

International Criminal Court (ICC) in Comparison with The Indonesian Human Rights Court

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Membandingkan Konvensi Roma mengenai ICC (International Criminal Court) dengan UU No. 26/2000 tentang Pengadilan Hak Asasi Manusia merupakan suatu langkah awal yang harus dilakukan apabila ada niat pemerintah untuk meratifikasi Konvensi Roma. Sebagai syarat utama meratifikasi Konvensi Roma adalah menghindari adanya suatu ketidaksesuaian antara hukum nasional yang berlaku dengan Konvensi Roma. Negara mempunyai tanggung jawab untuk melakukan penuntutan dan menyelaraskan hukum pidana dan hukum acara pidananya sesuai dengan konvensi. Konvensi Roma menyatakan "No reservations may be made to this Statute". Namun dalam UU No. 26/2000 penyelarasan yang dilakukan secara parsial telah menimbulkan suatu permasalahan dalam praktiknya. Komunitas hukum di Indonesia sangat mengerti kosekuensi dari meratifikasi Konvensi Roma seperti melakukan kerjasama dengan ICC dalam hal penyelidikan, penangkapan, dan pemindahan tersangka. Akan tetapi harus juga dipikirkan faktor lain seperti dimungkinkannya ekstradiksi terhadap warga negara sendiri, menjamin berlakunya yurisdiksi universal. Dengan demikian beberapa hal yang perlu dipertimbangkan sebelum melakukan ratifikasi terhadap Konvensi Roma, agar tidak terjadi kesalahan dalam mengambil kebijakan.

A. Introduction

The United Nations (UN) Charter's formal recognition of individual human rights was the culmination of a long historic fight. The Preamble of the Charter begins with the very important sentence:

^{*)} Penulis merupakan pakar hukum pidana dari Fakultas Hukum Universitas Diponegoro (UNDIP). Sejak muda beliau sangat aktif dalam berorganisasi sehingga kemudian dipercaya menduduki berbagai jabatan strategis diantaranya sebagai Dekan Fakultas Hukum UNDIP, Rektor UNDIP dan Menteri Kehakiman RI. Penulis yang dilahirkan di Solo tahun 1943 ini mengenyam pendidikan hukumnya strata 1 dan 2 di FH-UNDIP dan kemudian dilanjutkan dengan pendidikan doktor ilmu hukum di Fakultas Hukum Uuniversitas Padjadjaran.

“We the peoples of the UN determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and woman and of nations large and small ...”¹

The UN’s purposes also cover several references to human rights. Article 1 of the Charter stated:

- a. to maintain international peace and security;
- b. to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
- c. to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
- d. to be a centre for harmonizing the actions of nations in the attainment of these common ends.

The promotion of higher standard of living, solution of international complicated problems and universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion consider to be the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self determination of peoples.² Article 56 further stipulates:

“All Members pledges themselves to take joint and separate action in cooperation with the Organization for achievement of the purposes set forth in Article 55”.

¹ UN Charter Preamble

² Article 55 UN Charter

Concerning the promotion and protection of human rights, the role and the development of human rights principle, norms and standards, which inspired by the International Bill of Human Rights consider being very important. Those instruments of human rights emerge and develop through following manner:

Stage 1 -- *The Enunciative Stage* -- The emergence and shaping of internationally perceived shared values through intellectuals and social processes.

Stage 2 -- *The Declarative Stage* -- The declaration of certain identified human values, interests or right expressed in broad generalities in an international instrument. This stage includes non-legally binding norms and standards, elaborated by international organs and bodies.

Stage 3 -- *The Prescriptive Stage* -- The articulation in prescriptive form of specific principles, norms and standards in an international instrument whether general or particular, developed by an international organ or body; or the elaboration of specific normative prescriptions in a binding international agreement.

Stage 4 -- *The Enforcement Stage* -- The development of enforcement modalities through general or particular conventions or other international instruments or procedural mechanism or a combination thereof.

Stage 5 -- *The Criminalization Stage* -- The development of international penal proscriptions as a means of criminalizing human rights violations of significant gravity.³

The latest Stage will have connection with the establishment of Rome Statute of Criminal Court 1998, as the most significant international organization to be created since the United Nations. This court will prosecute genocide, crimes against humanity and

³ Cherif. M, Bassiouni, *The Protection of Human Rights in the Administration of Criminal Justice*, Centre for Human Rights, UN, Geneva, 1994, p. xxv.

war crimes when national justice systems are either unwilling or unable to do so themselves.

In this Stage, we come to the problem of monitoring mechanism of human rights promotion and protection, which actually, consist of either national or international monitoring system. They can be legal, political or informal. The various treaties or conventions set out, how a committee consists of independent experts has the liability of monitoring the treaty's implementation. Committees set up under the treaties on the elimination of racial discrimination, on torture, on the rights of children, on the elimination of discrimination against woman had demonstrated its effectiveness as international treaty monitoring bodies.

Another international monitoring body is The United Nations Commission on Human Rights which is a body made up of member States who has political in character, totally different with the treaty bodies. This Commission has a complaints system, where individuals and organizations could confidentially send complain about situations of gross violations of human rights in certain countries. Special Reporters can be appointed as investigators.

The establishment of international tribunals such as those on the Former Yugoslavia (ICTY), and Rwanda (ICTR) by UN Security Council as well as the International Criminal Court based on Rome Statute 1998, which shall exercise jurisdiction over the crime of genocide, crimes against humanity, war crimes and the crime of aggression was the reflection of the intergovernmental international bodies to monitor protection of the most serious crimes of concern to the international community as a whole.⁴ Europe, the Americas and Africa have in it self the regional human rights monitoring bodies.

In term of national level, the domestic courts, the parliament, Non-Governmental Organizations, national human rights institutions such as National Commission of Human Rights (KOMNAS HAM) in Indonesia, and the mass media can actively participate as powerful institutions monitoring human rights

⁴ Article 5(1) of the Rome Statute.

observance. Concerning the domestic court, the government of the Republic of Indonesia had established National Human Rights Court under Law No. 26/2000 which has adopted some international standards stipulated in Rome Statute of ICC, 1998, although Indonesia has not ratify the Convention yet. In some cases, it is possible that United Nations give support to strengthen a national court for the reason of lack of resources (the Hybrid Model such as the Serious Crime Unit of Timor Leste and which has happened in Sierra Leone).

Besides those developments, there were tendencies where several countries try to pass laws that give their courts universal jurisdiction over gross violation of human rights. Under this rule, the nationality of the accused, or his or her victims, or the place where the crimes were committed, does not determine where and when a trial can take place.⁵

B. The Nature of International Criminal Court

In Rome, 120 States voted to adopt the Rome Statute of the International Criminal Court on 17 July 1998. This Court will sit in The Hague and will come into being when sixty States have ratified the Statute. The different between the International Criminal Court and the International Court of Justice (ICJ) are ICJ is the Court where States litigate matters relating to their disputes as States. The role of individuals before the ICJ is marginal. ICC provide for prosecution and punishment of individuals (individual criminal responsibility), it also recognize a legitimate participation for the individual as victim. ICC is concerned, essentially with matters that might generally be described as serious human rights violations.

The ICJ, on the other hand, delimiting matters in all legal disputes concerning the interpretation of a treaty; any question of international law; the existence of any fact which, if established

⁵ International Council on Human Rights Policy, *Hard cases: bringing human rights violators to justice abroad, a guide to universal jurisdiction*, 1999, p. 4.

would constitute a breach of an international obligation; and the nature of extent of the reparation to be made for the breach of an international obligation. The latest development revealed that ICJ finds itself increasingly involved in human rights matters.⁶

ICC is a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crime of international concern and shall be complementary to national criminal jurisdictions.⁷ The term of complementary which also stated in the Preamble of the Statute, has very important meaning. It means that the Court could only exercise jurisdiction if domestic courts were unwilling or unable to prosecute.⁸

In order to have complete description about the struggle to establish the ICC, Andreychuk stated:

“A journey that started in Versailles in 1919 is about to end in Rome in 1998... This three quarter of a century journey has been long and arduous. It was also filled with missed opportunities and marked by terrible tragedies that ravaged the world. World war one was dubbed “the war to end all wars”, but then came World War II with its horrors and devastation. Since then, some 250 conflicts of all sorts and victimization by tyrannical regimes have resulted in an estimated 170 million casualties. Throughout this entire period of time, most of the perpetrators of genocide, crimes against humanity and war crimes have benefited from impunity.”⁹

In term of the effectiveness of ICC, Bassiouni stated that the success of the ICC, like all human institutions, would depend on those who will be part of it. But they will need the resources and political support of many states to make this important institution work effectively. Only time will tell whether these expectations will

⁶ William, A. Schabas, *An Introduction to the ICC*, Cambridge University Press, 2001, p. viii. See also Article 36(2) of the Rome Statute.

⁷ Article 1 of the Rome Statute.

⁸ Schabas, *op. cit.*, p.13.

⁹ Raynell A. Andreychuc, *The Long Journey to Rome: A Parliamentary Perspective*, AIDP, 1999, p. iii

be met. But judging from the ground swell of the international community's support, the prospects are favorable.¹⁰

In this regard, international society in the last two years surprised to the implementation of "Article 98 of ICC" which tend to be utilities by US Governments to gain immunity for its citizens from the ICC by seeking Article 98 agreements with another countries. US Government believes the Court will be used as a stage for political prosecutions, despite ample safeguards included in the Rome Statute to protect against such an event. American opposition to the ICC might seem strange not only because this nation firmly pressed for the establishments of the Rwanda and Yugoslavia tribunals. The reason is that those Articles are consistent with the Statute's complementary principle, which also allows a country the first opportunity to investigate crimes alleged against its own nationals.

Complementary, one of the several important underlying principles of the Statute, means that the Court may assume jurisdiction only when national jurisdiction are unable or unwilling to exercise it. Thus, in cases of concurrent jurisdiction between national and the international criminal court, the former have priority. The court is not intended to replace national courts, but to operate when national courts are unwilling or unable to operate.

It was understanding of the majority of participating States in the Rome conference, that States had a vital interest in remaining responsible and accountable for prosecuting violations of their laws and that national systems are expected to maintain and enforce adherence to international standards.¹¹

C. The Domestic Mechanism Under Law No. 26/2000

The judicial design for the establishment of specific or the ad hoc Court of Human Rights of Indonesia is based on Law 26/2000

¹⁰ Bassiouni, Cherif M, *Historical Survey: 1919-1998*, p. 2.

¹¹ Mahnoush H. Arsanjani, *Reflections on the Jurisdiction and Trigger Mechanism of the ICC*, on von Hebel, Herman AM, et. Al., *Reflections on the ICC*, TMC Asser Press, The Haque, 1999, p. 68.

on Human Rights Courts, which was adopted by Parliament in November 2000. The law provided for the establishments either permanent court or ad hoc human rights court for cases, which took place prior to the adoption of the law. This law has replace the Government Regulation in lieu of Law No. 1/1999, which is considered inadequate, so that is not approved by the Parliament to become a law.

It could be concluded that this Law has covered two models of human rights courts, namely the Ad Hoc International Criminal Tribunal Model (such as International Criminal Tribunal for Rwanda/ICTR and International Criminal Tribunal for Former Yugoslavia/ICTY) which was imposing *ex post facto* justice or retroactivity legislation, and The International Criminal Court (ICC) Model, which consistently maintained the prohibition of *ex post facto* criminalization.

Up to now, Indonesia has not ratified the Rome Statute of ICC, 1998 yet, but in order to maintain and enforce adherence to international standards, the Indonesian legislature has adopted several elements of ICC to be stipulated in Law No. 26/2000, particularly in term of definition of crime of genocide and crimes against humanity, and avoid the implementation of ordinary crimes stipulated in the Criminal Code.

An ad hoc Human Rights Court which could apply retroactivity legislation i.e. for East Timor cases and for Tanjung Priok cases is could only establish by presidential decree on the recommendation of parliament (People's Representative Assembly), especially for certain tempos and locus delicti.

All deviations or convergences stipulated on Law No. 26/2000 as well as on Rome Statute 1998, should be considered as "extraordinary measures" to be confronted to gross violation of human rights as "extraordinary crimes" or the most serious crimes of concern to the international community as a whole.¹² It means that the spirits behind the Law are that such crimes could deeply shock the conscience of humanity and threaten the peace, security

¹² Article 1 of the Rome Statute.

and well-being of the world, where all people are united by common bonds, their cultures peace together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time.

Effective prosecutions must be ensured by taking measures at the national and international level by enhancing international cooperation based on principle of complementary. For the sake of present and future generations, the practice of impunity for the perpetrators of those crimes must be put an end by recalling the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.¹³

D. The Perspective of Comparison Between Icc And Indonesian Human Rights Court

Talking about such comparison, it is very diminished, because the adoption of some elements of ICC which have been integrated on Law No. 26/2000 did not include two supplements which interconnected and interrelated with the Statute namely, Document of "the Elements of Crimes" pursuant to Article 9 of Rome Statute 1998 and Document of "Rules of Procedure and Evidence", as provided for in Article 51, in particular paragraph 4 and 5.

Since Indonesia has not ratify the Rome Statute yet, the "partial harmonization" and incomplete adoption of international standards could create practical problems, because actually, on one side the function of Document of the Elements of Crimes shall assist the Court in the interpretation and application of the relevant Articles (6, 7 and 8) consistent with the Statute, and on the other side, The Rules of Procedure and Evidence document are an instrument for the application of the Rome Statute of the ICC. In this matter, Article 10 Law No. 26/2000 stipulates that "Unless otherwise stated in this law, the law of procedure for cases on gross violation of human rights is carried out on the basis of the provisions on the

¹³ Preamble of the Rome Statute.

criminal law of procedure". Such of criminal law of procedure is The Indonesian Code of Criminal Procedure (KUHAP).

Several Article of Law No. 26/2000 which have been inspired by Rome Statutes, but consist of several differentiations are:

- (1) Crime within the jurisdiction of the Court shall be limited to the core crimes of genocide and crimes against humanity. Whereas the ICC also includes war crimes and aggression to be the crimes under the subject matter jurisdiction (*ratione materiae*) of ICC; the legislature did not include the war crimes because of the conceptual reason that war crimes is under jurisdiction of military tribunal; the crime of aggression has been excluded because the countries which have adopted the ICC Statute on July 17th, 1998 agreed to a compromise that the Court will not exercise jurisdiction over this crime until a provision is adopted using the stringent amendment procedures applicable to the addition of new crimes, which must wait until at least seven years after the entry into force of the Statute;¹⁴
- (2) Concerning the scope of crimes against humanity, The Law No. 26/2000 did not include the eleventh acts of Article 8.2.c. Rome Statute namely the multi interpreted definition of "Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health", for the reason of legal certainty in term of principle of legality; Hopefully human rights treaties and declarations to be adopted in the future should assist the ICC in determining the extent of "other inhumane acts".¹⁵
- (3) There are other very important offences which were under jurisdiction of the ICC, namely "offences against the administration of justice, when these relate to proceeding before the Court."¹⁶ These are perjury or presentation of evidence known to be false or forged, influencing or interfering with witnesses, corrupting or bribing officials of the Court or

¹⁴ Article 121-122 of the Rome Statute.

¹⁵ Schabas, *loc cit*, 2001, p. 39.

¹⁶ Article 70 of the Rome Statute.

retaliating against them, and in the case of officials of the Court, soliciting or accepting bribes; The Court can also sanction misconduct before the court. Unfortunately, the Law No. 26/2000 did not include those offences, whereas the function of those criminalization consider very important to uphold the independence and the impartiality of judiciary;

- (4) The incomplete adoption of the texts namely the non-existence of the word of "any" before the "word" of population, as well as the non-existence of the sentence of "to commit such attack" after the sentence of "pursuant to or in furtherance of a State or organizational policy" could create multi interpretation in the implementation of the law. Actually, the meaning of "any" population could cover the same category of population of victim and the perpetrator, the different category of population as well as the stateless. Whereas the sentence of "to commit such attack" is very important to clarify that not all State or organizational policy could be interpreted as an element of attack, but only the policy to commit such attack;
- (5) The Law No. 26/2000 simultaneously applied either non-retroactive principle based on principle of legality (*nullum crimen, nulla poena sine lege*) and retroactive legislation particularly for certain *tempus* and *locus delicti*, whereas the ICC does not apply to conduct prior to its entry into force. In the event of a change in the law before the entering of final judgment in a case, the law more favorable to the person investigated, prosecuted or convicted will be applied.
- (6) The penalties available to Indonesian Court of Human Rights are more severe than penalties set out in Rome Statute. The Law No. 26/2000, sets out not only life sentence or imprisonment sentence, but also included the death penalty and special minimum term of imprisonment.
- (7) The Law No. 26/2000 has also adopted several similarities concerning the general principles and standards sets out by the Statute such as:

- Individual criminal responsibility on natural person who have committed crimes within the jurisdiction of the Court. Legal persons, be they States, companies or others, are not covered by both Statutes; The material elements of the crime must be committed with intent and knowledge as defined in the Statute;
- Individuals under the age of 18 at the time of the alleged commission of a crime are excluded from human rights court;
- A military commander and other superior responsibility for acts committed by forces under his or her effective command and control as a result of failure properly to exercise control over those forces. This applies where the commander knew or should have known that the crimes were being or were about to be committed, and where he or she failed to take all necessary and reasonable measures to prevent or repress their commission or to submit the matter for investigation and prosecution; The responsibility of civilian superiors is very similar, however, responsible only for the crimes of subordinates where the superior either knew or consciously disregarded information clearly indicating that the crimes were being or were about to be committed;
- The crimes within the jurisdiction of the Court are not to be subject to any statute of limitations;
- Trials *in absentia* are not provided for under any circumstances;
- Stipulation of reparation to victims, including restitution, compensation and rehabilitation;
- Protection of the victims and witnesses and their participation in the proceeding. In this matter ICC has complete regulation stipulated on Article 68 and completed by Subsection 2 of the Rule of Procedure and Evidence, which stipulated the possibility to set up Victims and

Witnesses Unit entitled with a broad function. In connection with Article 34 and 35 of the Law No. 26/2000, the Government of Indonesia has issued Governmental Regulation No. 2/2002 on the Procedure of Protection of Victim and Witness in Gross Violation of Human Rights.

E. Conclusions

- The efforts to compare between ICC and Human Rights Court of Indonesia should be consider as preliminary step indicating intention to ratify the Rome Statute, because every States must avoid all situation which will incompatible with the requirements of the Statute in term of complementary principle, by which States are presumed to be responsible for prosecuting suspects found their own territory, many must also bring their substantive criminal law and the law of criminal procedure into line. Rome Statute states that "No reservations may be made to this Statute".¹⁷
- The partial harmonization of ICC stipulated on Law No. 6/2000 has created and demonstrated practical difficulties and problems. Therefore, the legislature has come to think about ratification, which has been delayed between signature and ratifications for about six years. However, legal communities fully aware some difficulties and consequences of the expected ratification such as significant legislative changes in order to comply with the obligations imposed by the Rome Statute and each States want to resolve those issues before formal ratification. Providing cooperation with the ICC in term of investigation, arrest and transfer of suspects, the possibility of extradition of their own nationals, enacting the all kinds and elements of core crimes, ensuring universal

¹⁷ Article 120 of the Rome Statute.

jurisdiction over those crimes, are several issues which must be intensively prepared before ratification;

Notes :

- 1) UN Charter Preamble;
- 2) Article 55 UN Charter;
- 3) Bassiouni, Cherif. M, *The Protection of Human Rights in the Administration of Criminal Justice*, Center for Human Rights, UN, Geneve, 1994, p. xxv;
- 4) Article 5(1) of the Rome Statute;
- 5) International Council on Human Rights Policy, *Hard cases: bringing human rights violations to justice abroad, a guide to universal jurisdiction*, 1999, p. 4;
- 6) Schabas, William, A, *An Introduction to the ICC*, Cambridge University Press, 2001, p. viii. See also Article 36(2) of the Rome Statute;
- 7) Article 1 of the Rome Statute;
- 8) Schabas, op. cit, p.13;
- 9) Andreychuc, Raynell A, *The Long Journey to Rome: A Parliamentarian Perspective*, AIDP, 1999, p. iii;
- 10) Bassiouni, Cherif M, *Historical Survey: 1919-1998*, p. 2;
- 11) Arsanjani, Mahnoush H, *Reflections on the Jurisdiction and Trigger Mechanism of the ICC*, on von Hebel, Herman AM, et. Al., *Reflections on the ICC*, TMC Asser Press, The Haque, 1999, p. 68;
- 12) Article 1 of the Rome Statute;
- 13) Preamble of the Rome Statute;
- 14) Article 121-122 of the Rome Statute;
- 15) Schabas, loc cit, 2001, p. 39;
- 16) Article 70 of the Rome Statute;
- 17) Article 120 of the Rome Statute.