Progressive Law Review Volume 8 No. 1 April 2026 University of Bandar Lampung
(e-ISSN) 2716-2141, progrresivelawreview.ubl.ac.id

LOOKING AT THE EXISTENCE OF THE INTERNATIONAL CRIMINAL COURT (ICC) AFTER 26 YEARS OF THE ROME STATUTE: A CRITICAL ANALYSIS OF HUMAN RIGHTS ENFORCEMENT IN INDONESIA

Received: March, 2026 Accepted: April 2026 Online Published: April 2026

Elia Setri[1], Dwi Putri Lestarika[2]

[1] *Faculty of Law,* University of Bengkulu, eliasetri015@gmail.com
[2] *Faculty of Law,* University of Bengkulu, dwipfhunib22@unib.ac.id

---

ABSTRACT

At the age of 26, the existence of the International Criminal Court (ICC) established under the 1998 Rome Statute continues to be in the spotlight, especially regarding its jurisdiction over crimes of gross human rights violations. This article specifically examines the existence of the ICC in relation to the enforcement of Human Rights (HAM) in Indonesia. Although the ICC has become a global judicial instrument, Indonesia has not ratified the Rome Statute until now. This rejection is based on the argument of national legal sovereignty, where Indonesia already has a Human Rights Court mechanism through Law No. 39 of 1999 and Law No. 26 of 2000. Through the normative juridical method, this journal analyzes the relationship between the national legal instrument and *the complementarity principle* adopted by the ICC. The results of the study show that the complementary principle allows the ICC to take over jurisdiction if a country is deemed unwilling or *unable* to seriously prosecute perpetrators of serious human rights crimes. Although Indonesia has a domestic legal framework, there are significant legal gaps, such as the reduction of material jurisdiction (excluding war crimes and aggression), weak standards of *command responsibility*, and the magnitude of political intervention in the establishment of the Ad Hoc Human Rights Court. This loophole has the potential to be interpreted by the international community as the inability or unwillingness of the national legal system. Therefore, harmonization of national law with the standards of the Rome Statute and ratification is an essential strategic step to protect Indonesia's legal sovereignty from potential future ICC intervention.

Keywords: *International Criminal Court, Rome Statute, Gross Human Rights Violations in*

Indonesia, Complementary Principles, Human Rights Court Law.

---

1. INTRODUCTION

1.1 Background

The existence of the *International Criminal Court* (ICC), which marks its 26th anniversary on July 17, 2024, continues to have extraordinarily significant implications for the architecture of the global legal system. The court, which was born from the womb of the 1998 Rome Statute, holds a mandate of universal jurisdiction to try individuals responsible for the four most serious categories of international crimes: *genocide*, *crimes against humanity*, war *crimes*, and crime *of aggression*.[1] The existence of the ICC has slowly but surely broken down the thick wall of the doctrine of functional immunity of state officials, making it the most crucial instrument in the evolution of universal human rights enforcement post-World War II.

For the Republic of Indonesia, the existence and dynamics of the development of ICC jurisprudence give rise to a dilemma of jurisdiction and the stake of the rule of law. As the third largest democratic state in the world that after the 1998 Reform loudly voiced its commitment to the enforcement of human rights, Indonesia's position on the international stage seems ambivalent because until now it has refused to ratify the Rome Statute.[2] This political and juridical reluctance is consistently based on the government's argument that the national legal framework, especially the presence of Law No. 39 of 1999 on Human Rights and Law No. 26 of 2000 on the Court of Human Rights, is sufficient and adequate to respond to the threat of *extraordinary crimes* independently, without the need to submit to the jurisdiction of the international court based in The Hague. [3]

However, this claim of independence and legal sovereignty cannot be separated from the sharp spotlight. The empirical track record of the implementation of the Human Rights Court in Indonesia over the past two decades actually exposes a contradictory reality. The series of trials of *the Ad Hoc Human Rights Court* and the Permanent Human Rights Court, starting from the

---

[1] Eko Riyadi. (2023). The principle of complementarity of the International Criminal Court and its relevance to Indonesia. *Journal of Constitution*, 20(1), 145–168.

[2] Sari, I. K., & Nugroho, A. (2022). Indonesian Human Rights Court in the perspective of international criminal law. *IUS Law Journal QUIA IUSTUM,* 29(3), 487–509.

[3] Harkrisnowo, H. (2022). Failure to prosecute gross human rights violations and the problem of impunity in Indonesia. *Human Rights Journal*, 13(2), 203–222.

cases of East Timor (1999), Tanjung Priok (1984), Abepura (2000), to Paniai (2014), show a pattern of decisions that consistently acquit intellectual actors and holders of the military chain of command at the cassation level. This phenomenon of structural impunity has given rise to a critical discourse among international criminal law academics about the extent to which Indonesia's domestic legal system is truly in good faith and "capable" of protecting victims of gross human rights violations from institutional injustice.[4]

In the context of international criminal law, the sovereignty of domestic justice is not absolute, but is highly dependent on the evaluation process based on the *complementarity principle* adopted by the ICC. This principle is a meeting point between respect for state sovereignty and the moral imperative to prevent impunity. Therefore, an analytical-critical study of the relationship between the anatomy of the human rights legal system in Indonesia and the mechanism of jurisdiction acquisition by the ICC is a very urgent juridical need to map potential challenges, gaps in legal vulnerability, and threats to the sovereignty of the judiciary in Indonesia in the future.

1.2 Problem Formulation

Based on this conceptual and empirical background, this journal is specifically designed to dissect and answer two main problems, namely:

1. What is the construction and legal position of the Human Rights (HAM) justice system in the Republic of Indonesia when analyzed using the *complementarity principle* of the International Criminal Court (ICC)?
2. What are the fundamental legal anomalies and loopholes in the legal instruments for the enforcement of human rights in Indonesia that have the potential to be interpreted by the international legal community as a tangible form of *inability* or unwillingness*, which can ultimately open up the space for the intervention of the International Criminal Court's jurisdiction?*

2. DISCUSSION

[4] Wicaksono, A. D. (2023). Structural impunity in the settlement of gross human rights violations in Indonesia. *Judicial Journal*, 16(2), 233–254.

2.1 Analysis of ICC's Complementary Principles on the Indonesian Human Rights Justice System

The presence of the International Criminal Court is not in essence designed, and does not have the institutional capacity, to act as a global court of first instance that completely *supersedes* the functions and existence of the criminal justice system in each domestic jurisdiction. Unlike its *predecessors such* as *the International Criminal Tribunal for the former Yugoslavia* (ICTY) or *the International Criminal Tribunal for Rwanda* (ICTR) which have *primacy* jurisdiction (the primary right that overrides national courts), the ICC was established on the foundation of *the complementarity principle*.[5]

2.1.1 Deconstruction of the Concept of Complementarity in Article 17 of the Rome Statute

The concept of complement is explicitly regulated in Article 17 paragraph (1) of the Rome Statute. This article expressly states that the ICC positions itself as a court *of last resort*. The ICC is only allowed to declare a case *admissible* and assume investigative and prosecution jurisdiction if a country that naturally has jurisdiction (such as the country where the crime occurred, or the country of origin of the perpetrator) is proven to be factually "unwilling" or "*genuinely* unable") to carry out its legal obligations.[6]

To understand the relationship between the Indonesian legal system and the ICC, a juridical elaboration of the terminology *of unwillingness* and *inability* is crucial:[7]

1. *Unwillingness*: Based on Article 17 paragraph (2), the unwillingness of a country is measured from three objective indicators. First, whether the national judicial process that is or has been running is designed solely with the aim of shielding perpetrators from criminal liability (often referred to as fictitious trials or *sham trials*). Second, whether there is an *unjustified delay* in the process of justice that is contrary to good faith to uphold justice. Third, whether the national judicial legal process is held in an independent and impartial manner.
2. Inability: Based on Article 17 paragraph (3), inability refers to the *total or substantial collapse or unavailability of its national judicial system*. This causes the state physically

[5] Putra, R. A. (2024). The dilemma of ratification of the Rome Statute and the rule of law of Indonesia. *Journal of Law & Development*, 54(1), 1–26.

[6] Arief, B. N. (2008). *A potpourri of criminal law policy*. Jakarta: Kencana Prenada Media Group. p. 49

[7] Sihombing, H. M. (2010). *International criminal law*. Jakarta: Pradnya Paramita. p. 84

and juridically to be unable to arrest the accused, unable to collect evidence and testimony, or generally unable to carry out the judicial process.

2.1.2 The Position of Law No. 26 of 2000 in Complementary Lenses

In response to international pressure, especially the threat of the establishment of an Ad Hoc International Court after the East Timor polls in 1999, the Indonesian government has strategically exploited the loopholes provided by this complementary principle. By enacting Law No. 39 of 1999 on human rights, which was quickly followed by Law No. 26 of 2000 on Human Rights Courts, Indonesia effectively sent a political and juridical signal to the global community that the country was "*able*" and "willing" to take care of its own domestic problems.[8]

According to the academic view of Bunga Dita Rahma Cesaria, a lecturer in law at President University, this frame of mind has been the *defense mechanism* of Indonesian diplomacy for many years. The government is of the view that with the establishment of a human rights justice instrument specifically tasked with prosecuting the crimes of genocide and crimes against humanity (Article 7 of Law No. 26/2000), Indonesia does not need to ratify the Rome Statute because its jurisdictional sovereignty has fortified the country from the intervention of The Hague.[9]

However, a more in-depth juridical review shows that the complementary principles of the ICC do not work superficially by simply examining the existence of *the physical structure* of the court or the existence of the law text on paper (*law in books*). The International Criminal Court is designed to evaluate the effectiveness, independence, and *law in action* of the judicial process that takes place within the institution. A country's unilateral claim of competence can be overturned at any time by the ICC if there is strong evidence to suggest that domestic trials are conducted with a manipulative intent to facilitate covert impunity. It is at this point that Indonesia's human rights justice system is under the shadow of a serious international jurisdictional evaluation.

2.2 National Human Rights Enforcement Legal Loopholes and Potential ICC Intervention

Although the institutional architecture of the Republic of Indonesia appears to have the

[8] Wahid, A. (2014). *International crimes and human rights justice.* Jakarta: Sinar Grafika. p. 87

[9]

capability to adjudicate cases of gross human rights violations, a comparative-critical analysis of the substance of the articles in Law No. 26 of 2000, juxtaposed with its track record of enforcement decisions (jurisprudence), reveals a number of anomalies and legal loopholes that are very worrying. These fundamental gaps have great potential to be classified by the international justice community as manifestations of *the state's systemic inability and* unwillingness to uphold universal justice. There are three essential weaknesses that shackle Indonesia's current human rights justice system:[10]

2.2.1 The Truncation of Core Crimes

The first and most fatal weakness that undermines the ability of the Indonesian legal system lies in the limitation of the authority to adjudicate or the reduction of material jurisdiction (*ratione materiae*). Article 5 of the Rome Statute establishes four *core crimes* as enemies of all humanity (*hostis humani generis*), namely: Genocide, Crimes against Humanity, War Crimes, and Crimes of Aggression.

However, through the formulation of Article 7 of Law No. 26 of 2000, Indonesian lawmakers (*legislators*) deliberately limited the scope of Gross Human Rights Violations to only two categories:

a. Crimes of genocide; and

b. Crimes against humanity.

The Indonesian legal system absolutely eliminates jurisdiction over War *Crimes* and *Crimes of Aggression*. This void *of law* cannot be underestimated. If in the future there is an internal or international armed conflict in Indonesia's sovereign territory (e.g. an escalation of military operations in combating separatism in violation of the Geneva Conventions), where state apparatus or armed groups are proven to have tortured prisoners or targeted civilian facilities that qualify purely as "War Crimes", then the national Human Rights Court has no basis of absolute authority to prosecute the perpetrators.[11]

[10] Ramadhan, F. (2024). Problems of material jurisdiction of Law No. 26 of 2000 against war crimes and aggression. *Pulpit Law*, 36(1), 88–105.

[11] Simanjuntak, J. (2023). Challenges to the principle of complementarity of the International Criminal Court (ICC) in the enforcement of domestic human rights after reform. *Scientific Journal of Legal Policy*, 17(3), 312–330.

Military crimes in Indonesia do have a Military Court (based on Law No. 31 of 1997), but the jurisdiction of the Military Court is designed for disciplinary violations and general crimes in the style of the Military Code, not for the framework of gross violations of international humanitarian law. From the perspective of international criminal law, this *inability by law* is a tangible form of the state's "inability" to process the types of crimes that are recognized globally. If war crimes occur in Indonesia and domestic law enforcement cannot act on them due to the absence of articles, this will provide perfect *legal grounds* for the International Criminal Court (or a reference from the UN Security Council) to step in and take over jurisdiction.[12]

2.2.2 Distortion of Command Responsibility Standards

The second legal gap is closely related to the way Indonesian law formulates the doctrine of superior accountability or *command responsibility*. In the crime of gross human rights violations, the perpetrators of criminal acts rarely act alone (*lone wolf*). These actions are usually part of hierarchical and structured institutional or military command policies. Therefore, punishing low-ranking soldiers in the field (*foot soldiers*) without touching the general or commander who drafted the policy, is considered a failure of the human rights judiciary.[13]

The Rome Statute recognizes the importance of this and formulates Article 28 on the Accountability of Commanders and Other Superiors very strictly. Under the Rome Statute, a military commander or party acting effectively as a military commander is criminally responsible for crimes committed by forces under *his effective command and control*. The mens *rea* element of this accountability includes two conditions of consciousness: the commander "*knew*" or, because of the circumstances, "should *have known*" that his troops were committing or about to commit a crime, and the commander failed to take precautionary measures.[14]

In Indonesia, this principle is visibly adopted into Article 42 of Law No. 26 of 2000. However, there are terminological distortions in the translation process that have extraordinarily severe juridical implications in practice. The judicial practice of the Ad Hoc Human Rights Court in

[12] Lestari, M. P. (2022). Juridical analysis of command accountability in gross human rights violations in Indonesia: A comparative study of Law No. 26 of 2000 and the Rome Statute. *Law and Justice*, 9(2), 210–228.

[13] Parthiana, I. W. (2015). *International criminal law*. Yrama Widya. p. 94

[14] Enny Soeprapto. (2018). *International law and human rights*. Gramedia Pustaka Utama. p. 84

Indonesia has consistently applied evidence that places too much emphasis on *de jure control* (formal administrative command) and overrides *de facto control* in the field. Worse, the phrase "should have known" is often interpreted narrowly by judges, where prosecutors seem obliged to prove that the general sitting in Jakarta must have direct (actual) knowledge of the actions of lowly soldiers in remote areas of the conflict.

The inconsistency in the standard of application of this principle has resulted in empirical results that are very tragic for the justice of the victim. In the track record of the Ad Hoc Human Rights Court for the East Timor Case (1999) and the Tanjung Priok Case (1984), almost all security forces, especially high-ranking officers and military command actors, were sentenced to be free *(vrijspraak*) both at the court of first instance and at the cassation level of the Supreme Court. The argument for acquittal was uniform: there was no evidence of "effective control" or that the commander did not directly give the order for the killing.[15]

From the perspective of international law, the phenomenon of impunity structured and legitimized by the Supreme Court's decision is the most fatal indicator. ICC prosecutors will not see the acquittal as a form of fair justice, but rather as a real precedent for "*sham proceedings*" designed in such a way as to circumvent the evidentiary rules to protect suspects from actual accountability. This series of releases of high-ranking commanding officers is a red signal for the ICC that validates the *systemic unwillingness of the Indonesian judiciary in punishing the main actors protecting the regime.*

2.2.3 Political Intervention in the Establishment of Ad Hoc Human Rights Courts

The third fundamental weakness concerns the issue of *separation of powers* which is flawed in the past human rights law enforcement mechanism. Based on the principle of universal legality (non-retroactive), criminal law cannot be applied retroactively. However, because gross human rights violations are extraordinary crimes, the international community recognizes mechanisms to prosecute past crimes in order to end impunity.

In Indonesia, Article 43 of Law No. 26 of 2000 stipulates that gross human rights violations that occurred before the promulgation of the law are examined and decided by the *Ad Hoc* Human Rights Court. The problem lies in paragraph (2), which stipulates that *the Ad Hoc*

[15] Hapsari, R. T. (2023). Judicial independence in the establishment of the Ad Hoc Human Rights Court: Criticism of Article 43 of Law No. 26/2000. *Journal of Law Ius Quia Iustum*, 30(2), 340–361.

Human Rights Court is formed on the proposal of the House of Representatives (DPR) based on certain events, through a Presidential Decree.[16]

The involvement of the House of Representatives as a legislative institution and full of political interests in determining the law enforcement process (judicial) is a defect in the design of the legislation. The conditions for the approval and recommendation of the House of Representatives reduce the purely judicial issue of the search for justice to mere political commodities and factional lobbying. The thorough (*pro-justitia*) investigation that has been painstakingly completed by the National Commission on Human Rights (Komnas HAM) often ends in vain simply because the legislature does not give approval to the establishment of its courts.

The case of the Trisakti Student Shooting Tragedy, Semanggi I, and Semanggi II (1998-1999), as well as the 1997/1998 Forced Disappearance of Activists, are silent witnesses of how dangerous this article is. Although Komnas HAM has concluded that there are elements of gross human rights violations in the form of crimes against humanity in these cases, the legal process has been stopped and stagnated for more than two decades due to the political reluctance of the factions in the House of Representatives to issue recommendations for the establishment of an *Ad Hoc Human Rights Court* to the President.

In the study of the ICC's complementary principles, this political dominance that silences the judicial process is an undeniable form of *the country's political unwillingness*. A country is institutionally considered to lack the good faith to conduct independent *and impartial judicial proceedings* if politicians who hold legislative power in that country arbitrarily have the veto power to submerge criminal investigation files.[17]

The construction of legislation such as Article 43 of Law No. 26/2000, if maintained, will provide absolute justification for the international community that Indonesia's domestic legal system has failed to become a space for the restoration of justice. If in the future a similar escalation of human rights violations resurfaces and the national judiciary is again hijacked by parliamentary political interests, it is inevitable that the International Criminal Court may restructure its view of Indonesia: that the enforcement of human rights in this country is nothing

---

[16] Wijaya, K. (2022). The standard of proof of 'Effective Command' at the Indonesian Human Rights Court after the Supreme Court's decision. *Indonesian Journal of Legislation*, 19(4), 510–525.

[17] Fajakarianto, A. (2020). *International criminal law: Introduction and essence*. Graphic Rays. p. 91

more than a political instrument.

3. CONCLUSION

Based on the overall deconstruction and juridical analysis that has been described in the discussion above, two comprehensive conclusions can be drawn that answer the formulation of this journal's problems:

1. Legal Position Based on Complementary Principles: Theoretically and early legal position, the initiative of the Republic of Indonesia in issuing Law No. 39 of 1999 and establishing the Human Rights Court through Law No. 26 of 2000 is a sovereignty maneuver intended as a juridical shield. This instrument is designed to meet the qualifications of a country's "*ability*" within the framework of the complementary principles of the International Criminal Court, thus giving the impression that Indonesia has an independent jurisdictional authority that negates the need for ICC intervention. However, the complementary principle (Article 17 of the Rome Statute) does not tolerate judgments that are purely normative formalities. The International Criminal Court has the interpretative authority to evaluate factually whether the existence of such national courts is aimed at realizing essential justice, or merely operates as *sham trials* to protect crime planners from global jurisdiction.

2. Identification of Legal Loopholes and Sovereignty Vulnerabilities: A factual and empirical evaluation of the anatomy of Law No. 26 of 2000 and its jurisprudence track record reveals three crucial legal loopholes that erode the credibility of Indonesia's complementary defense. *First*, the cutting off of the state's material jurisdiction because it does not adopt the War Crimes and Aggression Crimes Act, which gives birth to an innate disability in the form *of incapacity by law*. *Second*, the weak standardization of *command responsibility* in judicial interpretation, which paves the way for the impunity of military corporations, and deliberately frees elite intellectual actors; a precedent that reflects the strong phenomenon of *shielding the person from criminal responsibility*. *Third*, the large scope of legislative intervention (DPR) in determining the fate of the establishment of an Ad Hoc Human Rights Court for past crimes, which legitimizes the interpretation of the existence of acute political *unwillingness* from the state.

The accumulation of these structural and political weaknesses indicates very clearly that the

shield of Indonesia's legal sovereignty is actually very fragile. Instead of protecting the justice system from intervention, these loopholes create *justifiable space* for future intervention by the jurisdiction of the International Criminal Court. Therefore, the step of legal reform through a radical revision of the Law on Human Rights Courts to fully harmonize with the elements of the Rome Statute, and ultimately consider full ratification of the Rome Statute, is no longer just a choice of diplomatic rhetoric, but a strategic step of survival (survivability) that is very essential to maintain the dignity and sovereignty of Indonesian law in the era of modern human rights enforcement.

BIBLIOGRAPHY

Arief, B. N. (2008). A potpourri of criminal law policy. Jakarta: Kencana Prenada Media Group.

Eko Riyadi. (2023). The principle of complementarity of the International Criminal Court and its relevance to Indonesia. Constitutional Journal.

Enny Soeprapto. (2018). International law and human rights. Gramedia Pustaka Utama.

Fajakarianto, A. (2020). International criminal law: Introduction and essence. Graphic Rays.

Hapsari, R. T. (2023). Judicial independence in the establishment of the Ad Hoc Human Rights Court: Criticism of Article 43 of Law No. 26/2000. Ius Quia Iustum Legal Journal.

Harkrisnowo, H. (2022). Failure to prosecute gross human rights violations and the problem of impunity in Indonesia. Journal of Human Rights.

Lestari, M. P. (2022). Juridical analysis of command accountability in gross human rights violations in Indonesia: A comparative study of Law No. 26 of 2000 and the Rome Statute. Law and Justice.

Parthiana, I. W. (2015). International criminal law. Yrama Widya.

Putra, R. A. (2024). The dilemma of ratification of the Rome Statute and the rule of law of Indonesia. Journal of Law & Development.

Ramadhan, F. (2024). Problems of material jurisdiction of Law No. 26 of 2000 against war crimes and aggression. The Pulpit of Law.

Sari, I. K., & Nugroho, A. (2022). Indonesian Human Rights Court in the perspective of international criminal law. Journal of Law IUS QUIA IUSTUM.

Sihombing, H. M. (2010). International criminal law. Jakarta: Pradnya Paramita.

Simanjuntak, J. (2023). Challenges to the principle of complementarity of the International

Criminal Court (ICC) in the enforcement of domestic human rights after reform. Scientific Journal of Legal Policy.

Wahid, A. (2014). International crimes and human rights justice. Jakarta: Sinar Grafika.

Wicaksono, A. D. (2023). Structural impunity in the settlement of gross human rights violations in Indonesia. Judicial Journal.

Wijaya, K. (2022). The standard of proof of 'Effective Command' at the Indonesian Human Rights Court after the Supreme Court's decision. Journal of Indonesian Legislation.