



REFORMING THE INDONESIAN CRIMINAL LEGAL AID ACCORDING TO INTERNATIONAL STANDARDS ON LEGAL AID

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Abstract

This thesis focuses on assessing whether criminal legal aid in the Indonesian penal procedural code (the Code) and the Indonesian Constitutional Court (CCI) judgments on legal aid are compatible with the international standards on legal aid. The Code says that the court-appointed lawyer can only be granted to the most serious crime. Moreover, the Code does not ensure effective legal aid representation and adequate communication between a counsel and a defendant. The CCI says that the state has obligation to fulfill right to legal aid of a defendant who does not have sufficient means to pay for an attorney.

To analyze leading the European Court of Human Rights (ECtHR) and Human Rights Committee (HRC) jurisprudences on legal aid it is demonstrated that the state must ensure effective legal aid representation as well as competent court-appointed lawyer. Furthermore, both the ECtHR and HRC ascertain that the state has obligation to grant a legal aid representation to the defendant if she or he does not have sufficient means to pay for an attorney where the interests of justice so require.

The Code is incompatible with the ECtHR and HRC jurisprudences because the Code does not ensure effective legal aid representation as well as proper confidential communication between the defendant and his or her attorney. Moreover, the Code is incompatible with the ECtHR jurisprudence because article 56 paragraph 1 of Code says that a legal aid representation cannot be granted to the least serious crime. However, the Code is compatible with the HRC jurisprudence because the HRC says explicitly that a legal aid representation can be granted to the most serious crime only.

The CCI's judgments are compatible with the ECtHR and HRC jurisprudence because the CCI's judgments obligate explicitly that the state must ensure effective legal aid representation as well as proper communication between the defendant and his or her attorney. Furthermore, the CCI's judgments are compatible with the ECtHR jurisprudence when the CCI says that a legal aid representation can also be granted to the least serious crime because it is a constitutional right. However, the CCI's judgment is incompatible with the HRC jurisprudence where the HRC says that a legal aid representation can be granted to the most serious crime only.

Reforming the Indonesian Criminal Legal Aid According To International Standards on Legal Aid

Introduction

Indonesia is a newly democratic country where human rights and rule of law must be protected, respected and fulfilled. As Roger Smith, who is a prominent legal aid expert in the United Kingdom (UK), says that legal aid, which is one of access to justice elements, is also part of rule of law.¹ Furthermore, right to legal aid is recognized in international human rights instruments, such as article (art.) 14 paragraph 3.d of the International Covenant on Civil and Political Rights (ICCPR) and art. 6 paragraph 3.c of the European Convention on Human Rights (ECHR). The government of Indonesia (GOI) is a party to the ICCPR since it has been ratified and incorporated into a domestic law in 2005.

There are a number of legal aid seekers in the city of Jakarta of Indonesia. The Jakarta Legal Aid Office (LBH Jakarta) claimed that there were 10.015 legal aid seekers who came to the office in 2006 because they had either criminal or civil cases². Furthermore, those legal aid seekers also need adequate legal representation in order to ensure they can enjoy right to legal aid properly.

An indigent criminal defendant, who live either in rural or urban area of Indonesia, has difficulties having access to an effective legal aid representation because the existing criminal legal aid provision is inadequate to ensure state obligation to provide the court-appointed lawyer and effective legal aid representation so that why the defendant's right to legal aid and state

¹ Roger Smith, Justice Redressing The Balance 4-6 (1997)

² The Jakarta Legal Aid Office, The 2006 Annual Report 1 (2006)

obligations must be ensured by proper criminal legal aid provision. The problem of an indigent criminal defendant, who lacks of access to effective legal aid representation and competent attorney, will be elaborated in chapter one.

There is a mandatory defense provision based on narrow category of cases with vague standards in Central and Eastern Europe countries, but not on the financial status of the defendant.³ This condition is similar in Indonesia where [art. 56 paragraph 1 of the Indonesian Criminal Code merely grants a free legal representation to an indigent criminal defendant who is being charged with the most serious crime such as death penalty or crimes are charged with five years' imprisonment or more]. Thus, an indigent criminal defendant, who is being charged with the least serious crime, has lack of free legal representation.

International standards on legal aid require the state parties to provide free legal assistance to an indigent criminal defendant. The European Convention on Human Rights (ECHR) requires legal assistance to the defendant who meets the following requirements; the defendant does not have sufficient means to pay for an attorney, and the interests of justice so require. In addition, the ECHR says that the meaning of the interests of justice is whether the defendant's liberty is at stake, legal and factual complexity of the case, and the ability of the defendant to defend herself or himself.⁴

We can also find the state obligation on legal aid according to the United Nations Human Rights Committee (HRC) jurisprudence. The HRC ascertains that free legal aid must be made available

³ Edwin Rekosh et al, *Access To Justice : Legal Aid the Underrepresented*, in Public Interest Law Institute (PILI) et al, *Access To Justice In Central & Eastern Europe : Source Book 9* (2003)

⁴ *Id* at 12

if a defendant was charged with a capital punishment. This applies not only to the trial and relevant appeals, but also to the preliminary hearings relating to the case (Conroy Levy v. Jamaica, CCPR/C/35/D/223/1987, Robinson LaVende v. Trinidad & Tobago, CCPR/C/61/D/554/1993 (1997), Wright and Harvey v. Jamaica, CCPR/C/55/D/459/1991)⁵

There are also the state obligations on legal aid according to the Constitutional Court of Indonesia (CCI) jurisprudence. The CCI held two judgments in relation to legal aid in Indonesia where in the case-law of Tongat & others v. Indonesia the CCI says that the state must fulfill right to legal aid of an indigent criminal defendant who does not have sufficient means to pay for a lawyer.⁶ On the other hand the CCI looks at the financial status of a defendant to determine whether a defendant can be granted free legal representation, but not on the interests of justice. Subsequently in the case-law of the Indonesian Human Rights and Lawyer Association (APHI) & others v. Indonesia, the CCI says explicitly that there must be a competent attorney to represent an indigent criminal defendant before the court.⁷ The jurisprudences affirm the state obligation to ensure an effective legal aid representation.

The aim of this thesis is to assess whether legal aid provisions in the Code and the CCI judgments on legal aid are compatible with the international standards on legal aid. In addition, a particular attention will focus on whether the state obligation of Indonesia in providing the court-appointed

⁵ Open Society Justice Initiative (OSJI) & Public Interest Law Institute (PILI), International Standards On Legal Aid : Relevant Text And Summaries Of Documents 5 (2006)

⁶ Tongat & Others v Indonesia No.066/PUU-II/2004, *available at* www.mahkamahkonstitusi.go.id/putusan_sidang.php?download=59&file=putusanNo066PUU2004rev91204.pdf (last visited in March 2007)

⁷ The A PHI v Indonesia No.19/PUU-I/2003, *available at* www.mahkamahkonsitusi.go.id/putusan_sidang.php?download=56&file=putusanNo61PUUII2004.pdf (last visited in March 2007)

attorney to an indigent criminal defendant is compatible with the international standards on legal aid.

The meaning of international standards on legal aid in this thesis is leading the ECtHR and HRC jurisprudences on legal aid. Those jurisprudences will have proper explanation on the general principles of legal aid including the state obligation. Furthermore, this thesis will analyze the ECtHR and HRC jurisprudences on the general principles of legal aid. Those the principles will be applied to the Code and the CCI's judgments in order to assess whether they are compatible with the international standards on legal aid.

There are four chapters in this thesis. In chapter one, the problems of criminal legal aid in Indonesia will be identified by analyzing the weaknesses of the existing criminal legal aid provisions, the obstacles of an indigent criminal defendant access to legal aid, the work of domestic and international legal non-governmental organizations (NGO's) on legal aid, the findings of donor and a state commission on criminal legal aid problems.

Chapter two will discuss leading international jurisprudences on legal aid, such as the European Court Of Human Rights (ECtHR) and the United Nations Human Rights Committee (the HRC) jurisprudences. Leading international jurisprudences on legal aid, which have an adequate explanation on state obligation, will be selected.

Chapter three will analyze fact, legal issue and holding of the jurisprudences in order to look for general principles on legal aid. Subsequently, these general principles on legal aid will be applied

to the CCI judgments and the Code in order to assess whether they are compatible with the international standards on legal aid.

Finally chapter four will try to make the conclusion of assessments of the Code and the CCI judgments according to international standards on legal aid. Moreover, in the future this thesis will contribute to the reform of the Code and the CCI's judgments on legal aid which must be compatible with the international standards on legal aid.

Chapter 1

Access to Justice in Indonesia

The following points will be elaborated within this chapter ; the first is the definition and scope of legal aid, the existing penal procedural code (the Code) that has legal aid provisions or what conditions legal aid right can be granted according to the criminal legal aid law; the second is the findings of a state commission, domestic and international Non-Governmental Organizations (NGOs), which work either to provide a legal aid representation or conduct a research on the Indonesian legal aid policy, have obstacles or problems ; the third is how the Constitutional Court held access to justice problems in Indonesia.

1. The definition and scope of legal aid in Indonesia

This section will elaborate the definition and scope of legal aid in Indonesia. We, in Indonesia, do not have precisely the definition of legal aid. Several scholars and practicing legal aid lawyers ,however , tried to define the meaning and scope of legal aid in accordance with their experiences and academic perspective. The concept of access to justice must be defined broadly that is not only of how the unrepresented must have a right to legal aid before the court, but also is concerned with the whole range of mechanisms to combat the disabling effects of sources of social exclusion such as racism, poverty, educational impoverishment and gender. ⁸

Legal aid has been recognized in Indonesia since the Christians came to Indonesia in the fifteenth-century. But actually for the first time legal aid was introduced in article (art.) 250 of the

⁸ Smith, *supra* note 1, at 9

1918 Penal Procedural Code (*Het Herziene Indische Reglement (HIR)*). Legal aid is granted merely and limited to those who were charged with the death penalty.⁹ We, in Indonesia, had the 1918 Penal Procedural Code that was changed with a new Criminal Procedural Code, 8 (K.U.H.A.P) (1981) subsequently.

It means that historically legal aid is granted to those who are charged with the most serious crimes. Legal aid cannot be granted to those who are convicted or charged with the least serious crimes according to the 1918 Penal Procedural Code or on the other hand, the scope of legal aid cannot also be granted to those who have a civil or administrative case before the court.

After the independence of Indonesia in 1945 there were three constitutions which were the 1945 Constitution, the Constitution of the Indonesian Federation and the 1950 Constitution. The 1950 Constitution was applied in 1950 and then changed subsequently by the Constitution of the Indonesian Federation. The Constitution of the Indonesian Federation ruled from 1950 to 1959, and then backed to the 1945 Constitution. The 1945 Constitution was amended later four times from 1999 to 2002.

Actually right to legal aid was a constitutional right according to art. 7 paragraph 4 of the Constitution of the Indonesian Federation. The article says explicitly that every person has legal aid right before the court. But it does not mention whether legal aid can be granted in pre-trial detention as well.

⁹ The Ideas Of Legal Aid : Toward Structural Legal Aid 8 (Abdul Hakim Garuda Nusantara et al. eds., 1981)

Finally, the Indonesian Parliament and the Government of Indonesia (GOI) enacted a Criminal Procedure Code, 8 K.U.H.A.P (1981). The Code changed the 1918 Penal Procedural Code. The Code also introduced, amongst other criminal justice and fundamental human rights principles, a legal aid provision in a criminal case. A court-appointed attorney, who is being charged with the most serious crimes or crimes of minimum imprisonment are more than five years, can be granted to an indigent criminal defendant according to art. 56 paragraph 1 of the Code. But if an indigent criminal defendant is charged with the least serious crime or crimes of minimum imprisonment are less than five years so that she or he does not have the court-appointed attorney. Therefore, art. 56 paragraph 1 of the Code entails the possibility of absence of legal aid representation to an indigent criminal defendant who is charged with a crime of minimum imprisonment is less than five years or the least serious crime.

There is also an existing provision on criminal legal aid implementation, the Indonesian Ministry of Judiciary decree No. 02.UM.08.09 1980 and subsequently was revised by the Indonesian Ministry of Judiciary No. 01.02.08 1981, affirms explicitly that the court-appointed attorney can only be granted to an indigent criminal defendants who are charged with the most serious crimes, such as criminal offences are charged with five years' imprisonment or more, or the most serious crimes such as life sentence and the death penalty. However, the decree constitutes potential legal aid representation to an indigent criminal defendant, who is being charged with the least serious crime, if there is a public interest. Unfortunately this provision does not explain the criteria of public interest so that there is vague meaning of public interests within the decree.

There are a number of legal aid provisions to regulate and to define the scope of legal aid in Indonesia. Those legal aid provisions are the following:

1. Art. 22 of the Advocate Law 18 (2003) requires lawyers to provide legal aid to those who cannot sufficient means to pay for a lawyer. The scope of legal aid in this provision is both in criminal and civil cases. But there is a weakness of the provision that is not easy to implement the provision because in fact there are a lot of indigent criminal defendants who cannot have access to lawyers or the Bar Association in particular to those who live in rural area where there are few competent lawyers;
2. The Human Rights Act 39 (1999) also tries to stipulate the scope of legal aid in relation to human rights and its limitation. The act says that everyone is entitled right to legal aid since the accused is interrogated in the police station till proved guilty by an impartial and independent tribunal according to art. 18 paragraph 4 of the Act. But art. 18 paragraph 4 of the Act limits the scope of legal aid that can only be granted in criminal cases. Furthermore, legal aid right is subject to limitation. Such limitation must be prescribed by the law, and must meet one of the legitimate interests which are protection of freedoms and rights of other, public interest, and nation interest ;
3. Art. 37 of the Judicial Power Act, recognizes every person has legal aid right. The scope of legal aid is either in criminal or civil cases. Legal aid right can also be applied in pre-trial detention. But there is no explanation of the state responsibility on legal aid. The act says that there must be a particular legal aid act to regulate legal aid specifically;

4. The GOI is a party to the International Covenant on Civil and Political Rights (ICCPR) that has been ratified in 2005 through the Act 12 (2005). Art. 14 paragraph 3 d of the ICCPR stipulates that everyone charged with a criminal offence shall be entitled the following minimum guarantees, in full equality :...d. to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it. What constitute and condition legal aid representation can be granted according to the ICCPR. This issue will be discussed in chapter two of this thesis.

Several Indonesian scholars and prominent legal practitioners, such as T. Mulya Lubis, Adnan Buyung Nasution , try to define legal aid terminology. Legal aid defined narrowly to be linked with people who are insufficient means to pay lawyers and must be distinguished from the notion of legal assistance. Legal assistance is defined broadly the responsibility of lawyers to provide a legal service to those who does not have sufficient means to pay lawyers, but also to those who have sufficient means to pay lawyer¹⁰.

There is also a legal practitioner, Abdul Hakim Garuda Nusantara, sees that legal aid in Indonesia should be distinguished into two concepts. These distinctions are based on the

¹⁰ T. Mulya Lubis, *Legal Aid And Structural Poverty* 2-3 (1996)

objectives, nature and approach of legal aid program for an indigent criminal defendant.¹¹ Two concepts of legal aid are the following;

1. The Traditional Concept of Legal Aid ;

A legal aid representation is granted to an indigent criminal defendant individually. The nature of this legal aid concept is passive, having a legal-formal approach that means to view the legal problem of an indigent criminal defendant according to legal perspective only. Thus, all activities of this concept are merely to provide legal service before the court or in pre-trial detention. The objective is to seek justice in accordance with law. The charity-based is a basic principle. This type applied for the first time in 1940's when there was a law school in Jakarta¹²;

2. The Constitutional Concept Of Legal Aid

The objectives of this concept are more broader than the traditional concept. Its objectives are not only to represent an indigent criminal defendant before the court, but also to make the awareness of the defendant's rights under the national constitution and human rights law to ensure the rule of law. The nature of this concept is active where a legal aid representation can be granted by the state not only individually, but also collectively. The use of approach is legal-formal and non-legal, such as lobbying to decision makers, using mediation between parties to solve dispute and making a public opinion.

¹¹ Abdul Hakim Garuda Nusantara, *Legal-Politics In Indonesia* 110-112 (1988)

¹² At the time , the Dutch government established the first law school in Indonesia , we call the Hoogerecht school in the Dutch language. The law school had a legal clinic. Now it is a law school of University of Indonesia.

However, the development of those legal aid concepts in Indonesia has been criticized by other scholars. Social science scholars view the constitutional concept of legal aid cannot solve the basic problem of indigent criminal defendant. Furthermore, they see that the constitutional concept of legal aid is based on the middle class's view to social problems in Indonesia. The awareness of the constitutional rights of an indigent criminal defendant cannot change their social condition unless there must be a change on a social relation.¹³

Thus, the third concept of legal aid was developed, we in Indonesia call "structural legal aid". It means that the objectives of this concept are to grant a legal aid service to indigent criminal defendants individually and collectively, to broad a legal aid service not only in an urban area, but also in a rural area. The activities are also more broader than previous concepts. It is not only to represent an indigent criminal defendant before the court, but also to educate the defendant, who lives both in a rural and urban area, on human rights, to campaign human rights violations which are being suffered.¹⁴

Interestingly Muhammad Mustofa sees that the concept of structural legal aid can be applied to the integration process of former prisoners within the community where there is a social prejudice, accusing former prisoners cannot be accepted within the community because they will commit crime again. The activities of structural legal aid would help the integration of former prisoners within the community. The group of legal aid lawyers can educate the community on the prisoner's integration is better than they live in a prison.¹⁵

¹³ Nusantara, *supra* note 9, at 113

¹⁴ Adnan Buyung Nasution, Legal Aid In Indonesia 126-127 (1981)

¹⁵ Mustofa, *supra* note 9, at 128

Critically the structural legal aid is not easy to be done because there must have adequate resources in favor of all activities. A number of qualified lawyers, who have well knowledge on human rights and skill on mediation and paralegal education, are requirement to do the structural legal aid. Furthermore it is not easy to find the qualified lawyers in Indonesia where there are few qualified lawyer who understand and have proper human rights knowledge.

It can be concluded obviously that a legal aid is defined broadly. It can be said that legal aid covers a legal aid representation both before the court and out of the court where an attorney can represent an indigence in mediation in order to settle dispute, to educate the human rights and conduct the paralegal program to an indigent criminal defendant who lives in a rural or urban area in order to make a legal awareness on his or her rights. A legal aid representation is provided to an indigent criminal defendant who does not have means to pay for an attorney sufficiently, but it is limited to indigent criminal defendant who is being charged with the most serious crimes according to art. 56 paragraph 1 of the Code merely. The scope of legal aid service is defined broadly. It is not only in a criminal case, but also in a civil and administrative case.

2. The Finding of A State Commission, Domestic And International Non-Governmental Organizations (NGOs) And Donor Organization On Legal Aid Problems

This section will identify what problems are being faced by an indigent criminal defendant, and NGOs in relation to right to legal aid in Indonesia. The aim of this section is to make the reader to understand legal aid problems in Indonesia.

2.1. The Role Of Domestic NGOs

The following NGOs are the Indonesian Society for Court Monitoring (MAPPI), The Indonesian Legal Aid Foundation (YLBHI), The Indonesian Legal Aid and Human Rights Association (PBHI), The Women Lawyer Association for Gender Justice (the LBH APIK). The former is a research organization and others are active legal aid organizations in Indonesia.

The Indonesia Community for Court Monitoring (MAPPI) is a NGO in Indonesia which focuses on the court monitoring. The MAPPI conducted a research in 2003 in order to evaluate whether an indigent criminal defendant who was charged with the most serious crime has been granted the court-appointed attorney properly. [As a result of the research showed the following point that although art. 56 paragraph 1 of the Code recognizes the court-appointed attorney to those who charged with the most serious crimes. But in practice there were a number of indigent criminal defendants who met the requirements of art. 56 paragraph 1 of the Code did not have the court-appointed lawyer before Jakarta and Cibinong District Courts].¹⁶

The Indonesian Legal Aid Foundation (YLBHI), which is an Indonesian leading legal aid organization, has fifteen branches in Indonesia. There are two offices of LBH in Jakarta and Semarang, the former is so-called LBH Jakarta and the latter is so-called LBH Semarang, which have published an annual report. The 2005 report of the LBH Semarang, which is the capital of the Central Java province, shows the following cases¹⁷:

¹⁶ The Indonesian Community For Court Monitoring (MAPPI), *Legal Aid Research In 2003*, available at www.pemantauperadilan.com/detil.php?id=184&type=kolom (last visited in February 2007)

¹⁷ The LBH office in Semarang Central of Java Province Indonesia, the 2005 annual report 19 (2005)

Table.1 the 2005 LBH Semarang Report

Type of case	A Number Of Cases
Civil	32 (26.98 %)
Criminal	30 (23.80 %)
Labor	17 (9.25 %)
Marriage	14 (9.52 %)
Housing	10 (7.93 %)
Land	9 (7.14 %)
Migrant Workers	3 (2.48 %)
Domestic Violence	3 (1.58 %)
Women rights	3 (2.38)
Consumer protection	2 (1.58)
Education	1 (0.79)

There are thirty criminal cases according to the report. Unfortunately there is no record of whether right to legal aid representation has been violated. However, the LBH Office in Semarang had difficulty of access to the information of court proceedings where the court does not inform the court proceedings to the defendant properly.¹⁸

¹⁸ *Id.*

The LBH Jakarta is the oldest branch amongst others that founded in 1971. The 2005 LBH Jakarta report has the following¹⁹:

Table 2 the 2005 Jakarta Legal Aid Office Report

Type of case	A Number of Cases
Labor	318
Civil And Political Rights	261
City and Urban	81
Women And Children	176
Private And Criminal	298

The LBH office in Jakarta, which is the capital of Indonesia, is more unique than in Semarang because private and criminal cases in Jakarta were more predominant than in Semarang. Furthermore, labor case in Jakarta is also more predominant than in Semarang because Jakarta is an industry and service city where there is a low standard of minimum wage for labor. The LBH office in Jakarta names civil and political right for cases such as violation of freedom of expression, religious freedom and fair trial rights. Judicial corruption is the most problem that why it is difficult to have an independency of judiciary in Indonesia. However, the report does not mention whether right to legal aid representation has been violated.

¹⁹ The LBH Office In Jakarta, The 2005 Annual Report 3 (2005)

The 2006 annual report of the Indonesian Legal Aid Foundation (YLBHI), which is the head office of LBH, focuses on the following concerns; the first is the assessing of the fair trial guarantees that is still far from what people hope, the second is there is no the human rights defender protection properly, the third is access to justice of the society is closed by the laws that the state does not fulfill the indigent criminal defendant's right, the fourth is the fulfillment of the economic, social and cultural rights (ESCR) is not supported by the implementation of laws and its policies.²⁰

The PBHI, which a legal aid organization, provides a legal aid service to those who are victims of human rights violation either in criminal or civil cases. The PBHI's activities are to campaign and lobby human rights improvement in Indonesia. The PBHI has mission, vision and objectives to promote, protection and fulfill human rights. The long-term goal is a democratic society where human rights are respected and guaranteed by the state and to end the impunity.²¹

There is also a legal aid office which is the Women Lawyers Association for Gender Justice (LBH APIK) is concerned with a specific issue of the women rights such as to represent the victims of domestic violence, domestic workers either before the court or at the police office. There were only 19 domestic violence cases that have been submitted to the police office according to the 2005 report. Interestingly a fear factor of the victims is a reason why there are few a number of domestic violence cases have been submitted to the police office. This has been

²⁰ The Indonesian Legal Aid Foundation, *The 2006 Annual Report : The Work Of Government To Enforce And Fulfill Human Rights* (2006), available at www.ylbhi.or.id/index.php?cx=3cy=1&op=29 (last visited on May 2007)

²¹ The Indonesian Legal Aid and Human Rights Association (PBHI), *the PBHI's vision and mission*, available at www.pbhi.or.id/profil.php (last visited on February 2007)

occurred because there was the weakness of law enforcement made uncertain time and took long time to finish the cases. Furthermore, the victims of domestic violence are more likely to use civil proceedings than to submit a complaint to the police station. It reflects that the criminal procedure code does not create the law enforcement guarantee.²²

There is not only the role of NGO's which provides legal aid, but also the role of university's legal clinic. Many the state universities in Indonesia have legal clinic. The main function of the university's legal clinic is to provide a legal assistance to an indigent criminal defendant. Then, the second is a place where law students can intern. The Indonesian Islamic University of Law School in Yogyakarta Indonesia has a legal clinic where students can take an internship program and provide free legal representation to an indigent criminal defendant.²³

We can find the real problem in legal aid when access to a legal representation was difficult during state emergency in the Aceh province. As Imparsial, which is the Indonesian human rights organization, and YLBHI have published the report of the situation during the civil war in the Aceh Province. Furthermore, the report said explicitly that access to counsel was limited from 2000 to 2005 in the Aceh province where the GOI applied the martial law through the presidential decree 28 (2003). It reported that the martial law applied in the province where the court was not independent and impartial because of lack of access to counsel and government interference with the court proceedings. The security apparatus limited the defendant's access to the counsel in order to communicate with the defendant. The legal aid organization, the Acehese Legal Aid Office, was also limited to communicate with the suspects who were being

²² The LBH APIK , *The 2005 Annual Report* (2005), available at www.lbhapik.or.id/catahu%202006.htm (last visited in February 2007)

²³ The Islamic University Of Indonesia Law School, *Profile Of Legal Clinic* 9-31 (2006)

detained or convicted with an accusation of being involved in the GAM.²⁴ The police office also denied the right to counsel of the suspects even if they asked an access to communicate with the counsel of their choice²⁵

It can be concluded that the NGOs' roles, which provide a legal aid service, are obviously important in Indonesia where there is lack of the state obligations on legal aid in providing the court-appointed lawyer and effective legal aid representation to the defendant who does not have sufficient means to pay for an attorney and where the interests of justice so require. On the other hands lawyer himself has limited access to communicate with the defendant either during pre-trial detention or before the court that why even if there is a court-appointed lawyer, but such lawyer cannot provide an effective legal aid representation to an indigent criminal defendant.

2.2 The Role Of State Commission

The National Law Commission is a state body, but it must perform independently. The main function of the Commission is to conduct a research on legal policy in Indonesia and to submit those recommendations as the results of its study to the Parliament and Government. In response of the law enforcement problem, the National Law Commission of Indonesia, so-called KHN, has conducted a research in 2002 in order to gain the objective of whether the law enforcement official enforced law adequately.

²⁴ The Indonesian Human Rights Monitor (Imparsial), *State Reconstruction Through Aceh's Martial Law*, available at www.imparsial.org/index.php?year=2004&month=action=LIST (last visited in February 2007)

²⁵ The Indonesian Legal Aid Foundation, *The Report No.3* (2003), available at www.ylbhi.or.id/index.php?cx=3&cy=1&cy=1&op=3 (last visited in February 2007)

The study shows that the law enforcement official had weaknesses because of the way and conduct in interpreting their duty and powers. Lack of access to legal information entailed the violation of right to legal aid. As a result, the interrogation process is frequently distorted as most suspects are ignorant of the law. Even the absence of counsel also affected that during the interrogation process at the police station, various other abuses frequently occurred, including questioning at irregular hours, lack of a clear interrogation schedule, intimidation, the failure to accord information provided the respect it is due²⁶

It can be concluded according to the research that an indigent criminal defendant has lack of access to effective legal representation because of lack of information and awareness of legal aid. The Indonesian law apparatus was insufficiently to inform the defendant on legal aid. Thus, the absence of an attorney can entail ill-treatment during pre-trial detention at police office.

2.3 The International NGOs And International Donor

The World Bank, which is an international donor, has concerned with an access to justice problem in Indonesia. The World Bank sees that there are two problems of the access to justice in Indonesia where there are the lack of knowledge on legal aid and imbalance of bargaining position between the poor people and local authorities. Furthermore, the poor people do not know and understand right to counsel, the court proceedings, administrative and civil law, how to access legal aid. On the other hand, the local authorities manipulate and dominate the legal

²⁶ The Indonesian National Law Commission, Reform Policies (Recommendations) 119-127 (2003)

information practically so that the poor people can not know their right to counsel if they have a problem with criminal, administrative and civil law cases.²⁷

A legal aid problem is paid attention by the International NGO's such as the London-based NGOs the Amnesty International (AI) and Redress. The AI reported explicitly that there were the human rights violations during the 2004 military emergency in the Aceh province, including the arbitrary detention and unfair trials. The AI report on the fair trial rights violation in 2004, including denial access to legal counsel of the first days of detention during military emergency in the Aceh province is the following:

On the mid-July 2004, the authorities claimed to have arrested some 2,200 members of the GAM. Hundreds, and possibly more than one thousand, of those put on trial are accused of membership or support for the GAM and have been charged under Art. 106 and 108 of the Penal Code (KUHP) with "rebellion" which carries up to 20 years' imprisonment or, under some provisions, the death penalty. The military has authority to arrest and detain suspects according to Law 23 (1959) on the State of Emergency. Even they can detain suspect up to seventy days. The Law does not contain of protecting detainees or suspects rights except their arrest shall be carried out by a warrant (art. 32 paragraph 4 of Penal Procedure Code). The extensive, although not exhaustive, protection contained in the Code are interpreted by the military not to apply. For example, lawyers who have attempted to gain access to detainees during the first days of detention have been told that they have no right to see them.²⁸

Furthermore, the AI says that the right to counsel is denied is the following points:

1. The failure to provide competent and effective legal counsel in cases where lawyers are provided by the state;

²⁷ The World Bank, *Revitalization of Legal Aid In Indonesia : A Pilot Project Of Strengthening Community Legal Aid-Based In Indonesia* (2006), available at www.justiceforthepeople.or.id/?lang=id&act=showDetailProgram&id=90ad3f792af7e1c57d330010359e9d3f (last visited on May 2007)

²⁸ The Amnesty International, *Indonesia New Military Operations : Old Patterns Of Human Rights Abuses In Aceh* 19 (2004)

2. The denial proper time and facilities to prepare a defense and of the right to provide to confidential communication with legal counsel;
3. The absence of safeguards during interrogations, including presence of a lawyer. Even the trial of the five of GAM's high profile, they were the negotiators with the GOI in the peace agreement, were denied access to legal counsel during the first seven days of their detention;
4. There were many detainees who did not have access to legal counsel. There were only thirteen human rights lawyers in the province. Consequently, the majority of suspects were defended by the state-appointed lawyers who had no effective and competent defending suspects/defendants. There were reports that some of those lawyers have not accompanied their clients during the interrogation, and that, while they may appear in court, did not actually entail a defense on behalf of the suspects.²⁹

The AI report is concerned with the absence of effective and competent counsel during interrogation at the police station can entail torture and ill-treatment. There are a limited number of adequate attorney to represent an indigent criminal defendant. Interestingly the defendants do not have access to see their own attorney.

A London-based human rights organization, the redress, which is concerned with ill-treatment in Aceh province, published the 2003 report noted that there were difficulties of the torture survivors and their relatives in conflict areas and remote areas, including in the Aceh province, to

²⁹ *Id.* at 20-23

access to justice in order to take a legal action against the perpetrators of human rights violations.³⁰

It can be concluded that there are legal aid problems in Indonesia where right to legal aid can not be protected and respected properly because lacks of the government will, lack of proper legal protection, information and remedy so that why it constitutes directly difficulties to the indigent criminal defendant who has no sufficient means to pay an attorney to access a legal representation. The general legal aid problems are the following points;

1. A law enforcement official can only assign a counsel to represent indigent criminal defendants if they are being charged with the serious crimes like the death penalty according to art. 56 paragraph 1 of the Penal Procedure Code. This article will be assessed in chapter three of this thesis whether this article is compatible with the International Standards On Legal Aid;
2. Lack of indigent criminal defendant's awareness on a legal aid right that is caused by inappropriate information provided by the law enforcement officials. The Code does not mention explicitly the obligation of law enforcement officials to inform right to legal aid to an indigent criminal defendant prior to interrogation in pre-trial detention. This problem will be assessed whether the state has an obligation to inform the defendant on a legal aid right prior to the interrogation according to the International Standards On Legal Aid;
3. There is lack of competent lawyer and effective legal aid because the Code does not guarantees the provision of effective legal aid representation and competent lawyer.

This problem will be assessed in chapter three whether the state has an obligation to

³⁰ Redress, The 2003 Redress 's Torture Report On Indonesia 21 (2003)

assign a competent lawyer and guarantees effective legal aid according to the International Standards On Legal Aid;

4. Lack of confidential communication between an indigent criminal defendant and lawyer where in a certain circumstances, for example in case of national security interest a law enforcement official can intercept the communication according to art. 72 paragraph 2 of the Criminal Procedural Code. In this sense, to what extent a law enforcement official can interfere with confidential communication between a lawyer and indigent criminal defendant according to the International Standards on Legal Aid;
5. A legal representation cannot be granted to an indigent criminal defendant during the state emergency. This problem will be discussed in chapter three whether it is permissible the state can delay a legal aid representation to an indigent criminal defendant during the state emergency.

3. The Constitutional Court Of Indonesia (CCI) Judgments

The CCI, which is a newly established state institution in 2003, is mandated by Art. 24 paragraph 2 and art. 24 paragraph C.1 of the fourth amendment to the 1945 Constitution.

The CCI performs the following functions; the first is to determine the compatibility of the existing laws with the 1945 Constitution and its amendments, the second is to settle a dispute over the result of the presidential and the Member of Parliaments (MPs) elections, the third is to settle a dispute among state institutions, the fourth is to issue the advisory opinion on the request of the House of Representative regarding alleged violation of the President and Vice-President to

the 1945 Constitution and its amendments according to art. 24 paragraph C.1 & 2 of the fourth amendment to 1945 Constitution.

The CCI also receives the submission of an individual or collective complaint regarding to the 1945 Constitution and its amendments violation by asking the Court to determine whether the constitutionality of the existing law alleged is incompatible with the 1945 Constitution and its amendments according to art 51 paragraph 1 of the Constitutional Court Act, No.24 (2003). This opportunity has been used by several applicants who alleged his constitutional rights violated by the state including violation of right to legal aid.

There are few jurisprudences of the CCI in relation to right to legal aid because the CCI itself just established three years ago. In this section, I will try to look for principles on legal aid and then compared to the International Standards on Legal Aid in Chapter three. I will also analyze facts, legal issues and holdings of the jurisprudences in order to gain the general principle on legal aid.

The principles of right to legal aid according to the CCI jurisprudences are the following points:

3.1. Tongat & others v Indonesia

Facts

The petitioners, who are public interests lawyers and law professors at a University Legal Clinic (ULC) in Malang city of the East Java Province in Indonesia, were refused to represent an indigent criminal defendant at the local police office. They submit a complaint on the constitutionality of art. 31 of Advocate Act 18 (2004) to the 1945 Constitution and its amendments to the CCI. The Act forbids explicitly non-license counsel to represent defendants

before the court. Furthermore, the police office says that a lecturer, who works at the UCL, is not part of a lawyer definition according to art.31 of the Advocate Act 18 (2003). But the petitioners maintain that their UCL office has been approved by the Supreme Court so that why the UCL has a legal mandate to represent an indigent criminal defendant before the Court.

The applicants allege that their constitutional rights, right to work and equality before the law are protected by art. 28 D paragraph 1 and 2 of the second amendment to the 1945 Constitution. The applicants ask the CCI to examine the constitutionality of art. 31 Advocate Law, 18 (2003) whether the law is compatible with the 1945 Constitution and its amendments or not.

Legal Issue

Whether art.31 of the Advocate Law 18 (2003) is compatible with the 1945 Constitution and its amendments

Holding

The court examines admissibility and substance of the complaint. Threshold is whether the applicants have standing, the court should check whether applicants have a legal capacity as a person or natural person, and whether there is factual injury or potential injury. If so, then the court goes to the substance of complaint. But if not, then the court hold that the application is inadmissible. In the present case, the Court says that applicants have standing because the local police has refused them to represent an indigent criminal defendant before the court (so-called the actual injury) and have a legal capacity as a person so that the application is admissible.

The CCI says that there is a violation of art. 1 paragraph 3 of the third amendment to the 1945 Constitution regarding the rule of law principle and art. 28 F of the second amendment to the 1945 Constitution. The CCI quoted the British's Court Judgment, *R v Lord of Chancellor ex p Witham* (1998) that access to justice in order to fulfill a fair trial is inherent in the nature of the rule of law, by saying access to justice is a constitutional right that derived from the rule of law principle in art.1 paragraph 3 of the third amendment to the 1945 Constitution. Thus, Right to a legal aid representation is part of fair trial. Furthermore the Court says that the state has obligation to fulfill right to legal aid representation. Art.31 of the Advocate Law 18 (2003) is a restriction of the state obligations where an indigent criminal defendant, who does not have sufficient means to pay an attorney, has a limited access to an attorney. In particular to those who live in a rural or remote area where there are few lawyers who provide free legal aid representation.

In addition the CCI says that every person has right to choose information including right to legal information which is protected by art.28 F of the second amendment to the 1945 Constitution. An indigent criminal defendant needs legal information concerning his or her legal problem. The information is usually provided by the UCL and would be restricted by art. 1 paragraph 1 in conjunction with art. 31 of the Advocate Law 18 (2003). Accordingly, art. 31 of the Advocate 18 (2003) is incompatible with the rule of law principle that is recognized by art. 1 paragraph 3 of the third and art.28 F of the second to the 1945 Constitution.³¹

³¹ Tongat & Others v. Indonesia, *supra* note 6, at 56

This judgment is a landmark because for the first time the Indonesian court uphold access to justice principle. There was rarely the Indonesian jurisprudence, quoting International jurisprudence as a consideration to determine whether there is a violation of constitutional rights.

The CCI says explicitly that if the citizens have insufficient means to pay for a lawyer, the state obligations to fulfill right to legal aid of its citizens. Art. 31 of the Advocate Act limits and even does not open access to a lawyer either to the community who cannot pay counsel or to those who live in a remote area where they do not have sufficient means to pay for an attorney so that they will face difficulty of having an attorney.

The CCI assesses the public interest protection to justify the restriction. The aim of the art. 31 of the Advocate Act No.18/2003 is to protect public interests from any possible fraud carried out by those pretending to be a practicing lawyer. The CCI says that the measure is disproportionate to aim has been pursued. The public interests have been protected by the Penal Code adequately that why art. 31 of the Advocate Act declared as an excessive provision resulting in the prevention or at least narrowing of public access to justice which may turn in close the fulfillment of right to a fair trial³².

We can see in the present case that the CCI applies the proportionality test to examine whether the aim of the act is proportional to the measure being pursued and whether the measure is the least restrictive mean. The CCI says no proportional because the offence has been protected by the Penal Code.

³² *Id.* at 56

Principle 1 Access to justice is a constitutional right that can be derived from the rule of law principle enshrined in art. 1 paragraph 3 of the third amendment to the 1945 Constitution.

Principle 2 The state has an obligation to fulfill right to legal aid representation to an indigent criminal defendant who does not have sufficient means to pay an attorney

3.2. The Indonesian Human Rights Lawyer Association (APHI) & Others v Indonesia

Facts

The petitioners, who are the member of a lawyer organization based on human rights, are concerned with, *inter alia*, the limitation of the age, that is admitted by art.3 paragraph 1 of the Advocate Act 18 (2003). A candidate, who wants to be a lawyer, must have a minimum age which must be more than twenty five years old. The petitioners assert that the limitation is incompatible with art. 28 paragraph 1 d of the second amendment to the 1945 Constitution on equality before the law principle.

Legal issue

Whether art. 28 paragraph 1 of the Advocate Law 18 (2003) is incompatible with the 1945 Constitution and its amendments

Holding

The court unanimously held that the limitation was not a violation of art. 28 paragraph 1 D of the 1945 Constitution and could be justified by art. 28 paragraph 2 J of the 1945 Constitution on

exercising his/her rights every person shall have the duty to accept the restriction prescribed by law for the sole purpose of guaranteeing the recognition and respect the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society. Furthermore the court implicitly says that the limitation can be justified to ensure effective a legal aid that a lawyer must be competent and has some qualifications both in a practical and theoretical skill on the legal matters adequately. Thus, they have to take part in the internship program for certain years before representing an indigent criminal defendant before the court.³³

This jurisprudence emphasizes a competent lawyer to represent an indigent criminal defendant before the court that they must have a minimum standard, such as they have taken an internship program and passed the Bar Association exam. They must have proper practical and theoretical knowledge on legal matter in order to make a proper argument before the court. Those qualifications can directly affect to indigent criminal defendant to be represented in an effective legal aid.

Principle 3 The state must ensure the competent attorney who provides an effective legal representation before the court

³³ The APHI v. Indonesia, *supra* note 7

Chapter 2

The State Obligations on Criminal Legal Aid According To The International Standards On Legal Aid.

In this chapter the state obligations on criminal legal aid will be divided into two groups. The first is the state obligations on legal aid according to the Human Rights Committee (HRC) jurisprudence. The second is the state obligations on legal aid according to the European Court of Human Rights (ECtHR) jurisprudence.

2.1 The HRC Jurisprudence On Right To Counsel

In this section I will elaborate a briefly explained function and status of the HRC according to the International Covenant on Civil and Political Rights (ICCPR) and its optional protocol. The leading HRC jurisprudences on right to counsel will be explained deeply in order to look for several basic principles on legal aid. To analyze facts, legal issues and holdings of the HRC jurisprudences is a method of looking for basic principles on legal aid standard. Those basic principles on legal aid will be applied to assess whether the Indonesian Penal Procedural Code (the Code) including the CCI judgments is compatible with the HRC jurisprudence. The application of the basic principles on legal aid to the Code and the CCI judgments will be discussed in chapter three.

I have chosen eight of ten the HRC jurisprudences on the right to counsel, such as *Earl Pratt & Ivan Morgan v. Jamaica*, *Leopold Buffo Carballa v Uruguay*, *Miguel Millan Sequeira v. Uruguay*,

Dave Marais Jr. v. Madagascar, Sergio Euben Burgos v. Uruguay, Daniel Monguya Mbenge v. Zaire, Owen Brown & Burchell Parish v. Jamaica, and OF v Norway. Two of the HRC jurisprudences are Glinford & Campbell v. Jamaica and Lloyd Grant v Jamaica are excluded because Glinford & Campbell v. Jamaica and Lloyd Grant v Jamaica have the same general principle with Earl Pratt & Ivan Morgan on effective legal aid representation in order to avoid redundant principle.

The HRC jurisprudences have adequate basic general principles of the state obligation on legal aid, such as effective legal aid representation, to inform sufficiently right to legal aid to an indigent criminal defendant, the state shall provide a court-appointed attorney to an indigent criminal defendant so that why those principles will be proper principles to assess the Code and the CCI judgments. Furthermore, the jurisprudences are relevant with legal aid problems in Indonesia as it has been discussed in Chapter one such as whether a legal aid representation must be limited during state emergency.

The HRC was established according to art. 40 paragraph 1 of the ICCPR. There are three functions of the HRC that the first function is a mandatory reporting procedure according to art. 40 of the ICCPR. It means that the state parties to the ICCPR are undertaken to submit a report on the measure they have adopted to give effect to the rights recognized in the ICCPR and on the progress made in the enjoyment of those rights. The HRC makes consideration and study to those reports. Finally the HRC shall transmit its reports, and such general comments as it may consider appropriate, to the state parties. The HRC may also transmit these comments to the economic and social council (ECOSOC). The second function is that there is an inter-state complaint that if

another state does not fulfill its obligation under the ICCPR according to art. 41 and 42 of the ICCPR and art. 4 of the Optional Protocol of the ICCPR. But this inter-state procedure was not invoked since July 27 1990. The third function is that there is an individual complaint is provided to those who are the victim of civil and political rights violation according to art. 5 paragraph 2 of the Optional Protocol to the ICCPR.³⁴

The HRC is not a United Nations (UN) organ, but the HRC is a treaty body which is created by state parties to the ICCPR. Thus, the HRC has an independent status particularly in a decision making. Although the HRC has an independent status, in practice the HRC is not independent because it is financially dependent on the UN, the HRC also submits its annual report to the General Assembly. Even The UN Secretary-General holds an election of the HRC members. The amendment of the ICCPR and its protocol must be submitted to the General Assembly for its approval.³⁵

There were differences of the nature of the HRC as debated among scholars. Some scholars said that the HRC was not a judiciary body. Other scholars said that the HRC had the task to apply the provisions laid down in the ICCPR. Thus, the HRC had to exercise the judgment in order to ensure that the member state is fulfilling their obligations to the ICCPR. But to understand the nature of the HRC must be recognized that its nature may alter in accordance with its exercise of the various functions and roles. It performs and could perform. Accordingly, the nature of the

³⁴ Dominic Mc Goldrick, *The Human Rights Committee : Its Role In The Development Of International Covenant On Civil And Political Rights* 50-51 (1990)

³⁵ *Id.* at 52-53

HRC includes elements of judiciary, quasi-judicial, administrative, investigative, inquisitorial, supervisory and conciliatory functions.³⁶

Art. 5 paragraph 2 of the Optional Protocol to the ICCPR provides an individual complaint. Several individuals, who are a victim of violation of art. 14 paragraph 3 d of the ICCPR on right to legal aid, have submitted their complaint to the HRC. The HRC jurisprudences on right to counsel are the following:

1. Earl Pratt, Ivan Morgan v Jamaica

Facts

The petitioners, who is a Jamaican citizen, is charged with murder. The Jury finds the petitioners guilty of murder at the first instance court in Kingston. The court assigns a lawyer to represent him before the court. The petitioners assert that they have alibi witnesses because at that time the murder happened they were elsewhere. But the first instance court held the case without hearing the alibi witnesses. At the appeal court the petitioners allege, *inter-alia*, that their lawyer poorly defended them. Their lawyer did not decide to close the case without consent of the petitioners and did not call the alibi witnesses before closing the case³⁷

Legal Issue

Whether a lawyer, who is assigned by the state, represents the petitioners before the court ineffectively is a violation of art. 14 paragraph 3 d of the ICCPR.

³⁶ *Id.* at 55

³⁷ Pratt & Morgan v Jamaica No A/44/40 at 222 (1998), available at www1.umn.edu/humanrts/undocs/session44/210-1986.htm (last visited in July 2007)

Holding

The HRC held although persons availing themselves of legal representation provided by the State may often feel they would have been better represented by a counsel of their own choosing, this is not a matter that constitutes a violation of art. 14 paragraph 3 d of the ICCPR.³⁸ The HRC underlines even if the State already assigned a lawyer to represent indigent criminal defendants in the most serious crime such as a capital punishment. It must be ensured by effective legal aid principle. The most important thing is that indigent criminal defendants should be given an opportunity to choose her or his lawyer that she/he predicts to have an effective legal aid representation before the court. In the present case, petitioners did not have an opportunity to choose their lawyer and entailed a violation of art. 14 paragraph 3 d of the ICCPR.

Principle 1: The state obligation is to assign a lawyer in the most serious crime to represent an indigent criminal defendant before the court must be followed and guaranteed by an effective legal aid representation and should be given an opportunity to an indigent criminal defendant to choose their lawyer.

2. Leopoldo Buffo Carballal v Uruguay

Facts

The petitioner, who is a civilian/Uruguayan citizen, is detained incommunicado under the regime of prompt security measure at the military barrack and convicted of political crime. The petitioner asserts that during his detention he was effectively barred any recourse to an access to the outside

³⁸ *Id.* at 13.2

of the world while he kept incommunicado detention. But he does not claim explicitly that there is no access to the lawyer when he was held incommunicado detention.³⁹

Legal issue

Whether the condition of detention which barred effectively any recourse to an access to the outside of the world entails a violation of art. 14 paragraph 3 d of the ICCPR

Holding

Although the petitioner does not allege any violation of art. 14 paragraph 3 d of the ICCPR, the HRC finds, *inter alia*, that there is a violation of art. 14 paragraph 3 d of the ICCPR where the condition of detention barred effectively any recourse from an access to legal aid representation.⁴⁰ Though an indigent criminal defendant is detained incommunicado detention, access to legal aid representation must be ensured. It does not necessarily mean that incommunicado can be justified to limit access of the defendant to a legal representation.

Principle 2 The state shall guarantee an access of an indigent criminal defendant to a legal aid representation in any condition of detention

3. Miguel Angel Millan Sequeira v Uruguay

Facts

The petitioner, who is a Uruguayan nationality, is detained under the regime of detention so-called “prompt security measure” for a political crime. The petitioner claims that he has no an

³⁹ Leopoldo Buffo Carballal v Uruguay No.A/36/40 at 125 (1981), available at www.law.wits.ac.za/humanrts/undocs/session36/8-33.htm (last visited in July 2007)

⁴⁰ *Id.* at 13

access to a legal aid representation while he was kept in detention since the right to defense is not recognized by the authorities until a prosecution has been initiated. The petitioner alleges, *inter alia*, such measure violates art. 14 paragraph 3 d of the ICCPR.⁴¹

Legal issue

Whether art. 14 paragraph 3 d of the ICCPR can also be applied to pre-trial detention

Holding

The HRC finds, *inter alia*, a violation of art. 14 paragraph 3 d of the ICCPR when right to legal aid which is part of right to defense is not recognized by the authorities until a prosecution has been initiated.⁴² The HRC decides that art. 14 paragraph 3 d of the ICCPR can be applied to pre-trial detention irrespective of whether a prosecution has been initiated or not. The state shall provide a legal aid representation to an indigent criminal defendant in pre-trial detention. Whether prosecution against the defendant has been initiated or not cannot be justified to delay a legal representation to an indigent criminal defendant.

Principle 3 The state shall provide a legal aid representation to an indigent criminal defendant in pre-trial detention

4. Dave Marais, Jr v. Madagascar

Facts

⁴¹ Miguel Angel Millan Sequeira v. Uruguay No.A/35/40 at 127 (1980), *available at* the Minnesota University Human Rights Library www1.umn.edu/humanrts/undocs/session35/R1-6.htm (last visited in July 2007)

⁴² *Id.* at 16

Marais Jr., who is the son of the petitioners, is tried and sentenced five years for overflying the country without authority. The petitioners on behalf of their son alleges that they cannot communicate with their son. Their son cannot also communicate with his attorney. Furthermore, there is also poor prison condition where he has been held incommunicado detention and has inadequate facilities. He is forbidden to receive or send a letter as well. At the same time, his first attorney was refused re-entry into Madagascar. From December 1979 to May 1981, he was unable to communicate with his second attorney and to prepare his defense except for two days during the trial itself. His attorney was arrested and detained in a political police prison and expelled from Madagascar so that his attorney cannot defend him effectively.⁴³

Legal Issue

Whether the Malagasy government interference with petitioners' son's right to legal aid representation to prepare his defense and communicate with his attorney violates art. 14 paragraph 3 d of the ICCPR

Holding

The HRC finds, *inter alia*, violations of art. 14 paragraph 3 b and d of the ICCPR because he has been denied an adequate opportunity to communicate with his attorney. His right to a legal aid representation and prepare his defense have been interfered with by the Malagasy authorities.⁴⁴ Right to a legal aid representation shall be linked with right to an adequate opportunity to communicate with attorney and to prepare the defense in order to ensure an effective legal aid

⁴³ Dave Marais Jr. v Madagascar No.A/38/40 at 141 (1983) paragraph 1-17.3, *available at* the University of Minnesota the Human Rights Library www.law.wits.ac.za/humanrts/undocs/session38/49-1979.htm (last visited in July 2007)

⁴⁴ *Id.* at 19

representation. The state is to refrain from interference with right to a legal aid representation, for example the state is forbidden to expel the attorney just because the attorney defends the defendant.

Principle 4 The state has an obligation that an indigent criminal defendant has an adequate opportunity to communicate with his lawyer and prepare his defense without state's interference

5. Sergio Euben Burgos v Uruguay

Facts

The petitioner's husband , Sergio Euben Burgos, is kidnapped in Buenos Aires by the Uruguayan member of security and intelligence forces, traveled to Uruguay secretly where he was detained incommunicado for three months. He was subject to torture, inhuman and degrading treatment. Four witnesses assert that her husband has been forced to choose a military attorney provided for him where her husband has no access to a civilian lawyer, who may provide a genuine and impartial defense.⁴⁵

Legal Issue

Whether forcing petitioner's husband to choose a military lawyer, which is against his will, is a violation of art. 14 paragraph 3 d of the ICCPR.

⁴⁵ Sergio Euben Lopez Burgos v. Uruguay No.A/36/40 at 176 (1981), *available* at www.law.witsac.za/humanrts/undocs/session36/12-52.htm (last visited in July 2007)

Holding

The HRC finds, *inter alia*, a violation of art. 14 paragraph 3 d of the ICCPR because petitioner's husband is forced to accept the military lawyer. Furthermore, the HRC says that the state must ensure that defendant has a right to choose their own counsel providing a genuine and impartial defense in order to enjoy a proper safeguard of fair trial. In the present case, the violation of right did not happened in Uruguay, but it happened in Argentina. The HRC held explicitly that although the violation of the right happened abroad, reference in art.1 of the Optional Protocol is not the place where the violation occurred, but to relationship the individual and the State in relation to a violation of any of the rights set forth in the ICCPR, wherever they occurred.⁴⁶

The HRC, which invokes art. 5 paragraph 1 of the ICCPR to justify its argument that the violation has been occurred abroad, has been criticized by Christian Tomuschat. He, who is also member of the HRC, disagrees with invoking art. 5 paragraph 1 of the ICCPR which amounts a misleading conclusion. He looks at the intention of the drafters, saying the covenant is never to grant the States unfettered discretionary power to carry out willful and deliberate attack against the freedom to a personal integrity of citizens living abroad. Thus, the violations took place still abroad, but it comes to purview of the ICCPR.⁴⁷

Principle 5 the state has an obligation to ensure that an indigent criminal defendant chooses their own counsel without interference and not to be forced to agree with the counsel assigned to him or her. The state must ensure the competency of the counsel providing a genuine and impartial defense to protect the safeguard of a fair trial.

⁴⁶ *Id.* at 12.2-12.3

⁴⁷ *Id.* at dissenting opinion

6. Daniel Monguya Mbenge v Zaire⁴⁸

Facts

The petitioner, who was a Governor in one state in Zaire, has been tried *in absentia* and sentenced the death penalty for treason and conspiracy by the Zairian court. Actually he has never been informed about the trial *in absentia*, although he knew the trial through a press report after the trials have been taken place. The petitioner alleges, *inter alia*, that the Zairian authority violates his right to legal aid representation according to art. 14 paragraph 3 of the ICCPR⁴⁹

Legal Issue

Whether the state shall inform right to a legal representation before a trial *in absentia* has been taken place

Holding

The HRC finds a violation of art.3 paragraph 3 of the ICCPR. A trial *in absentia* means necessary in the particular circumstance where the accused has been informed duly about time and place of such trial and then the accused declines to exercise his right to defense including right to present. Accordingly, a trial *in absentia* is permissible in the interest of proper administration of justice according to the HRC unless the court has not informed sufficiently proceedings against the defendant who does not have an opportunity to exercise right to defense including right to a legal aid representation protected by art. 14 paragraph 3 of the ICCPR.⁵⁰

⁴⁸ Daniel Monguya Mbenge v Zaire No. A/38/40 at 134 (1983), *available at* the University of Minnesota Human Rights Library www.law.wits.ac.za/humanrts/undocs/session38/16-1977.htm

⁴⁹ *Id.* at 1-2.2

⁵⁰ *Id.* at 14.1

Principle 6 The state shall inform sufficiently rights right to a legal representation before a trial *in absentia* has taken place

7. Owen Brown & Burchell Parish v. Jamaica⁵¹

Facts

The petitioners ,who are a Jamaican citizen, has been convicted of murder and sentenced to death by a Jamaican court. They claim that their legal aid lawyers represent them poorly at the first court hearing such as lack of preparation to defense. The petitioner, Owen Brown, just saw his legal aid lawyer for five or ten minutes when he attended the first proceeding. He also did not see his legal aid lawyers till after the appeal hearing because he did not realize who were his legal aid lawyers. The other petitioner, Burchell Parish, never sees and just hears his legal aid lawyers at the appeal hearing. The state has assigned legal aid lawyers to those petitioners.⁵²

Legal issue

Whether the state can be held responsible for lack of preparation and alleged errors made by counsel

Holding

The HRC held that the state could not be held responsible for lack of preparation and alleged errors made by counsel unless it has denied to the petitioners and their counsel time to prepare the defense or it should have been manifest to the court that the counsel's conduct was incompatible

⁵¹Owen Brown & Burchell Parish v Jamaica Case Number : CCPR/C/66/665/1995, available at www.unhchr.ch/tbs/doc/nsf (last visited in July 2007)

⁵² *Id.* at 1-1.3.1

with the interest of justice. According to the facts the HRC cannot find in the court's file that the Jamaican government denied the petitioners and their counsel opportunities to prepare the trial or it should have been manifest to the court that the defense team was inadequate prepared. Legal aid lawyers were assigned in due time for the trial. Furthermore, neither the counsel nor petitioners were actively to adjourn the trial. The HRC said that the new counsel argued grounds of appeal on the behalf of the petitioners before the court of appeal.⁵³

Principle 7 The state can not be held responsible for the lack of preparation and alleged errors made by counsel unless it has denied an indigent criminal defendant and counsel time to prepare their defense or it should have been manifest to the court that the counsel's conduct is incompatible with the interests of justice.

8. O.F v. Norway⁵⁴

Facts

The petitioner, who a Norwegian citizen, is charged with a small fine and imprisonment up to one year because the petitioner violated the traffic law when the petitioner drove a car which exceeded the limit of speed. The petitioner's request, which wants to have the court-appointed attorney, was refused by the Norwegian court. The Norwegian court said because the nature of offence that the petitioner is charged with a small fine and imprisonment up to one year that why the petitioner cannot be granted a legal aid representation. The petitioner alleged, *inter alia*, that the refusal of the Norwegian court is a violation of art.14 paragraph 3 d of the ICCPR.⁵⁵

⁵³ *Id.* at 9.2 – 9.3

⁵⁴ O.F v Norway No.158/1983, available at www1.umn.edu/humanrts/undocs/html/158-1983.htm (last visited in July 2007)

⁵⁵ *Id.* at 1-3.2

Legal Issue

Whether the refusal of the Norway Court to grant a legal representation to the petitioner is the violation of art. 14 paragraph 3 d of the ICCPR

Holding

The HRC held that a legal aid representation could not be granted to the petitioner because the nature of offence could not entail a legal aid representation. Art.14 paragraph 3.d of the ICCPR only guarantees a legal aid representation to the most serious crime where the interests of justice so required and an indigent criminal defendant does not have sufficient means to pay an attorney.⁵⁶ Even if an indigent criminal defendant does not have sufficient means to pay for an attorney, it does not mean automatically that the state must provide a free legal aid representation unless where the interest of justice so require. The HRC interprets the interest of justice is narrowly the severity of penalty. Therefore, art.14 paragraph 3.d of the ICCPR cannot be applied to an indigent criminal defendant who is charged with the least serious crime.

Principle 8 Right to legal aid representation can only be granted to an indigent criminal defendant who is charged with the most serious crimes

⁵⁶ *Id.* at 5.6

2. 2 The ECtHR Jurisprudence On Right To Counsel

In this section I will make a briefly explained function and mandate of the ECtHR in relation to legal aid according to the ECHR and its protocols and then analyze ECtHR jurisprudence on criminal legal aid including facts, legal issue and holding in order to find several principles on legal aid. Those principles will be applied to assess whether the Indonesian penal procedural code, including the CCI judgments, is compatible with such principles. However the application of the jurisprudence to the Indonesian Criminal Procedural Code and the CCI judgments will be discussed in Chapter three.

The ECtHR receives both inter-state cases and individual applications according to art. 33 and 34 of Protocol 11 to the ECHR. Moreover, inter-state application means if a member state to the ECHR and its protocol infringes the provision of the ECHR and its protocol so that another party or other parties alleges a violation of the ECHR and its protocol to the court. But in practice few inter-state applications were brought to the court, such as *Ireland v the UK*, Ireland alleges the UK government violates art. 3 of the ECHR.⁵⁷

An individual application is provided to any person, Non-Governmental Organization (NGO) group of individual. They may submit an application to the court concerning a violation of one right enshrined in the ECHR or its protocols by a member state. The ECtHR construes the meaning of any person. It can be seen in case law of the *Sunday Times v the UK* A.30 (1979) 2 EHRR 245, the court interprets the meaning of any person broadly. It covers both natural persons (the editor of the newspaper) and legal persons (the company). Furthermore the ECtHR also construes the meaning of a NGO. We can see in the case law of *Ayuntamiento v Spain* 68 DR

⁵⁷ Alastair Mowbray, *Cases And Materials On The European Convention On Human Rights* 5 (2004)

209 (1991), the court interprets NGO as independent organization of the government. But in the case law of *Klass v. Germany* A.28 (1978) 2 EHRR, the court interprets narrowly the meaning of victims as the applicants who were affected directly by some forms of State action or inaction.⁵⁸

The applicants, who are the victims of violation of right to legal aid representation in art.6 paragraph 3 c of the ECHR, have used the individual application.

I have chosen 7 of 9 the ECtHR jurisprudences on criminal legal aid. Those the ECtHR jurisprudences are *Artico v Italy*, *Poitrimol v France*, *Megyeri v Hungary*, *Pereira v Portugal*, *Campbell*, *Fell v the UK*, *John Murray v. the UK* and *Quaranta v Switzerland*. Two the ECtHR jurisprudences, *Daud v Portugal* and *Morris & Steel v the UK*, are excluded because *Daud v. Portugal* has the same principle as with *Artico v. Italy* on the effective legal aid representation. *Morris & Steel v. the UK* is a civil legal aid. Those the ECtHR jurisprudences have proper explanation of the state obligations on criminal legal aid. The basic principles of the state obligation on legal aid are very important in order to analyze the Indonesian Criminal Procedure Code and the CCI judgments. This analysis of the jurisprudences will be discussed in chapter three.

The ECtHR jurisprudences on right to legal aid representation in criminal cases are the following:

1. *Artico v Italy*⁵⁹

Facts

⁵⁸ *Id* at 5-7

⁵⁹ *Artico v Italy* No. A.37 (1980) 3 EHRR 1, available at www.echr.coe.int/tkp197/view.aso?item=1&portal=hbkm&action=html&highlight=artico%20%7C%20v%7C%20cv%20italy&sessionid=1758077%skin=hudoc-en (last visited in March 2007)

The petitioner, who is an Accountant and Italian citizen, has been convicted and sentenced by the Verona District Court (Petrore) to eighteen months' imprisonment and a fine for simple fraud in 1965. Subsequently He has been sentenced to eleven months' imprisonment and a fine for repeated fraud, and uttering worthless cheques in 1970. Then, he submitted an appeal application, but his appeal declared as inadmissible. He also submitted an appeal to the court of cassation. Finally the court of cassation held the offence of simple fraud, impersonation and uttering worthless cheques had been extinguished by statutory limitation so that the Petrore decision was quashed, but not to regard with the offence of repeated fraud. Furthermore, the petitioner alleges that his legal aid attorney who is Mr. Della Roca, performs poorly before the court of cassation. Mr Della Roca is assigned to the petitioner after the petitioner applies a free legal aid to the court of cassation. But Mr Della Roca did not attend at the hearing of the court of cassation. Subsequently he sent a letter to the court of cassation that he cannot undertake the task of petitioner's lawyer because of health reason.⁶⁰

Legal issue

Whether the state should be responsible for ineffective legal aid representation in the particular circumstance where the lawyer has health problem, affecting representation

Holding

The ECtHR held that the state cannot be responsible for shortcoming on the part of a lawyer appointed for legal aid purposes. But in the particular circumstances it is for the competent Italian government to take step to ensure that the applicant enjoys effective legal aid representation. The state must choose one of two options: either to replace Mr Della Rocca or, if appropriate, to cause

⁶⁰ *Id.* at 1-15

him to fulfill his obligation. However the state remained passive according to the fact so that in this circumstance the state violates art. 6 paragraph 3 c of the ECHR⁶¹. Furthermore, the Court recalls that the ECHR is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. Art. 6 paragraph 3 c of the ECHR speaks of assistance and not nomination.⁶²

The ECtHR says that there are two conditions whether a legal aid representation can be granted to an indigent criminal defendant according art. 6 paragraph 3 C of the ECHR. It depends on whether the defendant who is charged with criminal offence does not have sufficient means to pay an attorney or where the interests of justice so require. In the present case, the petitioner cannot be said having sufficient mean. The interests of justice did require the provision of effective legal aid representation where in a certain circumstance there is the need of a qualified lawyer because of onerous task and the previous lawyer having health problem such as in the present case.⁶³

Principle 9 the state could not be responsible for the shortcoming of a legal aid lawyer assigned to an indigent criminal defendant unless in the particular circumstance the state must ensure effective legal aid representation where the interests of justice so require.

2. Poitrimol v France

⁶¹ *Id.* at 36

⁶² *Id.* at 33

⁶³ *Id.* at 34

Facts

The petitioner, who is a French citizen, decides to divorce his wife. Subsequently there is a dispute between the petitioner and former his wife on the custody of their children. The petitioner leaves France and takes his children to Turkey. Then, the French court awards custody to both parents jointly and makes an order that the petitioner shall return at least temporarily to France within three months. But the petitioner did not comply with this time limit. Former his wife lodges a complaint alleging failure to return the children.

Furthermore, the petitioner has been summoned, but he did not attend the hearing. The French court sentences the petitioner to a year imprisonment. He wished to be tried *in absentia* and defended by his counsel. The court of appeal and cassation refuse the petitioner request according to art. 410 of the French Penal Procedure Code. The court of appeal says that while the warrant of arrest has been issued the defendant is not entitled to instruct counsel to represent and defend him. The petitioner alleges such refusal of the court of appeal and cassation infringe art.6 paragraph 1 and 3 c of the ECHR.⁶⁴

Legal Issue

Whether the refusal of the court of appeal and cassation, where the courts say that the defendant is not entitled right to legal aid representation because the warrant of arrest has been issued, is a violation of art. 6 paragraph 1 and 3 c of the ECHR.

⁶⁴ Poitrimol v. France No.14032/88, available at www.cmiskp.echr.ceo.int/tkp197/view.asp?item=1&portal=hbkm&action=html&hihligth=Poitrimol1%20%7c%20v%20France&sessionid=175859&skin=hudoc-en (last visited in July 2007)

Holding

The court finds a violation of art. 6 paragraph 1 and 3 c of the ECHR where the right of everyone, who is charged with a criminal offence, to be effectively defended by a lawyer, assigned officially if need be, is one of fundamental features of a fair trial. A person charged with a criminal offence does not lose the benefit right to legal representation on the account of not being present at the trial. Moreover, the court says that the suppression of the petitioner's right to legal aid representation is disproportionate when the petitioner is not entitled to apply to present his argument and fact in the court of appeal.⁶⁵

Principle 10 An indigent criminal defendant, who is charged with a criminal offence in trial *in absentia*, does not lose his or her right to effective legal aid representation.

3. Megyeri v. Germany⁶⁶

Facts

The petitioner, who is a Hungarian citizen and lives in Germany since 1975, suffers from mental disability. The Cologne court decides that the petitioner must be detained in a psychiatric hospital because he commits crime such as insulting behavior, assault occasioning bodily harm, resisting the police, causing traffic hazard and unauthorized departure from the scene of an accident. The Aachen Regional Court decides to continue the petitioner detention. The petitioner does not have an attorney during the review proceeding of his detention before the Court. Furthermore, the court says that there is no legal provision to assign an attorney in review proceedings of the

⁶⁵ *Id.* at 33-38

⁶⁶ Megyeri v. Germany No. 13770/88, available at www.cmiskp.echr.ceo.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Megyeri%20%7C%20v%20%7C520Germany&sessionied=1758257&skin=hudoc-en (last visited in July 2007)

petitioner's detention. The petitioner alleges a violation of art. 5 paragraph 4 of the ECHR concerning his detention review proceedings without the presence of an attorney.⁶⁷

Legal issue

Whether the denial of the Aachen Regional Court constitutes a violation of art. 5 paragraph 4 of the ECHR.

Holding

The court says that the people with mental disability cannot be held responsible for committing crime. But they can be detained in a psychiatric hospital. In the determination of his continuous, suspension and termination detention, the court must ensure that such people receive a legal aid representation because the interests of justice so require when their personal liberty is at stake and diminished mental capacity.⁶⁸ Interestingly, the court interprets the interests of justice broadly to determine whether the petitioner can be granted a free legal aid representation to the defendant. The court sees that the interest of justice is not only the severity of penalty but also whether personal liberty is at stake and diminished mental capacity.

Principle 11 The state must ensure that right to legal aid representation can be granted to a mental disability case where the interests of justice so require.

⁶⁷ *Id.* at 6-11

⁶⁸ *Id.* at 23

4. Pereira v Portugal ⁶⁹

Facts

The applicant, who is a lawyer, suffers from mental disability and is detained in a psychiatric hospital according to the Portuguese court decision because he commits crime on fraud. But the court says that he cannot be held responsible for his mental illness and is dangerous so that he is detained for eight years in a psychiatric hospital. The court assigns a trainee barrister for him. But the attorney did not attend the hearing on July 1 1998. The applicant alleges, *inter alia*, the trainee barrister's conduct violates art. 5 paragraph 4 of the ECHR.⁷⁰

Legal issue

Whether the trainee barrister's conduct violates art.5 paragraph 4 of the ECHR

Holding

The court finds, *inter alia*, a violation of art. 5 paragraph 4 of the ECHR in which the court maintains that the state must ensure that the petitioner enjoys an effective legal representation.⁷¹ In the present case, the trainee barrister cannot be said to represent the petitioner effectively in the review proceedings of the petitioner's detention when the trainee barrister did not attend the proceedings. The court sees that the state must ensure effective legal aid representation to an indigent criminal defendant in a mental disability case.

⁶⁹ Magalhaes Pereira v Portugal No.44872/98, *available at* the ECtHR website, www.cmiskp.echr.ceo.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Megyeri%20%7C20v%20%7%20Germany&sessionid=1770364&skin=hudoc-en (last visited in July 2007)

⁷⁰ *Id.* at 10-31

⁷¹ *Id.* at 54- 63

Principle 12 The state must ensure that the court-appointed attorney in mental disability cases has to conduct an effective legal aid representation

5. Campbell, Fell and Others v The UK⁷²

Facts

The petitioner 1, Mr. Campbell who is a UK citizen, was convicted of several criminal offences, such as conspiracy to rob and possession of firearms with intent to commit robbery. The petitioner 2, Mr. Fell who is a Roman Catholic priest and UK citizen, has been convicted of conspiracy to commit arson, malicious damage, and taking part in the control and management of an organization using violent means to obtain a political end. They engaged in a protest, at the treatment of another prisoner, by sitting down in a corridor of the prison and refusing to move. The prison officer uses of force to move them so that petitioner 1 has been injured seriously. Six prisoners including the petitioner 1 has been charged with the disciplinary offence by the Prison Board Visitors (PBV) and subsequently then found him guilty.

The Petitioner 1 declares not to attend the disciplinary proceedings unless he was represented by the attorney. But such request was refused by the PBV because of the standard practice did not require such request. The PBV found the petitioner 1 guilty for mutiny and violence offences. The petitioners submit an application to the Home Secretary in order to consult with his lawyer concerning their access to court/legal adviser to seek for compensation for the personal-injuries after the protest against mal-treatment in the prison. The prison authority said that the petitioners

⁷²Campbell, Fell and others v the UK No.7819/77,7878/77, available at www.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Campbell%2C%20%7C%20Fell%20%7C%20Others%20%7C%20v%20%7C%20UK&sessionid=1770410&skin=hudoc-en (last visited in March 2007)

can not be granted facilities to obtain a legal advice, by a correspondence to the attorney, unless and until they had raised his complaint through the normal internal channels (petition to the Home Secretary, or an application to the Board of Visitors, a visiting officer of the Home Secretary or the Prison Governor) and been given definitive reply according to art. 37 paragraph 1 and 2 of the prison rule. The petitioners alleged, *inter alia*, (the petitioner 1) did not have a legal representation during the disciplinary proceedings, the delay to seek a legal advice, restriction on correspondence to their attorney and attorney's visit are a violation of art. 6 and 8 of the ECHR ⁷³

Legal issue

Whether right to legal aid representation can be applied to the disciplinary proceedings

Holding

The court finds, *inter alia*, violation of art. 6 paragraph 3 b and c of the ECHR in which the petitioner 1 did not have adequate time to prepare his defense when the petitioner 1 was informed a charge against him just five days before the first the proceeding commenced. The petitioner 1 did not attend the proceeding because he did not have a legal representation and his request was refused. The court says that a person is charged with a criminal offence who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing. The court quotes the Commission's finding on a violation of art. 6 paragraph 1 of the ECHR where the delay of seeking a legal consultation on civil action to obtain compensation concerning personal injuries is a violation of access to court (art.6 paragraph 1 of the ECHR). The court says that the effect of the prior ventilation rules is to prevent all correspondences between the petitioners and their advisers concerning the proposed litigation until the internal inquiry had

⁷³ *Id.* at 1-25

been completed was an interference with the petitioners' right for correspondence as protected in art. 8 paragraph 1 of the ECHR. The court also says that the restriction of attorney's visit to the petitioner 2 is a violation access to court of art. 6 paragraph 1 of the ECHR, and the restriction of confidential consultation between the petitioner 2 and his lawyer is a violation of right to private life protected in art.8 paragraph 1 of the ECHR. Such restriction can not be justified according to art.8 paragraph 2 of the ECHR⁷⁴.

Principle 13 The right to legal representation can be applied to the disciplinary proceedings of the prisoner. The state must ensure that an indigent criminal defendant enjoys right to access to court in relation to personal injuries because of mal-treatment in the prison. An indigent criminal defendant has rights to correspondence, confidential communication with their attorney unless in the particular circumstance it can be restricted.

6. John Murray v the UK⁷⁵

Facts

The petitioner, who is an Irish citizen, is detained under the 1989 terrorist prevention act. The police convicts of the petitioner's involvement in terrorist activities in Northern Ireland. The petitioner requests the police to consult with a solicitor, but the police delays such request, saying the delay is authorized for a period of the 48 hours according to the 1987 North Ireland (Public Emergency) Act on the basis that the police has reasonable grounds to believe that the

⁷⁴ *Id* at 97-120

⁷⁵ John Murray v. the UK No. 18731/91, available at www.cmiskp.echr.ceo.int/tkp197/view.asp?item=3&portal=hbk&action=html&highlight=John%20%7C%20Murray%20%7C%20v%7C%20UK&sessionid=1770382&skin=hudoc-en (last visited in March 2007)

exercise of the right would, *inter alia*, interfere with the gathering or information about the commission of acts of terrorism or make it more difficult to prevent an act of terrorism. The petitioner alleges, *inter alia*, that the 48 hours delay on access to counsel violates art.6 paragraph 3.c of the ECHR.⁷⁶

Legal issue

Whether the 48 hours delay on access to court is a violation of art. 6 paragraph 3.c of the ECHR

Holding

The court says, *inter alia*, that the 48 hours delay of the petitioner's access to counsel is a violation of art. 6 paragraph 3 c of the ECHR in conjunction with art.6 paragraph 1 of the ECHR. The court underlines two principles that firstly, right to legal aid is a paramount of the right to defense. Secondly, the concept of fairness requires the petitioner benefits legal aid.⁷⁷ Art. 6 paragraph 3.d of the ECHR can be applied to a terrorist case when the state declares a public emergency. Right to legal aid representation can be granted to indigent criminal defendant in pre-trial detention irrespective of the state situation.

Principles 14 Right to legal aid representation can be granted to an indigent criminal defendant in pre-trial detention in any condition

⁷⁶ *Id.* at 1-13

⁷⁷ *Id.* at 66

7. Quaranta v. Switzerland⁷⁸

Facts

The petitioner, who is unemployed and Italian immigrant, complains that the President of the Vevey District Criminal Court had refused his application twice for a legal aid representation. The Court ascertains that art. 104 paragraph 2 of the Vaud Code of Criminal Procedure requires conditions to determine whether a legal aid representation can be granted to an indigent criminal defendant. Those conditions are the needs of defense so require and the particular difficulties of the case. The Court also argues that the petitioner does not meet the needs of defense to lead a court-appointed attorney because the sentence, which the petitioner may expect on conviction, cannot be suspended because of its length or there is a likelihood of an order confining him to a non-penal institution. Furthermore the petitioner does not meet the requirement of the particular difficulties of the case where there are no difficulties to establish facts of the case or to produce evidences. The court of cassation and the federal Court affirm the Vevey District Court judgment. The Courts find the petitioner guilty for taking and trafficking drugs and on this account sentenced him to six months' imprisonment, the sentence was not suspended.⁷⁹ The petitioner alleges, *inter alia*, that the refusal of the president is a violation of art. 6 paragraph 3 c of the ECHR.

Legal Issue

Whether the refusal of president is a violation of art.6 paragraph 3 c of the ECHR

⁷⁸ Quaranta v. Switzerland No.12744/87, available at www.csmik.echr.ceo.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=quaranta%20%7C%20v%20%7C%20Switzerland&sessionid=1770603&skin=hudoc-en (last visited in July 2007)

⁷⁹ Id. at 1-12

Holding

The Court finds, *inter alia*, that the refusal of the president is a violation of art.6 paragraph 3 c of the ECHR. In the particular circumstance of the case where the petitioner is unemployment and young man has no real occupational training, cannot entail the petitioner's appearance before the investigating judge and the court in adequate manner. The Court views that the real condition which is economic condition of the petitioner is being faced by the petitioner. Therefore, he cannot defend himself before the court adequately. The ability of the petitioner to defend himself or herself before the court is a factor to grant free legal aid representation. In the present case, the Court strikes down the argument that a legal aid representation can only be granted in the most serious case.⁸⁰

The Principle 15 Right to legal aid representation can be applied to all criminal cases irrespective of potentiality and severity of punishment.

In this chapter I can conclude that the ECtHR and the HRC decide that the interests of justice and the financial status of defendant are conditions to determine whether a legal aid representation can be granted to an indigent criminal defendant. There is, however, a difference between the ECtHR and HRC to determine what condition entails the interests of justice. In the particular circumstance, the ECtHR's jurisprudences construe the interests of justice are more broader than the HRC. The ECtHR ascertains that the defendant's deprivation of liberty is at stake, diminished mental capacity and the ability of the indigent criminal defendant to defend himself or herself before the court are the interests of justice which can entail a legal aid representation in a criminal

⁸⁰ *Id.* at 34-37

case. But the HRC ascertains that the severity of punishment is the only one of the interest of justice which can entail a legal aid representation.

The ECtHR see differently that a legal aid representation can be applied to the disciplinary proceeding of the prisoner. Furthermore, the ECtHR also sees that the defendant has access to court and his lawyer to challenge mal-treatment during the detention in a prison. However, the HRC is silent on these issues.

I have found fifteen general principles on legal aid according to the HRC and ECtHR jurisprudences as I have been discussed above. Both The HRC and ECtHR affirm the following general principles; the state must ensure effective legal aid representation and competent court-appointed lawyer to an indigent criminal defendants, but the state cannot be held responsible for the shortcomings of lawyer's conduct unless it has been manifest to the court that the lawyer's conduct is incompatible with the interests of justice or it denies the defendant and counsel time to prepare his or her defense.

There are also other general principles on legal aid according to the jurisprudences such as the state must inform adequately right to legal aid to an indigent criminal defendant before trial *in absentia* has taken place. A legal aid representation can also be applied to pre-trial detention irrespective of whether the state is in a public emergency or not.

Chapter 3

The Implementation of the State Obligations In the Indonesia Criminal Legal Aid

In this chapter I will apply the general principles of the state obligation on criminal legal aid, which have been discussed in chapter two, to the CCI judgments and the criminal legal provisions in the Indonesian Criminal Procedural Code (the Code) in order to assess whether the CCI judgments and the Code are compatible with the international standards on legal aid. The HRC and ECtHR 's general principles, which have similar principle, will be joined in order to make an effective assessment. The first step is to apply the general principles to the CCI judgments. Then, the second step is to apply such general principles to the criminal legal aid provisions in the Code.

3.1 The CCI Judgments

There are two cases are held by the CCI in relation to right to legal aid which are Tongat & Others v. Indonesia and the Indonesian Human Rights Lawyers Association (the APhi) & Others v. Indonesia.

Principle 1, 5 &12 the state obligation is to ensure a lawyer who represents an indigent criminal defendant before the court must provide an effective legal aid representation

The HRC jurisprudences (**Earl Pratt, Ivan Morgan v. Jamaica, Sergio Euban Burgos v. Uruguay**)

The ECtHR jurisprudence (**Pereira v. Portugal**)

The CCI judgments are compatible with the principles that it is obviously in the case-law of the APhi & Others v. Indonesia, the court says that the state must ensure a competent lawyer, who has adequate qualifications in practical and theoretical skill, represents an indigent criminal defendant before the court. In addition, such lawyer has to take part in the internship program for certain years before representing an indigent criminal defendant before the court.

In the case-law of Tongat & Others v. Indonesia, the Court says explicitly that the state must fulfill its obligation on right to legal aid representation to an indigent criminal defendant who does not have sufficient means to pay for an attorney. Furthermore, the state obligation includes the defendant's right to choose his or her counsel.

The HRC explicitly asserts that the defendant must be given an opportunity to choose their own lawyer in the particular circumstance where the lawyer could not entail a defense on behalf of the defendant when the counsel could not call the alibi witness and closed the case without the consent of the defendant at the appeal court⁸¹. Furthermore, in Sergio Euben Burgos v. Uruguay, the HRC underlines the need of effective legal aid representation when the defendant is forced to accept the court-appointed lawyer⁸². In the present case, the court-appointed lawyer does not have proper qualification to represent the defendant because the court-appointed lawyer is a military officer.

The ECtHR also affirms effective legal aid principle. In Pereira v. Portugal, the ECtHR ascertains that the state must ensure an effective legal aid representation. In addition, the ECtHR says that

⁸¹ Earl Pratt & Ivan Morgan, *supra* note 38

⁸² Sergio Euben Burgos, *supra* note 46

the trainee barrister, who represented the defendant before the court, can not represent the defendant effectively because he cannot attend the court hearing⁸³.

We can find the similar situation in Indonesia where a trainee barrister cannot be said having a competent lawyer according to the APhi & Others v Indonesia because a trainee barrister does not have an adequate knowledge and practical skill in law yet. Thus, a trainee barrister must take an internship program and proper legal and practical knowledge before representing the defendant.

There is a difference between the ECtHR and HRC to determine whether a legal aid representation can be applied to the least serious crime. In *Earl Pratt & Ivan Morgan v. Jamaica* and *Sergio Euben Burgos v. Uruguay*, the HRC ascertains explicitly that an effective legal aid representation can only be applied in the most serious crime. But in *Pereira v. Portugal*, an effective legal aid representation can be applied in a mental disability or the least serious crime also.

Principle 2, 3, 14 Right to legal aid representation can be applied to pre-trial detention in any condition

The HRC jurisprudences (**Leopoldo Buffu Carballal v. Uruguay and Miguel Angel Millan Sequeira v. Uruguay**)

The HRtCH jurisprudence (**John Murray v. the UK**)

⁸³ *Pereira v. Portugal*, *supra* note 71

The CCI judgment is compatible with the principles. Particularly in the case-law of *Tongat & others v Indonesia*, the CCI says that access to justice is a constitutional right that can be derived from the rule of law principle in art.1 paragraph 3 of the third amendment to the 1945 Constitution. Furthermore, the CCI says that the state has an obligation to fulfill right to legal aid representation to those who can not have sufficient means to pay for an attorney. This principle can be applied to all kind of proceedings in any condition including pre-trial detention. Interestingly the Court underlines that the state is prohibited to interfere with the exercise of right to legal aid unless the measure is proportionate with the aim. In the present case, the state refused the petitioners to represent an indigent criminal defendant at the police station because the state says that such measure is to protect public interest and prevent a fraud carried out by pretending to be a practicing lawyer. Finally the CCI says that the measure is disproportionate with the aim because the criminal law has protected the public interest from such crime.

The HRC is concerned with incommunicado detention. In *Leopoldo Buffo Carballal v. Uruguay*, the HRC says that the defendant, who is detained incommunicado detention, has no access to a legal representation.⁸⁴ Finally in the present case, the HRC underlines explicitly that incommunicado detention infringes art. 14 paragraph 3 d of the ICCPR because such detention closes any recourse to a legal aid representation.

We can find the same principle in the other case-law of *Miguel Angel Millan Sequeira v. Uruguay*. In the present case, the HRC says that right to legal aid representation can be applied

⁸⁴ *Leopoldo Buffo Carbalal v. Uruguay*, *supra* note 40

to pre-trial detention irrespective of whether prosecution has been initiated or not.⁸⁵ In addition, a legal aid representation does not depend on the prosecution of which has been initiated or not.

There is also similar principle in *Murray v. the UK*, the ECtHR says that right to legal aid representation can be applied to pre-trial detention where in the present case the defendant was refused to exercise right to a legal aid representation in the 48 hours of detention by the police. On the other hand, the police station said that exercise of the right would interfere with the gathering of information or make it more difficult to prevent an act of terrorism⁸⁶.

Actually there is a difference between HRC and the ECtHR where in *Murray v the UK*, the ECtHR ascertains that a public emergency situation cannot be a justification to delay access to legal aid representation. But there is no explanation in the HRC's jurisprudence of whether a public emergency can be a justification to interfere with enjoying right to legal representation. The HRC just says that there must be any access to a legal aid representation to those who is being detained incommunicado detention.

Principle 4 & 13 the state has an obligation that an indigent criminal defendant has an adequate opportunity to communicate with his lawyer, to prepare his or her defense without the state interference

The HRC jurisprudence **(Dave Marais Jr. v Madagascar)**

The ECtHR jurisprudence **(The Campbell, Fell v the UK)**

⁸⁵ Miguel Angel Millan Sequeira v. Uruguay, *supra* note 42

⁸⁶ John Murray v. the UK, *supra* note 76

The CCI's judgment is compatible with the principle of the defendant's right to communicate with the lawyer. In *Tongat & others v Indonesia*, the CCI ascertains explicitly that right to legal aid representation is a constitutional right. The CCI also says explicitly that an indigent criminal defendant has right to information based on art. 28 F of the second amendment to the 1945 Constitution⁸⁷. Whereas right to information covers right to communicate and obtain information as well according to art. 28 F of the second amendment to the 1945 Constitution. Thus, an indigent criminal defendant has right to correspondence which cannot be interfered with by the state arbitrarily.

The CCI says in the case-law of *Tongat & Others v. Indonesia* that the state has obligation to fulfill right to legal aid representation of an indigent criminal defendant who does not have sufficient means to pay for an attorney. The fulfillment of the obligation includes ensuring the defendant has an adequate time to prepare his or her defense. Right to adequate time to prepare his or her defense is part of fair trial which is inherent in the rule of law principle according to the CCI's judgment.

We can find the same principle in *Campbell, Fell v. the UK* where the ECtHR held the defendants did not have adequate time to prepare their defense because they only had five days preparation before the trial commenced. Furthermore, the ECtHR held that the effect of ventilation rules was to prevent all correspondences between the applicants and their lawyer concerning the proposed litigation until the internal inquiry has been completed was an interference with the defendant's right to correspondence.⁸⁸

⁸⁷ *Tongat & Others v. Indonesia*, *supra* note 29

⁸⁸ *Campbell, Fell v. the UK*, *supra* note 73

The HRC also affirms the same principle in *Marais Jr. v. Madagascar* where the HRC held that an indigent criminal defendant was forbidden to receive a letter. His lawyer was detained and arrested. Subsequently he was expelled. Thus, this circumstance entails the defendant cannot have proper preparation to defense.⁸⁹

Both the ECtHR and the HRC held that right to communication cannot be interfered with the state arbitrarily. Right to adequate time to prepare a defense, to communicate and correspondence are elements of right to defense and cannot be separated from right to legal aid representation according to the ECtHR and the HRC jurisprudence.

Principle 6 & 10 The state shall inform sufficiently right to defense including right to legal aid representation before the trial *in absentia* has taken place.

The HRC jurisprudence (**Daniel Monguya Mbenge v. Zaire**)

The ECtHR jurisprudence (**Poitrimol v. France**)

The CCI's judgments are compatible with these principles. In the case-law of *Tongat & others v Indonesia*, although the Court does not mention explicitly that the principle of right to legal aid representation can also be applied in the trial *in absentia*. However, the Court says that the state has an obligation to fulfill right to legal aid representation, if the citizens have insufficient means to pay for a lawyer. This obligation can also be applied to trial *in absentia* where the court shall inform sufficiently the defendant on right to legal aid representation before the trial has taken place.

⁸⁹ *Marais Jr v. Madagascar*, *supra* note 44

Both the ECtHR and HRC ascertain that the defendant must be informed sufficiently right to legal aid representation before trial *in absentia* commenced. In *Poitrimol v. France*, the ECtHR held that right to legal aid representation did not lose on account of not being present at the trial.⁹⁰ We can also find this principle in *Daniel Monguya Mbenge v. Zaire* where the HRC held that the defendant shall be informed sufficiently right to legal aid representation before the trial *in absentia* has taken place⁹¹.

Principle 7 & 9 The state could not be held for the lack of preparation and alleged errors made by counsel unless it has denied an indigent criminal defendant and counsel time to prepare their defense or it should have been manifest to the court that the counsel's conduct is incompatible with the interests of justice

The HRC jurisprudence (**Owen Brown & Burchell Parish v. Jamaica**)

The ECtHR jurisprudence (**Artico v. Italy**)

The CCI's judgments are incompatible with the principles of the state can be held a responsibility for the counsel's conduct which is incompatible with the interests of justice according to the ECtHR jurisprudence in the case-law of *Artico v. Italy*. Furthermore, the court says in the present case that the state must act actively either to replace or ask the lawyer to fulfill its obligation if there is the shortcoming of the court-appointed lawyer in the particular circumstance

⁹⁰ *Poitrimol v France*, *supra* note 65

⁹¹ *Daniel Monguya Mbenge v Zaire*, *supra* note 59

where the lawyer cannot represent an indigent criminal defendant effectively because he or she has health problem and the onerous task entails the need of a qualified lawyer⁹²

However, the CCI's judgments are compatible with the principle of the state can be held a responsibility of the counsel's conduct when the defendant and the counsel have improper time to prepare their defense according to the HRC jurisprudence in the case-law of *Owen Brown & Burchell Parish v. Jamaica*. Furthermore, the HRC held that an indigent criminal defendant should enjoy effective legal representation, but did not find any shortcomings of lawyer's conducts because there was no court's file to prove the government denied the petitioners and their counsel opportunity to exercise preparation to defense or the HRC did not find that the shortcoming has been manifest to the court that the defense team was inadequate.⁹³

The CCI says in the case-law of the *APHI v. Indonesia* explicitly that a lawyer must have an adequate skill and knowledge in the legal matter. Those lawyer's qualifications are to ensure an effective legal aid representation. It is not only enough for the state to assign a legal aid representation to an indigent criminal defendant but also effective legal aid representation and competent lawyer must be ensured. The CCI does not say explicitly whether the state can be held a responsibility for lack of preparation and alleged errors made by counsel's conduct. However, The CCI says in the case-law of *Tongat & Others v. Indonesia* that the state has obligation to fulfill right to legal aid representation which is part of fair trial. Moreover, the CCI says in the present case that fair trial is inherent in the rule of law principle where right to adequate time to

⁹² *Artico v Italy*, *supra* note 61

⁹³ *Owen Brown & Burchell Parish v. Jamaica*, *supra* note 53

prepare his or her defense is also part of fair trial. Thus, the state can be held a responsibility for improper time to prepare a defense.

There is a difference between the HRC and ECtHR jurisprudence to determine whether the state can be held a responsibility for the shortcoming of the lawyer. The HRC does not look at the interests of justice, but is based on whether the defendant and the counsel have adequate time to prepare their defense. However, the ECtHR looks at the interests of justice to determine such state responsibility as the above-mentioned the ECtHR held in *Artico v. Italy*. The ECtHR says in the present case that in a particular circumstance where the state must be responsible for the shortcomings of the counsel because the counsel has health problem and the onerous task entails need of a qualified lawyer.

Principle 8 Right to legal aid representation cannot be granted to an indigent criminal defendant who is not charged with the most serious crime

The HRC jurisprudence (**O.F v Norway**)

The CCI's judgment is incompatible with the principle because in *Tongat & Others v. Indonesia*, the CCI held explicitly that the state has an obligation to fulfill right to legal aid to an indigent criminal defendant who does not have sufficient means to pay for an attorney. This right to legal aid representation is a constitutional right. It means that every person has right to legal representation that such right can be granted to an indigent criminal defendant irrespective of the severity of penalty. But the ECtHR took a different position to the HRC to determine whether a

legal aid representation can be granted to an indigent criminal defendant who is charged with the least serious crime. This will be discussed in the next principle.

Principle 11 & 15 legal aid representation can be applied to an indigent criminal defendant who is not charged with the most serious crime

The ECtHR jurisprudences (**Megyeri v Germany & Quaranta v. Switzerland**).

The CCI's judgement is compatible with the principles in Quaranta v. Switzerland and Megyeri v. Germany because in Tongat & Others v Indonesia, the CCI says explicitly that the state has an obligation to fulfill right to legal aid to an indigent criminal defendant who does not have sufficient means to pay for a lawyer. It also means that right to free legal aid can be applied to an indigent criminal defendant who is not charged with the most serious crime because right to legal aid representation is a constitutional right. As a result of constitutional right of right to legal aid representation that its application cannot be limited just in the most serious crime unless it is in accordance with right and freedom of others or other restrictions are defined according to art. 28 J of the second amendment to the 1945 Constitution.

But the CCI says that a legal aid representation can only be applied to an indigent criminal defendant based on the financial status of the defendant. The CCI does not look at the interests of justice such as the ability of the defendant to defend himself/herself before the court adequately. Furthermore, the CCI ascertains that the financial status of an indigent criminal defendant can

only entail a legal aid representation⁹⁴. In *Megyeri v. Germany*, the ECtHR says that the interests of justice, which are liberty is at stake and a diminished mental capacity, can entail a legal aid representation⁹⁵. We can also find similar consideration in *Quaranta v. Switzerland* where the ECtHR says that the interest of justice which is the ability of the defendant to defend himself or herself before the court adequately is a factor to determine whether the defendant can be granted a legal aid representation.⁹⁶

3.2 The Indonesian Criminal Procedural Code

Principle 1, 5 &12 the state obligation is to ensure a lawyer who represents an indigent criminal defendant before the court must provide an effective legal aid representation

The HRC jurisprudences (**Earl Pratt, Ivan Morgan v. Jamaica, Sergio Euban Burgos v. Uruguay**)

The ECtHR jurisprudence (**Pereira v. Portugal**)

Art. 54, 55 and 55 paragraph 1 of the Indonesian criminal code (the Code) recognize right to legal aid representation to the defendant. However, art. 54, 54 and 56 paragraph 1 of the Code is incompatible with the principles because art. 54, 55 and 56 paragraph 1 of the Code do not entail sufficiently an effective legal aid representation. These provisions cannot entail competent

⁹⁴ *Tongat & Others v. Indonesia*, *supra* note 31

⁹⁵ *Megyeri v. Germany*, *supra* note 68

⁹⁶ *Quaranta v. Switzerland*, *supra* note 80

counsel to represent an indigent criminal defendant as well, although the state can assign an attorney to represent an indigent criminal defendant in the most serious crime only according to art.54 paragraph 1 of the Code.

In practice the state could not ensure an effective legal aid representation and competent attorney, for example there was no effective legal aid representation during the 2004 military emergency in the Aceh Province in cases where a counsel is provided by the state. The defendants, who were detained in a police station, were not accompanied by the court-appointed lawyer during the police interrogation.⁹⁷

Art. 54 of the Code ensures that an indigent criminal defendant, who is being charged with a maximum imprisonment which is less than five years or the least serious crime, has right to legal aid representation at all kind of proceedings. But the state cannot assign a lawyer to an indigent criminal defendant because art. 56 paragraph 1 of the Code can only be applied to the most serious crime, such as capital punishment or the defendant is being charged with a maximum imprisonment is more than five years or more. Thus, an indigent criminal defendant will not have the court-appointed lawyer.

Art. 55 of the Code guarantees that an indigent criminal defendant, who is charged with the least serious crime, has an opportunity to choose her or him own counsel. But at the same time the state cannot assign a lawyer to an indigent criminal defendant. Thus, neither art. 54 nor 55 of the Code can entails the court-appointed lawyer to an indigent criminal defendant because an indigent criminal defendant is charged with the least serious crime unless if an indigent criminal

⁹⁷ The Amnesty International, *supra* note 29

defendant is charged with the most serious crime so that the court can grant a legal aid representation to the defendant according to art.56 paragraph 1 of the Code.

Art. 54 and 55 of the Code are meaningless to an indigent criminal defendant who is charged with the most serious crime. To look at the Court's holding, in *Pereira v Portugal*, that right to effective legal aid representation can be applied to a mental disability case where defendant is charged with, *inter alia*, the least serious crime such as an insulting behavior⁹⁸.

I will use an analogy, if the case-law of *Pereira v Portugal*, who is convicted of fraud and insulting behavior, is occurring in Indonesia, and then whether he can be granted right to legal representation according to art.56 paragraph 1 of the Code. If *Pereira* is found guilty of an insulting behavior in Indonesia, he shall be sentenced a maximum imprisonment is less than 9 months or a fine is less than 4000 IDR or 1 U\$ according to art. 310 paragraph 1 of the Indonesian Penal Code⁹⁹. Thus, he cannot be granted legal aid representation according to art. 56 paragraph 1 of the Code. In the same condition, if *Pereira* is found guilty for a fraud offence in Indonesia, the Indonesian Court shall sentence him a maximum imprisonment is less than four years or a fine is less than 900 IDR or less than 1 U\$ according to art.372 of the Indonesian Penal Code¹⁰⁰. Thus, *Pereira* cannot also be granted a legal aid representation according to art. 56 paragraph 1 of the Code.

⁹⁸ *Pereira v. Portugal*, *supra* note 71

⁹⁹ Art. 310 of the Indonesian Penal Code, *available at* www.wirantprawira.de/kuhp/buku_2/index2.html#babXVI (last visited in July 2007)

¹⁰⁰ Art. 372 of the Indonesian Penal Code, *available at* www.wirantprawira.de/kuhp/buku_2/index2.html#babXIV (last visited in July 2007)

As we have seen in chapter two that an indigent criminal defendant can be granted legal aid representation if the defendant is charged with a maximum imprisonment is more than five years or the most serious crimes. Art. 56 paragraph 1 of the Code cannot ensure an indigent criminal defendant, who is charged with a serious crime, an opportunity to choose his or her own counsel. Because the state is the only one who can assign a lawyer. Thus, the Court-appointed lawyer constitutes ineffective legal aid representation.

The defendant has an opportunity to choose her or her own counsel according to the case-law of *Earl Pratt & Ivan Morgan v. Jamaica* and *Sergio Euban Burgos v. Uruguay*. The court also says in the case-law of *Pereira v. Portugal* that the state must ensure an effective legal aid representation.

Principle 2, 3, 14 Right to legal aid representation can be applied to pre-trial detention in any condition

The HRC jurisprudences (**Leopoldo Buffu Carballal v. Uruguay and Miguel Angel Millan Sequeira v. Uruguay**)

The HRtCH jurisprudence (**John Murray v. the UK**)

Art. 56 paragraph 1 of the Code can also be applied to pre-trial detention in any condition. Accordingly, art. 56 paragraph 1 of the Code is compatible with the principles. However, in practice this article could not be applied sufficiently when there was lack of access to attorney during the 2004 emergency situation in Aceh province.¹⁰¹ In *Murray v the UK*, the court says that a public emergency situation, where the UK government says that access to lawyer can interfere

¹⁰¹ The Indonesian Legal Aid Foundation, *supra* note 25

with the gathering of information or make it more difficult to prevent an act of terrorism, cannot be justified to delay the first 48 hours detention of access to lawyer. The state infringes these principles during the 2004 state emergency in the Aceh province.

Principle 4 & 13 The state has an obligation that an indigent criminal defendant has an adequate opportunity to communicate with his lawyer, to prepare his defense without state interference arbitrarily

The HRC jurisprudence (**Dave Marais Jr. v Madagascar**)

The ECtHR jurisprudence (**The Campbell, Fell & Others v the UK**)

Art. 71 paragraph 2 of the Code is incompatible with these principles because art. 71 paragraph 2 of the Code stipulates that the state can interfere with the confidential communication between an attorney and an indigent criminal defendant in a crime against state security. This article is not followed by justifications of such interference. There is also no safeguard against arbitrary interference.

Having regard to the study of the National Law Commission (KHN) ascertains that the defendant has lack of legal information on right to counsel. Thus, in many cases investigator interrogate suspect in the absence of attorney¹⁰². In practice, an indigent criminal defendant in an emergency situation could not communicate with his or her attorney¹⁰³

Art.71 paragraph 2 of the Code is an excessive provision because there is no explanation of the scope of limitation or to what extent the state can interfere with the communication between the

¹⁰² The Indonesian National Commission, *supra* note 26

¹⁰³ The Imparsial, *supra* note 24

defendant and lawyer. Having regard to the case-law of *Campbell, Fell & Others v the UK*, the court says that restriction of confidential communication between the defendant and his lawyer is a violation of right to private life according to art.8 paragraph 1 of the ECHR and cannot be justified as a prevention of crime according art.8 paragraph 2 of the ECHR.

In the present case, the Court says that the defendant has access to court in order to challenge mal-treatment against civil rights of the defendant in the prison¹⁰⁴. The Code is incompatible with the principle where there is no provision in the Code to challenge mal-treatment against civil rights of the defendant in the prison.

Furthermore, in *Campbell, Fell v. the UK*, the Court says that a legal aid representation can be applied to the disciplinary proceeding¹⁰⁵. Right to legal aid presentation (art.56 paragraph 1 of the Code) can be applied to all criminal court proceedings, but not to apply to the disciplinary proceedings of the prisoner because the code excludes the disciplinary proceedings. The meaning of the court proceedings in the Code are from pre-trial detention to the court hearing only.

Principle 6 & 10 The state shall inform sufficiently right to defense including right to legal representation before the trial *in absentia* has taken place.

The HRC jurisprudence (**Daniel Monguya Mbenge v. Zaire**)

The ECtHR jurisprudence (**Poitrimol v. France**)

¹⁰⁴ *Campbell Fell v. the UK*, *supra* note 40

¹⁰⁵ *Id.* at 66

The Code does not explain trial *in absentia* explicitly. However, art. 214 of the Code affirm the existence of trial *in absentia* when the defendant cannot present in the court hearing. Furthermore, the article says that the court can continue the trial without the presence of defendant. However, the article is not followed by sufficient safeguards against trial *in absentia* including informing sufficiently right to legal aid representation before the trial has taken place. There will be potentially the absence of legal aid representation for an indigent criminal defendant before trial *in absentia*. Accordingly, art. 214 of the Code is incompatible with principle 6 and 10.

Principle 7 & 9 The state could not be held for the lack of preparation and alleged errors made by counsel unless it has denied an indigent criminal defendant and counsel time to prepare their defense or it should have been manifest to the court that the counsel's conduct is incompatible with the interest of justice

The HRC jurisprudence (**Owen Brown & Burchell Parish v. Jamaica**)

The ECtHR jurisprudence (**Artico v Italy**)

The Indonesian Criminal Procedural Code does not mention clearly that neither defendant nor attorney has right to adequate time to prepare a defense. The Code merely explains the equality of arms according to art. 72 of the Code. Accordingly the provision of proper safeguards against arbitrary trial including right to adequate time to prepare a defense must be included in the Code otherwise in practice it will remain a problem. The Code does not say whether the state must be

responsible for the shortcomings of the counsel's conduct where the interests of justice so require. Accordingly the code is incompatible with these principles.

Principle 8 a legal aid representation cannot be granted to an indigent criminal defendant who is charged with the least serious crime

The HRC jurisprudence (**O.F v. Norway**)

Art. 56 paragraph 1 of the Code is compatible with this principle because the article says that a legal aid representation can only be applied to an indigent criminal defendant who is charged with the most serious crime only. Having regard to the case-law of O.F v. Norway, the defendant, who violated the traffic law because he drove a car which exceeded the limit of speed, was refused by the court to be granted a legal aid representation because the nature of offence could not entail a legal aid representation.¹⁰⁶

Principle 15 Right to legal aid representation can be applied to the least serious crime

The ECtHR jurisprudences (**Megyeri v. Germany, Quaranta v. Switzerland**)

Art. 56 paragraph 1 of the Code is incompatible with this principle because art. 56 paragraph 1 of the Code says that a legal aid representation can only be granted right to an indigent criminal defendant who is charged with the most serious crime only. Furthermore, art. 56 paragraph 1 of the Code says that the severity of penalty is the only one of the interests of justice. However, the ECtHR says that the interests of justice are liberty is at stake and a diminished mental capacity¹⁰⁷.

¹⁰⁶ O.F v Norway, *supra* note 56

¹⁰⁷ Megyeri v. Germany, *supra* at note 68

Furthermore, the ECtHR says explicitly that in the particular circumstance where the defendant 's condition, who is a unemployment, cannot entail the ability of the defendant to defend himself/herself before the court adequately so that why a legal aid representation should be granted to the defendant.¹⁰⁸

Accordingly, the Code has narrowly construed the interests of justice rather than the ECtHR, although they agree with the financial status of the defendant is also one of factors to determine whether a legal aid representation can be granted.

Chapter 4 will conclude the analysis of whether the Code and CCI judgments are compatible with the international standards on legal aid which have been discussed in this chapter.

¹⁰⁸ Quaranta v. Switzerland, *supra* at note 80

Chapter 4

Conclusion

In this chapter I would like to make conclusions what it has been discussed in chapter three. The first step is to conclude the compatibility of the CCI's judgments with the general principles on legal aid according to international standards on legal aid which have been discussed in chapter two. The second step is to conclude the compatibility of the Code with general principles on legal aid according to international standards on legal aid as well. Finally, the third step is the final conclusions

4.1 The CCI Judgments

In general the CCI's judgments, *Tongat & Others v. Indonesia* and the *APHI v. Indonesia*, are compatible with the general principles, but in the particular situation where the CCI's judgments are incompatible with either the ECtHR or the HRC's jurisprudence. The assessments of the CCI's judgment are as follows:

1. In *Tongat & Others v Indonesia*, the Court ascertains that access to justice including right to legal aid representation is a constitutional right. It means that the state has an obligation to fulfill the right if an indigent criminal defendant does not have sufficient means to pay an attorney. In the *APHI v. Indonesia*, the Court says that an attorney, who represent an indigent criminal defendant before the court, has to have proper qualifications in order to ensure effective legal aid representation;
2. The CCI's judgments are compatible with effective legal aid representation and competent lawyer principle. Elements of right defense are right to have proper preparation to defense,

right to communicate with her or her counsel without unjustified interference, right to correspondence to his or her counsel and right to choose his or her counsel. Those rights cannot be separated from an effective legal aid representation otherwise it entails ineffective legal aid representation;

3. The CCI's judgments are compatible with right to legal aid representation can be applied to all court proceedings including pre-trial detention in any condition because legal aid is a constitutional right and cannot be limited unless it can be justified just because of right and freedom of others according to art. 28 J paragraph 2 of the second amendment to the 1945 Constitution;
4. The CCI's judgment is incompatible with the principle of right to legal aid representation cannot be applied in the least serious crime according to the HRC jurisprudence in the case-law of *O.F v Norway*. In *Tongat & Others v. Indonesia*, the CCI held that a legal aid representation was a constitutional right. It means that it can be applied to all criminal cases irrespective of the severity of penalty. The right cannot be limited just to be applied to the most serious crime unless it can be limited in accordance with right and freedom of others according to art. 28 J paragraph 2 of the second amendment to the 1945 Constitution;
5. The CCI's judgment is incompatible with the ECtHR jurisprudences in *Megyeri v. Germany* and *Quaranta v. Switzerland* where the Court held in the former case that the interests of justice which were whether the defendant's liberty is at stake and a diminished mental capacity can entail free legal aid. Furthermore, the Court held in the latter case that the ability of an indigent criminal defendant to defend himself or herself before the court could entail a legal aid representation. In *Tongat & Others v. Indonesia*, the CCI held that the financial status of an indigent criminal defendant was the only factor to determine whether an indigent

criminal defendant can be granted a legal aid representation. The CCI does not look at the interests of justice;

6. The CCI's judgment is compatible with the principle of the defendant and counsel have right to adequate time to prepare a defense according to the case-law of *Dave Marais Jr. v. Madagascar* and *Campbell, Fell & Others v. the UK*. In case-law of the *APHI & others v. Indonesia*, the CCI does not say whether the defendant and counsel have adequate time to prepare a defense. However, the CCI says in the case-law of *Tongat & Others v. Indonesia* that legal aid is a constitutional right which is part of fair trial. Right to adequate time to defense is part of fair trial as well. Furthermore fair trial is inherent in art.3 paragraph 1 of the third amendment to the 1945 Constitution according to the CCI's judgment;
7. The CCI's judgment is incompatible with the principle of the state responsibility on the shortcomings of the court-appointed lawyer based on the interests of justice according to the case-law of *Artico v Italy* because the CCI's judgment is just based on right to adequate time to prepare a defense to determine whether the state can be held a responsibility for the shortcomings of the lawyer.
8. The CCI's judgment is compatible with the principle of the defendant's right to communicate with and correspondence. The CCI says explicitly in the case-law of *Tongat & Others v. Indonesia* that the defendant has right to information including right to communicate with and correspondence which are derived from art. 28 F of the second amendment to the 1945 Constitution on the right to information.

4.2 The Indonesian Criminal Procedural Code

In general the Criminal Procedural Code (the Code) is incompatible with the general principles of the HRC and ECtHR jurisprudences on legal aid. The assessments of the Code are as follows;

1. The Code does not ensure an effective legal aid representation generally. In particular art. 56 paragraph 1 of the Code is incompatible with effective legal aid representation and competent attorney. Whereas in practice art. 56 paragraph 1 of the Code cannot entail an effective legal aid representation and competent attorney;
2. Art. 54 (right to legal aid), 55 (right to choose her or his own counsel), of the Code are meaningless to an indigent criminal defendant, who is being charged with a criminal offence of a maximum imprisonment is less than five years or the least serious crime because those articles cannot entail the court-appointed attorney. Art. 56 paragraph 1 of the Code merely grants the court-appointed attorney to the defendant who is charged with the most serious crime. Furthermore, art. 55 paragraph 1 of the Code is incompatible with right to choose his or her own counsel because art. 55 paragraph 1 of the Code does not give an opportunity for an indigent criminal defendant to choose his or her own counsel;
3. Art. 56 paragraph 1 of the Code can be applied to pre-trial detention as well. Thus, art. 56 paragraph 1 of the Code is compatible with right to legal aid representation can be applied in pre-trial detention, but in practice it is difficult to be implemented, particularly in places where a public emergency situation is being applied;
4. Art. 72 paragraph 2 of the Code is incompatible with right to proper communication between the defendant and his or her lawyer because the article says that the state can interfere with the communication between lawyer and the defendant in a crime against

state. However, the HRC and ECtHR say that the state cannot interfere with confidential communication between an indigent criminal defendant and his or her lawyer arbitrarily;

5. Art. 214 of the Code is incompatible with the principle of right to inform a legal aid representation before trial *in absentia* has taken place because art. 214 of the Code cannot provide sufficient safeguards against arbitrary trial including right to inform legal aid to the defendant sufficiently;
6. Art. 56 paragraph 1 of the Code is compatible with the principle of right to legal aid representation cannot be granted to the least serious crime according to the HRC jurisprudence. Because the article says that a legal aid representation can only be granted to the defendant who is charged with the most serious crime;
7. The Code does not ensure right to adequate time to prepare a defense. There are no provisions in the Code to ensure such right.

4.3 Final Conclusions

1. Several articles in the Indonesian Criminal Code must be reformed in order to ensure that an indigent criminal defendant enjoys effective legal aid representation and has adequate access to counsel. Art. 54, 55 and 56 paragraph 1 of the Code must ensure an effective legal aid representation and competent attorney. Art.56 paragraph 1 of the Code must also be applied to an indigent criminal defendant who is being charged with the least serious crime where interests of justice so require. Art. 72 paragraph 2 of the Code must ensure proper communication between an indigent criminal defendant and his or her lawyer. Art. 214 paragraph 1 of the Code must ensure effective safeguard against arbitrary trial in

absentia including right to inform legal aid representation properly. The Code must also ensure right to adequate time to prepare a defense ;

2. The CCI's judgment is gently compatible with the general principles on criminal legal aid according to international standards on legal aid. But hopefully, in the future the CCI must look at the interests of justice. It can also include the defendant's deprivation of liberty is at stake and the complexity of the case and the ability of the defendant to defend himself or herself to determine whether the defendant can be granted a free legal aid or not. The CCI must also look at the interests of justice to determine whether the state can be held responsible for the shortcoming of the court-appointed lawyer.

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