

# Law Enforcement of Crime of Aggression in the Angle of Rome Statute: Perspectives and Challenges

Dr. Marthen Napang, S.H.,M.H.

Senior Lecturer at International Law Department, Faculty of Law Hasanuddin University, Indonesia

Email: marthennapang@gmail.com

## Abstract

Violation of human rights is one of the oldest forms of crime since humans live together and interact each other in social life, as a state and a nation. The conception of war and other armed conflicts are not only limited to conquer the opponent, but they have come to destroy the opponent. Ironically, the destruction weapon is not only owned by the state, but also controlled by armed groups instead of the state... To anticipating the development of crimes against humanity that tends to increase, eventually by the initiative of the United Nations, the Conference of Rome, 1998 has been conducted

**Keywords:** law enforcement, crime of aggression.

## 1. Introduction

Violation of human rights is one of the oldest forms of crime since humans live together and interact each other in social life, as a state and a nation. Even the history of the human race showed more serious consequences for the safety of life and civilization of mankind because the *modus operandi* now involving the government and the increasing of sophisticated military equipment. The more sophisticated equipment of mass destruction weapon has led to the easily actions that cause unnecessary suffering of humans, even killing the human race massively with their treasures too. So the conception of war and other armed conflicts are not only limited to conquer the opponent, but they have come to destroy the opponent. Ironically, the destruction weapon is not only owned by the state, but also controlled by armed groups instead of the state. Various disputes among states, between the state and armed groups, or among the armed groups that lead to war, battle, or other types of armed contacts are really potentially evoke the violation of human rights.

In modern warfare, the use of destruction weapons such as nuclear, biological, and chemical (NUBIKA) are looked scary and all strategy against opponents, including against innocent civilians carried out by the parties of the warfare. However, peace efforts and the setting of customs of war are more humanized to create world peace and protection of human rights for all nations.

Thus, the crime against humanity continues to coloring the human life throughout the history, even increased and touching heart along with the development of science and military technology that allows the modern warfare. Starting with the Peace Treaty of Westphalia in 1648 to end the 30-year war (1618-1648) in Europe, The Congress of Vienna in 1815 to end the Napoleonic War, The Peace Treaty of Versailles in 1919 to end the First World War (1914-1918), as well as forming the League of Nations, until the San Francisco Peace Treaty in 1945 to end World War II (1939-1945) and the establishment of the United Nations.

Interspersed with various other peace agreements, such as the Locarno Pact in 1925 so that France, Germany, and Belgium pledged together to run a political of non-aggression, Kellogg Briand Pact of 1928 in which the signatory states (France, USA, etc.) abolished war as an instrument of national politics and promised to seek resolution of dispute settlement by peaceful way.<sup>1</sup> Provisions of the law of war are directly affected by the humanitarian principles that animating the 1864 Geneva Convention is the prohibition on the use of certain weapons.<sup>2</sup> Then humanitarian principles in war are espoused in The 1899 Hague Convention, the 1907 Hague Convention and the 1949 Geneva Convention and their Additional Protocols I & II in 1977.

Protection and enforcement of the principle of humanity in situations of international and non-international armed conflict began to be seriously realized after the end of the second world war to prosecuting and punishing the actors of war crimes include crimes against peace and crimes against humanity by a special judiciary.

<sup>1</sup> Arthur, Nussbaum, *the History of International Law*, Translated by Sam Suhaedi Admawiria, Penerbit Binatijpta, Bandung, 197, p. 193.

<sup>2</sup> Mochtar, Kusumaatmadja, *Geneva Convention 1949 Concerning Protection of Victims of War*, 2nd Ed. Bina Cipta Bandung, Bandung, 1986, p.15.

To that end, the International Military Tribunal (IMT) at Nuremberg and the International Military Tribunal for the Far East (IMTFE) in Tokyo were established, which has adjudicate and convicting the criminals against peace and humanity. Furthermore, The International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague and the International Criminal Tribunal for Rwanda (ICTR) in Arusha have been formed to adjudicate and imposing penalties on anyone who is guilty of crimes against humanity in situations of armed conflict in the region in both states.

Excepting the establishing of four ad hoc Tribunal above, also since the end of the First World War, the five commissions' examiners (Investigatory Commissions) has been formed, namely:<sup>1</sup>

- (A) the 1919 Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties, which investigates various crimes committed during World War I;
- (B) the 1946 UN War Crimes Commission, which investigates the German war crimes during World War II;
- (C) the 1946 Far East Commission, which investigates the Japanese war crimes during World War II;
- (D) the Commission of Experts Established Pursuant to Security Council Resolution 780, which investigates the violations of humanitarian law in the former region of Yugoslavia; and
- (E) the Independent Commission of Experts Established in Accordance with Security Council Resolution 935, the Rwanda Commission, which investigates the violations committed during the Civil War in Rwanda.

To anticipate the development of crimes against humanity that tends to increase, eventually by the initiative of the United Nations, the Conference of Rome, 1998 has been conducted. In this conference there was an agreement, called 1998 Rome Statute as the basis for the establishment of the International Criminal Court (ICC) permanently.

1998 Rome Statute became effective on 1<sup>st</sup> of July 2002, after the 60th day since the ratification of the 60th state on 11 April 2002 according to Article 126 of the statute. On that date 66 states have been recorded of ratifying the statute in the same time with the 60th state.

The Statute confirms that the criminal jurisdiction of the ICC is only about serious crimes against humanity which due to the character and situation of the circumstances of the events are separated into four types of crime, as defined in Article 5 of the Statute, namely:

1. Jurisdiction of the Court limited to the most serious crimes related to the international community as a whole. Statute of the Court has jurisdiction in accordance to the statue about following crimes:
  - (A) The crime of genocide;
  - (B) Crimes against humanity;
  - (C) War crimes;
  - (D) The crime of aggression.
2. The Court has jurisdiction over the crime of aggression after a provision has legalized, according to chapter 121 and 123 which defines the crime and sets the conditions which the Court has jurisdiction over the crimes. Such provisions must be in accordance with the relevant provisions related to the United Nations Charter.

Thus, three of the four types of crimes of universal humanity in sequence defined in Article 6, 7 and Article 8 of the Statute. Whereas the formulation of the crime of aggression is waiting for the interval of seven years from the effectuation of the Statute that is 1<sup>st</sup> of July, 2002, which the statute has come into force effectively consistent with the Article 5, paragraph 2, which refers to Article 121 of the Amendments and Article 123 of the Statute of the review of the Statute. This Statute is effective from 1<sup>st</sup> of July, 2002 because it has been eligible by the ratification of 60 states. However, until now the Court has not held a review conference to adopt a provision which has to formulate definitions and specific conditions of the crime of aggression. Thus, it is become a legal issue about how the Court can enforcing the law against the crime of aggression that has been confirmed as part of the jurisdiction of the Court but the formulation of the crime has not been established.

Article 5, paragraph 2 asserts:

"The Court has jurisdiction over the crime of aggression after a provision has legalized, according to chapter 121 and 123 which defines the crime and sets the conditions which the Court has jurisdiction over the crimes. Such provisions must be in accordance with the relevant provisions related to the United Nations Charter."

Article 121 states (about Amendment):

---

<sup>1</sup> Muladi, *ICC: a Great Art amongst Nation*, FaCulty of Law UNDIP, Semarang, 2002, p.4.

1. After the period of seven years from the effectuation of this Act, each Signatory state may propose amendment on it. The draft of any proposed amendment must be submitted to the Secretary-General of the United Nations, which will distribute it immediately to all Signatory States.
2. No more than three months from the date of notification, the Assembly of the Signatory states next with a majority of those present and voting will decide whether to approve the proposal or not. The Assembly may deal with the proposal directly or conduct a Review Conference if the issue is requiring.
3. Approval of an amendment at the meeting of the Assembly of Signatory States or at the Review Conference on which consensus cannot be achieved are requiring a majority of two-thirds of the Signatory States.
4. Unless as specified in paragraph 5, an amendment will apply to all Signatory States one year after the instrument of ratification or acceptance has been sent to the Secretary General of the United Nations to be kept by seven-eighths of it.
5. Any amendment to article 5 of this law applies to Signatory States that have received the amendment one year after delivery of the instrument of ratification or acceptance. Related to a Signatory State which has not received the amendment, the Court is not using its jurisdiction over a crime covered by the amendment when committed by citizen of that Signatory state or conducted in its region.
6. If an amendment has been accepted by seven-eighths of Signatory State according to paragraph 4, each of the Signatory State which has not received the amendment may withdraw from this act which still applicable immediately, regardless of paragraph 1 of article 127, but comply to paragraph 2 of Article 127, by sending notification no later than one year after the effectuation of the amendment.
7. Secretary General of the United Nations shall distribute to all Signatory States, every amendment that is legitimated on the meeting of the Assembly of Signatory state or at a Review Conference.

Article 123 (on the Review of the Statute):

1. Seven years after the effectuation of this Statute, the Secretary-General of the United Nations has to conduct a Review Conference to discuss any amendment to this Statute. The review may include, but are not limited to, the list of crimes contained in article 5. The conference is open to those who participated in Assembly of Contracting States and on the same conditions.
2. At any time thereafter, at the request of a Contracting state and for the objective that set out in paragraph 1, the Secretary-General of the United Nations, upon approval by the majority of Contracting States, will conduct a Review Conference.
3. The provisions of article 121, paragraph 3 to 7, apply for ratification and effectuation of an amendment to the Statute that are considered in the Review Conference.

Article 124 (of the Transitional Provisions):

Regardless of Article 12, paragraph 1, a state, after becoming the party in this Statute, could stating that, for a period of seven years after the effectuation of this Statute to that state, the State does not accept the jurisdiction of the Court about the categories which are referred to the article 8 when a crime is reported to have done by citizens of that state or in its territory. A declaration based on this article could be withdrawn at any time. The provisions of this Article shall be reviewed at the Review Conference, which is held in accordance with Article 123, paragraph 1.

Subsequently confirmed in Article 21, 22, 30, paragraphs 1 and 9 of the Statute, which requires a defining and settling of the elements of serious human rights violations firstly then it could be implemented or adjudicated by the ICC.

Article 9 paragraph 1 asserts:

1. Elements of Crimes assist the Court in interpreting and enacting clause, 6,7, and 8. Elements was legitimating by majority of two-thirds of the members of the assembly of contracting parties.

Article 21 of the Statute confirms the sources of law that applied or implemented by the ICC:

1. The Court shall applies:
  - a. In the first place, this Statute, Elements of Crimes and Criminal Procedure and the Law of Evidence;
  - b. On the second turn, where appropriate, the agreements that can be applied and the principles and rules of international law, including the principles of international law of armed conflict have to applied;
  - c. If it fails, the general principles of law took by the Court from the national law of the legal system of the world, including, where appropriate, the national laws of the State which usually runs jurisdiction over the crime, with the requirement that these principles are not contradicted to this Statute and with international law and norms and internationally recognized standards.
2. The court may apply the principles and rules of law as interpreted in its precedents.

3. The application and interpretation of law related to this Article shall be in accordance with human rights which are internationally recognized, and should be no distinction in contrary are built on such basis of gender, as applied in article 7, paragraph 3, age, race, color, language, religion, or belief, political or other opinion, national origin, ethnic or social origin, property, birth or other status.

Article 22 of the Statute confirms *Nullum Crimen Sine Lege* principle by stating:

1. A person is not criminally responsible based on this Statute unless the action, that referred to, at the time the action was taking place, a crime is in court's jurisdiction.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In the event of obscurity, the definition should be interpreted due to the benefits of person who are being investigated, prosecuted or convicted.
3. This article shall not affect the characterization of any behavior as criminal under international law independently to the Statute.

Article 30, paragraph 1, asserts:

1. Unless provided otherwise, a person is criminally responsible and can be convicted of a crime, which is within the jurisdiction of the Court only if the material element has been done deliberately and consciously.

Thus, although Article 5, paragraph 1 of the Statute confirms aggression as one of the types of crimes into the jurisdiction of the ICC, but the ICC has not be able to perform law enforcement efforts against crime because the crime of aggression is not defined yet in the provisions of the Statute and its amendments to the formulation of the Elements Crime of aggression as stipulated in article 5, paragraph 2, Article 9, Article 121, Article 123, Article 124, Article 22, Article 30, and Article 21 of the Statute.

Law enforcement against the actor of the crime of aggression can be done by:

1. National Court which is established by national law Participating State of the Highly Geneva Conventions of 1949, as set in article 49 of the Convention I, Article 50 of the Convention II, Article 129 of the Convention III, and Article 146 of the Convention IV), or
2. The Ad Hoc International Court that is established by The United Nations Security Council (article 7 of the Charter).

Setting the type of crimes against humanity in a different chapter is essential for proper application of the law according to type of crime. But in one case, it could be related to more than one type of human rights violations. For example, the crime of genocide and crimes against humanity committed in the war of Serbia-Bosnia-Herzegovina, but the character and situation of circumstances of the war crimes are more prominent so that the former President Radovan Karadzic and The Head of Armed Forces, Ratko Mladic in Serbia Bosnia are devoted as war criminals before the Ad Hoc Tribunal for the former region of Yugoslavia domiciled in The Hague, and charged for violating the 1949 Geneva Convention on the protection of war victims. Also, former President of the Federal Republic of Yugoslavia, Slobodan Milosevic was devoted on the same Ad Hoc Court with 66 charges of crimes against humanity that he has done during the war in Croatia, Bosnia, and Kosovo.

It seems clear that the application of the proper law (jurisdiction) is very important, both in the Ad Hoc Tribunal, the Permanent International Criminal Court (ICC), and the Ad Hoc Court and permanent national court of a state, if wrong; the guilty actor could be free from the punishment. However, there are many parties who do not want to be called actor of war crime - another name of war criminals – although the character of the crimes against humanity that has been done is occurred in situations of armed conflicts, both between the national army troops against an organized armed forces or among the organized armed forces each other.

Therefore, the focus of study in this paper is to question the enforcement over the law of crime of aggression under the 1998 Rome Statute.

## **2. The Problems related to the Enforcement over the Law of Crime of Aggression**

### **2.1 Jurisdiction of the International Criminal Court (ICC)**

The most important discussion related to law enforcement of the crimes against humanity is several jurisdictions that are known in the literature of international law and the 1998 Rome Statute.

#### **2.1.1 Jurisdiction over the Principal Case (Subject Matter Jurisdiction/Ratione Materials)**

In Article 5, paragraph 1 of the 1998 Rome Statute has affirmed the jurisdiction of the ICC is over a serious human rights violations or crimes that include:

- a. The Crime of Genocide;
- b. Crime against humanity;
- c. War Crimes;
- d. The Crimes of aggression.

Three of the four types of crimes of universal humanity became the jurisdiction of the ICC in sequence has defined by Articles 6.7 and 8 of the 1998 Rome Statute. While the fourth formulation of ICC Jurisdiction of crime of aggression is not done yet while waiting for the interval of 7 years commencing from 1<sup>st</sup> of July, 2002 at which this statute applies come into force as stipulated in article 5, paragraph 2, which refers to Article 121 about the amendment and Article 123 about review statutes. The Rome Statute came into force on 1<sup>st</sup> of July, 2002 since it has passed over the 60th day after the ratification of the 60th state on April 11<sup>th</sup>, 2002.

However, because aggression is associated with war or international armed conflict even the early part of the war itself, so the serious crimes against humanity that is related to the crime of aggression can be merged into the jurisdiction of the ICC on war crimes. War crimes can be started from the crime of aggression, or a crime of aggression can continue to be a war crime. But both types of crime can be distinguished and set their own because they have different characteristics.

As an illustration of the future, it should be noted about several conceptions and rules of international law on aggression that actually has long been known in the literatures of international law. In 1954 the International Law Commission had submitted the conception of aggression to the UN General Assembly as expressed by James Barros<sup>1</sup>. The following actions are contrary with the peace and security of mankind:

- 1) Any act of aggression, including the placement of armed force by the authorities of a state against another for any purpose except self-defense, both national and collective or executing the verdict of the United Nations or on the recommendation of a competent organ of the United Nations.
- 2) Any threat by the authorities of a state to be forced to take an act of aggression against other states.

Additionally, J.G. Starke<sup>2</sup> stated that the United Nations Special Commission has been established to formulate the definition of aggression that describe Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of other states or in other ways that are contrary to the UN Charter, as applied in this definition.

In its application, the Nuremberg Tribunal in its verdict, distinguish between actions of aggression such as the German occupation action over Austria in 1938 and Czechoslovakia in 1939 without any significant armed resistance with the war of aggression such as the German occupation over Poland since 1<sup>st</sup> of September, 1939 received a fierce armed resistance. But the Tokyo Tribunal in its verdict did not make a distinction between acts of aggression and wars of aggression.

So aggression is any threat of armed force of a state to another state that is not based on the efforts of self-defense (in accordance with Article 51 of the UN Charter) or not a verdict or advice from the competent organs of the United Nations which is the UN Security Council (in accordance with Article 39 jo. Article 41 and Article 42 UN Charter).

The main difficult in formulating aggression as expressed by J.G. Starke is how to determine the existence of a war of aggression or when the war hostilities not cause aggression.<sup>3</sup> The difficulties were experienced by the UN international law commission in preparing a draft verdict to the jurisdiction of the ICC on the crime of aggression so that the formulation still requiring a period of 7 (seven) years after the affectation of the ICC through the efforts of the amendment and review of the statute (Article 121 in conjunction with the statutes of the ICC 123). The United States also rejected the jurisdiction of the ICC on the crime of aggression, especially considering that their soldiers and military interests are everywhere in this earth.

Indeed, since the affectation of the UN Charter, especially under article 2, paragraph 3 and 4 which affirms the principle of resolving disputes without armed violence as well as Article 33 which is mentioned ways of peaceful

---

<sup>1</sup> James Barros, *United Nations; Past, Present, and Future*, Translated by D. H. Gulo, Bumi Aksara, Jakarta, p. 210.

<sup>2</sup> J.G. Starke, *An Introduction of International Law*, 10th Ed. Translated by Bambang Iriana Djajaatmadja, Sinar Grafika, Jakarta, p. 222.

<sup>3</sup> *Ibid.* p. 296.

settlement can be reached by the parties who are in a dispute so the war can no longer be used as a tool to solve international disputes. The UN Charter only justifies the use of force / military force in resolving an international dispute in two things:

- 1) The defense of a state from the threat / military attack from the other states in accordance with Article 51 of the UN Charter.
- 2) Military action from UN Peacekeeping Force, which is consisting of various states in accordance with, Article 39 jo. Article 41 and Article 42 of the UN Charter.

Thus all the military action of a state that is threatening or attacking other states which do not under article 51 and article 39 jo. Article 41 & 42 of the UN Charter is an act of aggression or a war of aggression. This principle is the main criteria in the preparation of the formulation of aggression that can be the fourth ICC jurisdiction in the future.

#### 2.1.2 Related Jurisdiction Time (Temporal Jurisdiction / Rationed Temporis)

Temporal jurisdiction is affirmed in Article 11 paragraph 1 and Article 24 of the ICC Statute and intertwined with Article 22, Article 23 and Article 12 paragraph 3 jo. Article 11 paragraph 2 of the Statute of the ICC.

Article 11, paragraph 1, explicitly states *ratione temporis* jurisdiction of the ICC is only concerned with crimes that occurred after the affectation of the ICC statute. Then Article 24 confirms the principle of non-retroactivity that no one should be asked for responsibility of committing criminal acts before the enactment of the statute of the ICC. Strengthened again in chapter 22, which confirms the application of the principle of *Nullum crimen sine lege*, that person is not criminally responsible unless their actions constitute a crime within the jurisdiction of the ICC. The assertion which is also found in Article 23 which is imposing *Nulla poena sine lege* principle, that a person can only be punished by the ICC based on the statute of the ICC.

Furthermore, Article 12 paragraph 3 in conjunction with Article 11, paragraph 2 set the exclusion to the implementation of *temporis* jurisdiction in pre-condition. Related to that issue, Muladi<sup>1</sup> stated, the enactment of the principle of legality contains exceptions set out in article 12 paragraphs 3 Jo. Article 11, paragraph 2 that if the state concerned has made a statement (*ad hoc* declaration) filed in the Registrar that the state may accept the implementation of jurisdiction by the Court with regard to the relevant crimes committed in the past, in accordance with Section 9 of the Statute (International Cooperation and Judicial Assistance).

He added further, that the principle of legality in a different context is also explicitly and implicitly contained in article 22 and article 23 of the ICC Statute. Related to the crimes that have been started before the Statute becomes effective and continuing thereafter (continuous crimes), then the solution is entirely on the judgment of the Court. The most important thing anyway, that all changes rules of procedures and evidence and other rules will not be applied retroactively (Article 51 paragraph 4 of the Statute of the ICC). However, the Ad Hoc International Criminal Court imposed retroactive principle that is contrary to the principle of legality.

On this issue, Indiyanto Seno Adji<sup>2</sup> suggests, that the meaning contained in the universality of the character of principle of legality, whether the law, doctrine and precedent, is that (1) there is no crime without regulatory legislation in advance, (2) a prohibition against any legal analogy, and (3) a ban on retroactive legislation, known as the prohibition of affectation of the principle of retroactivity. The last articulation is making polemical problem within the framework of the preparation (draft) of Law on Human Rights Court, so as to understand the effectiveness, there is a need to do a historical approach in the discourse of Indonesian criminal law system, which since the effect of the Indonesian criminal law concordance always deny the existence of the principle of retroactivity.

Furthermore, he said, that from the historical approach, the existence of retroactive principle must meet rigid and limited criteria, as follows:<sup>3</sup>

- (1) The existence of a correlation between the State Emergency Procedures (*Staatsnoodrecht*) with criminal law means that the retroactivity principle can be applied only when a state in emergency (abnormal)

---

<sup>1</sup> Muladi, *op.cit.* p. 9.

<sup>2</sup> Indriyanto Seno Adji, *Some Notes on Human Rights Court and its Problems*, Talk Show IKA UNAIR, 6 Mei 2000, Jakarta, p. 6.

<sup>3</sup> *Ibid*, p.9.

- condition with the principles of emergency law (*abnormaalrecht*), because of its character, the placement of this principle only temporary and the jurisdictions are very limitedly,
- (2) The principle of retroactivity is not allowed to contrary with Article 1 paragraph 2 of the Criminal Code, which is an imperative clause, means that the emergency reason of the validity of the retroactive principle is not in a state that is detrimental to a suspect / defendant, and
  - (3) Substantial of a rule which is retroactive must observe the principle of *lex certa*, that is the substantial placement of a rule has to strict and do not arise a multi-interpretation, so it is not used by the government as a way to act something considered as abuse of power.

The enactment of Retroactivity principle for the Ad Hoc International or national human rights court is unwise to be contrasted with the principle of legality because both principles essentially are derived from a more fundamental principle; it is the principle of justice. It is unfair that a human rights violation that is so evocative the conscience did not meet the judgment. Moreover if that is conducted by government officials / state that is supposed to serve and protect the people and foreigners in its state. Enactment of the retroactivity principle exclusively specific to the cases of serious human rights violation in the past through the ad hoc human rights court does not violate the principle of justice/fairness. The suppression of purpose of ad hoc human rights court is not the enforcement of the principles, but the eradication of crime that does not impress retaliation (*lex talionis*).

#### 2.1.3 Territorial Jurisdiction (Territorial Jurisdiction / *ratione loci*)

Based on Article 12 paragraph 2 of the Statute of the ICC, the ICC territorial jurisdiction is applicable to crimes against humanity that occurred on:

- a) Area of the Participating States in the Convention/The 1998 Rome Statute without considering the citizenship of the actor.
- b) Area of the states that accepted the jurisdiction of the ICC by an ad hoc statement (ad hoc declaration).
- c) Specified region of the UN Security Council.
- d) The territory of Ships and Aircraft with State Flag.

Since the birth of the modern states that began and marked by the signing of agreements Westphalia In 1648, a treaty that ended the 30-year war in Europe (1618-1648), the practice of using flag as a symbol of national identity has been developed (even much earlier in the age of empires in the past the flag as a symbol of royal identity already exists).

Furthermore, in states that were born after World War II are more likely to include nationality flag into the State Constitution. Then the state of Indonesia confirmed in Article 35 of the Constitution 1945. As the state identity the flag is also seen as "positive shadow" of the independence, sovereignty, and jurisdiction of the flag state, as well as the dignity of the people / nation, so that the flag has a value of sacred, holy and magical especially for state that was born from a long struggle of all nationals and people in the past such as Indonesia.

The close and essential relationship between and the flag and the existence of a state, such as seen in the states practice since the 18th century on flag of convenience which contains a general principle that the flag determines the application of state jurisdiction over a vessel means the laws and regulations as well as state government policies are treated on board wherever it is either on the international sea or in the territorial sea of another state. Also in the practice in warfare age, there was an international customs about reduction or raising the flag as the symbol of defeat or victory of one side (state or empire).

In the laws and customs of war, also the flag is one of the main distinguishing symbol/mark of the parties who have roles as well as other relevant parties such as the International Red Cross Organizations and The Peacekeeping Forces (UN). More specifically, in distinguishing the status of combatants and non-combatants and non-combatants groups which in certain cases are treated same as the other combatants as set out in the Hague Convention IV of 1907 on the law and customs of war in land and the 1949 Geneva Convention on the protection of the war victims.

#### 2.1.4 Personal Jurisdiction-Individual (Personal Jurisdiction / *ratione Personae*).

Individual personal jurisdiction of the ICC is regulated in several articles, those are in Article 12, paragraph 2 b, article 12, paragraph 3, article 27, paragraphs 1 and 2, Article 28 paragraph 1 and 2 as well as Article 26 and Article 25 of the ICC statute.

Based on the articles mentioned above, the jurisdiction of the ICC Individual includes:

- a. Citizens of Participating States of the 1998 Rome Convention.
- b. Citizens of Recipient State of ICC jurisdiction.
- c. Citizens of any state who commit crimes against humanity in the territory of the Participating States and the Recipient States of the ICC jurisdiction.
- d. Citizens of any state who commit crimes against humanity on Ships and Aircraft.
- e. Citizens of any state who commit crimes against humanity based on the verdict of the UN Security Council.
- f. Anyone who commit crimes against humanity regardless of the position state/government on his/her self.
- g. Military commanders and other superiors.
- h. Anyone who has reached the age of 18 years or more.

The system of criminal responsibility regardless of capacity-position adopted by the ICC Statute is an exclusive restriction to the theory of imputation which has been known in the literature of international law over the years. According to the theory of imputation, responsibility for violations / crimes committed by the officials / state agency can moved to the state, as long as such action is carried out in accordance to his/her authority. Means the individual state agency officials may be released from criminal responsibility.

Only in the case of a state agency officials take action that goes beyond the limits of his/her authority so that the organs of state conduct ultra-vires, the officials of the state agency can be individually requested a criminal responsibility.

But according J.G. Starke<sup>1</sup>, in the terms ultra vires events, the state could be responsible if because of those events have violated the stand-alone obligation, for example, the obligation to take steps to stop the wrong actions and so on. So the state can be indirectly responsible for acts of ultra vires.

Thus, according to the author's thought, the transfer of responsibility from the state to the state agency officials is not the removal of individual criminal responsibility but limited exclusively only on civil responsibility/private form of compensation for errors / omissions of the state agency officials that causes damage to a third party, can also be a political-diplomatic responsibility such as form of apology by government / state, or the severance of diplomatic relations or action of persona non grata to the an individual person.

Implementation of the above individual jurisdictions receives an exclusive restriction on the basis of:

- a) Security Council Veto of Prosecution by the UN Security Council that is in accordance with Article 16 of the Statute of the ICC, the UN Security Council can ask the ICC to delay the investigation and prosecution of a case for twelve months, may be extended with respect to the authority of the UN Security Council in Chapter VII of the UN Charter about actions relating to threats to the peace, rioting against the peace and acts of aggression.
- b) The assertion of Article 26 of the ICC Statute, which states the personal jurisdiction of the ICC, does not reach someone who is under 18 years old at the time of the alleged crime.

According to the author's thought, this would complicating the application of the provisions of the ICC jurisdiction on war crimes by the Geneva Conventions adopted in 1949 and also into the ICC Statute which still allows the recruitment of 15 years old children to become members of combatants. Since they are the members of the combatants although Geneva Convention prohibits putting them on the front lines of battle, then children aged 15 years / less than 18 years may be involved in a war crime that has become the jurisdiction of the ICC.

That the provisions of the ICC Statute above reflects the principle of individual criminal responsibility in accordance with Article 25 of the Statute of the ICC against anyone who committed crimes against humanity that have been demanded to be adjudicated and convicted by a court.

The Nuremberg Tribunal and the Tokyo Tribunal and the Ad Hoc Court ex Yugoslavia and Rwanda Ad Hoc Human Rights Court and the Ad Hoc National Court of Indonesia has been judging and convicting the accused person of crimes against humanity based on the principle of Individual criminal responsibility.

There is a sharp distinction between the Nuremberg Tribunal, Tokyo Tribunal and the International Court of Human Rights Ex Yugoslavia and Rwanda, including the Ad Hoc National Court of Indonesia one hand with the

---

<sup>1</sup> J. G. Starke, op.cit. p.176.



ICC and human rights (permanent) national court of Indonesia on the other hand, the group who firstly implementing the principle of Retroactive Law and the others are implementing the legal principle of legality.

In addition, the Tribunal Nuremberg and Tokyo put their trial as an international court, which is above (Superior or primacy), from the national courts. While the ICC put the tribunal in relation to complementary (complementary) of a national human rights court. It is the same with the Geneva Convention, which allows for the national court in addition to the international criminal court.

About the handling of cases of crimes against humanity transition from an international court (tribunal) to the National Human Rights Court above, Mochtar Kusumaadmadja<sup>1</sup> states these provisions turns out that the convention does not follow the judicial system for criminals of World War II that has become famous for the trials of war criminals Nuremberg and Tokyo. This provision otherwise is giving the criminal court of violations to the provisions of international law that is the provisions of the Geneva Conventions of 1949, to the national court of Signatory Parties.

As a war criminal judicial system, the 1949 Geneva Convention system becomes an intermediate level from the judicial of international crimes by national courts which are known in the traditional laws of war and international judicial for the war criminals of Nuremberg and Tokyo after World War II. Thus together with the ICC, each sovereign state has given the legal authority to prosecute crimes against humanity as defined in the Statute of the ICC.

The crimes against humanity that are not regulated in the Statute of the ICC such as jurisdiction over the crime of aggression, should be judged by the International or National Ad Hoc Human Rights Court by applying the legal principles which is contained in the Geneva Conventions of 1949 and dispersed in various other human rights convention. While waits to the consummation of ICC jurisdiction in seven years ahead.

#### 2.1.5 Jurisdiction over Administrative Violations of the Courts

ICC jurisdiction over the court's administrative violations stipulated in Article 70 of the ICC Statute is set about the following things:

- A) To give false recognition to the truth of the evidence provided by the witness.
- B) To submit a false or forged evidence.
- C) To intervene either through persuasion as bribes or threats to witnesses in giving testimony or to the court's official in carrying out its duties.
- D) To request for delivery of a case to the competent authorities to prosecute.
- E) To cause a maximum imprisonment of five years and / or fines.

#### 2.1.6 Jurisdiction over Violation to the Rules of Court.

ICC jurisdiction of the violation to the rules before the court is provided for in article 71 of the ICC Statute, which includes:

- A) Causing sanctions against any person who violates the rules in the courtroom, including disrupt the trial and refused to comply with the rules.
- B) Causing serious administrative action as sanction, imprisonment, extrudes temporarily or permanently from the courtroom and fined or similar measures set out in the regulations and evidence.

### 2.2 International Criminal Justice System

#### 2.2.1 Conception of Criminal Justice System

The Criminal Justice System is a system of crime prevention was initially developed in the United States in the reign of President Lyndon B. Johnson in the 1960s. At that time a crime is growing, widespread and grave in various places and cities in the US, so the President, LB Johnsons was launched a national program on prevention of crimes that became known as the conception of Criminal Justice System. Since that time, in the literature appear several thoughts among experts about the criminal justice system.

Remington and Ohli<sup>2</sup> argued that the Criminal Justice System can be defined as the use of systems approach to the administration of criminal justice mechanisms, and criminal justice as a system is the result of interaction

---

<sup>1</sup> Mochtar Kusumaatmadja, p. 42.

<sup>2</sup> Romli Atmasasmita, *Criminal Court System in Eksistensialisme and Abolisionisme Perspectives*, 2nd Ed. Putra Bardin Publishing, Jakarta, 1996, p.14.

between legislation, administrative practices and social attitudes or behavior. Understanding the system itself implies an interaction process rationally prepared and efficient manner to provide certain results with all its limitations.

Meanwhile, Hagan (1987) distinguishes between the definition of "criminal justice process" and "criminal justice system". "Criminal justice process" is every stage of a verdict that exposes a suspect into the process that led to the determination of punishment for him, while the "criminal justice system" is the interconnection between the verdicts of each agency involved in the criminal justice process.

Some experts in Indonesia also provide an explanation about the same thing. Mardjono Reksodipoetra<sup>1</sup> imposes limits in defining criminal justice system as crime control system consisting of institutions of police, prosecutors, courts and the Penitentiary.

Meanwhile Romli Atmasasmita<sup>2</sup> (which agrees with Sanford Kadish) says that the definition of the criminal justice system can be seen from the point of normative approach, and social management. All three forms of those approaches, though different, but cannot be separated from one another. Even further the three forms of the approaches are influencing each other in determining the measure of success in tackling crimes.

The three approaches are:

- 1) Normative approach sees four the law enforcement agencies (police, prosecutors, courts, and penitentiary) as the implementing agency of the regulations that enacted so the fourth apparatus is an integral part of the law enforcement system solely.
- 2) The administration approach sees the four law enforcement agencies as a management organization, which has a working mechanism, either horizontal relationship or vertical relationship according to the structure or organization within the organization. The system used is a system of administration.
- 3) Social approach sees the four law enforcement agencies as an integral part of a social system so the society as a whole has responsibility for the success of the four law enforcement agencies in carrying out their duties. The system used is a social system.

In terms of normative approach as mentioned in sub.a above, there are two models namely Crime Control Model and Due Process Models which have the same characteristics and different values. But Muladi<sup>3</sup> revealed weaknesses models of the criminal justice system for Indonesia, as follows:

- a) Crime control models: not suitable because this model holds repressive measures as important in implementing the criminal justice process.
- b) Due process models: not entirely beneficial because it is "anti-authoritarian values".
- c) Model family or "family model" (Griffiths) is inadequate because too "Offender-oriented" because there are victims who also need serious attention.

In addition, the resistance system (adversary model) as it is known in the United States, whether they are "crime control model" or "due process model" seems rather difficult to accept the role of a third party, which is the victim, in the criminal justice process. This is because the model of resistance is philosophically only known as a contest between two opposing parties that the Prosecutor in this case represents the defendant together with its legal counsel and the state. In this model the most important are the "public order" and "efficiency". Criminal process is essentially a struggle or even some sort of war between the two interests that cannot be reunited, the interests of the state and the interests of individuals (defendant). Therefore this model is also often called "The Battle Model" Protection of rights model (due process model) which began to prioritize the protection of the rights of individuals to control the maximum efficiency is essentially remain within the framework of the resistance system that is based on the balance of interests and lack of relationship harmony between the state and the criminal.

On adversary models, developing the third model of the criminal justice system, called "Family Model" which was introduced by John Griffith. In this model the perpetrator is not seen as enemies of the people but is seen as

---

<sup>1</sup> Mardjono Reksodipoetra, *Criminal Court System in Indonesia*, Quoted from Romli Atmasasmita, *Criminal Court System*, p.14.

<sup>2</sup> Romli Atmasasmita, op.cit. p.16-17.

<sup>3</sup> Muladi, op.cit. p. 22.

a member of the family to be scolded to control his personal control, but should not be rejected or ostracized. Everything is guided by the spirit of love<sup>1</sup>.

Furthermore Muladi argued that the criminal justice system model suitable for Indonesia is a model which refers to: "daad-dader Strafrecht" called: a model of balance of interests. This model is a realistic model that take care to the various interests which have to be protected by the criminal law, those are the interests of the state, the public interest, the interests of the individual, the interests of the criminal and the interests of victims of crime.

The same understanding also raised by Indriyanto Seno Adji that provides abstractions based on the opinions of Mardjono Reksodiputro, that integration between the operations of the sub-system determines the success of the criminal justice system's mechanism. The pattern of this system works like a "vessel-related" which requires correlation and cooperation among them, so that as a contrario, the work of the sub-system will affect the work of other sub-systems. Barriers to the success of an "Integrated Criminal Justice System" located on arrogant sector among the working pattern of the sub-system.<sup>2</sup>

Thus the criminal justice system (criminal justice system) is strongly associated with:

- 1) Control of the crime to the minimum limit.
- 2) The applicable law system and legal awareness, which is, live and affected in the society.
- 3) The existence of the police, prosecutors, courts and Penitentiary (including the role of the Legal Counsel).
- 4) Socio-cultural life of the society, which is living and growing around.

Thus, the criminal procedural law is legislative product that is used as a guide in the process of criminal proceedings through an inspection system to investigate, prosecute, and deciding which are involving the police agencies, prosecutors, courts and penitentiary. So the following discussion is the applicable rules as guidelines for police, prosecutors, courts and penitentiary, also the state and institutions of international organizations, the defendant and his legal counsel to do their duties, responsibilities, rights and obligations of each institution at all levels investigation and judicial, from the investigation, prosecution, investigation, the imposition of judgment until the implementation of the verdict; from the court of first level to a higher level (Appeal to High Court, Appeal to Supreme Court and Review), including on legal aid or defense of the accused person.

In the Indonesian national law, Procedural Law is stipulated in Act No. 8 Year 1981 on the Law of Criminal Procedure but the ICC Statute use the term, Rules of Procedure and Evidence term (Article 51 of the Statute of the ICC) which are scattered in various articles regarding the authority of the investigation, pre-investigation / trial, prosecution, arrest, detention, conviction, runs sentence, appeal, compensation, international cooperation, the provision of legal aid, the protection of witnesses, filing evidence, guilty plea cases, regular inspection, and special examinations.

### 3. Permanent International Criminal Court - ICC

The criminal justice system that is applied by the international criminal court (ICC), including:

#### a. Preliminary examination

Preliminary examination is an examination conducted before the examination in court (ICC), which starts from the stage of the investigations and prosecution (litigation in court). In this process the Prosecutor and the Council of Pre-Investigation/the Pre-Trial Chamber that consists of a Single Judge / Members of the Panel of Judges of the ICC play a major role, especially in terms of determining whether information or the results of the investigation / inquiry has been proposed as a case qualifies to be submitted before the ICC criminal court. Functions and duties of the Pre-Investigation Council widely regulated in article 57 that can issue any commands and rules in the form of a verdict or determination under section 15, 18, 19, 54 (2), 62 (7), 72, 58, 56 Sections 9, 93, paragraph 1 (j). The discretion is including researching and deciding whether an investigation by the Prosecutor's request is reasonable or not, or whether the results of the investigation prosecution have qualified to be brought to the court, calling, investigation, arrest, detention, confiscation, and other things that support the smooth process of the investigation in order to prosecuting in court by the prosecutor.

The Beginning of an investigation on information or reports of crimes against humanity (Genocide, Crimes against humanity and war crime) conducted by the Prosecutors formed in Article 42 of the Statute of the ICC.

<sup>1</sup> Muladi, *Human Rights, Politic, and Criminal Court System*, Penerbit UNDIP, Semarang, 2002, pp.181-182.

<sup>2</sup> Indriyanto Seno Adji, *Supra Note 8*.

Information or reports may be coming from a state (Article 14), the United Nations Security Council (Article 13 b), or other parties such as international organizations, individuals / groups of individuals.

According to Article 15 in conjunction with 53 of the Statute of the ICC, the prosecutor may conduct an investigation "proprio mutui" (initial testing of information) humanitarian crime information, analyzes it, and concludes with two possibilities:

- 1) If the information inferred to have a solid basis for further action, the prosecutor asked the authority to investigate to the Pre-Trial Chamber.
- 2) If the conclusion is unfounded information, the prosecutor shall notify the information source person about it. Unless subsequently, there are new facts or new evidence strongly to the same thing, then the prosecutor can return to "proprio mutui" with two possibilities above.

In the case of Prosecutor wants to initiate an investigation related to the information he/she receives, Prosecutor is bound by the criteria (Article 53, paragraph 1):

- 1) The information must be really convincing,
- 2) The case can be resolved in accordance with Article 17
- 3) Considering the severity of the crime and the interests of victims which are affected.

While, the criteria has no sufficient basis for prosecution after an investigation held which is binding the Prosecutor (Article 53 paragraph 2) are:

- 1) The absence of sufficient legal and factual basis to make an arrest or guaranteed under article 58.
- 2) The case does not meet the requirements of Article 17.
- 3) Overall, the sue is not in the interests of the court.

Furthermore, Article 54 set Duties and Powers of the Prosecutor related to the investigation, as follows:

- 1) Take all effective and necessary investigation in the broadest sense to obtain and collect the facts and evidence of a crime against humanity, including the call and examine witnesses, victims and other parties, to cooperate with the state or other organizations, maintaining confidentiality of information sources, seek protection against any person who is giving information and protection of evidence.
- 2) Commit an investigation in the territory of a state in accordance with the provisions of Section 9 or endorsed by the Council of Pre-investigation based on Article 57 paragraph 3 (d).

#### b. Court Hearing

Furthermore, in the increase from inspection into investigation in order to face prosecution in court, prosecutor still plays an important role on the approval and supervision of Investigator Assembly / Council of Judges with all the functions and authority contained in Article 64.

Prior to the increase in the examination from inspection to investigation, firstly, there is a confirmation of charges before Pre-Investigation Board, after that the Acting President of the ICC appoints the Judge in charge of further court proceedings, and took over all the functions and authority of the Pre-Investigation Board referred to Article 61.

At the start of the examination (investigation) before the trial, the judges give an opportunity to the accused person to submit a guilty plea or admission of innocence. The judges are not bound by the plea from the defendant. If the panel of judges considers admission of innocent by the accused person is not supported by the facts and the evidences contained in the lawsuit and previously recognized by the defendant and the witnesses so the Panel of Judges may order the case to be continued with regular examination (Article 65, paragraph 1 (c), paragraph 3 and 4).

During the period of investigation and examination in court, defendants' rights continue to be protected in accordance with Article 67. The defendant examined and judged at the seat of the court (unless specified otherwise) in accordance with Article 62 and treated according to the principle of presumption of innocence, so it is the responsibility of prosecution to prove the defendant mistake in accordance with Article 66. Therefore verification system that used is the usual proof system not a system of reversal proof. Prosecutor has the right to submit all the evidences; otherwise the defendant can reject or accept the evidences or may submit other evidences. However, the final assessment of the truth of the evidences is the discretion belongs to the judges to be used as consideration of the final verdict.

In the making of the verdict, the judges of the ICC must qualify with the article 74, article 66, paragraph 3, Article 77 and Article 78:

- 1) Attending in all stages of examination at the trial investigation.
- 2) Evaluating the evidences and everything, which are revealed in the trial?
- 3) Do not exceed more than what the Prosecutor require.
- 4) Putting the verdict making unanimously/acclamation, then a verdict shall be by majority vote (voting).
- 5) A verdict is in writing and contains the views of the majority and minority judges in verdict making by voting.
- 6) Consideration of the judges is confidential until the verdict was read publicly in the trial.
- 7) Should be sure about the guilty of the accused person beyond reasonable doubt, if give punitive verdict for the defendant.
- 8) Dropping a maximum prison sentence of 30 years or lifetime imprisonment.
- 9) Dropped fine or redemption of property penalty / asset from crime activity.
- 10) Consider things that can ease or incriminate the defendant's condition.
- 11) Reduce the period of imprisonment according to the period of detention that the defendant has been received.
- 12) Announcing the punishment for each crime and punishment that describes the combined length of the sentence, but may not exceed 30 years imprisonment or lifetime imprisonment in accordance with Article 77, paragraph 1 (b).

The source of law that must be applied by the ICC (Article 21) is:

- 1) Statute of the ICC and the elements of the crime as well as procedural law (procedure and evidence) are arranged also in the ICC statute.
- 2) Facts, principles and rules of international law relating including armed conflict.
- 3) General Principles of Criminal Law from the national legal system (national courts) and the legal systems of the world, as long as not contrary to the Statute of the ICC.
- 4) Precedent from previous verdicts.
- 5) Legal interpretation that is consistent with internationally known human rights without discrimination.

When referring to the hierarchy of the statute of the International Court of Justice Article 38 is:

- 1) All the provisions of the Statute of the ICC including the Geneva Conventions of 1949 and the General Principles of the clearly Penal Code. Then Conventions or other present international agreements relating specifically to the crimes into the jurisdiction of the ICC.
- 2) International customs, which are common practices, (especially related to the crimes against humanity that becomes the jurisdiction of the ICC, such as customs in wars and battles on land, sea and air).
- 3) The general principles of law recognized by civilized nations, (especially as related to crimes against humanity that became the jurisdiction of the ICC).
- 4) Court verdicts and teachings (doctrine) of experts from various nations, as an aid in establishing the rule of law.

According to the author's thought, the general principles of criminal law are set in Section 3 and several other articles. The application of the law placed the first order equated with international conventions or agreements since the general principles of criminal law is part of the provisions of the Rome Statute of 1998. So it is distinguished by the principles of other common law, which is not mentioned in the Statute of the ICC, it is placed in the third.

General principles of criminal law that must be applied by ICC are:

- 1) Nullum crimen sine lege principle (Article 22 of the ICC Statute);
- 2) Nulla poena sine lege principle (Article 23);
- 3) The principle of non-retroactivity *ratione personae* (Article 24);
- 4) The principle of individual criminal responsibility (Article 25);
- 5) The principle of non-jurisdiction over persons under the age of 18 years. (Article 26);
- 6) The principle to do not look at Official Position or Impunity (Article 27);
- 7) The principle of Responsibility by Commander and other superiors (Article 28);
- 8) The principle No Stipulation Restrictions (Article 29);
- 9) The principle of the Mental Element (Article 30);
- 10) The principle of Elimination of Criminal Responsibility (Article 31);
- 11) The principle of Top's Command and Error of Law (Article 32 and Article 33);
- 12) *Ne bis in idem* principle (Article 20);

- 13) The principle Complementary (Article 1);
- 14) The principle of Inadmissibility(Article 17);
- 15) The principle of Non-Lapse of Time or Invalidity of Expiration.

In addition, other principles of international law that can be used by the ICC are:

- 1) The principle of "Au dedere Au Punere"
- 2) The principle of "Au dedere Au Judicare"
- 3) The principle of "Primacy" (limited).

Then the question, whether the application of the 1949 Geneva Convention on war crimes cases which is comply with the jurisdiction of the ICC not be retroactive? According to the author's thought, the application of the 1949 Geneva Conventions by the ICC as well as by the criminal court (HAM) national which is applying the criminal jurisdiction of the ICC is not retroactive or not violate the principle of legality in the ICC Statute, because:

- 1) The introduction of the 1949 Geneva Convention together with the application of several principles of international criminal law which has been known much earlier as mentioned in the ICC Statute adopted such as: Nullum crimen sine lege principle (Article 22), Nulla poena sine lege principle (Article 23), principle of non-retroactivity *ratione personae* (Article 24), the principle of individual responsibility (Article 28) and others.
- 2) With their mention in the ICC Statute, the Geneva Conventions of 1949 became part of the provisions of the ICC Statute are the same as the validity of all other provisions of the ICC on war crimes, especially on international and non-international armed conflict.

#### c. Efforts Law Appeals and Revision

Against the above court verdict may be rejected by the defendant or prosecutor through an appeal in accordance with Articles 81-83 and review (revision) in accordance with Article 84. There are different reasons to appeal to the prosecutor and the defendant, are:

The reason for the prosecution appeal (Article 81, paragraph 1 (a) are:

- (A) Error procedures
- (B) Errors of facts; or
- (C) The error of law.

While the reason for the defendant appeals (Article 81 paragraph 2) is:

- (A) Error procedures;
- (B) Errors of fact;
- (C) The error of law; or
- (D) Other reasons that affect the honesty and trust litigation or verdict.

Article 81, paragraph 2 allows also appeal by prosecutor or defendant to punishment by reason of the penalty imposed is not comparable with the crimes committed. If the appeal Assembly considers there is reason to cancel the sentence either partially or wholly, the Appeals Chamber may invite the prosecutor and the defendant to plead under article 81, paragraph 1 (a) or (b).

Likewise prosecutor and the defendant or his family (spouse and children their parents) can apply for the review / revision of the verdict to punish, the basic reason was the discovery of new evidence, it has been found / known evidence that determine the investigation and prosecution was wrong, forgotten or falsified.

Panel of Judges (revised) may reject or grant the request for revision. In the event that the application is considered useful revision and grounded to be granted the Panel of Judges (revised) invited back earlier Appeals Judge for feedback whether or revision.

#### d. Implementation of the Verdict

After the verdict has a permanent legal power (*incracht*), then the court will execute the verdict as stipulated in Article 103 - Article 111. The court determines in which state of the states that are willing to be the place of execution in accordance with the verdict, including determining the removal of imprisonment to another state. Host states are bound and cannot change the nature of the implemented verdict. But the terms of imprisonment detention conducted by national law implementing state while respecting the requirements of international standards and must not discriminate between ICC prisoners with domestic prisoners in the sense that the ICC prisoner should not be treated worse than local prisoner. Host states can do extradition or surrender or send someone under its domestic law to other states for the purpose of investigation or enforcement, including the

escape but with the consent or court orders of ICC. Implementation of the verdict in question concerns the implementation of his imprisonment in addition; also include the implementation of fines and redemption of assets or property that was ordered by the Court in accordance with Article 109.

ICC Statute also regulates international cooperation and legal assistance as stated in Article 86 - Article 102. The international cooperation covers various forms of cooperation with the tribunal in the investigation and prosecution of crime which is the jurisdiction of the ICC there are included arrest, delivery of people, detention, granting the data and evidence, examination of people, and other actions related to mutual legal assistance.

In a series of international cooperation between signatory states / receiver of ICC statute or / and with the ICC over the penitentiary and the national police force plays an important role under the domestic law of the concerned state. For that the signatory states ensure that their national law governing the procedures for all forms of international cooperation (Article 88).

#### **4. Formulation of definitions and objective elements of Crime of Aggression**

For the formulation of crime of aggression that has been there, some responses are following definition:

First, even though in the fact that member states are involved in the process to agree on a definition of aggression, negotiation undeniably has been affected by the realization that the conceptions of a wider or narrower of that could be important in the scope of self-defense. Indeed, some of the major constraints for many years impede consensus is basically concerned with self-defense, rather than the competence of the enforcement of the Security Council. The main stumbling block exists in accordance to the question of the extent to which it is permissible self-defense against various forms of indirect aggression, such as acts of subversive or terrorist acts committed by irregular groups, volunteer or organized armed groups, supported or directed by another state (as opposed to a direct attack by the armed forces of other states). Strength Thirteen positions on this issue are clear. Article 7 of their proposals do not include the implementation of self-defense in situations where a very defensible position vigorously in the whole debate of the Committee. In contrast, the Power of Six constantly refused to agree all definitions of aggression that do not incorporate (in certain cases) indirect aggression.

Second, the scope of self-defense also arises in relation to the Soviet proposal that the first State who commits unlawful acts that have been set will automatically identified as the aggressor that is the principle of priority or the 'first use'. Some states support the principle as a valuable confirmation that self-defense cannot be implemented / executed preventively. Other states objected that the rigid application of the principle can lead to undesirable results under certain circumstances and may be difficult to gather convincing evidence to know which party is the first to act. Six strengths especially emphasized that in determining the aggressor, we have to look at the intention of the state that perform certain actions and not fixated on priority. This latter view received critics from the states who choose objective elements over the subjective analysis of a state's motives.

Third, who plays a significant role in the debate concerning the criterion of proportionality? Article 6 of the proposal Thirteen Strength insists that the right of self-defense does not give the right to the State to take action that is not 'quite disproportionate' against armed attack. However, as assessed previously, a number of states, especially the Soviet Union, are strongly opposed to the reference to proportionality as a precondition for self-defense, mainly because they fear that it would be too tying the hands of the victims of aggression and aggressors favorable candidate states.

Fourth, the scope of self-defense was also raised in relation to other elements, such as gravity is required to qualify as an act of aggression, or vis-a-vis certain actions, such as a declaration of war. However, the main division is the definition listed above: first, the separation (partition) on the legality of self-defense against aggression indirectly, especially between Thirteen Strength and The Power of Six, second, the partition of the role of the use of 'first and criteria intentions, especially among Six of the Soviet Union and strength, and the third, the partition of the principle of proportionality between the Soviet Union and the Power of Thirteen.

Fifth, considering that the problems are complex and interrelated, some delegates indicated that there is might be no breakthrough, unless there is a basic understanding of the type of conceptions that must be defined by the Committee: armed aggression / armed attack within the meaning of Article 51 of the UN Charter, or act of aggression within the meaning of Article 39. If some states occasionally insist that these conceptions are one and the same, the majority of states are agreed that there is a relationship which sequentially (cascading) between terms the use of force, aggression and armed attack. As noted by one delegation: Article 2, paragraph 4 prohibits the threat of violence and because it relates to the broader conceptions than the use of armed force. More limited conceptions mentioned in Articles 1 and 39 of the UN Charter, and the more limited conceptions of armed attack

under Article 51. In other words, it is generally accepted that the conceptions used in Article 39 and 51 are not identical and that there is no single definition that can be designed which simultaneously will cover both.

Sixth, by this background, several ways open to negotiators. Thirteen Strength suggested that the Committee should, awhile, refrain from discussing about indirect aggression that always proved too controversial - and vice versa limiting to define direct aggression. Considering that the position of the Thirteen Strength in self-defense against indirectly aggression, and slim prospects for obtaining definition that separated on the next several stages, it is not surprising that the Power of Six showed little enthusiasm for the idea. In contrast, the Power of Six constantly argued that the conception of aggression are inseparable and cannot be divided into two parts, one that allows for self-defense and others exclude them. They emphasize that it is unrealistic to think that the definition of armed attacks that can be achieved. Britain is particularly strongly stressed that member states have long been divided between two schools of thought - one group see Article 51 of the Charter of the United Nations as part of a broader right habits of self-defense, and the other group saw Article 51 as an exclusive regulation of self-defense - and that the definition of aggression should be accepted by both groups. Furthermore, deemed unnecessary to examine the scope of self-defense in detail, since the Committee is only required to establish the meaning of aggression for the purpose of clarifying the competence of the UN Security Council under Article 39 of the UN Charter, the last provisions serve entirely different purposes of Article 51. In the end, Strength Six claims that it is too simplistic to assume self-defense as part of a review aggression. Self-defense is only part of incidental relevance to the aggression. For this reason, a general provision, which states that self-defense is not an aggression, is necessary.

Seventh, differences of opinion vis-à-vis the rights of self-defense in the end proved to be too deep to overcome. As part of a broader compromise (which involves more controversial issues, such as the right of self-determination), it was agreed that the definition should include a reference to indirect aggression (Article 3 (g)), and if at the same time is only understood as defines 'aggression' within the meaning of Article 39 of the UN Charter.

Eighth, related to the scope of self-defense, limiting the resolution on the understanding that nothing in this definition that can be interpreted as a way to enlarge or reduce the scope of the UN Charter, including its provisions concerning cases in which the use of force backwardly legal (lawful). According to the Soviet delegation, the inclusion of the last provisions was a success, especially given that this issue has divided the Special Committee for several years, the Committee has acted quite reasonable to restrict itself to the formulations that cannot lead to differences of opinion.

Ninth, the UN General Assembly Resolution on Definition of Aggression of this kind serves as a non-binding guideline for the Security Council to determine the existence of an act of aggression within the meaning of Article 39 of the UN Charter. Article 4 clarifies that the UN General Assembly resolution on the Security Council is not binding at all. Moreover, the General Assembly Resolution No. 3314 (XXIX) that explicitly refers to the definition of aggression only in relation to the occupation of Namibia by South Africa and Israel's occupation of the Golan Heights; The most interesting developments in the United Nations Conference in Rome in 1998 states conference participants approved the Rome Statute of 1998 that became the basis of the establishment of the International Criminal Court - ICC (International Criminal Court. In Article 5, paragraph (1) defined the crime of aggression, as one of the serious human rights crimes, but the formulation of definitions made within seven years after the statute is valid, that is 60 days after receiving the ratification of 60 states. The formulation of the definition, through the mechanism of an amendment in accordance with Article 121 and 123 statutes and must be consistent with the UN Charter. Although it has been over a period of seven years since the 60th day statute gets ratification of 60 states in this regard Rome Statute of 1998 became effective on July 1, 2002 for 60 days have passed since gaining ratification 60th state on April 11, 2002 under the intent of Article 126 of the Statute. However, turns to the present definition of the crime of aggression had not yet been made. The setting aggression as a serious human rights crime and international legal obligations to formulating a definition of aggression within seven years of the Rome Statute in 1998 was a breakthrough penetrates a deadlock of formulating definition of aggression by member of the UN. This breakthrough opens the way wide open towards a common goal a definition of the crime of aggression. Thus the debate on the definition of aggression, which is more political, juridical formal standardized in the Rome Statute in 1998 as one of the international obligations of the participating states in conference to formulate. However the legal obligation has to be implemented.

Tenth, the debate over the definition of aggression which failed in formulating could provide an understanding that the Western powers have managed to defuse the debate by distorting / direct binding document with legal



implications into a political tool that they can very easily ignore. Again, the use of the phrase acts of aggression in Article 2 and 3, in relation to the text of Article 6, has made it clear that a consensus resolution does not directly restrict or expand the scope of legitimate self-defense, a belief shared by the majority of legal doctrine.

The implication is that any armed attack within the meaning of Article 51 is usually also an act of aggression within the meaning of Article 39. More importantly, the opposite would mean that any act of aggression restrictions identified by the Definition of Aggression would apply to the conception of an armed attack.

## 5. Conclusion

Discussing and debating related to crime of aggression are set in the scope of article 5 of Rome Statute. The article then has correlation with article 121 and 122 the Rome Statute. To support it, those articles of the Rome Statute is also associated with the article 39 and 51 the the UN Statute. The big challenge of the implementation of Rome Statute is definition of Rome Statute. This challenge can affect law enforcement of the Rome Statute.

## References

- Arthur, Nussbaum, (1963), *the History of International Law*, Translated by Sam Suhaedi Admawiria, Bandung, Penerbit Binatjipta.
- Indriyanto Seno Adji, *Some Notes on Human Rights Court and its Problems*, Talk Show IKA UNAIR, 6 Mei 2000, Jakarta.
- James Barros, *United Nations; Past, Present, and Future*, Translated by D. H. Gulo, Bumi Jakarta, Bina Aksara.
- J.G. Starke, (1990), *an Introduction of International Law*, 10th Ed. Translated by Bambang Iriana Djajaatmadja, Jakarta, Sinar Grafika.
- Mardjono Reksodipoetra, *Criminal Court System in Indonesia, Quoted from Romli Atmasasmita, Criminal Court System*.
- Mochtar, Kusumaatmadja, (1986), *Geneva Convention 1949 Concerning Protection of Victims of War*, 2nd Ed. Bandung, Bina Cipta Bandung, Bandung.
- Muladi,(2002), *ICC: a Great Art amongst Nation*, Semarang, Faculty of Law UNDIP.
- , (2002), *Human Rights, Politic, and Criminal Court System*, Semarang, Penerbit UNDIP.
- Romli Atmasasmita, (1996), *Criminal Court System in Eksistensialisme and Abolisionisme Perspectives*, 2nd Ed. Jakarta, Putra Bardin Publishing.

The IISTE is a pioneer in the Open-Access hosting service and academic event management. The aim of the firm is Accelerating Global Knowledge Sharing.

More information about the firm can be found on the homepage:

<http://www.iiste.org>

### CALL FOR JOURNAL PAPERS

There are more than 30 peer-reviewed academic journals hosted under the hosting platform.

**Prospective authors of journals can find the submission instruction on the following page:** <http://www.iiste.org/journals/> All the journals articles are available online to the readers all over the world without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. Paper version of the journals is also available upon request of readers and authors.

### MORE RESOURCES

Book publication information: <http://www.iiste.org/book/>

Academic conference: <http://www.iiste.org/conference/upcoming-conferences-call-for-paper/>

### IISTE Knowledge Sharing Partners

EBSCO, Index Copernicus, Ulrich's Periodicals Directory, JournalTOCS, PKP Open Archives Harvester, Bielefeld Academic Search Engine, Elektronische Zeitschriftenbibliothek EZB, Open J-Gate, OCLC WorldCat, Universe Digital Library, NewJour, Google Scholar

