

COMPARISON OF THE CONCEPT OF COMMAND RESPONSIBILITY IN HUMAN RIGHTS COURT PROVISIONS

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Submitted : 27/05/2021 Reviewed: 08/02/2021 Accepted:02/09/2021

Abstract: *The new spirit of human rights enforcement in Indonesia through the ratification of Law no. 26 of 2000 became the main pillar to accommodate issues that attracted international attention. Law No. 26 of 2000 has shown the importance of regulating human rights enforcement, the regulation is also the main instrument to protect and guarantee human rights enforcement mechanisms in Indonesia. The author takes a legal problem on the comparative law of Law no. 26 of 2000 concerning the Human Rights Court which was adopted from the provisions of the 1998 Rome Statute. Several human rights activists took action, this was because the 1998 Rome Statute provisions were adopted imperfectly in article 42 of Law no. 26 of 2000 which caused problems in the enforcement of the Human Rights Court. Some of the perpetrators of gross human rights violations in Indonesia are generally parties with power or position, who can escape the applicable legal sanctions and are free from responsibility for the actions that have been committed by them or their groups. So it is important for the development of human rights in Indonesia to improve the norms of command responsibility in Article 42 of Law no. 26 of 2000. Based on these issues, the author will integrate several comparative laws and principles to get a concrete solution. The purpose of this research is to build a legal framework to strengthen the enforcement of Indonesian human rights. The methodology that will be used is a normative method with a conceptual approach. The findings of this study reveal that several human rights violations by the Command in Indonesia have not yet been*

resolved properly and have attracted international attention. In theoretical studies, the existence of the principle of command responsibility is considered difficult to prove in court. The involvement of human rights violators by the TNI command in several cases is evidence that the implementation of the command responsibility mechanism in human rights violations is far from being expected.

Keywords: *Command; Government; Politics; Violation.*

DOI: *10.32801/lamlaj.v6i2.259*

INTRODUCTION

A long debate about the existence of Human Rights (HAM) in Indonesia has existed long before the proclamation of this nation's independence. The creation of a legal umbrella regarding courts human rights in Indonesia through Law No. 26 of 2000 (Law No. 26 of 2000) on Human Rights Courts adopted from the 1998 Rome Statutes shows how important the role of the State is in dealing with the rights of its citizens.¹ Basically, the birth of Law No. 26 of 2000 is a very important legal product to be implemented in the community to become a parameter in assessing an event to determine a violation, whether the violation falls into the category of criminal, military violations, human rights violations and violations. Serious human rights that competently meet the elements to be tried before a court.²

However, the emergence of Law No. 26 of 2000 does not necessarily embody or be able to overcome all human rights problems in Indonesia's sovereign territory. This illustrates that Law No. 26 of 2000 is not perfect and still needs a lot of in-depth study because some of the existing provisions have not been

able to accommodate the needs of human rights enforcement in Indonesia.

The problems that arise behind the birth of Law no. 26 of 2000, among others, the government only adopted some of the provisions contained in the 1998 Rome Statute as political interests needed to reduce pressure from the international community regarding events that are alleged to have removed human rights and dignity. With the aim that the perpetrators of these incidents can only be tried at home and foreign countries cannot intervene regarding cases of alleged human rights violations that are currently happening.

Therefore, the author tries to take a legal issue regarding the norm of command responsibility, where in the formation of Law No. 26 of 2000 it was very unsystematic and seemed to omit important things to protect the interests of state officials at that time³. Some of the provisions of the 1998 Rome Statute were taken partially because Indonesia only adopted and did not ratify. So there is a sense of concern that the judiciary that is being carried out for human rights violations by using this law is not as expected⁴. The im-

¹ Eko Riyadi, *Bahan Ajar Mata Kuliah Hukum Hak Asasi Manusia* (Yogyakarta: Fakultas Hukum Universitas Islam Indonesia, 2015), 109

² Wakhid Aprizal Maruf, "Kebijakan Indonesia Belum Meratifikasi Statuta Roma 1998," *Journal of International Relations* 3, no. 2 (2017): 161–65.

³ Jawahir Tantowi, *Law Contemporary International*, (Bandung: Rafika Aditama, 2006) 80.

⁴ Muhammad Iqbal Rachman and Sahid Hadi, "The Dynamics Of Human Rights Enforcement In Indonesia: A Misconception and Political Consideration in the Formulation of Law Number 26

portance of the command responsibility norm in human rights violations is because the commander has a very important responsibility regarding all activities that have been currently, and will take place against the group he leads.

So that the implementation of human rights enforcement through the national judicial mechanism related to command responsibility is considered difficult to charge the leaders of the troops because several cases of human rights violations have proven that they can escape from legal bondage and are free from responsibility for the actions that have been committed by them or members of the group they lead⁵.

Differences in translating The 1998 Rome Statute as the basis for the birth of Law No. 26 of 2000 can give rise to an indication that causes the norm of command responsibility to be blurred, thus indicating that the protection of human rights will be very difficult to achieve. Especially in military culture, a unit leader has an important position as the bearer of responsibility for all actions and activities carried out by his subordinates that are specifically within the scope of carrying out the unit's duties.⁶

The purpose of this study is basically to discuss errors in translating the norms of command responsibility contained in the

1998 Rome Statute. So the author feels that this issue is interesting and important because several cases that have been tried have proved very difficult to ensnare the commandos of the troops. This is considered very important for the development of human rights in Indonesia to improve the norms of command responsibility that currently exist.

The legal issues that will be described in this study are regarding the differences and implementation of command responsibility norms by comparing Law No. 26 of 2000 and the 1998 Rome Statute which specifically regulates command responsibility norms to find out what factors make the court's authority Indonesia's human rights are very limited and it is difficult to prove the concept of command responsibility for human rights violations before the courts. This writing will also examine more deeply the strengths and weaknesses of the norm of command responsibility in the development of human rights in Indonesia if Indonesia makes amendments or revisions to Law no. 26 of 2000 specifically in changing the norms of command responsibility that currently exist.

In addition, the study in this paper also aims to be an academic reference regarding the concept of command responsibility. The results of this study are also expected to be considered by the government, both executive and legislative, in taking steps to address the existence of several regulations in Law no. 26 of 2000 so that changes or amendments can be made.

METHOD

The writing methodology that will be used is a normative method with a conceptual approach. It is intended that the legal research which was carried out prioritizes the achieve-

Year 2000 on Human Rights Court.," in *International Conference on Law and Society (ICLAS) VI: Legal Challenges in Social Justice and Economic Progress* (Universitas Muhammadiyah Yogyakarta: Fakultas Hukum Universitas Muhammadiyah Yogyakarta berkolaborasi dengan International Islamic University Malaysia, Istanbul Medeniyet University Turkey, University Islam Sultan Zainal Abidin Malaysia, Fatoni University Thailand, 2007).

⁵ Maruf, "Kebijakan Indonesia Belum Meratifikasi Statuta Roma 1998.," 161

⁶ *Ibid.*

ment of the truth of coherence⁷.

This research basically uses several approaches that are intended as a medium to facilitate the author in finding solutions in dealing with the legal problems that the author puts in this legal research. The approaches taken in this research are as follows;

a. The Law Approach

This approach is carried out by analyzing Law no. 26 of 2000 and the 1998 Rome Statute to conduct comparative law relating to the legal issues being handled. This approach is carried out to find the ratio legis of the birth of the law⁸.

b. The Conceptual Approach

approach is carried out by using the views and doctrines that develop in the science of law. By studying the views and doctrines in legal science, researchers will find ideas that give birth to legal notions, legal concepts, and legal principles that are relevant to the issues at hand⁹.

This comparative study of law is based on the author's desire to explore the norms of command responsibility adopted from the norms of an international law as a whole and without taking advantage of the political interests of the stakeholders. In solving the legal issues faced, it is necessary to have research sources which in this case consist of primary legal materials and secondary legal materials. Primary legal materials are legal materials that have an authority and contain legal provisions that are sourced from several laws and regulations along with their hierarchical

derivatives and judges' decisions¹⁰. While secondary legal materials are library materials that contain new or up-to-date scientific knowledge, or new knowledge about known facts or legal issues. Secondary legal material is not an official source of law.¹¹

ANALYSIS AND DISCUSSION

Comparative Law of Law No. 26 of 2000 with the 1998 Rome Statute¹²

The problem of incompatibility of word translation in Law No. 26 of 2000 is an important matter because the implementation that will occur in the community will be chaotic because the norms are translated out of sync, so that if we apply them to , it will not solve the practice of human rights violations that occur because many regulations do not accommodate the interests of human rights enforcement. Among them are the differences in interpretation between Article 42 of Law No. 26 of 2000 and the 1998 Rome Statute which indicates that justice is hampered to be achieved and the practice of human rights courts through human rights courts is definitely inadequate and relevant in dealing with the issue of human rights violations.¹⁴ This is what creates a sense of injustice for the enforcement of human rights if the case is related to the command of troops in the human rights court because the norm of command responsibility is difficult to prove in court. Thus,

¹⁰ *Ibid.*,135

¹¹ *Ibid.*

¹² Law of the Republic of Indonesia Number 26 Of Year 2000 Concerning Human Rights Courts

¹³ *International Criminal Court, Rome Statue of The International Criminal Court*

¹⁴ Mahrus Ali and Syarif Nurhidayat, *Penyelesaian Pelanggaran HAM Berat (In Court System Dan Out Court System)* (Jakarta: Gramata Publishing, 2011) , 10-14.

⁷ Peter Mahmud Marzuki, *Penelitian Hukum*, Cetakan Ke (Jakarta: Prenada Media Group, 2016), 60.

⁸ Bambang Waluyo, *Penelitian Hukum Dalam Praktek* (Jakarta: Sinar Grafika, 2008), 51.

⁹ Marzuki, *Penelitian Hukum*, 135-136

there is a perception that the commandos of these troops are considered immune from the law, making it difficult to be convicted in a case of human rights violations.

Comparison of Law no. 26 of 2000 and the 1998 Rome Statute are used to emphasize respect for human rights and basic freedoms, as a concrete step in an effort to create and bring justice for all, as a medium in helping to end and provide conflict solutions or resolve social conflicts, and become a lesson learned. for the next generation as a preventive measure to prevent similar incidents from occurring in the future. In addition, a comparison of these legal norms is carried out in order to obtain similarities ranging from understanding, understanding to clear legal implementation regarding the norms of command responsibility that apply under the law. international law and Indonesian national law.¹⁵

Table 1

No	Difference
1	‘shall be criminally responsible’ article 28 of the 1998 Rome Statute ‘Can be accounted for criminal acts’ article 42 of Law No.26 of 2000
2	‘a superior’article 28 of the 1998 Rome Statute ‘A superior, both police and other civilians’ article 42 Law No.26 Year 2000
3	‘Crimes’ Article 28 of the 1998 Rome Statute ‘Severe Human Rights Violations’ Article 42 of Law No. 26 Year 2000

¹⁵ Muladi, “Mekanisme Domestik Untuk Mengadili Pelanggaran HAM Berat Melalui Sistem Pengadilan Atas Dasar UU No.26 Tahun 2000,” *ELSAM: Lembaga Studi & Advokasi Masyarakat*, last modified 2007, accessed January 2, 2021, <https://referensi.elsam.or.id/2014/09/mekanisme-domestik-untuk-mengadili-pelanggaran-ham-berat-melalui-sistem-pengadilan-atas-dasar-uu-no-26-tahun-2000/>.

4 ‘The crimes concerned activities that were within the effective responsibility and control of the superior’article 28 of the 1998 Rome Statute Not regulated in Law No.26 of 2000

If we look at the comparison table between Article 42 of Law No.26 of 2000 and Article 28 of the 1998 Rome Statute, we can clearly observe the philosophy the translation as written in Law No. 26 of 2000, where there are several differences in words and meanings, among others; First, article 42 of Law No.26 of 2000 which clearly removes the word ‘shall be criminally responsible’ in the provisions of article 28 of the 1998 Rome Statute by replacing it with ‘shall be held responsible for any criminal action’ (“can be held criminally liable”) so that this often confuses law enforcement officers. law, especially judges when interpreting actions as criminal acts or offenses categorized as human rights violations. In some cases, judges have different understandings when interpreting an act that is categorized as a crime against humanity because the references they use regarding the concept of command responsibility are different from the interpretation of Article 42 of Law No. 26 of 2000¹⁶.

Furthermore, the concept of command responsibility can lead to multiple interpretations for law enforcement circles because it can be interpreted as a civilian. This clearly has deviated from the concept of command itself because in fact the command is a leader who is given the task by the state to lead

¹⁶ Lina Hastuti, “Pengadilan Hak Asasi Manusia Sebagai Upaya Pertama Dan Terakhir Dalam Penyelesaian Pelanggaran Berat Hak Asasi Manusia Di Tingkat Nasional,” *Jurnal Dinamika Hukum* 12, no. 3 (2012): 398–402, <http://dinamikahukum.fh.unsoed.ac.id/index.php/JDH/article/view/197>.

a group, so that the enforcement of human rights against the concept of command responsibility is impossible to hold civilians accountable for without further explanation of the true meaning of civilians. .

Then, the actual concept of the 1998 Rome Statute is to regulate the responsibility for criminal acts against human rights violations, so it is not appropriate if the concept contained in Law No. 26 of 2000 is the concept of human rights violations. The imperfect translation was allegedly only a form of government panic because Indonesia at that time received a statement from the Secretary General of the United Nations through UN Security Council Resolution 14 No. 1264. The formulation of gross human rights violations also resulted in differences in Article 7 of Law No. 26 of 2000 which states that serious human rights violations include genocide and crimes against humanity. This is a gap for the command to take responsibility for the violations of human rights that occur, because the regulations related to gross human rights violations are very limited. Meanwhile, the 1998 Rome Statute stipulates that serious human rights crimes include genocide, crimes against humanity, war crimes, and crimes of aggression. The difference in categories of gross human rights violations is also beneficial for commandos who are prosecuted in cases of human rights violations because the regulated provisions do not accommodate other existing provisions, so the potential for freedom and being declared innocent is wide open¹⁷.

After that, the provisions regarding com-

mand responsibility in Article 42 of Law No. 26 of 2000 also do not include the clause "The crimes concerned activities that were within the effective responsibility and control of the superior" contained in article 28 of the 1998 Rome Statute. This is a big question mark for humanitarian activists, why the government does not include this provision. In fact, this provision makes it more difficult for the command to be criminally responsible to escape the legal snares, because the command must be responsible for crimes committed by members of its group while on duty. Thus, the mandate and responsibility of the command given by the state are carried out as well as possible to supervise the actions taken by members of their group while on duty. So it can be interpreted that, when a group member commits a violation while on duty, the command is definitely responsible for the violation so that there is no loophole to escape the snares of the law.

These misinterpretations that change the norm of command responsibility in the 1998 Rome Statute will also have an impact on the boundaries of the jurisdiction of the human rights court itself so that it implicitly illustrates the difficulty of reaching the commanding officer or order giver because they do not participate directly. Therefore, the norms of command responsibility contained in Article 42 of Law No. 26 of 2000 actually need to be revised or the government needs to make amendments and renewals so that the implementation of the norms of command responsibility can run more effectively and comprehensively.

The Position of the Human Rights Court according to the International Legal Mechanism

¹⁷ Sarah Sarmila Begem, Nurul Qamar, and Hamza Baharuddin, "Sistem Hukum Penyelesaian Pelanggaran Hak Asasi Manusia (HAM) Berat Melalui Mahkamah Pidana Internasional," *SIGN Jurnal Hukum* 1, no. 1 (2019): 7, <https://doi.org/10.37276/sjh.v1i1.28>.

Basically when we refer to the 1998 Rome Statute Article 28 letter (a) which specifically describes command responsibility which states a military commander or person who effectively acts as a military commander is criminally responsible for crimes committed by troops under his command and control effectively so that violations committed by subordinates do not relieve the commander of the responsibility if he finds out because it includes preventive measures¹⁸.

The 1998 Rome Statute in article 28 also emphasizes that the birth of command responsibility in leading a war unit should be followed by several elements that cannot be separated from the command's duties, one of which is the element of field knowledge and troop control which includes knowledge of the actions of his subordinates in the field. If he is about to commit a crime then the command is obliged to prevent it and if his subordinates have committed a crime, then the command is obliged to punish him¹⁹. So the emphasis on reforming the norms that want to be applied from this comparison is regarding the responsibility of the command which cannot be free from responsibility criminal, especially if the commando is aware that he knows that his troops have or will commit un-

lawful acts related to their duties, commandos should ideally take steps to prevent and foster group members.²⁰

Then if we look at the ad-hoc decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute) in²¹ order to see the implementation of command responsibility in the international world, this case occurred in Bosnia which was carried out by Zlatko Aleksovki who was found guilty of violating Article 7 paragraph (3) The ICTY Statute as the basis for the decision which emphasizes or focuses that for commandos who are responsible for the crime committed, if Zlatko Aleksovki knows, or has reason to know that his subordinates are committing an act or have committed a crime and their superiors fails to take action and to prevent the act, the act is categorized as a troop commander neglecting the responsibilities given.²²

Departing from this case, the international court can basically apply responsibility command with the elements fulfilled, so that it does not rule out the possibility that the command is responsible for the events committed by its subordinates on the battlefield. Therefore, the point of view contained in the ICTY Statute becomes a very important element for observing and evaluating the application of the command responsibility norm in Indonesia so that the command responsibility

¹⁸ Fadilah Agus, "Tanggung Jawab Komando," in *Training Hukum HAM Bagi Dosen Pengajar Hukum Dan HAM Di Fakultas Hukum Pada Perguruan Tinggi Negeri Dan Swasta Di Dan HAM Di Fakultas Hukum Pada Perguruan Tinggi Negeri Dan Swasta Di Indonesia* (Yogyakarta: Pusat Suti HAM UII bekerjasama dengan NCHR University of Oslo Norway, n.d.), <http://e-pushamuii.org/files.php?type=pdf&id=268>.

¹⁹ Ryan Fani, "Doktrin Pertanggungjawaban Komando Atas Kejahatan Berat HAM Menurut Hukum Pidana Internasional," *Wacana Paramarta: Jurnal Ilmu Hukum* 19, no. 1 (2020): 49–50, <https://doi.org/10.32816/paramarta.v19i1.84>.

²⁰ Marfuatul Latifah, "Urgensi Indonesia Menjadi Negara Pihak Statuta Roma Bagi Perlindungan HAM Di Indonesia," *POLITICA* 5, no. 2 (2014): 158–161, <https://jurnal.dpr.go.id/index.php/politica/article/view/341>.

²¹ *International Criminal Tribunal for the Former Yugoslavia ICTY Statute*.

²² Benadito Rompas, "Tanggung Jawab Komando Menurut Hukum Humaniter Internasional," *Lex Privatum* 5, no. 2 (2017): 144, <https://ejournal.unsrat.ac.id/index.php/lexprivatum/article/view/15284>.

evidence is more comprehensive before the court, especially if the elements of the command have been fulfilled. , there is no reason not to put the responsibility on the command.

The Cases of Human Rights Violations Involving Commands in Indonesia

The norm of command responsibility has an important role in resolving a human rights violation, so we will find that there are errors in interpreting the 1998 Rome Statute which may indicate that the government at that time was deliberately misinterpreting so that the provisions which was in Law No. 26 of 2000 could protect the perpetrators of human rights crimes at that time.²³ The error of norms in the interpretation of the 1998 Rome Statute contained in Article 42 of Law no. 26 of 2000 has a very different meaning if we compare it with the original source of the regulation in Article 28 of the 1998 Rome Statute.²⁴

This is possible because if we draw on the historical record of the emergence of command responsibility which is a legal product that was born to avoid the International ad hoc Court as happened in Rwanda and Yugoslavia where military leaders were tried in the UN ad hoc Court.²⁵ So that the birth of Law No. 26 of 2000 is a product that was born as a result of pressure from foreign countries so that the enforcement of human rights in Indonesia is enforced, so that the requirements will be political.²⁶

The difficulty of proving the existence of command responsibility for the defendants is due to the complexity of regulations and factual references so that the evidentiary process is considered difficult to ensnare the parties to human rights violators, this is also because the current provisions are not sufficient to provide understanding and limits on how the elements of responsibility the command responsibility is applied.²⁷

Then, if we look at the decisions of the ad-hoc human rights courts in Indonesia, for example, the decision on the East Timor case after the popular consultation, among others, served as the basis for the prosecution by the Prosecutor against the defendant Abilio Soares (Governor of East Timor). However, Abilio Soares was eventually released from his sentence after a request for reconsideration, the basis for Soares' release was allegedly due to the interpretation of the judge against article 42 which only defines command responsibility as a violation of the duty or service that must have a direct relationship or be the main cause of the occurrence of a crime.²⁸

Where such an interpretation does not see the defendants as having certain authority and authority to prevent violations. Then in the Tanjung Priok case, in the Tanjung Priok case it was said that the perpetrator and the person in charge, the Team Leader who carried out the shooting, was led by Serda Sutrisno Mas-

²³ Agus, "Tanggung Jawab Komando.",49-70

²⁴ Ibid.,

²⁵ Mona Ervita, "Teori Pertanggungjawaban Komando (Command Responsibility): Studi Kasus Kurt Meyer Di Pengadilan Militer Kanada," *Simbur Cahaya* 24, no. 2 (2017): 1–3, <http://journal.fh.unsri.ac.id/index.php/simburcahaya/article/view/58>.

²⁶ I Wayan Parthiana, *Hukum Pidana Internasional* (Bandung: Yrama Widya, 2015), 205-210.

²⁷ Joko Setyono, "Penerapan Pertanggungjawaban Komando Di Indonesia Atas Pelanggaran HAM Berat Kategori Kejahatan Terhadap Manusia," *Jurnal Masalah-Masalah Hukum* 9, no. 4 (2010): 352–353.

²⁸ Satrio Saptohadi, "Eksistensi Pengadilan Hak Asasi Manusia Dalam Penegakan Hukum Di Timor Timur Pasca Jajak Pendapat," *Jurnal Dinamika Hukum* 13, no. 2 (2013): 346–348, <http://dinamikahukum.fh.unsoed.ac.id/index.php/JDH/article/view/216>.

cung where the defendant was charged with individual responsibility offenses. This reasoned that Sutrisno Mancung was a subordinate officer even though in the incident Mancung was the executor who led the shooting squad. The prosecutor could not prove that the mancung was a command that was officially assigned by the state, so the decision of the mancung was considered as an individual fault. This basis makes that in the application of Law. No. 26 of 2000 is very weak.²⁹

In addition, in the formulation of Article 42 of Law no. 26 of 2000 which extensively uses the word “can” which replaces the word “must” when we translate the article from the main law, semiotics is intended that command responsibility is very difficult to prove and only leads to direct actors in the field. The ambiguity in the formulation of this article also came with a lack of explanation Adequate explanation of the formulation will result in various legal interpretations.³⁰

CONCLUSION

The Comparison of Law No. 26 of 2000 and the 1998 Rome Statute is basically aimed at eliminating the controversy where at the time the process of forming the regulation was motivated by the political interests of the state when there were allegations of human rights violations in Indonesia, the officials involved and related were not brought to justice. international justice, but it is sufficient to

be tried using domestic justice mechanisms.

In addition, the results of the comparison can be concluded that there is laxity in proving a commando guilty in Indonesia, in the Indonesian justice system the norm of command responsibility is very difficult to prove. It is different if we look at the implementation of command responsibility in international courts. In addition, the results of this legal comparison are intended to form a new provision and characteristic through an amendment to the norm of command responsibility contained in Article 42 of Law No. 26 of 2000 so that justice for human rights courts becomes more comprehensive.

Suggestion

The purpose of the amendment or change is to make improvements or perfect some of the provisions and rules in Law No. 26 of 2000, especially on the norm of command responsibility. So that with the amendment, it is hoped that it will achieve national goals and the welfare of the Indonesian people and protect human rights comprehensively. In addition, changes or revisions to Law No. 26 of 2000 are also aimed at eliminating the political interests of the country which at that time were pressured by foreign nations in order to protect generals from being prosecuted internationally so that several existing meanings and provisions need to be evaluated so that the main points The main point of upholding human rights in it is purely to uphold human rights in Indonesia.

The adjustments that need to be changed in the amendments that have been described in this study regarding the norms of command responsibility where command responsibility is very broad and can be held responsible criminally for all activities that occur in the

²⁹ ELSAM: Lembaga Studi & Advokasi Masyarakat, “Final Progress Report Pengadilan HAM Tanjung Priok : Gagal Melakukan Penuntutan Yang Efektif,” accessed January 15, 2020, http://lama.elsam.or.id/downloads/1268369271_Final_Progress_Report_Pengadilan_HAM_Tanjung_Priok.pdf.

³⁰ Ali and Nurhidayat, *Penyelesaian Pelanggaran HAM Berat (In Court System Dan Out Court System)*, 50-62.

unit including due to omission and failure to carry out obligations to control subordinates.

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