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THE MECHANISM OF SETTLEMENT OF GROSS VIOLANCE OF HUMAN RIGHTS ABUSES BY THE INTERNATIONAL CRIMINAL COURT,
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THE MECHANISM OF SETTLEMENT OF GROSS VIOLANCE OF HUMAN RIGHTS ABUSES BY THE INTERNATIONAL CRIMINAL COURT

Fadli Andi Natsif
Faculty of Law Bosowa University
Email: fadlianfa@yahoo.com

Abstract

Although there were differences in the mechanism of enforcement against Human Rights violations or Human Rights crimes among national law (Law Court of Human Rights) and international law (Statute of Rome 1998) between the two jurisdictions, however, have a relationship. Jurisdiction in the Statute of Rome was said to be only as a complement to the jurisdiction of the national law. When there are indications of "unwilling and unable" to national jurisdiction in processing the cases of Human Rights violations which are also regulated in the Statute of Rome, then this is the reason the Roman Statute of the jurisdiction can apply. In addition, previous State should ratify the Statute of Rome became part of national law.

Keywords: Severe Human Rights Violations Settlement Mechanism – The Statute of Rome

INTRODUCTION

The tendency of crimes now occurring not only the kind of crime that scope only as provided for in the national law of one country only. However, the crimes tend to have crossed the boundaries of a country setting is through international law.

One of the types of crime that are categorized as crimes that cross State boundaries is a crime of Human Rights (Human Rights), commonly termed severe Human Rights violations. Severe Human Rights violations is one of the crimes categorized as international crimes, because not only influential in the sphere of one country alone but had to involve other countries.

Thus if a crime like this is the case, then not only national legal instrument that can be used, but international law also can be made into guidelines or mechanisms to resolve such prolific international crimes. Types of evil HAM such as

crimes against humanity (crime against humanity), in the context of national law, Indonesia law No. 26 of 2000 on Human Rights Courts (law courts of HAM or UUPHAM) known as the severe Human Rights violations.

A very progressive developments relating to the world's attention to Human Rights, can be seen with a successful United Nations (UN) establish instruments and institutions for the protection of Human Rights, namely the Rome Statute of the International Criminal Court in 1998. The instrument is known by the name of the 1998 Rome Statute of the International Criminal Court. If the Declaration, the Covenant, and conventions governing Human Rights contains only the principles of Human Rights, while the 1998 Rome Statute of the international law is already a formal enforcement mechanism because it contains against violations of the Human Rights violations referred to as heavy and can be categorized as international crimes.

How to structure and mechanism the International Criminal Court (ICC) in solving cases of severe Human Rights violations, which became the focus of the issue that the author will discuss in this article.

UNDERSTANDING SEVERE HUMAN RIGHTS VIOLATIONS

The term severe Human Rights violations, in UUPHAM called a heavy Human Rights violations constitute crimes arranged outside of The Criminal Law Act (Criminal KUH), so the process of settlement of the case subject to UUPHAM. Crime contained in UUPHAM is a special no Criminal in KUH criminal, either in book II of this type of crime, or the book III of the violation. Though in UUPHAM uses the term "violation" is essential, but not the same as the type of offences and crimes that exist in The Book of Criminal Law.

> In fact any philosophical crime either under the criminal LAW or other KUH also included Human Rights violations. But as a normative term of Human Rights violations is already a special arranged criminal separately and firmly in Uudang Human Rights Act and UUPHAM. So every ACT especially associated with crime or criminal in fact was established to provide protection against Human Rights. This is in accordance with what is expressed by Achmad Ali (2008: 208) that:
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> Pemidanaan and criminal law is closely associated with the protection of Human Rights (Human Rights), hence the birth of Indonesia's Criminal Code (Law No. 8 of 1981) inspired by the Universal Declaration of Human Rights (10 December 1948).

In addition the shape of Achmad Ali without diktat and not published, entitled basic understanding of theories of law and Human Rights, also outlines the differences between the terms "Regular" Human Rights violations and "Severe Human Rights abuses". According to him the whole Crime or Tort is including the category of "Human Rights violations", but not necessarily "Severe Human Rights abuses". Referring to law No. 26 of 2000 on Human Rights Court, Human Rights violations, there are two kinds of Weights, namely, genocide and crimes against humanity (crime against humanity). In Indonesia in addition to two types of crimes, then the whole "Human Rights violations" is only an "Ordinary" Human Rights violations, which, if including the crime, Judicial Authority became common. In contrast to severe Human Rights violations, the authority is the Court of Human Rights. If suspected cases of severe Human Rights violations that occurred prior to the entry into force of the ACT, the Human Rights Court on trial by an Ad Hoc Human Rights Court set up by the President.

Then further said elements who entered the category of Human Rights violations based on weight of UUPHAM is that the category of genocide, must be fulfilled the element acts that intend to demolish or destroy all or part of the four groups, including the nation, race, ethnicity and religion. If the category of crimes against humanity must meet are widespread or systematic element. So even though any such deeds happen to murder, extermination, enslavement, expulsion or transfer of population by force, rape, and others, but all do not meet any element of genocide or crimes against humanity, then the deed does not include severe Human Rights violations, but only Ordinary Human Rights violations subject to Criminal KUH anyway.

In the sense of international instruments of Human Rights violations is heavy also has not been defined clearly and unequivocally, as expressed by Code (1999: 52), as follows:

> *Gross violations of Human Rights: a term used but not well defined in Human Rights resolutions, declarations, and treaties but generally meaning systematic violations of certain Human Rights norms of a more serious nature, such as apartheid, racial discrimination, murder, slavery, genocide, religious persecution on a massive scale, committed as matter of official practice. Gross violations result in irreparable harm to victims.*

What is advanced by Code in principle says that in a variety of resolutions, declarations and Covenants on Human Rights, the notion of Human Rights violations has not been well defined weight. But in General can be interpreted that the severe

Human Rights violations is a violation or violence, serious, systematic and massive scale perpetrated by State officials against the norms related to Human Rights such as, aparteid, racial discrimination, slavery, murder, mass murder, violence or torture related to religion (persecution). Then the weight of the Human Rights violations that are felt by the victims of the crash to be restored or repaired.

> But even if there are no experts provide a firm definition of severe Human Rights violations, there is a resolution that has been issued by the UN Economic and Social Council No. 1530 which gives a breakdown of the categories of Human Rights violations including as weight, as expressed by Shelton (1999: 320) as follows:
> *International Human Rights law, especially as developed within the United Nations, recognizes a category of situations of gross and systematic violations of Human Rights. Though never exactly defined, it constitutes the jurisdictional threshold for consideration of Human Rights complaints submitted pursuant to Ecosoc Resolution 1503.*

According to van Boven (2002: 2) the term of Human Rights violations and other abuses with different weight. The word "weight" that explains the word "breach" shows how the severity of the violation committed, but the word "weight" these should relate to the kind of Human Rights are violated. There is also a category of Human Rights violations from the van Boven weight refers to the draft Ordinance of the criminal offence of crimes against the peace and salvation of the human race, such as genocide, apartheid, and systematic violations of Human Rights or bulk include; murder, torture, forcible enslavement, forced labor, persecution on the basis of the reasons social, political, racial, religious, or cultural by way of systematic or mass; exile or forced displacement of the population.

Heavy violation of terms that should be linked with Human Rights also expressed by Antonius Sujata (2000: 68), namely:

> Clarification and proper formulation of heavy offense surely cannot be separated from the context of Human Rights, because the weight of the offense won't be able to stand on its own, or as a criminal act with, or criminal acts carried out by a cruel, or that results in death, and so on. Heavy violations are Severe Violations of Human Rights and is not a violation of a criminal offence or heavy criminal acts are heavy.

The formulation of the term Human Rights violations with the weight of the Word also does not list put forward by de Rover (2000: 454-455) that there are two

ways to designate the content of Human Rights violations were based on Declaration for Victims of Crime and Abuse of Power (Declaration for victims of crime and abuse of power), namely:

> The first classified the violations as "a violation of the criminal law in force in the Member States including the violations of the law that establishes abuse of power as a crime". The center of attention was the loss of individual or collective and the suffering inflicted on the people, including physical or mental harm, emotional suffering, economic loss or substantial weakening of their basic rights, for acts or omissions which can be blamed to the State. The second formulation to associate with "Act or omission (which can be blamed to the country) that has not been a breach of national criminal law but is an internationally recognized rules in relation to Human Rights".

Indeed there is a difference between the principle of Human Rights violations or Human Rights crimes with criminal offences. For the first term is called the extra ordinary crime which is commonly known as the severe Human Rights violations. If the second term, the criminal offense, called ordinary crime or ordinary crimes.

Description of the differences about the term above is also contained in the manual monitoring and Investigation of Human Rights. In this book (Setyasiswanto, editor, and 2009: 70) explained that Human Rights abuses is a type of crime that exclusively in contrast to criminal offences or crimes. Human Rights violations (Human Rights violations) is crimes committed by the State apparatus (state actors) in the form of abuse of power (abuse of power), either in the form of direct action (by act) or through the issues (by omission). Then the next difference is: Human Rights violations is the failure of the State to fulfill the responsibility (responsibility) or obligations (obligation) based on international Human Rights law. As for the characteristics of Human Rights violations is a product of the law, policy, or practice officials intentionally violated, ignored or failed to meet the standards of the normative Human Rights. If the offence or criminal offences related to the crime or crimes committed by non-State actors (non state actors). These crimes in international Human Rights law technical terms referred to as Human Rights abuse.

THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT (ICC)

It is also important to understand with regard to study aspects of international law against a crime that happened in a country's national territory is about understanding of jurisdiction.

In the book The Philosophy of Law an encyclopedia (Gray, 1999: 458), the word jurisdiction meant: is the general term defining the scope and limitation of the power of a legal official or institution to interpret and apply the law authoritatively. So the jurisdiction is the General term that refers to the power of an institution which has the legal authority to interpret and apply the law.

The term jurisdiction can be understood in the context of the sovereignty of the State and the context of the judicial organs. In the context of State sovereignty, the jurisdiction is the manifestation of sovereignty includes the authority to make laws (to prescrible law). If the jurisdiction of the judicial organs contextualized is closely related to the authority to impose the rule of law (to enforce a rule of law). (Arie Siswanto, 2005: 39).

It further suggests that Siswanto Arie:

> Jurisdiction is essentially a form of authority (power) that the Court, which gave the Court the power to review the case, to apply the law, and take decisions thereon. Implied can be known to all, that there are basically the criteria concerning the subject matter and the person. More fully, in fact there are at least four criteria that determine the jurisdiction possessed by a Court of law, namely: (a) areas; (b) time; (c) material things; and (d) the person who can be covered by the Court concerned.

So theoretically the State jurisdiction is a consequence of the recognition of the sovereignty that belongs to the State. If sovereignty is derived from the English language, i.e. the meaning of sovereignty is the supreme power of the State. Thus the sovereign State can be said to be independent and not subject to the authority of another country. But it does not mean that there is no limitation of sovereignty. By the sovereignty of other countries (national law) as well as international law.

Regarding the limitation of sovereignty, I Wayan Parthiana (1990: 294) says: The sovereignty it basically contains two aspects. First, the internal aspects which are of the highest authority to regulate everything that exists or occurs within the boundaries of its territory. Second, external aspects, namely the supreme power to conduct relations with members of the international community as well as organize everything that is going on outside the region or the country but all still has to do with the country's interests

The country is said to be sovereign, if a country has the power or authority to manage internally and externally to problems relating to the interests of the country. The existence of a power or authority is called jurisdiction.

When it says the jurisdiction of the country means a country has the power or the authority to make laws (legislative), implementing the law (the Executive), and process or prosecute violators of the law (the judiciary).

In addition to the State can implement yudikatifnya to a jurisdiction of crimes committed citizens can state also has the authority/power or jurisdiction to make the provisions of the legislation about crimes of prolific international, such as crimes against humanity.

If jurisdiction is linked with the existence of the International Criminal Court (ICC) or the International Criminal Court, means the authority that belongs to the ICC in the conduct of proceedings against crimes categorized as international crimes. In the Statute of Rome this type of crime is termed "the most serious crimes of concern to the international community" (the most serious crimes that concern the international community). If the UUPHAM is termed "severe Human Rights abuses".

The existence of the ICC international criminal institution regulated as clearly in the Statute of Rome in 1998. In the Rome Statute of the ICC in the mechanism set about resolving cases categorized as "most serious crimes". There is also the crime types consist of: the crime of genocide (genocide), crimes against humanity, war crimes and the Crime of aggression, regardless of who and in the country where the crime occurred (introduction to Jerry Fowler in the Statute of Rome, 2000: ix).

The 1998 Rome Statute other than is very dependent on the will of the State through the ratification (article 125) as well as its application should not be enforced against the case occurred before the Statute of Rome established (article 24). It means the application of the Statute of Rome does not recognize retroactive principles or the principle of retroactive settlement mechanism in addition to severe Human Rights violations that occur in a country through the International Criminal Court can be done in national courts of these countries there is a factor in the unwillingness and inability (unwillingness) (inability). The size of the unwillingness of this can be seen in article 17 paragraph (2) of the Rome Statute of the International Criminal Court (Rome Statute) as follows:

1. *The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court reffered to in article 5;*
2. *There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;*

3. *The proceedings were not or are being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.*

If the size of the inability mentioned in article 17 paragraph (3) of the Statute of Rome as follows:

> *In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.*

In order to determine inability in a particular case, the Court considered whether, due to the collapse of the whole or a large part of its national judicial system, the State is not able to produce the accused or the necessary evidence and testimony or otherwise unable to carry out his legal measures.

Regarding article 17, paragraph (2) of the Statute of Rome mentions the size of unwillingness has been described also by Lenroy (Pulpit Law Journal, 2003: 31-32) as follows:

1. The judicial process that has been or is being done or decided upon is aimed at protecting the perpetrators from criminal responsibility;
2. The occurrence of the delay in the judicial process, the reason cannot be justified;
3. The judicial process was not conducted independently or impartially.

If the size of the inability in article 17 paragraph (3) of the Statute of Rome set this when associated with specific cases, i.e. If the international criminal court or ICC considering there has been thoroughly or substantial failure or absence of a/the national justice system an unwillingness to find or suspect evidence and testimony or otherwise unable to organise the judicial process.

Concerning article 17 of the Statute of Rome is also clearly outlined by Arie Siswanto (2005: 37), which says that a case will be declared admissible (admissible) by the ICC in as follows:

(a) There is unwillingness or inability of State should have jurisdiction over the investigation and prosecution in a case, even though the process of investigation and prosecution against the offender is running in national courts.

(b) The State that has jurisdiction decide not to prosecute a suspect convicted international and this decision is the result of the inability or unwillingness of these countries.
(c) Court proceedings (including the national courts) against suspected perpetrators of international crimes, in a given case is meant to protect the suspect perpetrators from criminal responsibility (shielding from criminal responsibility).
(d) Court proceedings (including the national courts) against suspected perpetrators of international crimes, in a given case did not take place independently.

The existence of complementary principles in the Statute of Rome 1998 provides an opportunity for the jurisdiction of national courts to carry out their responsibilities in conducting the investigation and prosecution of international crimes to be any authority of international criminal court. This principle is stated expressly in article 1 of the Statute of Rome 1998 as follows:

> *An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.*

In this chapter there are words of ... shall be complementary to national criminal jurisdictions. Does the enforceability of the Statute of Rome is complementary to national jurisdiction. The principle of complementarity would like to affirm, the jurisdiction of the International Criminal Court is not intended to replace a judicial system still works, but rather to provide an alternative in preventing impunity caused an independent judicial system and effective are not available.

According to Romli Atmasasmita (2001: 167) this principle shows that there is a relationship between the International Criminal Court and national courts. Further it is said that there are two things esensil from those principles as follows:

1. that indeed the International Criminal Court is the length of the hand/the authority of national courts of a country;
2. That real works of the International Criminal Court does not immediately change the position of the national courts.

ACCORDING TO THE MECHANISM OF THE INTERNATIONAL CRIMINAL COURT (ICC)

The 1998 Rome Statute was established by the United Nations, based in Hague since 2003 it has jurisdiction over the Human Rights crimes regardless of where the crime-the onset (locus) is. Including if the crime occurred in Indonesia, Human Rights though Indonesia already has rules to conduct legal proceedings related to the crime of Human Rights. Especially if Indonesia had ratified the Rome Statute.

Though there are differences between the structures of the Court of Human Rights with the International Criminal Court. HAM Court even handle the special case of severe Human Rights violations but is part of a Public Court in Indonesia which have special powers in the field of judicial course.

In contrast to international criminal court as an international organization provided for in the Statute of Rome 1998, besides there are bodies that carry out judicial functions also there is also a body that does not implement the functionality.

Based on the provisions of the Rome Statute in 1998, each agency has different tasks. Responsibility in accordance with article 38 of the Statute of Rome, only the administrative nature relating to the setting up of the Court, except with regard to the duties of the State Attorney's Office but still can be and made an agreement with the public prosecutor on all issues of concern with. In the body of this Presidency than the President's Vice President who filled in by the judges as well.

Judicial Division of functions provided for in Article 39 of the Statute of Rome relating to hearings. The placement of the judges in each judicial division is based on the qualifications and experience of each judge, so each Division was filled by a combination of expertise in the field of viable legal and Criminal Code (legal event) as well as international law.

Pre-trial mechanisms (pre-trial) in the Statute of Rome was not known in the judicial system of Human Rights in Indonesia. Pre trial known only in the code of criminal code which is used by a person because of the legal apparatus carries out its functions contrary to Criminal Code

If a Judicial pre-trial in use, when the International Criminal Court Prosecutor based on investigation no reports either of people or institutions that can be trusted about the situation indicated a crime takes place is the jurisdiction of the Court, ask for an application to the Court to conduct the investigations in a country. Pre-trial Trial implemented by 3 judges, which was attended also by the public prosecutor as well as supporting witnesses to support the Court's order approving, giving authority to the public prosecutor to carry out investigations. When the Court decided there is a

"reasonable basis" for the investigation is carried out, then the Court should immediately give the authority to the public prosecutor to launch an investigation into the crime based on the jurisdiction of the Court. The existence of such a hearing system can prevent the occurrence of similar cases, back and forth in Indonesia between the investigator (Komnas HAM) and the public prosecutor (Attorney-General), as well as the realization of the purpose of the Court is cheap, fast, and efficient. (Great Yudhawiranata, in the preface to the book: International Criminal Court: the Statute of Rome, Law, and the elements of crimes, 2007: xv-xvi).

Organs of the State Attorney's Office in accordance with article 53 of the Statute of Rome, is in charge of evaluating the information associated with a crimes that come under the jurisdiction of the Court, for further investigation. If there is no basis for continuing the process of the investigation, then it must notify the pre-trial Hearing.

Organ (body) last in the International Criminal Court, as contained in article 34 of the Statute of Rome, is the Register (the registry). If the term in court in Indonesia called a Registrar. According to article 43 of the Statute of Rome, the register is responsible for the non-judicial aspects of an administrative nature and Ministry of Justice. The Agency is headed by the Registrar who is the main administrasif of the officials of the Court and carry out its functions under the authority of the President of the Court (the President of the Court).

CONCLUSION

The mechanism of settlement of cases of Human Rights violations that occur in Indonesia heavily despite having been set in national law through the ACT of the Court of Human Rights, but the process can also be subdued in the settlement mechanism provided for in the Rome Statute of 1998. This is due to substances crimes provided for in the ACT of the Court of Human Rights to adopt the kind of evil HAM which is also provided for in the Statute of Rome. Although the subjugation of the jurisdiction of the Statute of Rome against the perpetrators of Human Rights violations in Indonesia did not immediately, but will have to meet several conditions. First, Indonesia must first ratify the Statute of Rome. Because of the of international law (Rome Statute) in the national laws of a country must go through stages of ratification (endorsement) by these countries. Then the second requirement, the implementation of the Statute of Rome when the national jurisdiction of a State does not run effectively to conduct legal proceedings against severe Human Rights violations. This is due to the provisions of the Statute of Rome

there is mentioned that the Statute of Rome merely as complementary to national jurisdiction jurisdiction. Later national law does not have the willingness and ability of the (unwilling) (unable), then the jurisdiction of the Statute of Rome can be put in place to process the cases of severe Human Rights violations that occurred in an area of the participating countries of the Statute of Rome. So there is really no compelling reason for the Government of Indonesia to ratify the Statute of Rome, because it already has a national law (Law Court of Human Rights) to process the cases of severe Human Rights violations. Because of the Statute of Rome provides the opportunity for countries to optimally process the cases of Human Rights violations that occurred in the country based on national jurisdiction in advance.

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