



DECISION

Number 18/PUU-V/2007

FOR THE SAKE OF JUSTICE UNDER THE ONE ALMIGHTY GOD

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

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

[1.2] **EURICO GUTERRES**, 38 years old, Catholic, ex-Vice Commander of East Timor Integration Fighters Force, having his address at Liliba Sub-District RT/RW. 008/001, Oebobo District, Kupang City;

Based on a Special Power of Attorney of June 2007, having authorized, M. Mahendradatta, S.H.,MA.,MH.PhD, A. Wirawan Adnan, S.H., Achmad Michdan, S.H., Akhmad Kholid, S.H., Irwan H. Siregar, S.H.,LL.M., Guntur Fattahillah, S.H., Hery Susanto, S.H., Sutejo Sapto Jalu, S.H., Advocates/Legal Counsel domiciled at The Law Offices of M. Mahendradatta, at Jalan Rumah Sakit Fatmawati Nomor 22 FG, Cipete Selatan, Cilandak, South Jakarta 12410, acting jointly or severally;

Hereinafter referred to as **the Petitioner**;

- [1.3]** Having read the Petition of the Petitioner;
Having heard the statement of the Petitioner;
Having read the written statement of the People's Legislative Assembly of the Republic of Indonesia;
Having read and heard the written statement of the Government;
Having read the written statement of the National Commission on Human Rights;
Having heard the statements of the experts presented by the Petitioner;
Having examined the evidence presented by the Petitioner;
Having read the concluding opinion of the Petitioner;

3. LEGAL CONSIDERATIONS

[3.1] Considering whereas the purpose and objective of the Petitioner's petition are as described above;

[3.2] Considering whereas prior to further examining the substance or the Principal Issue of the Petition of the *a quo* Case, the Constitutional Court (hereinafter referred to as the Court) shall first consider the following matters:

1. Whether the Court has the authority to examine, hear and decide upon the *a quo* Petition;
2. Whether the Petitioner has the legal standing to file the *a quo* petition;

With respect to the foregoing two issues, the Court is of the following opinion:

AUTHORITY OF THE COURT

[3.3] Considering whereas the *a quo* petition is concerned with the judicial review of a law, *in casu* Article 43 Paragraph (2) of Law 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, hereinafter referred to as the Human Rights Court Law) along with its Elucidation against the 1945 Constitution of the State of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution);

[3.4] Considering whereas based on the provision of Article 24C Paragraph (1) of the 1945 Constitution, the Court has the authority to hear at the first and final level the decision of which shall be final, among other things, to review a law against the 1945 Constitution. The aforementioned provision is further affirmed in Article 10 Paragraph (1) Sub-Paragraph a of Law Number 24 Year 2003 regarding the Constitutional Court (hereinafter referred to as the Constitutional Court Law);

[3.5] Considering whereas the Petitioner's Petition is for judicial review of a law, *in casu* Article 43 Paragraph (2) of Law Number 26 Year 2000 regarding Human Rights Court and its Elucidation against the 1945 Constitution;

[3.6] Considering whereas Article 43 Paragraph (2) of the Human Rights Court Law has been petitioned for review in case Number 065/PUU-II/2004. In accordance with Article 60 of the Constitutional Court Law *juncto* Article 42 Paragraph (2) of the Constitutional Court Regulation Number 06/PMK/2005 about Guidelines on the Procedures for Judicial Review Cases which reads, "... petitions for judicial review of the substance of paragraphs, articles, and/or sections which are similar to those in a case that has been decided by the Court can be petitioned for judicial review again on the constitutionality conditions that the reason for the petition shall be different";

[3.7] Considering whereas in case Number 065/PUU-II/2004 the Petitioner's reason is the prohibition of using the retroactivity principle which is contrary to Article 28I of the 1945 Constitution, while in the *a quo* petition the reason is the involvement of the People's Legislative Assembly in the establishment of the *ad hoc* Human Rights Court which according to the Petitioner is contrary to Article 24A Paragraph (5) of the 1945 Constitution. Accordingly, the Court has the authority to examine, hear, and decide upon the *a quo* petition.

LEGAL STANDING OF THE PETITIONER

[3.8] Considering whereas in order to be able to file a petition for judicial review of a law against the 1945 Constitution, Article 51 Paragraph (1) of the Constitutional Court Law provides that the parties qualified to act as Petitioner shall be a) individual Indonesian citizens, b) customary law community units insofar as they are still in existence and in line with the development of the

communities and the principle of the Unitary State of the Republic of Indonesia as regulated in law, c) public or private legal entities, or d) state institutions.

[3.9] Considering whereas, in order for a person or a party to qualify as Petitioner in cases of judicial review of law against the 1945 Constitution, according to Article 51 Paragraph (2) of the constitutional Court Law, the following must be described:

- a. The person/party's qualification in the petition, whether as an individual Indonesian citizen, a customary law community unit, a legal entity, or a state institution;
- b. the impairment of the Petitioner's constitutional rights/authority, in the qualification as stated in item a, as the result of the coming into effect of the law petitioned for judicial review.

[3.10] Considering also, following Decision Number 006/PUU-III/2005 and subsequent cases, the Court is of the opinion that the impairment of constitutional rights/authority must fulfill the following requirements:

- a. the Petitioner must have constitutional rights and/or authority granted by the 1945 Constitution;
- b. the Petitioner deems that his constitutional rights and/or authority have been impaired by the coming into effect of the law petitioned for review;

- c. the impairment of such constitutional rights and/or authority must be specific and actual or at least potential in nature which, pursuant to logical reasoning, will take place for sure;
- d. there is a causal relationship (*causal verband*) between the impairment of constitutional rights and/or authority and the coming into effect of the law petitioned for review;
- e. if the petition is granted, it is expected that such impairment of constitutional rights and/or authority will not or does not occur any longer;

[3.11] Considering whereas the Petitioner *Eurico Guterres* has been sentenced to imprisonment of 10 years by the *ad hoc* Human Rights Court of the Central Jakarta District Court in case Number 04/PID.HAM/AD.HOC/2002/PN.JKT.PST, and the decision has been affirmed by the Supreme Court in its Decision Number 06 K/PID.HAM AD HOC/2005, dated March 16, 2006;

[3.12]1 Considering whereas the Petitioner as an individual Indonesian citizen in his petition states that his constitutional rights are impaired by the coming into effect of Article 43 Paragraph (2) and its Elucidation. The Petitioner, based on that article, was brought to the *ad hoc* Human Rights Court and sentenced to imprisonment of 10 years. Therefore, the Petitioner fulfills the requirements to have the legal standing as Petitioner in this case.

PRINCIPAL ISSUE OF THE PETITION

[3.13] Considering whereas the Principal Issue of the Petitioner's Petition is concerning the constitutionality of the Article 43 Paragraph (2) and its Elucidation of the Human Rights Law, which reads:

"The ad hoc Human Rights Court as intended in Paragraph (1) shall be established upon the recommendation of the People's Legislative Assembly of the Republic of Indonesia for certain incidents by a Presidential Decree", while the Elucidation reads, "In the case that the People's Legislative Assembly of the Republic of Indonesia recommends the establishment of an ad hoc Human Rights Court, it shall be based on the People's Legislative Assembly of the Republic of Indonesia's assumption that a gross human rights violation has occurred which is restricted to specific locus and tempus delicti that happened prior to the enactment of this law".

Whereas the Petitioner considers that Article 43 Paragraph (2) of the *a quo* Law, with its Elucidation is contrary to the 1945 Constitution, as follows:

- Article 24A Paragraph (5) of the 1945 Constitution, *"The composition, position, membership and proceedings of the Supreme Court as well as of judicial bodies under it shall be regulated by law";*
- Article 27 Paragraph (1) of the 1945 Constitution, *"Without exception, all citizens shall have an equal position before the law and government and shall be obligated to uphold such law and government";*
- Article 28D Paragraph (1) of the 1945 Constitution, *" Every person shall have the right to the recognition, the guarantee, the protection and the legal certainty of just laws as well as equal treatment before the law";*

- Article 28G Paragraph (1) of the UUD 1945, *"Every person shall have the right to protect him/herself, his/her family, honor, dignity and property under his/her control, and shall have the right to feel secure and be protected from the threat of fear to do, or not to do something which constitutes human right"*;
- Article 28I Paragraph (2) of the UUD 1945, *"Every person shall have the right to be free from discriminatory treatment on any basis whatsoever and shall have the right to obtain protection against any such discriminatory treatment"*;

[3.14] Whereas the Petitioner in his Petition does not problematize the existence of the *ad hoc* Human Rights Court, as regulated in Article 43 Paragraph (1) of the Human Rights Court Law, but the process of establishing such *ad hoc* Human Rights Court which is considered contrary to the 1945 Constitution. To the Petitioner, the process of establishing the *ad hoc* Human Rights Court, according to Article 43 Paragraph 2 *a quo* Law, shall be upon the recommendation of the People's Legislative Assembly of the Republic of Indonesia for certain incidents by a Presidential Decree, and in its Elucidation, it is stated that when the People's Legislative Assembly of the Republic of Indonesia recommends the establishment of an *ad hoc* Human Rights Court, it shall be based on the People's Legislative Assembly of the Republic of Indonesia's assumption that a gross human rights violation has occurred which is restricted to specific locus and tempus delicti that happened prior to the enactment of the Human Rights Court Law, in essence has opened a chance for

the political authorities to intervene in the legal process which is a part of the judicial authority. To the Petitioner, the People's Legislative Assembly, according to the 1945 constitution, has a legislative, budgetary, and oversight functions, principally to exercise authority in creating laws. In the 1945 Constitution, there is no single article which normatively gives the People's Legislative Assembly the right to conduct 'assessment which is *judgmental* toward a criminal legal event, as normatively set out in the Elucidation of the *a quo* Article 43 Paragraph (2);

[3.15] Considering whereas with the Petition's description and the Petitioner's statement as described above, the legal matter to be considered by the court is whether Article 43 Paragraph (2) of the Human Rights Court Law with its Elucidation is contrary to the articles of the 1945 Constitution, and thus must be declared to have no binding legal effect;

[3.16] Considering whereas in order to support his arguments, the Petitioner has presented written evidence (Exhibit P-1 through Exhibit P-3) and has presented three experts, respectively named Dr. M. Sholehuddin, S.H., M.H., Dr. Bernard L. Tanya, S.H., M.H., and Prof. Dr. M. Arief Amrullah S.H., M.Hum., who have given their statements under oath and also given their written statements as completely set out in the Facts of the Case part, which are principally as follows:

Expert Dr. M. Sholehuddin, S.H., M.H.

- Article 20A of the 1945 Constitution reads "*The People's Legislative Assembly shall have legislative, budgetary, and oversight functions.* In

relation to the legislative function, the People's Legislative Assembly holds the authority to formulate laws, including criminal legislations. The Human Rights Court Law can be substantively categorized as a criminal legislation, because it contains provisions on various criminalized acts. Not only does the aforementioned law contain material criminal law provisions; it also stipulates formal criminal law provisions, for example Article 43 Paragraph (2) and its Elucidation which regulates the 'procedures' and 'mechanism; in establishing the *ad hoc* Human Rights Court;

- According to Article 43 Paragraph (2) of the Human Rights Court Law, the establishment of an *ad hoc* Human Rights Court shall be stipulated by a Presidential Decree based on the recommendation of the People's Legislative Assembly based on certain events. The *a quo* article then ascertain that to recommend the establishment of an *ad hoc* Human Rights Court, the People's Legislative Assembly shall base its recommendation on the assumption that gross violations of human rights have occurred which are restricted to specific *locus* and *tempus delicti*. In criminal law terminology, "assumption" is not merely a *word*, but it is a generally accepted term among criminal law theorists and practitioners. The word "assumption" means to estimate, guess, or to reckon. Thus it is very naïve to appraise or decide a case considered as a gross violation of human rights with such guessing or reckoning, because the matter is related to the *fate* of the prospective suspect whose rights must be legally

- protected. Conceptually, the term “assumption” is related to the act of investigation to search and find whether or not an act considered to be a criminal violation has occurred. Therefore, to reach an “assumption” that a gross violation of human rights has occurred, the People’s Legislative Assembly must conduct a preliminary investigation to be used as the legal basis or consideration in establishing the existence of a certain event assumed to have occurred as a gross violation of human rights. It is inconceivable what negative excess on the life as a state and nation would be, if an ‘assessment which is in essence a *judgement* on a criminal law event (gross violation of human rights) is given to political institutions, such as the People’s Legislative Assembly;
- According to Article 1 Number 5 of the Human Rights Court Law, a preliminary investigation is a series of acts by the investigator to search and find whether or not of an event “assumed” to be a gross violation of human rights have occurred, to be followed by an investigation. Whereas the investigator appointed by the Human Rights Court Law is the National Commission on Human Rights (Komnas HAM) only. In other words, the People’s Legislative Assembly does not have the legal qualification to conduct a preliminary investigation on an event of gross violation of human rights;

Expert Dr. Bernard L. Tanya, S.H., M.H.

- In the modern world, the impartiality and independence of the court is the keywords for the creation of a just legal process to achieve legal certainty and justice. Intervention by any authority in the legal process is always responded to as a threat and distortion to the nobleness of the court. In relation to the Elucidation of Article 43 Paragraph (2) of the Human Rights Court Law, the assumption used by the People's Legislative Assembly as the basis to recommend the establishment of an *ad hoc* Human Rights Court is a form of intervention by a political authority into the law;
- the assumption used by the People's Legislative Assembly as the basis to recommend the establishment of an *ad hoc* Human Rights Court as stated in the Elucidation of Article 43 Paragraph (2) of the Human Rights Court Law is a form of intervention by a political authority into the law. The core of the matter which is the object of "assumption" in the Elucidation of Article 43 Paragraph (2) of the Human Rights Court Law is a criminal matter or violation of law. The word assumption in the elucidation of the *a quo* article, must refer to the criminal law terminology, especially regarding the act of preliminary investigation on criminal violations. The aforementioned matter also constitutes a violation of the protective and instrumental functions in legality and the *Lex Certa* principle.
- The People's Legislative Assembly's entry into the criminal law realm has violated the *Trias Politica* principle. Ever since Montesquieu revised Locke's concept, judicial authority holds a central position as a pillar of the modern democratic state. Montesquieu positioned judicial authority in an

autonomous area, away from the cooptation of the executive authority. Montesquieu's action, not only released the executive grasp of the judicial realm, but also in the later development became the inspiration to end the parliament's *superiority* inherited from the Ancient Greece.

- The preliminary investigator appointed by the Human Rights Court Law is the National Commission on Human Rights (Komnas HAM) only, as stipulated in Article 18 Paragraph (1) of the Human Rights Court Law. The People's Legislative Assembly holds no legal authority to conduct preliminary investigations on any event of gross violation of human rights. The appointment of National Commission on Human Rights as the preliminary investigator on human rights abuse events is a form of prudence and rationality in using and applying criminal law;

Expert Prof. Dr. M. Arief Amrullah, S.H., M.Hum.

- The problem with Article 43 Paragraph (2) of the Human Rights Court Law lies in the authority given to the People's Legislative Assembly to recommend the establishment of an *ad hoc* Human Rights Court with a Presidential Decree. Article 43 Paragraph (2) of the Human Rights Court Law reads "*The ad hoc Human Rights Court as intended in Paragraph (1) shall be established upon the recommendation of the People's Legislative Assembly of the Republic of Indonesia for certain incidents by a Presidential Decree*". This sentence, if connected with Law Number 10 Year 2004 regarding Formulation of Laws and Regulations and the legal

- principle of *lex superior derogat legi inferiori*, would be asynchronous either vertically or horizontally. If Law Number 10 Year 2004 regarding Formulation of Laws and Regulations is read, then a Presidential Decree is not included in the types and hierarchy of legislations. Then if Article 43 Paragraph (2) of the Human Rights Court Law is connected with the legal principle of *lex superior derogat legi inferiori* which states that a higher legislation prevails over a lower one, then Article 43 Paragraph (2) of the Human Rights Court Law which reads “*The ad hoc Human Rights Court as intended in Paragraph (1) shall be established upon the recommendation of the People’s Legislative Assembly of the Republic of Indonesia for certain incidents by a Presidential Decree*”, is clearly contrary to Article 24 Paragraph (1), Article 24 Paragraph (3), Article 24A Paragraph (5) of the 1945 Constitution, and Article 4 Paragraph (3) of Law Number 4 Year 2004 regarding Judicial Power. Therefore Article 43 Paragraph (2) Human Rights Court Law which stipulates that the ad hoc Human Rights Court shall be established upon the recommendation of the People’s Legislative Assembly by a Presidential Decree, needs to be reviewed, with the purpose is to prevent misuse of authority by making use of legislation;
- the separation of powers concept covers the executive, the legislative, and the judicial authority branches. Judicial authority is in the judicial authority branch, not in the legislative or executive, and thus it is peculiar that Article 43 Paragraph (2) of the Human Rights Court Law is established

- upon the recommendation of the People's Legislative Assembly based on certain incidents by a Presidential Decree;
- The Human Rights Court Law does not state that the People's Legislative Assembly is a (criminal) law enforcement agency. That matter can be read in Articles 18-20 which give the authority to the National Commission on Human Rights to conduct preliminary investigation on gross violations of human rights, and Articles 23-25 which give the authority to the Attorney General to conduct prosecutions of gross violations of human rights.
- If the authority of the People's Legislative Assembly in Article 43 Paragraph (2) of the Human Rights Court Law is maintained, it is very likely to disrupt the order of judicial authority and the operation of the criminal justice system;

[3.17] Considering whereas the Court has asked the statements of the legislators (the People's Legislative Assembly and the Government), who have presented written statements as completely described in the Facts of the Case part, and which in essence explain the following matters:

Statement of the People's Legislative Assembly

- The background of establishing the *ad hoc* Human Rights Law was based on the Minutes of Meeting of the Special Committee on Human Rights Court Draft Law dated November 2, 2000 which originated from legal developments, considered from both national and international interests. Therefore, to settle gross violations of human rights problems and to

restore security and peace in Indonesia it was necessary to establish a Human Rights Court;

The basis for establishing the Human Rights Court Law is included in Article 104 Paragraph (1) of Law Number 39 Year 1999 regarding Human Rights, namely that the Human Rights Court Law is expected to be able to protect human rights, whether individually or communally, and shall be the basis in enforcing legal certainty, justice, and security, both for the people and the community against gross violations of human rights;

- The Minutes of the Special Committee on Human Rights Court Draft Law dated November 2, 2000 mentions that gross violations of human rights that occurred before the coming into effect of this Law shall be examined and decided upon by an *ad hoc* Human Rights Court, and then gives authority to the People's Legislative Assembly (Article 43 Paragraph (2)) to help in the settlement process, so that the Government can immediately process the said violations of human rights;
- Gross violations of human rights are extraordinary crimes, with extensive impacts, in the national or international level, and not the crimes as stipulated in the Indonesian Criminal Code, and they cause material or immaterial damages, create insecurity, both to individuals or in the community, and therefore they need to be remedied immediately to create supremacy of the law to achieve peace, order, tranquility, justice, and prosperity for all the Indonesian people. Therefore, the preliminary investigation, investigation, prosecution, and examination of gross

violations of human rights must be conducted in a special manner, as follows:

- a. it is necessary to have preliminary investigators by forming an *ad hoc* team, *ad hoc* investigators, *ad hoc* prosecutors, and *ad hoc* judges;
 - b. it is necessary to reaffirm that preliminary investigations can only be conducted by the National Commission on Human Rights, while the investigator is not authorized to accept reports or complaints as stipulated in the Indonesian Criminal Code;
 - c. it is necessary to have regulations on a certain time frame to conduct investigations, indictments, and court examinations;
 - d. It is necessary to have regulations concerning the protection of victims and witnesses;
 - e. It is necessary to have regulations reaffirming that there is no expiration date for gross violations of human rights.
- The establishment of the People's Legislative Assembly's Post East Timor Referendum Special Committee is was within the scope of implementation of the Human Rights Court Law. The process to establish an *ad hoc* Human Rights Court upon the recommendation of the People's Legislative Assembly is in accordance with the People's Legislative Assembly's oversight functions as stipulated in Article 20A Paragraph (1) and Paragraph (2) of the 1945 Constitution which reads as follows:

- (1) *The People’s Legislative Assembly shall have legislative, budgetary and oversight functions.*
- (2) *In implementing its functions, in addition to the rights stipulated in other articles of this Constitution, the People’s Legislative Assembly shall have the right of interpellation, the right of inquiry and the right of to express opinions.*
- Article 19 Paragraph (1) of the 1945 Constitution reads “*Members of the People’s Legislative Assembly shall be elected through general elections.*” In line with that regulation, considering that the People’s Legislative Assembly is the representation of the people of Indonesia, it is natural if the law gave authority to the People’s Legislative Assembly to have an assumption that a gross violation of human rights had occurred prior to the coming into effect of the *a quo* law. It is necessary that such authority is given to the People’s Legislative Assembly because with respect to the *ad hoc* Human Rights Court, the provision on the setting aside of the non-retroactivity principle applies, and thus a political policy is needed. The People’s Legislative Assembly’s authority to have an assumption that a gross violation of human rights has occurred is related to the duty to base such authority on valid legislation as stipulated in Article 17 of the Criminal Procedures Law (KUHAP) which reaffirms that the “assumption” must be based on sufficient initial evidence;
 - The People’s Legislative Assembly’s political intervention in establishing the *ad hoc* Human Rights Court refers to international customs, such as in

the Nuremberg, Yugoslavia, and Rwanda cases, where the *ad hoc* Human Rights Court examining such cases was established based on a resolution of the UN Security Council, and so political intervention can be legally justified in order to disclose major human rights cases;

Government's Statement:

- Limitatively, the *ad hoc* Human Rights Court is only authorized to examine gross violations of human rights which occurred prior to coming into effect of this law. The establishment of the *ad hoc* Human Rights Court closely related to the application of the retroactivity principle in examining gross violations of human rights which occurred prior to the coming into effect of the Human Rights Court Law. Philosophically, the establishment of the *ad hoc* Human Rights Court is greatly needed, so that there is no impunity in the enforcement against gross violations of human rights and it is expected that that it can finish the protracted conflicts between one community and another, or between one nation and another;
- Political intervention by the People's Legislative Assembly in the establishment of the *ad hoc* Human Rights Court is in the context of carrying out its oversight function (*vide* Article 20A Paragraph (1) and Paragraph (2) of the 1945 Constitution, and also refers to international customs. As Nuremberg, Yugoslavia and Rwanda Cases, the *ad hoc* Human Rights Courts adjudicating such cases were established based on the resolutions of the UN Security Council Resolutions and such political

intervention is legally justifiable, especially for the purpose of disclosing gross violations of human rights cases.

In similar fashion, the establishment of an *ad hoc* Human Rights Court based on the People's Legislative Assembly recommendation must be seen as an exception, because gross violations of human rights are very specific crimes, and thus they are very difficult to disclose using the Indonesian Criminal Code;

- According to Article 2 and Article 43 Paragraph (3) of the Human Rights Court Law, the Human Rights Court and the *ad hoc* Human Rights Court belong to the Court of General Jurisdiction. For this reason, the Human Rights Court and the *ad hoc* Human Rights Court have been in accordance and in line with the provisions in Article 24 of the 1945 Constitution. The existence of the *ad hoc* Human Rights Court has also been reaffirmed by Constitutional Court Decision Number 065/PUU-II/2004;

[3.18] Considering whereas the National Commission on Human Rights has presented its written statement dated February 4, 2008 and received in the Registrar's Office on February 8, 2008, which in essence states as follows:

- The application of the provisions in Article 43 Paragraph (2) and the Elucidation of Article 43 Paragraph (2) of the Human Rights Court Law has created problems which do not support certainty in settling cases of gross violations of human rights which occurred prior to the coming into

effect of Law Number 26 Year 2000 regarding the Human Rights Court. The problem happened because the phrase "*based on the assumption that a gross violation of human rights has occurred*" as formulated in the Elucidation of Article 43 Paragraph (2) of the Human Rights Court Law has been interpreted by the People's Legislative Assembly in such away that the People's Legislative Assembly has the authority to conduct preliminary investigations on gross violations of human rights. The purpose of the *a quo* article giving authority to the People's Legislative Assembly, was based on political considerations instead of legal considerations. The People's Legislative Assembly's political considerations creating the "assumption" on the existence of gross violations of human rights, must be based on the results of preliminary investigations conducted by the National Commission on Human Rights. Therefore the phrase "*based on the assumption that a gross violation of human rights has occurred*", must be construed in such a way that it refers to preliminary investigation findings of the National Commission on Human Rights.

- The People's Legislative Assembly as a political institution does not have the authority to conduct preliminary investigations in criminal cases, particularly cases on gross violations of human rights. Preliminary investigations on cases of gross violations of human rights are a judicial acts which requires a high degree of thoroughness and carefulness, because the crimes stipulated in that law have layered elements.

Therefore, to guard the objectivity of preliminary investigations on gross violations of human rights cases, the preliminary investigation is delegated to an independent institution which in this matter is the National Commission on Human Rights;

Opinion of the Court

[3.19] Considering whereas before giving its opinion on the Principal Issue of the Petition, the Court shall first consider the background of the establishment of the *ad hoc* Human Rights Court stipulated in Chapter VIII of Law Number 26 Year 2002 regarding the Human Rights Court;

[3.20] Whereas in essence, the *ad hoc* Human Rights Court was established by the Indonesian Government based by the mandate of the UN Security Council as set forth in Resolution 1264 (1999) decided on September 15, 1999, to the effect among other things, that the UN Security Council is deeply concerned with the deteriorating security situation in East Timor, particularly with the protracted violence against and large scale displacement and relocation of East Timorese civilians, including the reported violation of international humanitarian and human rights law committed in East Timor, and the Security Council urges that the perpetrators of such violence bear the responsibility. Therefore, the UN Security Council also Condemned all acts of violations in East Timor, demanded that those responsible for such violence be brought to the court;

"Deeply concerned by deterioration in the security situation in East Timor, and in particular by continuing violence against and large scale displacement and relocation of East Timorese civilians";

"Expressing its concern at reports indicating that systematic, widespread and flagrant violation of international humanitarian and human rights law have been committed in East Timor, and stressing that person committing such violation bear individual responsibility";

"Determining that present situation in East Timor constitutes a threat to peace and security."

"Condemned all acts of violation in East Timor, calls for their immediate end and demands that those responsible for such acts be brought to justice."

[3.21] Whereas with such UN Security Council Resolution, the government of Indonesia was then bound by international obligations to adjudicate those responsible for the violence occurring after the East Timor Referendum through an *ad hoc* Human Rights Court. For that purpose, the National Commission on Human Rights established the Investigation Committee on Violations of Human Rights in East Timor (KPPHAM) to conduct preliminary investigations and after completing its task it reported to the Attorney General in January 31, 2000 and gave its recommendations as follows:

- a. requesting the Attorney General to investigate the suspected perpetrators involved in gross violations of human rights in East Timor after the Referendum;

- b. requesting the People's Legislative Assembly and the Government to establish a national Human Rights Court which has the authority to examine violations of human rights cases and crimes against humanity which refers to national and international law (human rights and humanitarian law);

Whereas based on the KPPHAM recommendation, the Attorney General conducted an investigation and on September 1, 2000, determined more or less 23 people as suspects conducting gross violations of human rights in East Timor and one of those men is the *a quo* Petitioner;

[3.22] Considering whereas after examining the Petition and the arguments set forth by the Petitioner, evidence, and experts' statements both written and oral, of the Government, the People's Legislative Assembly, the National Commission on Human Rights, and the background for establishing the Human Rights Court, the Court is of the following opinion:

[3.23] Considering whereas in his petition the Petitioner has argued that **Article 43 Paragraph (2)** of the Human Rights Court Law which reads, "*The ad hoc Human Rights Court as intended in Paragraph (1) shall be established upon the recommendation of the People's Legislative Assembly of the Republic of Indonesia for certain incidents by a Presidential Decree*" and its elucidation which reads, "*when the People's Legislative Assembly of the Republic of Indonesia recommends the establishment of an ad hoc Human Rights Court, it shall be based on the People's Legislative Assembly of the Republic of Indonesia's*

assumption that a gross human rights violation has occurred which is restricted to specific locus and tempus delicti that happened prior to the enactment of this law” is contrary to Article 24A Paragraph (5) of the 1945 Constitution; Nevertheless the Petitioner in essence does not argue about the existence of an *ad hoc* Human Rights Court, on the process of establishing it through the recommendation of the People’s Legislative Assembly to the President who then stipulated it by a Presidential Decree, claiming this to have impaired the Petitioner’s constitutional right to legal certainty and justice;

With respect to the Petitioner arguments, the Court is of the opinion that regarding Article 43 Paragraph (2) *a quo* Law and its Elucidation, the Court has given a legal consideration on the existence of the *a quo* article in Decision Number 065/PUU-II/2004 in relation to the non-retroactivity principle which is, “...*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 as intended in Paragraph (1) shall be established upon the recommendation of the People’s Legislative Assembly of the Republic of Indonesia for certain incidents 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 Decree 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,

Besides that, the Petitioner does not argue about the existence of the *ad hoc Human Rights Court* as described above, so the Petitioner's Petition on Article 43 Paragraph (2) Human Rights Court Law above and the related arguments do not need to be considered;

[3.24] Considering whereas the Petitioner argues that the establishment of the *ad hoc Human Rights Court* through a Presidential Decree as stipulated in the Elucidation of Article 43 Paragraph (2) of the Human Rights Court Law is contrary to Article 24A Paragraph (5) of the 1945 Constitution. The Court in the legal considerations of Decision Number 012-016-019/PUU-IV/ 2006 has stated its stand as follows:

“whereas the implementer of the judicial power, according to Article 24 Paragraph (2) of the 1945 Constitution, is a Supreme Court (and courts within the four court jurisdictions existing under the Supreme Court) and a Constitutional Court; whereas the courts from the four court jurisdictions as intended by Article 24 Paragraph (2) of the 1945 Constitution are the courts existing under the Supreme Court; Whereas in a similar way, the establishment of special courts so long as they are still under one of the four court jurisdictions as regulated in Article 24 Paragraph (2) of the 1945 Constitution, is possible.

Whereas furthermore, Article 24A Paragraph (5) 1945 Constitution states, “The structure, status, membership and legal procedure of the Supreme Court as well

as courts under its supervision shall be regulated by law". The phrase "regulated by law" in the aforementioned Article 24A Paragraph (5) of the 1945 Constitution means that the establishment of a court under the Supreme Court must be conducted by law. This is also in line with the provision of Article 15 Paragraph (1) of Law Number 4 Year 2004 concerning Judicial Authority as the implementation of Article 24A Paragraph (5) of the 1945 Constitution. The aforementioned Article 15 Paragraph (1) reads, "Special courts can only be established within one of judicatures as intended in Article 10 which is regulated by a law". The elucidation of the aforementioned paragraph reads, "Referred to as "special courts" in this provision, among others, are child court, commercial court, human rights courts, Anti-Corruption Courts, industrial relation court which are within the Courts of General Jurisdiction, and tax court in the courts of state administrative jurisdiction". Although Law Number 4 Year 2004 concerning Judicial Authority was made after the CEC Law, similar provision has been included in article 10 Paragraph (1) (along with the Elucidation) of Law Number 14 Year 1970 concerning Principal Provisions of Judicial Authority. The provision of Article 10 Paragraph (1) reads, "Judicial Authority shall be implemented by Courts within: a. General Jurisdiction; b. Religious Jurisdiction; c. Military Jurisdiction; d. State Administrative Jurisdiction". Meanwhile, the Elucidation reads, "This law differentiates between four court jurisdictions where each has a certain adjudication authority and consists of Courts at the first and appellate levels. Religious, Military and State Administrative Courts are special courts, because they hear specific cases or address specific groups of people, whereas

Court of General Jurisdiction is a court for the people in general for both civil and criminal cases. The differences in these four court jurisdictions, do not eliminate the possibilities of differentiation/specialization in each jurisdiction, for example in Courts of General Jurisdiction, it is possible to make a specialization in the forms of Traffic Court, Child Court, Economic Court, etc. by a law. *In* addition, the phrase that reads “regulated by a law” in Article 24A Paragraph (5) of the 1945 Constitution also means that the structure, status, membership, and legal procedure of the Supreme Court as well as the courts under its supervision can not be regulated by other forms of statutes except law”;

[3.25] Considering whereas based on the foregoing legal considerations, the Court states that the law regulates the Supreme Court and the four judicatures under the Supreme Court and the special courts which are differentiated or specialized from those four judicatures. The Human Rights Court as a special court of the general judicature has been established by the Human Rights Court Law;

[3.26] Considering whereas eventhough the establishment of the *ad hoc* Human Rights Court which is a specialization of the Human Rights Court is not stipulated by a separate law, this does not mean that it is contrary to Article 24 Paragraph (5) of the 1945 Constitution because the existence of the *ad hoc* Human Rights Court is an integral part of the Human Rights Court’s scope as stipulated in CHAPTER VIII of the Human Rights Court Law. Thus, the

establishment of the *ad hoc* Human Rights Court by a Presidential Decree is not contrary to Article 24A Paragraph (5) 1945 Constitution.

Therefore, the Petitioner's arguments are groundless.

[3.27] Considering whereas the Petitioner argues about the establishment process of the *ad hoc* Human Rights Court which involves the People's Legislative Assembly based on an assumption that a gross violation of human rights has occurred, which the Petitioner finds very political and opens the chance for political intervention into a legal process. Therefore, according to the Petitioner, the People's Legislative Assembly's role can be construed as entering the realm of judicial authority and damaging the "*integrated justice system*" principle.

With respect to the Petitioner's argument, the Court is of the opinion that to establish whether or not an *ad hoc* Human Rights Court for a certain case according to its *locus* and *tempus delicti* does need the involvement of a political institution which mirrors the representation of the people, which is the People's Legislative Assembly. However, the People's Legislative Assembly in recommending the establishment of an *ad hoc* Human Rights Court must observe the results of preliminary investigation and investigations conducted by the authorized institutions. Therefore, the People's Legislative Assembly cannot simply assume for itself without receiving the results of preliminary investigation and investigation by the authorized institutions, in this case the *National Commission on Human Rights* as the preliminary investigator and the Public Prosecutor as investigator as stipulated by Law Number 26 Year 2000. The word

"assumption" in the Elucidation of Article 43 Paragraph (2) of the Human Rights Court Law must be understood in such a way that it can create legal uncertainty (*rechtsonzekerheid*) as the result of interpreting the word "assumption" differently from the mechanism described above. Therefore, a part of the Petitioner's Petition in relation to the Elucidation of Article 43 Paragraph (2) of the Human Rights court Law as long as it is concerned with the word "assumption" has valid grounds.

4. CONCLUSION

[4.1] Based on all the foregoing descriptions, the Court is of the opinion that the Petitioner's Petition with respect to the Elucidation of Article 43 Paragraph (2) of the Human Rights Court Law as long as it is related to the word "assumption" has sufficient grounds, and therefore it must be granted;

[4.2] Whereas the Petitioner's Petition against Article 43 Paragraph (5) Human Rights Court Law is groundless, and thus it must be rejected;

5. RULINGS

In view of Article 56 Paragraph (2), Paragraph (3) and Paragraph (5) and Article 57 Paragraph (1) and Paragraph (3) of Law Number 24 Year 2003 Regarding the Constitutional Court (State Gazette of the Republic of Indonesia Year 2003 Number 98, Supplement to the State Gazette of the Republic of Indonesia Number 4316);

Passing the Decision:

- [5.1]** To declare that the Petitioner's Petition is granted partly;
- [5.2]** To declare that the Elucidation of Article 43 Paragraph (5) of Law Number 26 Year 2000 regarding Human Rights Court (Supplement to the State Gazette of the Republic of Indonesia Number 4026), as long as it is concerned with the word "assumption" is contrary to the 1945 Constitution of the State of the Republic of Indonesia;
- [5.3]** To declare that the Elucidation of Article 43 Paragraph (2) of Law Number 26 Year 2000 regarding Human Rights Court (Supplement to the State Gazette of the Republic of Indonesia Number 4026), as long as it is concerned with the word "assumption" does not have any binding legal effect;
- [5.4]** To reject the rest of the Petitioner's Petition;
- [5.5]** To order that this decision be properly promulgated in the Official Gazette of the Republic of Indonesia;

Hence the decision was passed in the Consultative Meeting of Constitutional Court Justices on Wednesday, February 20, 2008 by nine Constitutional Court Justices and was pronounced in the Plenary Session open for the public on this day, Thursday, February 21, 2008 by the eight of us, Jimly Asshiddiqie as Chairperson and concurrent Member, AH.M. Laica Marzuki, H.A.S. Natabaya, H. Abdul Mukthie Fadjar, H. Achmad Roestand, I Dewa Gede

Palguna, Maruarar Siahaan, and Soedarsono respectively as Members, assisted by Sunardi as the Substitute Registrar and attended by the Petitioner/his Attorneys, the Government or its representative, and the People's Legislative Assembly or its representative.

CHIEF JUSTICE,

signed

Jimly Asshiddiqie

JUSTICES,

signed

H.M. Laica Marzuki

signed

H. Abdul Mukthie Fadjar

signed

I Dewa Gede Palguna

signed

H.A.S. Natabaya

signed

H. Achmad Roestandi

signed

Maruarar Siahaan

signed

Soedarsono

6. DISSENTING OPINION

With respect to the aforementioned decision of the Court, one Constitutional Court Justice, namely **Constitutional Court Justice I Dewa Gede Palguna** has a dissenting opinion fully described as follows:

The constitutional issue of the *a quo* Petition is that the Petitioner **does not** argue about the constitutionality of the *ad hoc* Human Rights Court existence, as stated in his Petition (*vide* Petition p. 9) and this has been reaffirmed numerous times in the hearings, but about the **procedure or mechanism for establishing** such court which the Petitioner finds to be contrary to the 1945 Constitution, principally with the following reasons:

- 1) Whereas, in the provisions of the Human Rights Court Law, *in casu* Article 43 Paragraph (2), the People's Legislative Assembly as a legislative institution has intervened with the *criminal justice system*.
- 2) Whereas the establishment of the *ad hoc* Human Rights Court cannot be done with a Presidential Decree because it is contrary to Article 24A Paragraph (5) of the 1945 Constitution.

The provisions of Article 43 Paragraph (2) and the Elucidation of Article 43 Paragraph (2) of the Human Rights Court Law, petitioned for review in this Petition, cannot be understood separately from the context with the whole provisions in Article 43 of the Human Rights Court Law under Chapter VIII (*AD HOC HUMAN RIGHTS COURT*). This chapter consists of only 2 articles, namely

Article 43 and Article 44. Article 43 of the Human Rights Court Law reads as follows:

- (1) *Gross violations of human rights which occurred prior to the coming into effect of this law, shall be examined and decided by an ad hoc Human Rights Court.*
- (2) *The ad hoc Human Rights Court as intended in Paragraph (1) shall be established upon the recommendation of the People's Legislative Assembly of the Republic of Indonesia for certain incidents by a Presidential Decree.*
- (3) *The ad hoc Human Rights Court as intended in Paragraph (1) shall be under the General Judicature.*

Meanwhile, the Elucidation of Article 43 Paragraph (2) of the Human Rights Court Law reads: *"when the People's Legislative Assembly of the Republic of Indonesia recommends the establishment of an ad hoc Human Rights Court, it shall be based on the People's Legislative Assembly of the Republic of Indonesia's assumption that a gross human rights violation has occurred which is restricted to specific locus and tempus delicti that happened prior to the enactment of this law"*

Furthermore, before addressing the issue of whether or not Article 43 Paragraph (2) and the Elucidation of Article 43 Paragraph (2) of the Human Rights Court Law are constitutional, it must be first understood that the

substance of the matter stipulated in Chapter VIII (Article 43 and Article 44) of the Human Rights Court Law is a matter of *transitional justice*. The solution of the *transitional justice* problem is the question because the Human Rights Court, established by the Human Rights Court Law, only applies to the perpetrators of gross violations of human rights which occur **after** the coming into effect of the *a quo* law, and thus creating the question: what about the gross violations of human rights which occurred **prior** to the coming into effect of the Human Rights Court Law; will they be just left unprosecuted? Here lies the problem of *transitional justice* which generally in the *a quo* case can be construed as an attempt to give a fair solution both to the victims and the perpetrators of gross violations of human rights which occurred in the past. Such Problems often occur in nations undergoing a regime transition from an authoritarian regime to a democratic regime, as it is the case with Indonesia.

In solving the problem of *transitional justice*, most nations generally take two options, namely the creation of an *ad hoc* Human Rights Court or through a Commission for Truth and Reconciliation, both being mutually substitutive. In general, the thoughts underlying the options for solving the *transitional justice* problem are:

- Firstly, moving from a painful past needs space for truth, reconciliation, and justice for the crimes committed by the previous regime without adjudicating the previous regime in an arbitrary manner.

- Secondly, on the other hand, it is extremely important to make a fast and comprehensive transition to a legal, social, and political system without causing social and political upheaval.

The two alternative models for solving the *transitional justice* problem is to accommodate and simultaneously to end the confrontation between the two interests of the parties namely those in favor of the legal process (court) and those who against it, as both have strong arguments. Those who are in favor of legal process (court) argue, among other things as follows: legal process against perpetrators is absolutely needed to guarantee truth and justice; the legal process also constitutes a moral responsibility for the victims and their families; the legal process is for upholding the law, because democracy is derived from the law; the legal process is also needed to prevent future violations; the legal process is important to create democratic values and to encourage the community's trust in them; the legal process guarantees public responsibility for what the state has done. Meanwhile, those who are against the legal process argue, among other things as follows: "democracy must be built on the foundation of reconciliation where parts of the people may set aside the past; the democratization process must involve a common understanding of various groups in the community on the possibility that there is no compensation for past atrocities; in many ways, violations have been perpetrated not only by past authoritarian regime but also by its opposition; such crimes happened with the pretext of suppressing community-sponsored terrorism; the community must also be responsible because they accepted it; amnesty is extremely needed to build a

new democracy; a stable democratic system is needed before bringing perpetrators to court (*vide IV National Workshop on Human Rights*, November 21-24, 2000 in Surabaya).

Therefore, it is clear that whichever alternative is chosen, the political element is unavoidable because the justice being upheld is the *transitional justice* problem and not only *legal justice*, but also *social and moral justice*. However, by choosing one out of the two alternative models, the principle *aut punere aut de dere* or *nullum crimen sine poena* (no crime without punishment), which is an important principle in every democratic constitutional state, is fulfilled. However, the punishment in the context of *transitional justice* may not always take the form of sanctions, especially if the model chosen is by creating a commission for truth and reconciliation.

By understanding the substance of the *transitional justice* problem as described above and understanding that Chapter VIII of the Human Rights Court Law (which consists of Article 43 and Article 44) are provisions made in order to settle the *transitional justice* problem, we can construe the following:

- (a) The Human Rights Court must be **differentiated** from the *ad hoc* Human Rights Court. **The Human Rights** Court is a special court established to pass judgments on the perpetrators of **future** gross violations of human rights (prospective), while the ***ad hoc* Human Rights Court's** purpose is a part of the efforts to settle the problem of *transitional justice*, which is to pass judgments on the perpetrators of gross violations of human rights

which occurred in the **past** (retrospective). Therefore, different from the establishment of other courts, including the Human Rights Court which is relatively free from political considerations because it is intended for future problems (prospective), the *ad hoc* Human Rights Court is established based on a political decision because the purpose of its establishment is to settle past problems (retrospective), especially concerning gross violations of human rights, and is alternative in nature. Thus, as an example and comparison, the establishment of the truth and reconciliation commission in South Africa, which was established after the fall of the apartheid regime as an alternative to establishing an *ad hoc* human rights court in order to solve the problem of *transitional justice* in that country, has been a political decision. Likewise, in the international level, the establishment of the *ad hoc* court in the former territories of Yugoslavia (*International Criminal Tribunal For The Former Yugoslavia* or *ICTY*) or the *ad hoc* court in Rwanda (*International Criminal Tribunal For Rwanda*) has been a political decision, because they were established based on UN Security Council Resolutions.

- (b) Whereas the spirit for establishing an *ad hoc* Human Rights court is to abolish impunity, which is the attitude of leaving past gross violations of human rights unsettled. Therefore, the establishment of the *ad hoc* Human Rights Court is part of the efforts to uphold the principle “no crime shall be left unpunished” (*aut punere aut de dere, nullum crimen sina poena*), which is an important principle in a democratic constitutional state;

- (c) Whereas eventhough the establishment of the *ad hoc* Human Rights Court is a political decision, to guarantee the balance between political interests, legal interests, and demands for justice not to be arbitrary, there are limitations not only on the type of acts which can result in competence to adjudicate (*ratione materiae*) of the established *ad hoc* Human Rights Court, but also limitations on the *locus delicti* and *tempus delicti* of the acts inside the *ad hoc* Human Rights Court's *ratione materiae*, which is implemented through a comprehensive investigation. In the case of ICTY which was established in 1993, for example, the *ratione materiae* were war crimes and crimes against humanity, the *locus delicti* were the former territories of Yugoslavia, and the *tempus delicti* was after January 1, 1991. Meanwhile, in the case of ICTR (which was established in 1994), the *ratione materiae* were genocide and other serious crimes of international humanitarian law. The *locus delicti* were Rwanda and surrounding states, while the *tempus delicti* was between January 1, and December 31, 1994.
- (d) Whereas, based on the understanding described in the foregoing items (a) through (c), the *ad hoc* Human Rights Court is a necessity, as one of the tools to settle past gross violations of human rights which cannot be settled through the (special) Human Rights Court because, even though the *ratione materiae* is the same, the (special) Human Rights court only has the authority to settle gross violations of human rights perpetrated after the coming into effect of the Human Rights Court Law.

Furthermore, because the *ad hoc* Human Rights court has been established to settle the problem of *transitional justice*, judging the constitutionality of the establishment of this court can not be separated from the meaning of its existence which is as a tool of *transitional justice*. For that reason, in considering the Petitioner's arguments, I am of the following opinion:

- (i) The Petitioner argues that the provisions in Article 43 Paragraph (2) and the Elucidation of Article 43 Paragraph (2) of the Human Rights Court Law means that in recommending the establishment of the *ad hoc* Human Rights Court, the People's Legislative Assembly based it on an assumption that a gross violation of human rights had occurred. That matter, argues the Petitioner, means that the People's Legislative Assembly had to first decide or judge prior to recommending the establishment of the *ad hoc* Human Rights Court. In other words, the People's Legislative Assembly has exercised a judicial function based on its assumption. Furthermore, the Petitioner also states that the "act of making an assumption" if connected to Article 1 Paragraph (5) [*sic!*] is part of the legal act of preliminary investigation. Whereas according to the provisions of Article 18 Paragraph (1) and the Elucidation of Article 18 Paragraph (1) of the Human Rights Court Law, the authority to conduct preliminary investigations is held by the National Commission on Human Rights. Therefore it means that the People's Legislative Assembly has replaced or overlapped or taken over the function of the National Commission on Human Rights. For that reason, the Petitioner is of the

opinion that the People's Legislative Assembly has taken part in the criminal justice system. As a result, the Petitioner claims that his constitutional right to legal certainty has been impaired because he has been tried by a process of the political authorities not in the context of upholding the law but accommodating political interests. (*vide* Petition, p. 7-10, items 1-16).

With regards to the foregoing argument of the Petitioner, I am of the opinion that, as described in the foregoing items (a) through (d), the establishment of the *ad hoc* Human Rights Court is aimed at settling the problem of *transitional justice* against gross violations of human rights which occurred in the past. Therefore, political consideration is an inherent factor therein. The reason is that settling the problem of *transitional justice* itself is a political decision. The establishment of the *ad hoc* Human Rights Court being a political decision does not mean that it is without deep consideration and prudence, as reaffirmed by the Court in the legal considerations of its decision on the review of the Human Rights Court Law in relation to the overriding of the non-retroactivity principle, as set forth in Decision Number 065/PUU-II/2004. However, in relation to the Petitioner's argument, the problems that need further considerations are:

- Firstly, whether the words "*based on an assumption*", in the Elucidation of Article 43 Paragraph (2) of the Human Rights Court Law, means that the People's Legislative Assembly conducted

preliminary investigation in the framework of *criminal justice system* or *due process of law*;

- Secondly, whether it is true that the National Commission on Human Rights has the authority to conduct preliminary investigations against gross violations of human rights that occurred prior to the coming into effect of the Human Rights Court Law.

Before answering the first question, it is important to clarify that the meaning of *criminal justice system* is different from the meaning of *criminal justice process* or *due process of law*. The meaning of *criminal justice system* in general also covers the creation of criminal law (material or formal), and even the direction of the criminal law policy. Thus, in this respect, the People's Legislative Assembly is clearly a part of it. However, after thoroughly researching the Petitioner's argument, it is noticeable that what he meant is that, according to the Petitioner, with the provisions in Article 43 Paragraph (2) and the Elucidation of Article 43 Paragraph (2) of the Human Rights Court Law, the People's Legislative Assembly is considered to have interfered with the *criminal justice process* or *due process of law* which is the authority of the judicial bodies. Furthermore, with respect to the first question I am of the opinion that the words "based on an assumption" as written in the Elucidation of Article 43 Paragraph (2) of the Human Rights Court Law, cannot be interpreted in such a way that the People's Legislative Assembly has interfered with the Judicial

Authority. The legal consideration of Court Decision Number Nomor 065/PUU-II/2004, in item (ii), has reaffirmed that “*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*” (vide Number 065/PUU-II/2004, p. 57). The words “must first be assessed” means that the matter or material to be assessed has existed before, and then the People’s Legislative Assembly assesses it whether or not it is considered a gross violation of human rights, and so it is considered necessary to take a political decision namely to recommend the establishment of the *ad hoc* Human Rights Court. Rationally, the matter being assessed by the People’s Legislative Assembly is the preliminary investigation results. Therefore the word “assumption” in the Elucidation of Article 43 Paragraph (2) of the Human Rights Court Law is a necessity because it is the continuation of the preliminary investigation results. The next question that arises is: who has the authority to conduct preliminary investigations? Is it the National Commission on Human Rights? The answer to this question is related to the answer to the second question, which is whether the National Commission on Human Rights has the authority to conduct preliminary investigations against gross violations of human rights which occurred prior to the coming into effect of the Human Rights Court Law.

Whereas it is true according to Article 18 Paragraph (1) of the Human Rights Court Law that the *National Commission on Human Rights* is the

institution given the authority by the Human Rights Court Law to conduct preliminary investigations. However, bear in mind that the authority is given by the Human Rights Court Law in the framework of *criminal justice process* in the Human Rights Court, not the *ad hoc* Human Rights Court. In other words, the *National Commission on Human Rights* does not have the authority to conduct preliminary investigations on gross violations of human rights which occurred before the coming into effect of the Human Rights Court Law.

If that is the case, then who has the authority? To answer this question, we must remember that the existence of the *ad hoc* Human Rights Court is for settling the *transitional justice* process. As a part of the efforts to settle the *transitional justice* problem, the decision to appoint who shall be given the authority to conduct preliminary investigations is also a political decision. But, as described in item (c) above, to prevent that political decision from being arbitrary, the authority to conduct preliminary investigations cannot be held alone by the People's Legislative Assembly but by an independent institution. Whereas that political decision would afterward appoint, for example, the National Commission on Human Rights, that can be done. However, in that matter, the authority of the National Commission on Human Rights to conduct preliminary investigations on the assumption of gross violations of human rights that occurred before the coming into effect of the Human Rights Court Law, **does not** arise from Article 18 Paragraph (1) of the Human Rights Court

Law but as a result of the People's Legislative Assembly's political decision.

Based on the above explanation, then specifically regarding the Elucidation of Article 43 Paragraph (2) of the Human Rights court Law, it would be constitutional if it is construed that the assumption of a gross violation of human rights, whose *locus* and *tempus delicti* have been determined, **is not merely a decision of the People's Legislative Assembly but the result of preliminary investigations by an independent institution specifically established by the People's Legislative Assembly and authorized to conduct such preliminary investigations.**

- (ii) The Petitioner argues that the *ad hoc* Human Rights Court can not be established by a Presidential Decree because it is contrary to Article 24A (Paragraph (5) of the 1945 Constitution which reads, "*The composition, position, membership and proceedings of the Supreme Court as well as of judicial bodies under it shall be regulated by law*". Meanwhile, Article 15 Paragraph (1) Law Number 4 Year 2004 regarding Judicial Authority reads, "*Special courts can only be established inside one of the judiciatures as intended in Article 10 which is regulated by law*". The Elucidation of Article 15 Paragraph (1) Law Number 4 Year 2004 regarding Judicial Power reads, "*what is meant by "special courts" in this provision shall includes, child court, commerce court, human rights court,*

criminal act of corruption court, industrial relations court which resides in the general judiciary, and the tax court in the state administration court judiciary” (vide Petition p. 10-11, number 17-21)

With respect to this argument of the Petitioner, I am of the opinion that the Petitioner’s purpose with his argument is to state that the *ad hoc* Human Rights Court is a special court and therefore according to Article 24A Paragraph (5) of the 1945 Constitution *juncto* Article 15 Paragraph (1) Law Number 4 Year 2004 and the Elucidation of Article 15 Paragraph (1) Law Number 4 Year 2004, a special court must be established by law, not by a Presidential Decree. In fact, it has been expressly stated in the Elucidation of Article 15 Paragraph (1) of Law Number 4 Year 2004 that “special court” in this respect refers to the Human Rights Court, not the *ad hoc* Human Rights Court. Therefore, in the context of the Petitioner’s argument, what the 1945 Constitution made compulsory to be established by a law is the Human Rights Court. In relation to the *ad hoc* Human Rights Court, while it is true that the words “*ad hoc*” (which is derived from Latin) can be interpreted as “special” because it has the meaning of “formed for a particular purpose” (vide ***Black’s Law Dictionary***, 1999, p. 41), it is however clear that this is not the court meant as “special courts” by Article 15 Paragraph (1) and its Elucidation of Law Number 4 Year 2004. The term “*ad hoc*” (formed for a particular purpose) also has the meaning of “not permanent”. It means that the existence of an *ad hoc*

body or institutions will end if the purpose of establishing such body has been fulfilled.

The Human Rights Court, which is established by the Human Rights Court Law, is not meant as a tool to solve the *transitional justice* problem. In addition to that, the Human Rights Court is a permanent court which specifically handles gross violations of Human Rights (*vide* Article 4 and Article 5 of the Human Rights Court Law) which occur after the coming into effect of the Human Rights Court Law. Meanwhile, the *ad hoc* Human Rights Court, as a tool to settle the *transitional justice* problem, is established in the event of cases regarding gross violations of human rights in the past whose *locus delicti* and *tempus delicti* have been determined or limited and not permanent. In other words, the Petitioner's argument in this respect can only be accepted if directed against the Human Rights Court, if the establishment of the Human Rights Court as a special court is considered contrary to the 1945 Constitution by the Petitioner, **not to the *ad hoc* Human Rights Court.**

Based on the foregoing description, with the *a quo* Petition, I am of the opinion that the Petitioner's Petition as long as it is concerned with Article 43 Paragraph (2) of the Human Rights Court Law must be declared **rejected**, while the petition concerning the Elucidation of Article 43 Paragraph (2) of the Human Rights Court Law must be declared **rejected as being conditionally constitutional** in the sense that the elucidation must be interpreted in such a way that the People's Legislative Assembly's decision to recommend the

establishment of the *ad hoc* Human Rights Court to the President was taken after a result had been resulted from the preliminary investigations conducted by an independent institution specifically established and authorized to conduct preliminary investigations on the assumption that a gross violation of human rights had occurred before the coming into effect of the Human Rights Court Law whose *locus delicti* and *tempus delicti* had been specifically defined.

SUB REGISTRAR

signed

Sunardi