SOVEREIGN IMMUNITY IN COMMERCIAL TRANSACTION UNDER INTERNATIONAL LAW

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ABSTRACT

Under international law, a state is immune from execution or judgement before any foreign jurisdiction. However, parallel with the urge to international transaction including between a state and a corporate, the international community demand a "protection" to the right of a corporate against a foreign government. Thus, international law introducing a new doctrine of state immunity. Under the restrictive immunity, a state waives its right to immunity so long it become a party in a commercial transaction. On the other hand, the older doctrine which is absolute immunity, is giving the full protection to the state to any claim against it including its assets and properties. The purpose of this paper is to elaborate the current issue regarding the state immunity under international commercial transaction from the perspective of international law. The methodology used for this paper is library research. The research concludes that a sovereign is still having its immunity against any claim brought under international commercial transaction with certain conditions as required under international law.

Dalam hukum internasional, suatu negara memiliki imunitas atas putusan peradilan yang memiliki yurisdiksi yang berbeda. Namun demikian, adanya tuntutan dari masyarakat internasional untuk perlindungan terhadap korporasi dalam transaksi internasional melahirkan doktrin baru dalam imunitas negara. Berdasarkan doktrin imunitas terbatas, suatu negara dianggap melepaskan imunitasnya jika melibatkan diri dalam transaksi komersil. Hal ini berbeda dengan doktrin imunitas absolut yang pertama kali diperkenalkan dalam hukum internasional yang memberikan perlindungan penuh atas suatu negara. Tujuan dari tulisan ini adalah mengelaborasi isu-isu terbaru terkait imunitas negara yang melakukan transaksi internasional dari sudut pandang hukum internasional. Metodologi yang digunakan adalah melalui pendekatan studi pustaka. Dari pendekatan tersebut didapat kesimpulan bahwa sebuah negara masih memiliki imunitasnya meskipun menjadi salah satu pihak dalam transaksi komersial selama transaksi tersebut memenuhi beberapa kondisi dalam hukum internasional.

***Keywords**: international law, state immunity, commercial transaction.*

I. INTRODUCTION

Sovereign immunity, also known as state immunity, is a principle under international law that allows a state protects its assets/properties and its representatives against other state or foreign private entity before court or tribunal in a foreign jurisdiction including its judgement/award enforcement. Sovereign immunity used to be absolute. The classic doctrine of sovereign immunity was succinctly exposed by Marshall, C.J thus:

> "One sovereign being in no respect amenable to another, and being bound by obligations of the highest characters, not to degrade the dignity of his Nation by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license or in the confidence that the immunities belonging to his independent sovereign nation, though not expressly stipulated, are reserved by implication and will be extended to him".[1]

International law acknowledges two doctrines of state immunity: absolute immunity and restrictive immunity. Absolute immunity is a privilege for a state under international law where a state is immune against foreign court or tribunal proceeding whether it is under public act or commercial act. Absolute immunity thus refers to the privileges and exemptions, granted by one state through its judicial machinery to another, against whom it is sought to entertain proceeding, attachments of property or the execution of judgement.[2] This is to avoid foreign state from, either infringing sovereign prerogatives of states, or interfering with

[1] Paschal Oguno, "The Concept of State Immunity Under International Law: An Overview", *International Journal Law*, vol.2, issue 5, 2016.
[2] Idem.

the functions of a foreign state agent under the guise of dealing with an exclusively private act, in other word personifying the state or the state itself.[3]

In other words, under absolute doctrine, a state's assets and properties including its diplomatic representatives are protected to a "limitless" extent. As a result, in case of a corporate make a deal with a state through its government, for instance a loan agreement, such corporate might have a hard time to make a claim against the related state. This is highly possible as under the absolute doctrine there is no difference of the transactions being taken by the state, whether it is under diplomatic act or commercial act. Thus, in case of a corporate make a claim against a state's assets or properties, such assets or properties are fall under the protection of state immunity. It is then make sense that a corporate will think twice in making an international deal with a government despite its large amount. No corporate is willing to corporate with a government without an underlying to protect its interest.

Therefore, to promote the same ground between a private entity and a sovereign entity in transnational transactions, the international community urges an exception to a sovereign absolute immunity. As a result, so long a sovereign act under commercial transaction, restrictive immunity replaces the absolute immunity. This new immunity allows private entity to get "guarantee" when dealing with a state. This exception to absolute immunity gives private entity something to claim as state is no longer having an absolute immunity. Without this exception, it is almost impossible for a foreign private entity to pursue its claims against a sovereign party.

The question now is the reason behind state allows the exception to immunity and how does this exception applied. Is not it better for a state to stay immune while getting advantages from commercial activities? This paper is addressed to such issue and the issue regarding the sovereign immunity under international law as well as the difference between public act and private act of a sovereign. The point of view will be from the perspective of a state as well as a private entity. This paper elaborates the immunity of the state and its assets and properties under commercial transaction with a foreign private entity/corporation.

II. SOVEREIGN IMMUNITY UNDER INTERNATIONAL LAW

The issue of sovereign immunity arises mostly when a foreign private entity bound itself with a state. With regard to the old doctrine of sovereign immunity, a state has an absolute immunity against a foreign private entity even if they bound themselves in the name of commercial act. Under this principle, a foreign state or private entity could not claim jurisdiction over another state nor could it enforce any judgment or award from foreign jurisdiction. From this alone, it is clearly an advantage to a state and a burden to a private entity. In case of dispute such foreign private entity could not seek for claims to satisfy detriment it is suffered. On other words, it means that such private entity most likely get nothing in return. However, under restrictive immunity, foreign private entity is like hope. Does it mean that under this principle, the private entity will automatically able to make a claim against a sovereign? Under restrictive immunity, the answer can be yes and no. It is can be a "yes" when a state waives its immunity. How? It is either by stating a waiver of immunity clause in the contract or agreement, or by orally saying so before a court or tribunal. In the latter case, such statement should be made before the court or tribunal. It is can be a "no" when a state does not waive its immunity when bound itself under a contract/agreement with a private entity.

[3] Idem.

Under the new principle of state immunity, a state cannot claim an absolute immunity from adjudication on disputes arising from its commercial transactions; nor can it claim immunity from execution.[4] Aside from the urge of need for same level of parties under international commercial transaction, the increase number of states involved in commercial transaction contributes to the creation of such principle. The idea of this principle is to give an assurance as well as a protection to a private entity when dealing with a state but without denying the fact that a state is a sovereign which basically has immunity under international law. It is important to keep in mind that restrictive immunity applied only to international commercial transaction where a state acts under private act.

The next question then is to differentiate whether a state complied under public act or private act. Under public act, it is not possible for a private entity to bring any proceeding under a foreign jurisdiction or to enforce court judgment or tribunal award against a state. Public act of a state means that such state represented by its legal personal and to act under public act. It is also known as a diplomatic mission. Under private act, it does not mean that a state will automatically fall under restrictive immunity. The counterparty had the burden to ensure that the said state acts under commercial act and waive its immunity. Understanding international law regarding sovereign immunity will at least gives clues to what is fall under public act and what is not. Defining a commercial transaction can be so tricky for a party other than the sovereign. In case a written statement defines that the party bound themselves under a commercial transaction, the claim then is well-grounded. However, in the event that there is no such statement, the purpose of the transaction is defining whether the deal was made under commercial act for the private entity to be able to make a claim.

Therefore, in order to correctly define the nature of a transaction, understanding the international treaty will be a good guide to do so.

A. Vienna Convention on Diplomatic Relations 1961

Vienna Convention on Diplomatic Relations 1961 (Vienna Convention 1961) address the issue of state immunity with regard to its public acts. Its entry into force in 24 April 1964 after at least of 22 instruments of ratification submitted to the Secretary-General of the United Nations. This is as stated in Article 51 of the Vienna Convention 1961. Vienna Convention 1961 addresses the issue of state immunity with regard to its public acts. This convention is believed to contribute to the development of friendly relations between states by assuring the privileges and immunities to states under its public acts. The purpose of such privileges and immunities, however, is given for a state represented by its personal in performing the diplomatic mission. This purpose is as stated in the preamble of such convention.

The articles of Vienna Convention 1961 elaborate what are the diplomatic missions and the criteria of a representative:

1. Article 1 defining the subject of a diplomatic mission which is a person who is formally charged to represent such state. There are two issues under this article, the personal and the act. The personal has to be a representative who is legally acting in the name of the state under a diplomatic mission. This two conditions alone is an assurance for a state and its personal to claim absolute immunity. However, there are several exceptions such immunity as under Article 31: when such representative act as a private person and become a party in a commercial activity.

[4] Justice Woo Bih Li, "State Immunity in Commercial Dispute – An Overview of Singapore Law & A Re-visit to The Absolute Doctrine of State Immunity", *The Fifth Judicial Seminar on Commercial Litigation*, 2016.

2. Under Article 3(1) the diplomatic mission as such:

> "The functions of a diplomatic mission consist, inter alia, in: (a) Representing the sending State in the receiving State; (b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law; (c) Negotiating with the Government of the receiving State; (d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State; (e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations."

B. Vienna Convention on Consular Relations 1963

Vienna Convention on Consular Relations 1963 (Vienna Convention 1963) is adopted from Vienna Convention 1961 which particularly address the consular relations between states. This convention comes into force on 19 March 1967 after the twenty-second instrument of ratification was submitted to the Secretary-General of the United Nations (Article 77 of the Vienna Convention 1963).

The purpose of this convention as stated on the preamble is to ensure the efficient performance of functions by consular posts. Similar to Vienna Convention 1961, under this convention members of diplomatic staff also enjoy diplomatic privileges and immunities. This convention defines consular premises and consular archieves which are usally exempted under waiver of immunity clause in an international commercial transaction. Article 1 of Vienna Convention 1963 defines consular premises and consular archieves as:

> "Consular premises" means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used exclusively for the purposes of the consular post; "Consular archives" includes all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safe keeping."

C. Convention on Jurisdictional Immunities of States and Their Property

Convention on Jurisdictional Immunities of States and Their Property 2004 (Convention 2004) is a protection for states under commercial act. In other word, this convention will be a complement to the other two conventions particularly regarding state's properties. The purpose of this convention as in its preamble is to enhance the rule of law and legal certainty in a commercial transaction between states with natural or juridical persons. Moreover, it is expected to contribute to the codification and development of international law and the harmonization of practice in the relationship between states and private entity. Thus, this convention is a kind of protection to a state and its property against jurisdiction of foreign court.

This convention is in the different ground compare to Vienna Convention 1961 and Vienna Convention 1963 which aims the diplomatic relations and consular relations of states accordingly. Under this convention states the condition to exercise a claim of a jurisdiction and the properties that are immune from court order or tribunal award. Commercial transaction under this convention defines as:

> "(i) any commercial contract or transaction for the sale of goods or supply of services; (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction; (iii)

any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons."

Article 2 (2) giving a further elaboration to determine whether a contract or transaction is a commercial transaction or else. This article is not only emphasis the nature of the contract or transaction but also to the purpose of the parties who bound themselves onto the said contract or transaction. This convention also gives a more elaborated meaning to state as:

> "(i) the state and its various organs of government; (ii) constituent units of a federal state or political subdivisions of the state, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity; (iii) agencies or instrumentalities of the state or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State; (iv) representatives of the state acting in that capacity."[5]

This definition will help in determining whether a private entity bound itself to a personal that legally represent a state. This convention also making it clear that under international relations, a state should respect another state's immunity by refraining its court from exercising jurisdiction against another state whether such state is a party in the proceeding or become the third party. Then what is the difference between this convention with the other two conventions? As elaborated in the previous chapter, under commercial transaction, a state is not absolutely immune. Under restrictive immunity, a state which acts under commercial law is not immune to a jurisdiction or proceeding. This convention elaborates immunity of a state under commercial transaction and what condition or requirement for a state to be taken before court/tribunal proceeding.

But why does state want to waive its immunity if it can involve in a commercial transaction with a private entity? By waiving its immunity, it can get broader chances to take part in a transnational commercial transaction particularly those who are yet be a developed countries. In order to do so, it has to expand its commerce by making international trades, develops its national security by purchasing an up-to-date weaponry, etc. All of those transactions are possible by not limiting its commercial transactions to national or state-to-state transaction. On the other hand, this convention gives a private entity an assurance that by bound itself to a sovereign, such private entity will get a guarantee of a claim against a state. Under Article 7 (1), there are three options for a state to waive its immunity: (a) by international agreement; (b) in a written contract; or (c) by a declaration before the court or by a written communication in a specific proceeding. It can be concluded that the waiver of immunity should be stated explicitly and agreed between parties. Statement made by the sovereign alone shall not be deemed enough to conclude such waiver. Article 7 (2) make an addition that a statement merely agreed to a choice of law does not automatically a statement of a state to exercise of such law. Once a state become in a party or intervened in a proceeding, it cannot longer invoke its immunity under such jurisdiction. However, if such state intervenes before a court in order to invoke immunity or to asserting its right or interest in a property at issue in proceeding, it should not be considered as an exercise of jurisdiction as stated under Article 7 (1). The appearance or no appearance of a representative of a state before a court also should not be considered as a consent to the exercise of jurisdiction.

[5] Convention on Jurisdictional Immunities of States and Their Property, 2004.

III. WAIVER OF IMMUNITY

In a commercial transaction where the parties are a private entity and a state with different jurisdiction, immunity will be one of the main issues. Such private entity will need a guarantee that in case of dispute, it will be able to make a claim before a court or tribunal against the state. However, as international law gives immunity to a state, sometimes a private entity become reluctant to involve itself in an agreement/contract with a sovereign. On the other hand, a sovereign need to make a commercial transaction with a foreign private entity for it to developed. For such state to get wider chances which also give a multi choice in making a commercial transaction, it has to offer a waiver to its immunity guaranteed by the international law.

There are two kind of waiver of immunity for a state: waiver of immunity to a foreign jurisdiction and to a foreign court judgement or tribunal award. Waiver of immunity to a foreign jurisdiction does not mean that such state also waive its immunity against a foreign court judgement or tribunal award. Immunity from jurisdiction can be defined as a limitation on the forum state to exercise jurisdiction over a foreign state.[6] Under this principle, it is impossible for a foreign court or tribunal to bring any claim in the choice of jurisdiction, let alone to execute the court judgement or tribunal award. In case of a state waive its immunity under particular jurisdiction, it can take claims against such state in such jurisdiction before its court or tribunal. However, if such state does not waive its immunity to the enforcement of court's judgment or tribunal award, even a claim can be brought before a court or tribunal, it could not be executed.

On the other hand, state immunity from enforcement measures prevents courts of the forum state from imposing measures of constraint on the foreign state.[7] Mag. Eva Wiesinger in her journal elaborate the conditions for enforcement against state property. The first thing to be determined is the purpose of the object of execution. As elaborated, the state's immunity does not apply if a state bound itself under public act and not commercial act. In case it is under public act, but the private entity does have a faith to make a claim before a court or tribunal, the purpose of the said object will be a big point in determining the nature of the agreement or contract. For example, in case a private entity and a state bound themselves under an agreement and the object of such agreement is cotton. In the absent of statement that they bound themselves under commercial law, the purpose of cotton will determine the nature of such transaction. In case of it is proved that such cotton is used for the army's uniform, then it should be classified as public act where the state exercise its right under sovereignty. However, if the cotton is used as a clothes material and then sell it, then it should be classified as a commercial transaction. Therefore, the private entity can brought claim before a court or tribunal against said state. However, the execution of court judgment or tribunal award will depend on the national law where the judgement or award brought to execution. For example, Bank A and State B signed an international commercial contract where State B will make a purchase of a ship from Company C with condition that State B will pay Company C by getting loan from Bank A. After Company C fulfills its obligation to provide State B with the ship, State B had difficulties to pay Bank A due to the increased value of USD against its national currency. Under the contract, State B agreed to waive its immunity and choose Bank A's jurisdiction to govern such contract. Bank A then make a claim against State B before its court and demand payment using State's properties including properties in the state where the ship was purchase which is State C. However, court in State C refuse to recognize such judgement for it law does not allow

[6] Mag. Eva Wiesinger, "State Immunity from Enforcement Measures", 2006.

[7] State immunity from enforcement measures, mag. Eva wiesinger, university of vienna, july 2006. P.3

exception to immunity. As a result, even Bank A succeeds in getting judgment but to no avail. Property which has been allocated or earmarked by the state for the satisfaction of the claim, which is the object of that proceeding, is subject to enforcement measures by the forum state.[8]

The purpose of a property can be elaborated as under Article 19 (c) of the Convention 2004. Under this article, a state's property shall be immune from execution so long that property used for non-commercial purposes. Article 21 of the Convention 2004 listing five categories of state property which are shall not be regarded as property used or intended for use by the state for other than governmental non-commercial purposes, which are: (i) property which is used or intended for use in the performance of the functions of the diplomatic or consular mission. For this purpose, it is including any bank account used for such purposes; (ii) property for military used; (iii) property of the central bank or other monetary authority; (iv) property forming part of the cultural heritage which is not placed or intended for sale; (v) property forming part of an exhibition of objects of scientific, cultural or historical interest which is not placed or intended for sale.

A. Property for Non-Commercial Purpose

Property used for non-commercial purpose usually determined on the national's laws and regulations or by earmarking such properties whether it is for commercial use or non-commercial use. This property is including those in its jurisdiction and outside of the state for the purpose of diplomatic and consular missions as stated under Vienna Convention 1961 and Vienna Convention 1963.

B. Military Property

The broad wording of Article 21(b) of the Convention 2004 could lead to protection from attachment of ordinary commercial things which may be used for a military purpose, as for example, food or clothing.[9] It is important to note that the property should be used for the performance of military functions. State-owning of military equipment so long it used for commercial purpose such as for sale, it is not fall under military property as stated under Article 21(b) of the Convention 2004. The 1926 Brussels Convention for The Unification of Certain Rules Relating to The Immunity of State-Owned Vessels makes a distinction between normal state-owned ships and such state-owned ships that exclusively serve governmental non-commercial purposes, the latter being immune from enforcement measures.[10]

C. Property of Central Bank

Including property of central bank under this exemption is quite challenging as there is an apparent separation of central bank in a government. For example central bank in Indonesia which is Bank Indonesia. Under Law No. 23 Year 1999 on Bank Indonesia as amended by Law No. 2 Year 2008, it states that Bank Indonesia as a central bank of Indonesia is a separate entity from the government, including its property. It is can be a good thing or not so good thing in the same time. Why? Isn't it a totally good thing as it is as under Article 21 of Convention 2004? Well, unfortunately, this convention is yet taken into force. As this convention is yet effective, it means that the property of central

[8] United Nations convention on jurisdictional immunities of states and their property, art. 18(b).

[9] State immunity from enforcement measures, mag. Eva wiesinger, university of vienna, july 2006. P.13

[10] Brussels Convention for the Unification of Certain Rues Relating to the Immunity of State-owned vessels, art 2

bank is not property as defined under Vienna Convention 1961 and Vienna Convention 1963. In the meantime, it is good to discuss this issue.

The separation of Bank Indonesia is a good thing as when the Government of Indonesia making an international contract with a foreign private entity. It means that the property of Bank Indonesia is separated from the state's property. Thus, in case of pre-judgement or judgement execution, the property of Bank Indonesia will not be included. However, it is can be a not so good thing too. The statement that Bank Indonesia is a separate entity will also means that its property could be considered as commercial property. Nonetheless, this is will depend on the court or tribunal to decide whether central bank property then can be considered as commercial property of a state.

D. Cultural Heritage, Scientific, or Historical Property

This property is a new addition to state immunity that worthy get praise. This protection will allow state to protect its heritage particularly its historical sites. In the best practice of international contract, cultural heritage, scientific, or historical property is not yet include in the property exempted under waiver of immunity clause.

Those lists of property, however, should be limited as to the condition under Article 19(c). The property should be located in the state of the forum and should be has a connection with the entity against which the proceeding was directed. This excludes the possibility of attaching state property located in a third state by means of a treaty on the enforcement of judgement.[11] The wording of Convention 2004 is certainly broader and allows attachment against all property of the entity involved in the proceedings, irrespective of the subject matter of the suit.[12] The annex to Convention 2004 contains understandings with respect to, inter alia, Article 19, which stipulates that the connection with the entity is to be understood as broader than ownership or possession.[13] This could mean that also a lien or an indirect interest in the asset of the defendant suffices to allow attachment.[14]

This convention is not yet come into force. In accordance to Article 30 of Convention 2004, such convention will come into force at the thirtieth day after submission of the thirtieth instrument of ratification. By the time this journal is written, there are a total of 28 states that have their document of ratification submitted to the Secretary-General of the United Nations. With the effectiveness of such convention, there are several additions to what properties shall be exempted from claims made against a state under the principle of restrictive immunity.

However, although state immunity is a principle of international law, it is applied in accordance with the law applicable to the proceedings, the law of the forum.[15] This means that the particular court or tribunal dealing with issues of immunity will look to its own national law, or the law of the seat if in arbitration.[16] When a state agreed to a foreign jurisdiction to govern a commercial contract, the counterparty is allowed to bring any claim against such state before the agreed forum whether it is a court or tribunal. For instance, immunity under United Kingdom law. United Kingdom imposing restrictive immunity as stated in its State Immunity Act 1978 (SIA). Under Section 2(1) of SIA, a state which

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[11] State immunity from enforcement measures, mag. Eva wiesinger, university of vienna, july 2006. P.16
[12] Idem, at P.17
[13] Idem.
[14] Idem.
[15] https://www.ashurst.com/en/news-and-insights/legal-updates/state-immunity--an-overview/
[16] Idem.

submitted its jurisdiction to a court of the United Kingdom is not immune to a proceeding submitted to such court. However, it is important to note that a mere statement under an agreement that a state choose United Kingdom as its governing law shall not regarded as a submission meant under Section 2(1). Furthermore, Section 3 of SIA states exemptions to state immunity which are regarding commercial transaction and obligation of a state whether it is under commercial act or not that is to be performed a whole or partly in the United Kingdom. SIA, however, defines its commercial transaction under Subsection 3(3) as: (a) any contract of goods or services; (b) any loan/transaction/guarantee/indemnity relating to financial obligation; (c) any other transaction/activity by a state that is not regarded to act under sovereign authority. Thus, under SIA, it is possible for a private entity to make any claim before court or tribunal in the United Kingdom so long the condition under SIA is fulfilled.

On the other hand, if the national law where the claim is sought does not allow restrictive immunity, then such judgment or award could not executed in the state where the property is exist. It is the same if the national law of the state is not allow any exemption to state immunity; the court judgment or tribunal award could not be registered let alone be executed. Then what is the case under Indonesian law? Under recent laws and regulations, Indonesia is yet to have state immunity law. It means that even though a state chooses Indonesia as its jurisdiction, such state is immune against claim brought by a private party before a court in Indonesia.

IV. CONCLUSION

The new doctrine of state immunity protects both international subjects which are person and state. It also gives assurance to a corporate to legally bind itself with a government under commercial transaction. These assurance benefits the state as it contributes to the number of corporates who are willingly to bind itself under a commercial transaction with a state. However, in the execution of such transaction, each party has its own interest. In one hand, a state need to protect its assets and properties while a corporate have to protect its own interest with underlying assets as a guarantee. Thus, both state and corporate formulates their interest in a contract or an agreement where a state has to waive its immunity for the interest of corporate and on the same time make exceptions to such waive for the interest of the state. However, the execution of waiver of immunity and its exception then will depend on the judgment proceeding or tribunal, and the law of immunity of chosen jurisdiction.

With the absent of state immunity law in Indonesia, a judgment seeker regarding state immunity will be put into question, whether it can be executed in Indonesia or not. The absence of state immunity law in Indonesia results in legal vacuum regarding such issue. It might solely depend on the international law to make the judgment. Or is it could not be executed before the court or tribunal in Indonesia?

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