the next strategic field. The violation of the principle



of non-retroactivity can be used as a start to violate the other six human rights, including the right to have a religion and the right not to be enslaved, with made up excuses. If this is not anticipated from the start, this violation will be the start of a big disaster that threatens Human Rights in the future. The application of the principle of retroactivity may satisfy a short lived interest however it will impair long term interest, because it can be used as a tool for revenge (*talionis*) by a ruler against his political opponent, hence the law is positioned merely as a tool of power;

- e. We must indeed consider the development of international politics and laws, however the highest norms of test is the 1945 Constitution. The entire interrelationship of the entire Article 28 (Chapter XV Human Rights), must be interpreted with coherent legal logic and construction as follows:” There are a number of Human Rights guaranteed in the 1945 Constitution. Based on Article 28J all Human Rights can be limited by a certain reason, except for Human Rights stated in Article 28I”. Once again, it must be interpreted as such, because if the seven human rights indicated in Article 28I can still be violated by limitations provided in Article 28J, there will be no longer any differences between the seven Human Rights and the other Human Rights. If that is the case, it serves no purpose in specifically regulating the Human Rights in Article 28J. In other words there is no purpose of having Article 28J. The phrase “... the right not to be prosecuted under a retroactive law is

a human right which can not be reduced under any circumstances whatsoever“, particularly the words “*which can not be reduced under any circumstances whatsoever*” are words which are clear, or using the term of Islamic (*fiqh*) law, is a definitive and *standard (qoth'i) argument*. To find the true intention of the drafters of the 1945 Constitution, interpretation on those words can be carried out using authentic, grammatical, historical, theological methods of interpretation and so on. Legal construction through the methods of analogy, *argumentum a contrario*, or the refinement of law can also be made to broaden the interpretation of those words. However, the result of the interpretation must not turn something which is clearly unacceptable to become acceptable, or turn something which is clearly negative to something positive. Such analysis can no longer be categorized as the task of interpreting or developing legal construction, but becomes more like the task of a magician. Therefore, the seven Human Rights indicated in Article 28I are absolute, insofar as the 1945 has not changed it! “*A retroactive law is not unconstitutional, unless ... is constitutionally forbidden*”, said Bryan A. Garner in Black’s Law Dictionary page. 1343;

From the above descriptions, it can be concluded that Article 43 Paragraph (1) of the *a quo* law is contradictory to Article 28I of the 1945 Constitution, therefore it must be declared as having no binding legal force, in accordance with the petition of the Petitioner;

## 2. Prof. Dr. H.M. Laica Marzuki, SH ;

Constitutional Justice H.M. Laica Marzuki is of the opinion that the principle of non-retroactivity is prohibited by the constitution. Article 28I Paragraph (1) of the Law of the Republic of Indonesia provides that "...the right not to be prosecuted under a retroactive law is a right which can not be reduced under any circumstances whatsoever". The principle of non-retroactivity is the mandate and order of the constitution, it can not be violated, let alone to be negated by other laws and regulations. *Constitutie is de hoogste wet!*

The prohibition of the application of the principle of retroactivity is no longer just regulated in Article 1 Paragraph (1) of the Indonesian Criminal Code which contains the principle of '*nullum delictum, nulla poena sine preavia lege poenali*', even though the *Nullum Delictum* principle has in fact been – in a *buiten werking gesteld* way – overridden by the NICA occupational government in 1945, based on stbl 1945 nr 135, commonly known as *Brisbane Ordonnantie*, however, the principle of non-retroactivity can no longer be overridden, let alone to be violated, with the inclusion of the principle in Article 28I of the Constitution of the State of the Republic of Indonesia Year 1945. Neither can Article 28I of the Law of the State of the Republic of Indonesia Year 1945 be negated by Article 28J of the 1945 Constitution which only provides for the limitation for every person in exercising his/her rights and freedom in the sense of *wet*,

*Gesetz*, but not in the sense of limitation based on *Grundgesetz* (Constitution);

Based on the above description, the Court should have granted the petition of Abilio Jose Osorio Soares as the *justitiabel*;

### **3. Prof. H. Abdul Mukthie Fadjar, SH, M.S.**

*God will not punish his people with severe torture before sending his disciple to them (Q.S. 17 : 15)*

Constitutional Justice H.A. Mukthie Fadjar is of the following opinion:

1. In theological perspective, God's words as quoted above from a verse of the Al Quran, shows how God himself as the Almighty Creator does not apply the principle of retroactivity in religious scriptures, including in its laws, before the laws are set forth in religious scriptures and brought by the disciples to mankind;
2. Therefore, it can be understood if the principle of non-retroactivity becomes one of the main pillars of laws, especially criminal law, of all of the people, nations and democratic states. Not only for legal certainty, but also for justice, and for the sake of human dignity (human rights);
3. The acceptance of the principle of non-retroactivity in the UN Universal Declaration of Human Rights Year 1948 is indicated in Article 11

Paragraph 2 “**No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, under national or international law, at the time when it was committed**”, certainly with the awareness that the principle is one of the pillars of Human Rights. Such is also the case when the Cairo Islamic Human Rights Declaration was established by the Conference of Islamic Organizations (OKI) countries which formulated in Article 19 Sub-Article d “ **There shall be no crime or punishment except as stipulated by the Islamic Law (*syariat*)**”, is in line with the provision of God’s words in the above theological perspective;

4. In the perspective of International Criminal Law, the Rome Statutes on International Criminal Court/ICC year 1998 states in:
  - Article 11 Paragraph (1): “ the Court only has jurisdiction on criminal acts committed after the applicability of this statute”;
  - Article 24 Paragraph (1): “No one shall be criminally responsible based on this Statute for an action prior to the applicability of this Statute”;
5. In the perspective of State Administration Law (Constitutional Law), it can be said that almost all Constitutions in the world adopt the principle of non-retroactivity, hence when the 1945 Constitution in Article 28I Paragraph (1) formulates “The right to life, the right not to be tortured,

the right of freedom of thought and conscience, the right to have a religion, the right not to be enslaved, the right to be recognized as a person before the law, and **the right not to be prosecuted under retroactive laws shall constitute human rights which cannot be reduced under any circumstances whatsoever**”, it is certainly with full awareness and evidence of religious commitment and the universality of Human Rights. Article 28J Paragraph 2 of the 1945 Constitution is as a restriction on a number of Human Rights outside what have been stated in Article 28I Paragraph (1) in a limited manner;

6. Various arguments for the limited application of the principle of retroactivity for various criminal case categorised as “extra-ordinary crime” with unclear criteria, are more of political consideration rather than legal consideration, in national or international dimension;
7. The presence of Law Number 26 Year 2000 on Human Rights Court, particularly its Article 43 which applies the principle of retroactivity, from the argument presented by the law makers, shows the existence of political pressure affecting it. Therefore, the Constitution [Article 28I Paragraph (1)] must not be affected by the *a quo* law, otherwise, the Court will become a **butcher [penjaga] of the Constitution** rather than the **guardian [penjaga] of the Constitution**;

Hence the decision was made in the Plenary Consultative Meeting attended by 9 (nine) Constitutional Court Justices on:

**Wednesday, March 2, 2005**, and was pronounced in a Plenary Session of the Constitutional Court open for the public on **Thursday, March 3, 2005**, by us **Prof. Dr. Jimly Asshiddiqie, S.H** as the Chairperson and concurrent Member, accompanied by **Prof. Dr. H. M. Laica Marzuki, S.H., Prof. H.A.S. Natabaya, S.H., LL.M., H. Achmad Roestandi, S.H., Dr. Harjono, S.H., MCL., Prof. H. Abdul Mukthie Fadjar, S.H.,M.S., Maruarar Siahaan, S.H., Soedarsono, S.H.** respectively as members and assisted by **Teuku Umar, S.H.,M.H.** as Substitute Registrar, in the presence of the Petitioner/the Petitioner's Attorneys-In-Fact, the Government, and the People's Legislative Assembly;

**CHIEF JUSTICE,**

**SIGNED**

**PROF. DR. JIMLY ASSHIDDIQIE, S.H.**

**JUSTICES,**

**Prof. Dr. H.M. LAICA MARZUKI, S.H.      Prof. H.A.S. NATABAYA, S.H., LL.M.**

**H. ACHMAD ROESTANDI, S.H.      Prof. H. A. MUKTHIE FADJAR, S.H., MS.**

**Dr. HARJONO, S.H., MCL.**

**I DEWA GEDE PALGUNA, S.H., M.H.**

**MARUARAR SIAHAAN, S.H.**

**SOEDARSONO, S.H.**

**SUB REGISTRAR,**

**TEUKU UMAR, S.H.,M.H**