

## **The Position of Non-Retroactive Principle in The International Criminal Law**

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**ABSTRACT:** A heavy violation of human right, war, and several other international crimes have become serious problems at the moment. It is crucial to understand the procedures in resolving those problems. In solving an International crime, there is a famous principle called non-retroactive principle whose position in the international criminal law enforcement in relation to international crimes should be well comprehended. This study employs normative approach which is conducted through library analysis by reviewing existing relevant literature. The result reveals that the application of non-retroactive is not an absolute principle, except in some cases applied either heavily or lightly on criminals. It is expected that the enforcement of International criminal law, particularly to ensnare the doers of International crimes, should retain the non-retroactive principle as a protection toward the human rights.

**Key words:** Non Retroaktif, International Criminal Law, International Crimes

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### **I. INTRODUCTION**

A global development throughout the world has resulted in an increasing demand to resolve heavy human right-related cases, war-related crimes, and other international crimes. Thus, it is extremely essential to have an understanding about the procedures to solve those cases so that there will be no mistakes that likely obscure such cases. This may result from International court that involves in solving international cases. This court, one of the agencies under the control of PBB, does not deal with a problem that happens between a citizen and his/her country, but between a country and another according to its jurisdiction.<sup>1</sup>

Meanwhile, the agency authorized to resolve international crimes is International Criminal Court. It is headquartered in Den Haag, Belanda. Its jurisdiction has been regulated in article 5 Rome statute that involves crimes in court jurisdiction: Court Jurisdiction is limited to a serious crime related to international society as a whole. Mahkamah has jurisdiction based on the statute pertaining to genocide, crimes toward humanity, war crimes, and aggression crimes.

International criminal court is a secondary to national jurisdiction, meaning that this court can merely deal with a case if the national law is unable or unwilling to adjudicate the criminals who commit heavy crimes against human rights that is actually a responsibility of this court or the national law has set a purpose to protect the criminals. It means that International criminal court must proceed all processes of national law.

On the other side, although International criminal court has a clear jurisdiction comprising four types of international crimes, this court has also comply with the International justice principles. International criminal law principle makes us able to differentiate between international law-based principles and national criminal law-based principles.

Law principle based on international law can be differentiated between general principle and specific principle. General principle of international criminal law is not different from the international law principle, namely the principle of *sunt servanda pact*. This pact emphasizes that every treaty that has been made will bind all treaty makers and they have to execute the treaty with a good intention. Another important principle is that the treaty only binds state parties, but not the third state parties without the latter's agreement. The countries who sign a treaty will not be bound by it, yet they are held responsible to refrain themselves from an action that can violate the object and purpose of such treaty. A treaty is usually implemented after some countries have given their agreement to be bound through a ratification. After the countries give their

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<sup>1</sup>Elsam, *Statuta Roma*, (Jakarta: Lembaga Studi dan Advokasi Masyarakat, 2000), hlm. v

agreement to be bound and the treaty is ratified, then they will be a party that involves in that treaty.<sup>2</sup> Meanwhile, the specific principles in the international criminal law are as follows:

- a. The first principle comes from Hugo Grotius, namely *au dedere au punere*, meaning that the criminal who commits international crimes can be convicted by the local state *locus delicti* that happens within the countries' territorial border or can be extradited by the requesting country that has jurisdiction to adjudicate that criminal.
- b. The second principle is proposed by Bassiouni, namely *au dedere au judicare*, meaning that every state is obliged to demand and adjudicate a criminal committing an international crime and to arrange a cooperation with another country to apprehend, detain, and demand as well as adjudicate international crimes.<sup>3</sup>

Meanwhile, the principle of international criminal law originating from national criminal law is legality principle, territorial principle, active and passive nationality principle, universal principle, non-retroactive principle, *ne bis in idem* or *non-bis in idem* principle.

The principles of international criminal law comprises all regulations in the international conventions regarding international crimes and bilateral, regional, and multilateral international treaties regarding international crimes and other regulations that possibly exist as long as they are related to international criminal cases.

The process or the instrument of the international criminal law enforcement includes the regulations of international law pertaining to the procedures in enforcing the international criminal law and the law enforcement institutions, such as international police (INTERPOL) and international criminal court.

Meanwhile, the procedures to enforce the international criminal law can be differentiated or classified into two ways:

- a. Direct enforcement system is the enforcement of international criminal law by filing a demand against the international criminal actor through International criminal court. Meanwhile, the crimes that fall within the criminal jurisdiction of international criminal court can be found in article 5(1) Rome statute of the international criminal court 1998.
- b. Indirect enforcement system is international criminal law with an effort to file a demand or justice against the international criminals through national constitutions. Apart from that, an international cooperation can also be established.

According to the elaboration above, in this article, we can discuss the application of non-retroactive principle toward the international crimes within the law enforcement of international criminal law.

## **II. STUDY METHOD**

This study employs the normative approach method.<sup>4</sup> Normative research is carried out through library research, namely the review toward library resources. Normative approach is a historical law, the comparison between law and philosophy of law. The law research is new, precise and systematic in nature and it researches factual data or theoretical concepts regarding principles and regulation of particular law issues to ensure information to generate a research finding, conceptual, theoretical, and principal revisions and their uses.<sup>5</sup>

## **III. DISCUSSION**

### A. Definition of International Criminal Law Principle

The law principle cannot be assumed as a concrete law norm, yet as the general bases or the guidance for the existing law. According to Bellefroid, the law principle is a viewpoint toward the positive law in a certain group of society.<sup>6</sup> Mertokusumo argues that the law principle is not a concrete law regulation, but it serves as a basic thought which is general in nature or a background of the concrete regulations that can be found in and behind a law system whose manifestation can be found in the constitution and the judge's verdict

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<sup>2</sup> Robert Beckman and Dagmar Butte, *Introduction to International Law*. (Layari: <https://www.ilsa.org/jessup/intlawintro.pdf>), hlm. 3-5.

<sup>3</sup> Romli Atmasasmita, *Pengantar Hukum Pidana Internasional*, Jakarta: Refika Aditama, 2000, hal. 14

<sup>4</sup> A. Yakin, *Legal Research and Writing*, Lexis Nexis, Kelana Jaya, 1992, page. 10.

<sup>5</sup> Mahdi Zahraa, *Research Methods for Law Postgraduate Overseas Student*, Stiglow Sdn. Bhd. Kuala Lumpur, 1998, page. 17.

<sup>6</sup> Eddy O.S. Hiariej, *Pengantar Hukum Pidana Internasional*, Jakarta: Erlangga, 2009, page. 24

which is a positive law and can be found by searching for the general characteristics in such concrete law regulation.<sup>7</sup>

Thus, the law principle is a background of concrete regulation which is general and abstract in nature so that it is not a concrete law principle. However, part of the law principles in the international criminal law is included in the concrete law regulation. Such law principle is commonly a general regulation in the criminal law constitutions in each country. This is because such principles originate not only from international law but also from national criminal law principles.

The principle of international criminal law can be differentiated between the principles of law based on international laws and the law principles derived from national criminal law. The former can be classified as general and specific principles. General principle of international criminal law is not different from the principle implemented in the international law, namely the principle of *servanda sunt pact*. Meanwhile, the specific principle in the international criminal law includes:

- a. The first principle comes from Hugo Grotius, namely *au dedere au punere*, meaning that the criminal who commits international crimes can be convicted by the local state *locus delicti* that happens within the countries' territorial border or can be extradited by the requesting country that has jurisdiction to adjudicate that criminal.
- b. The second principle is proposed by Bassiouni, namely *au dedere au judicare*, meaning that every state is obliged to demand and adjudicate a criminal committing an international crime and to arrange a cooperation with another country to apprehend, detain, and demand as well as adjudicate international crimes.

Meanwhile, the principle of international criminal law originating from national criminal law is legality principle, territorial principle, active and passive nationality principle, universal principle, non-retroactive principle, *ne bis in idem* or *non-bis in idem* principle.

#### B. The application of Non-Retroactive Principle in the International Criminal Law Enforcement

International criminal law is differentiated between international delinquency and international crime. International delinquency is not a crime as the country which is involved in delinquency cannot be punished and even the responsibility is limited merely to ameliorate its past wrongdoing.<sup>8</sup>

The non-retroactivity of criminal law in international criminal law Overtime is the legal establishment which exists in both national and international systems. Of course the contributions of each of these systems are not the same in accepting and applying of them. The establishment of overtime in national systems has been more fortunate compared to the international system. Overtime can be presented both in legal and criminal issues.<sup>9</sup> The overtime can be divided to what is related to criminal affairs, overtime of complaints, prosecute, sentencing and overtime of carrying out the punishment Like the internal systems, the international community legislates rules and regulations to protect the values and fundamental interests.<sup>10</sup> These rules considered as a guarantee to the fundamental values of society. Thus, there is an association between fundamental value and the international community's reaction to violations of laws and regulations protecting the value of it. Severe reactions from the international community against the worst and most despicable actions described in the criminalization and the description of these acts reveals as an international crime.<sup>11</sup> Meanwhile, international crime can be classified into 3 types, namely:

1. Crime against peace, including the preparation or a statement for an aggression;
2. war crime or the violations towards traditional laws and customs in a war; and
3. Crimes against humanity, namely all types of cruelty toward society (non-combatant) over a war.<sup>12</sup>

International criminal law has 5 characteristics, namely:

1. Individual criminal responsibility;
2. Such responsibility does not depend on the individual's rank;

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<sup>7</sup> Sudikno Mertokusumo, *Mengenal Hukum : Suatu Pengantar*, Jakarta: Liberty, 2003, hal. 34

<sup>8</sup> *Ibid.*, hal 34

<sup>9</sup> Non-Retroactive Challenges of the Criminal Law in the Procedure of International Criminal Court, International Research Journal of Applied and Basic Sciences, Vol, 9 (8): 1239-1244, 2015, page 1242. See: [http://www.irjabs.com/files\\_site/paperlist/r\\_2670\\_150716133103.pdf](http://www.irjabs.com/files_site/paperlist/r_2670_150716133103.pdf).

<sup>10</sup> *Ibid*, page 1242.

<sup>11</sup> *Ibid*, page 1242.

<sup>12</sup> Romli Atmasasmita, *Op. Cit*, hal. 41

3. Such responsibility does not depend on whether national constitution has an exception for such responsibility
4. Such responsibility contains a consequence of law enforcement through international criminal court or through national court conducted by means of universal principle.
5. There has existed a historically, practically, and doctrinally close relationship between the things prohibited in the constitution and international law bases after the second world war.<sup>13</sup>

Thus, the enforcement of international criminal law to uphold a justice against a criminal involving in an international crime cannot be carried out by violating the international law itself, yet it must comply with the international law principles and be based on the principle of international criminal law. One of the principles is non-retroactive.

The retroactive principle is one of the international criminal law principles based on the national constitution in each country. A country holds the most important position to enforce the international criminal law because it concerns with another principle, namely the principle of legal certainty. In the international law system, the non-retroactive principle can be found in the law of international treaty, human right law, and international criminal law. Meanwhile, in the national law system, this principle can be found in the national constitution of a country which claims itself as a democratic nation, either stated in the constitution or its national criminal law.

This non-retroactive principle aims at protecting the society right from the tyranny of the rulers in managing the country. It also emphasizes that either in the international or national levels, this principle is meant to respect and protect the human right, particularly from the actions that lead to the authority abuse by the rulers. Each individual needs to be given a legal certainty for their life so that they can have a secure, safe, and prosperous life.<sup>14</sup>

Actually, if we learn the international law regarding international crime or international criminal law, we will find that the international customary law has recognized that the non-retroactive principle is not applicable to heavy crimes, including gross-violation of human rights, for example the processes in the court of justice in Nuremberg, Tokyo, Rwanda, and the former Yugoslav colony. All the legal principles applied in such courts have been acknowledged as an indispensable part of international law practically since all verdicts in those courts are able to bind and recognized by international society and all the defendants are obliged to serve the sentences given by those courts. The criminal law experts' viewpoints on the implementation of this principle is still heterogeneous. Conventional viewpoint still emphasizes that non-retroactive principle is an absolute law principle and it can be a general criminal law principle which is universal in nature. UUD 45 constitution in the second amendment also emphasizes human rights, in the chapter XA particularly article 28 I with certain limitation as has been stipulated in the article 28 J. In the reference dealing with human right, we have to know that an individual's right for not being demanded by the existing constitution is not absolute, yet relative right. Meanwhile, the last sentence in the article 28 I UUD 45 and its amendment is "in any circumstance" is not in line with either article 28 J or article 29 in United Nation's the universal declaration of human right.

On the other side, modern viewpoint toward the application of non-retroactive principle is in line with the development of international criminal law and international convention regarding organized transnational crime including corruption and money laundering, terrorism, narcotics, and the development of international convention regarding international criminal court. Modern viewpoint in 20th century concerning the application of non-retroactive principle emphasizes that according to the time and context of a certain crime which can threaten the peace and security of humankind, the application of non-retroactive law can be put aside selectively and limitedly. In this regard, such application has been done from the judicial process in the Nuremberg Court (1946) to the ad hoc tribunal process for the genocide and crimes against humanity in the Yugoslav colony. Corruption has been stipulated in the corruption eradication constitution in Indonesia as the violation of society economy and social which is systematic and nationwide in nature so that it is categorized as extra-ordinary crime. Thus, the application of retroactive law UU nomer 30, 2002 regarding KPK is legal and should not be debated anymore.

I Wayan, states that actually the non-retroactive principle is not absolute. A legal principle can be applied retroactively as long as it is beneficial to the involving parties that become the targets of such law regulation. The application of criminal laws by using retroactive principles is still tolerable, yet only with condition that that will not cause any harm to the suspect, accused, and defendant.<sup>15</sup>

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<sup>13</sup> Eddy O.S. Hiariej, *Op. Cit.*, hal. 43

<sup>14</sup> I Wayan Parthiana, *Hukum Pidana Internasional dan Ekstradisi*, Jakarta: Rama Widya, 2004, hal. 104

<sup>15</sup> I Wayan Patriana, *Loc.Cit.*

Thus, it is obvious that non-retroactive principle generally acknowledged and widely is not the principle absolutely applicable, except in some circumstances that can be put aside and excepted, either being beneficial, light, or heavy for the involving legal subject.

The light exception meant is to respect and protect the individual or the legal subject's right. Meanwhile, the heavy exception meant is to protect the human or international society's interest as a whole from the action againts with the universal values of humanity.

International Military Court in Nuremberg 1946 and Tokyo 1948 categorizes the crime accused to the defendant as a crime that is against human's conscience that regards himself or herself as a civilized and cultural human. An action regarded as a crime if measured from the civilized and cultural human's conscience should be known by everyone, including the defendant that has done it.

#### **IV. CONCLUSION**

The application of the non-retroactive principle that has been recognized universally and widely is not an absolute principle, except in some circumstances that can be put aside, either being beneficial, light, or heavy for the involving legal subject. The light exception meant is to respect and protect the individual or the legal subject's right. Meanwhile, the heavy exception meant is to protect the human or international society's interest as a whole from the action againts with the universal values of humanity. It is expected that the international criminal law enforcement, especially to ensnare the international crime actors, should mantain the principle of non-retroactive as a method to protect the human right.

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