WORKING PAPERS

INDONESIA TOWARD THE RATIFICATION OF THE STATUTE OF ROME ON INTERNATIONAL CRIMINAL COURT BY THE YEAR 2008

I. AN OVERVIEW OF THE INTERNATIONAL CRIMINAL COURT

International Criminal Court (ICC) was established on the basis of the Statute of Rome, which on July 17th, 1998, was adopted by 120 countries participating in "United Nations Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court" in Rome, Italy.

The Statute of Rome on International Criminal Court regulates the authority to bring to justice the most serious crimes gaining attention from international community. Those considered here include four kinds: crime of genocide, crimes against humanity, war crimes, and crime of aggression.

Unlike the previous international tribunals, such as International Criminal Tribunal for fomer Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), which were ad hoc, International Criminal Court is a permanent tribunal (Article 3 (1), the Statute of Rome). It prevails only for crimes taking place after the Statute of Rome has been put into effect (Article 24, the Statute of Rome).

International Criminal Court is an independent tribunal and is not a body of the United Nations (UN) since it was established on the basis of a multilateral agreement, in spite of the fact that under certain circumstances, there is a relation of roles between ICC and UN (Article 2, the Statute of Rome).

The Statute of Rome contains many securing elements which guarantee that investigations and prosecutions will only be performed for the sake of justice, and not for political purpose. Although UN's Security Council and countries can give recommendations to Prosecutor of the International Criminal Court, the decision to carry out an investigation is the authority of Prosecutor. However, Prosecutor will not merely rely on Security Council or recommendations from states, but will also base his/her investigation on information from various sources. Prosecutor must seek authorization from the Pre-Trial Chamber both for carrying out an investigation and prosecution, and the demand can be criticized by the states.

I. A. Indonesia's Role in the Establishment of the International Criminal Court

During the process of the adoption of the Statute of Rome, Indonesia was actively involved by sending a delegation to participate in a Diplomatic Conference in Rome in July, 1998, when the Statute of Rome was legalized. On that historic moment, Indonesia stated its support for the legalization of the Statute and the establishment of the International Criminal Court. Indonesia also expressed its intention to ratify the Statute.

In 1999, Indonesia made a positive statement before the Sixth Committee of UN's General Assembly in its view on the Statute of Rome. Indonesia stated that "universal participation should become the sharp point of the ICC", and that "Court should be the result of cooperation of all nations regardless of political, economic, social, and cultural differences." Still in the same statement, Indonesia also stated that the Statute of Rome gives more importance to the values contained in the Charter of the United Nations, which include consensus, impartiality, non-discrimination, and sovereignty of states and unity of territory. In this case, Indonesia emphasized that the Court should attempt to be a complement, and not a replacement, of national law mechanisms.

In 2004, President Megawati Sukarnoputeri approved a National Plan for Action on Human Rights (*Rencana Aksi Nasional tentang Hak-Hak Asasi Manusia*/RANHAM) 2004-2009. The Plan stated that Indonesia intends to ratify the Statute of Rome by the year 2008. To implement the Plan, President formed a National Committee. On several occasions the government has also stated that it is studying the Statute, and that a national legislation needs to be made for the purpose of cooperation with the Court before the ratification can be done.

In August 2006, a delegation of the Indonesian parliament participated in a regional conference of all Asian parliaments on International Criminal Court, and Indonesia promised to work to pursue a ratification/accession by the year 2008, or even sooner. In 2007, it was established as well the Parliamentarian for Global Action (PGA) Indonesia Chapters, and as a matter of fact, the international secretariat of the PGA has been very active in supporting the universality of the International Criminal Court.

I. B. International Criminal Tribunals: from Nuremberg to Den Haag

The establishment of the International Criminal Court has a background of—and a close relation with—the establishment of several international criminal tribunals before. *First* was the establishment of international criminal tribunals after the end of World War II, i.e. International Military Tribunal (IMT), or better known as Nuremberg Tribunal, in 1945, and International Military Tribunal for the Far East (IMTFE), or better known as Tokyo Tribunal, in 1946. *Second* was the establishment of international criminal tribunals after the end of the cold war, i.e. International Criminal Tribunal for fomer Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) having headquarters in Den Haag.

Four international criminal tribunals mentioned above were ad hoc in nature. The establishment of the IMT was based on an initiative by the Allied States, who won the war, to bring to justice the German-Nazi leaders (both from the military and non-military) as war criminals by previously putting it into London Agreement on August 8th, 1945. Meanwhile, the IMTFE was established on the basis of the Proclamation by the Highest Commander of the Allied Forces, General Douglas MacArthur in 1946.

Both tribunals had similarities and differences. One of the similarities was the fact that the IMTFE Charter was adopted from that of the IMT. Besides, the spirit of the establishment of these two international criminal tribunals was based on the position of the Allied States as the winner of World War II, so that it is known as victor's justice.

Meanwhile, the difference was in the fact that although both charters had the same contents, their instruments and processes of court were very much different, so that they resulted in a significant difference regarding settlements of the court. At the IMT, some of the accused were declared free, but at the IMTFE, no body escaped the punishment.

Another difference lay in the legal basis of the establishment. At the IMT, all German-Nazi leaders sat on chairs of the accused, while at the IMTFE, Emperor Hirohito as the highest leader of Japan was not touched at all. This was due to an agreement between Japanese Government and the Allied States, in this case the United States, not to disturb the existence of Emperor as the holder of the highest sovereignty of Japan. Based on this difference, it can be concluded that both tribunals didn't have characteristics of being independent and impartial.

Next was the establishment by UN's Security Council of International Criminal Tribunals for former Yugoslavia (ICTY) and for Rwanda (ICTR). These two

tribunals also had a similarity and a difference. The similarity was that both were established by the same institution, i.e. UN's Security Council, through a resolution. Meanwhile, the difference was that the establishment of the ICTY was a result of the evaluation by international community through UN's Security Council toward serious crimes against human rights taking place in former Yugoslavia. The establishment of this tribunal at the time didn't gain support particularly from "the new Yugoslavia", which consisted of Serbia and Montenegro.

The fact of a court having been performed against war criminals of World War II didn't make the thought to establish a permanent judicial institution for bringing international crime perpetrators to justice faded. This is due to the fact that mechanisms of international tribunals, which are ad hoc in nature, have basic weaknesses as follows:

(1) Victor's justice

Of the four international tribunals which have been held, all have a similarity in the fact that those considered responsible for the crimes are individuals from countries which lost the war. Meanwhile, countries, which won the war, were free from the responsibilities, in spite of the fact that they have done similar crimes. That is why the justice achieved through such process of the four tribunals is considered victor's justice.

(2) Selective justice

Another weakness of the mechanism of ad hoc international tribunals is the occurrence of selective justice. It means that not all of the most serious international crimes will have equal opportunities to be addressed by establishing international tribunals. Only certain cases, which are considered to have influenced international stability and security, will be brought to justice; and only cases involving important countries will have opportunities to be resolved. It

means, there will be perpetrators that will not be punished, and there will be victims who will not receive their rights to justice and compensation. Further more, such condition will not contribute much to the efforts to stop practices of impunity in various parts of the world.

(3) Lack of effects of being cured and prevention for similar crimes from happening again in the future

Although there was rapid progress from the two international criminal tribunals after World War II, the next two tribunals still had the same limitations. Among others, they were lack of cooperation with countries where serious international crimes happened; the fact of being unable to stop conflicts going on and unable to prevent conflicts from happening again; and the reach of prosecution which is limited to categories of conflicts (internal or international conflicts).

(4) Political content

It has been more than a half of a century since Nuremberg and Tokyo tribunals, and many countries have failed to bring those responsible for genocides, crimes against humanity, and war crimes to justice. This is due to the mechanism that the establishment of international ad hoc tribunals can ONLY be done through UN's Security Council. It means that "the destiny" of justice will highly depend on the membership composition of the Security Council and the use of veto by its permanent member countries. In this context, political interests will certainly play role more than the consideration of law and justice.

Based on the reasons above, it is necessary to have a mechanism of international tribunal which is relatively free from international political intervention, respectful toward sovereignties of states, independent, and able to behave more fairly even to the perpetrators.

I.C. Process of the Establishment of the International Criminal Court (ICC)

In 1950, the United Nations through its General Assembly formed a committee, named Committee on International Criminal Jurisdiction, whose duty was to prepare a Statute for International Criminal Tribunals.

The committee completed its duty one year later, but it didn't receive much attention from UN members. This issue disappeared as political and ideology confrontations took place during the cold war. However, in mid-1980s, Soviet Union leader, Gorbachev, raised again the idea to establish an International Criminal Court, which would be meant especially as a movement against terrorism.

In 1989, the idea to establish an International Criminal Court was taken up again during the Session of Committee VI of UN's General Assembly with a proposal from Trinidad & Tobago delegation in the name of the other six countries of Caribbean region. The proposal was to reactivate the work of the International Law Commission (ILC) to reformulate a draft of the Statute for International Criminal Court in relation to the efforts of fighting the international drug trade/trafficking. Then this proposal was responded well by the General Assembly.

In 1992, once again UN's General Assembly issued a resolution, asking the ILC to formulate a draft of the Statute for International Criminal Court. Only in 1994 the ILC completed its duty of formulating the draft of the Statute. And to discuss the draft, the General Assembly then formed a committee named Ad Hoc Committe on the Establishment of International Criminal Court. At the same time, the ILC recommended a diplomatic conference to consider the adoption of the draft, but it was postponed for there were still some disagreements about the draft.

Then in 1995, the Ad Hoc Committee was replaced with Preparatory Committe on the Establihment of International Criminal Court which would prepare everything for the establishment of the ICC. The result was a diplomatic conference of the United Nations—United Nations Conference of Plenipotentiaries on The Establishment of an International Criminal Court in Rome, Italy, July 15th-17th, 1998, attended by 120 countries which then adopted the Statute of Rome on International Criminal Court.

I.D. Women and the International Criminal Court

In every conflict, women and children are the most vulnerable ones, and they always become victims. Just to mention some of them, various conflicts widely known by the international community are armed conflicts in Yugoslavia (1993), Rwanda (1994), and lately in Darfur (2003)—all of them involved a considerable number of women as victims, especially of sexual crimes. In Indonesia itself, similar cases were involved in the implementation of the Territory of Military Operation in Aceh during the New Order rule, and also in the case of riot of May 1998.

At Nuremberg and Tokyo Tribunals, there was a weakness in their charters as the guidelines to bring the crime perpetrators to justice. This was due to the fact that planners of the two charters have failed to include rape or sexual crimes and gender violence. Other criminal elements, such as sexual slavery committed by Japan during the War in East Asia, were not included in Tokyo Tribunal.

At ICTY and ICTR, planners of the Statutes for both tribunals were successful to include rape. ICTY included rape as a part of torture, and ICTR put it as a part of genocide. In practice, however, at ICTR in the case of Akayesu, crimes against women were only disclosed after court of judges asked some questions to victim witnesses, and only then the Prosecutor made additional accusation.

International Criminal Court provides a mechanism for women protection, which is much more progressive than those of the previous international tribunals. The protection can be found in:

a. Codification of crimes

   The Statute of Rome puts sexual and gender violence as a part of war crimes and of crimes against humanity. In detail, war crimes and crimes against humanity include, among others, rape, sexual slavery (including women trafficking), prostitution by coercion, pregnancy by coercion, and all kinds of violence committed because of gender distinction.

b. Female victims and witnesses in ICC's mechanism

   Female victims and witnesses in ICC's mechanism may ask that the examination procedures be carried out according to their needs. The Court has an obligation to provide protection for female victims and witnesses, so that they will have a feeling of security, healthy physical and mental conditions, and confidentiality of themselves for specific cases related to sexual and gender violence. The Statute also regulates special units for witness protection (Victim and Witness Protection), counselling, and many other forms of assistance.

c. Proving mechanism

   Proving mechanism in the Statute of Rome is made such a way that it will protect victims of sexual crimes from a proving process that could harm their credibilities and dignities as women. This Court has a specific guideline when dealing with cases of sexual violence.

d. Special expert staff for gender and sexual crimes

   The Statute of Rome obliges ICC's Office of the Prosecutor to appoint advisors with legal expertise in sexual and gender violence. Special unit of witness and victim under the Court's Registry must also have staff

experienced in dealing with cases of sexual crimes. Selection of the Court's judges is also done by considering a fair representation of number between female and male judges.

e. Participation of victims in processes of the Court.

   The Statute of Rome and its procedures facilitate direct involvement of victims in judicial process. Victims can express their opinions according to the rules, i.e. they are given a chance to tell their experiences, even if they are not invited as witnesses. This mechanism will open opportunities for every individual woman to speak about things which are frequently absent in international judicial processes.

With these regulation and mechanisms, it means that the International Criminal Court not only gives certainty to justice seekers, but also guarantees the dignities of female witnesses and victims.

II. THE IMPORTANCE OF THE RATIFICATION OF THE STATUTE OF ROME

An imperative to ratify the Statute of Rome in 2008 is not only because of the normative reason that it has been mentioned in RANHAM 2004 – 2009. Ratification of the Statute in this year will also give a very positive contribution to enforcement and protection of human rights in Indonesia, as well as to peace in the region and in the world. Besides, it will also make Indonesia seen as equal to the other nations in the world who have committed themselves earlier to the order of international justice.

In detail, the importance and advantages of ratification of the Statute of Rome in this year are explained as follows:

a. Abolishing Various Practices of Impunity

Ratification of the Statute of Rome is urgently needed by Indonesia, moreover after we have seen examples of treatments to the cases of serious human rights violations taking place in Indonesia, which end up with the failure of the Court to find and punish "the most responsible persons".

The establishment of the International Criminal Court is aimed at stopping and preventing practices of impunity toward perpetrators of serious international crimes, which is regulated by the Statute of Rome, and is aimed at making a significant change to behaviors of nation-state actors. Such crime perpetrators must not be free from prosecution, even if they are representation of the sovereignties of their countries.

In other words, there are three important things due to the existence of the International Criminal Court as a preventative from serious international crimes to happen, as regulated in the Statute of Rome.

First, those in state power will no longer be able to do any practice of impunity by any reason aimed at protecting crime perpetrators by using national law mechanisms, either by performing a trial, which is aimed at protecting the perpetrators, or by amnesty.

Those in state power must think carefully not to make any political policy that may result in serious crimes, since the International Criminal Court has the authority to perform investigation and prosecution into serious crimes which have taken place, and to decide whether the national judiciary performed meet the requirements of being independent and impartial.

Second, it has something to do with the very far reach of the International Criminal Court in applying its jurisdiction, even though its presence is complementary. Besides perpetrators cannot seek protection in national legislation mechanisms of their own countries, they cannot seek protection in other countries either, even if the countries are not parties of the Statute. In practice, countries, which have become parties of the Statute, have done transformation into the Statute of Rome on the International Criminal Court, so that the Statute's terms and conditions have fully become parts of their national laws.

Third, particularly for countries which send peace-keeping force, the International Criminal Court even protects personnels of peace-keeping force from possibilities of acts which are categorized serious international crimes, and not on the contrary threatens the existence of peace-keeping force who are doing their operation in a conflict area. In other words, the International Criminal Court provides legal protection for personnels of peace-keeping force.

International Criminal Court and UN's Peace-Keeping Force

Indonesia has since long participated in sending peace-keeping force in the framework of the United Nations. This is a manifestation of Indonesia's declaration of intent as contained in the Preamble of the Constitution UUD 1945, that is to take part in keeping the orderliness of the world. The last time, Indonesia sent its armed force (TNI) to join UN's Peace-Keeping Force in Lebanon.

Then, what is the relation between the involvement of UN's Peace-Keeping Force from Indonesia and the International Criminal Court? The Statute of Rome provides a guarantee to every personnel from various countries who are on duty as UN's Peace-Keeping Force. The guarantee takes forms of warning, prevention, and protection from all kinds of criminal acts in the jurisdiction of the Court during their duty in a conflict area, and not on the contrary becoming barrier to their work in peace-keeping operation.

The Statute of Rome provides a more complete guideline about rules of engagement for peace-keeping force, so that members of the force can understand more clearly what they can do and what they musn't do during they perform their duties. Still further, with a clearer definition and clearer parameters of elements of crimes, the Statute of Rome even reduces possibilities of politicization of a case involving peace-keeping force.

Indonesia is not a party state in the Statute of Rome, but it doesn't mean that its personnels are free from jurisdiction of the International Criminal Court. The Statute's mechanism enables a referral from UN's Security Council as in the case of Darfur in Sudan. However, it is necessary to be noticed that the International Criminal Court will not all at once apply its jurisdiction to personnels of peace-keeping force. The Principle of Complementarity, which is the main principle of the International

Criminal Court, still prevails, i.e. prioritizing national law mechanisms to bring crime perpetrators to justice as a form of respect to the sovereignties of countries.

How is Indonesia's position if it becomes a party state in the Statute of Rome? The Principle of Complementarity will still prevail, but the problem is that Indonesia doesn't have a mechanism of national law to bring perpetrators to justice, especially those related to war crimes. Indonesia's Law No. 26 of the Year 2000 about Human Rights Court doesn't regulate war crimes in its jurisdiction. Therefore, there is a possibility for Indonesia to be categorized unable to bring crime perpetrators to justice.

Thus, the solution for this problem is that Indonesia should, as soon as possible, ratify the Statute of Rome. The ratification will even become a trigger for Indonesia's efforts to improve and strengthen its national law mechanisms. In fulfiling the efforts, it is necessary to be noticed that war crimes cannot be put in the jurisdiction of military judiciary. This is important, considering that in international practices, and it has been an international fact, perpetrators of war crimes are not always from the military, but also from civilians. Thus, the best way is to include war crimes in an Amendment to the Law No.26 of the Year 2000 about Human Rights Court, which is at the same time also a form of the implementation of the Statute of Rome in Indonesian national law.

Based on the explanation above, ratifying the Statute of Rome will mean that Indonesia will be bound by a strong commitment to provide protection of human rights for its citizens, and will be bound to do the obligation to punish perpetrators of serious international crimes in a proper way in order not to be seen as "unwilling" country.

b. Overcoming Weaknesses of Indonesia's Legal System

Bringing perpetrators of international crimes to the court and punishing them are forms of state responsibility and manifestation of the protection of human rights provided by the State to its citizens. To implement the responsibility, however, Indonesia is often hindered by various weaknesses and insufficiency of its existing legal system.

Ratifying the Statute of Rome will become an impetus for Indonesia to immediately overcome its shortcomings. Besides, ratification of the Statute of Rome containing rules about forms of extraordinary crimes, which are dynamic, but are not regulated in KUHP, can motivate the State to improve its judicial system, including its law of procedures. This is by consideration that after ratifying the Statute, a party state must have rules of implementation which work in accordance with contents of the Statute, and its national law must be able to provide a guarantee for full cooperation with the International Criminal Court.

c. Protection for Witnesses and Victims

Process of ratifying the Statute of Rome is an effort to prevent reoccurrence of crimes with greater effects in the future, and also to give protection and reparation for the victims. Besides carrying out punishment for the perpetrators, giving compensations to the victims is one form of state responsibility when a serious human rights violation is taking place in its territory.

Protection for victims of serious human rights violations in Indonesia is regulated in Article 34 of Law No. 26 of the Year 2000 about Human Rights Court, and followed by Government's Regulation No. 2 of the Year 2002 about Protection for Witnesses and Victims as its rule of implementation. However, when compared to the Statute of Rome, many rules contained in the Statute are not accommodated in the Regulation. For instance, the existence of Trust Fund for the

sake of witnesses and victims, which is collected from fine or ransom, of which the arrangement is delegated to the Assembly of Party States.

Next, the Statute of Rome also regulates the existence of Witness and Victim Unit, which is aimed at providing steps for protection and arrangement of security, counseling service, and any other necessary assistance for witnesses, victims who come to the Court, and other people who may suffer from the risks due to testimonies given by the witnesses. By ratifying the Statute of Rome, Indonesia will be able to effectively adopt the system and mechanisms for witness and victim protection, as contained in the Statute, into its national system and mechanisms. Further more, the Institution for Witness and Victim Protection, which was established on the basis of Law No. 13 of the Year 2006 about Witness and Victim Protection, will get stronger legitimacy when referring to practices done by the International Criminal Court in performing its duties.

Advantages of Ratifying the Statute of Rome

a. Right to Active Preference

Real benefit gained is that, if there is a mechanism involving Party States, for example the Assembly of Party States, we can vote and give our opinions on things related to changes/improvements in the Statute's contents as well as other things related to the arrangement and the implementation of the International Criminal Court, including administrative issues. For states ratifying the Statute of Rome, it means that they have the right to active and direct preference to actively take part in all activities of the International Criminal Court, including to protect their citizens who become subjects of the Court.

By ratifying the Statute of Rome, Indonesia will automatically become a member of the Assembly of Party States, which has very important functions in the International Criminal Court. The important functions of the Assembly of Party

States, among others, are being able to participate in election process of all legal positions in the Court. Among the positions are judges and prosecutors.

If Indonesia ratifies the Statute of Rome this year, then by 2009, when a Review Conference is scheduled to be held, Indonesia will have been able to participate actively.

b. Opportunity to Become Part of the Organs of the International Criminal Court

As a party state, Indonesia will certainly get an opportunity to join and be involved in organs of the International Criminal Court. This is because every party state is entitled to nominate one of its citizens to be judges, prosecutors, or prosecutors at the court. Of course this opportunity can increase capability of Indonesian apparatus of law enforcement in practicing in international judiciary and can strengthen state's bargaining position in the international relation. Meanwhile, non-party states cannot nominate their delegates to be core organs of the Court. Thus, becoming a Party State in the Statute of Rome means that Indonesia will play active role in improving effective function of the International Criminal Court. It also means that human resources of Indonesia will have an opportunity to actively participate in international system, so that it will improve capacities of human resources of Indonesia. Besides, in terms of law enforcement in Indonesia, after the ratification of the Statute of Rome, the apparatus of law enforcement will have to open themselves, whether they like it or not, to get used to—and to be more trained in—observing the development of international cases taking place in order to make them sources of reference in resolving legal problems in Indonesia.

c. Acceleration of Law Reform Process in Indonesia

A logical consequence of the ratification of an international regulation is that the ratifying states will be bound by rules of the convention. By ratifying the Statute

of Rome, Indonesia will soon be motivated to fix its legal instruments, which are still insufficient, in order to be in accordance with rules contained in the Statute of Rome. This is due to non-reservation principle in the ratification of the Statute of Rome, which means that the ratifying states are obedient to all rules contained in the Statute. In order to make the implementation of the Statute effective, a ratifying State is obliged to make rules of implementation which is performed through a harmonizing process of national legal instruments, accompanied by a step of socializing the rules to various elements which are related to the protection of human rights.

d. Effectiveness of National Legal System

In the Statute of Rome, it is stated clearly that a resolution to a case remains to prioritize national legal measures, both formally and materially, with basis and principles that are in accordance with the international law. It means that the International Criminal Court even opens a great opportunity to make national legal systems and domestic judiciaries effective in prosecuting crime perpetrators.

This is what is called by a complementarity approach through a strategic and more focussed pattern. It means, this can encourage apparatus of law enforcement and the government as well as all relevant parties to actively participate in law enforcement and protection of human rights. Thus, by becoming a party of the International Criminal Court, the state will surely be motivated to implement the enforcement of human rights by making its national legal and judicial systems effective, which is based on one of the Court's fundamental principles, i.e. the complementarity principle.

Further more, the Statute of Rome also makes it possible to provide Party States with "technical assistance" in the process of improving and adjusting their domestic law systems in order to meet standards and principles of the prevailing international law. For practitioners of law in Indonesia, especially judges and

prosecutors, the International Criminal Court also opens a great opportunity for them to learn and build career, either through apprentice mechanism or through a line of "visiting professionals".

e. Improvement of Human Rights Protection

The presence of the International Criminal Court can be a motivator to keep intensifying and improving Indonesia's role in international efforts for human rights protection, precisely as the state's intention written in the Preamble of the Indonesian Constitution (UUD 1945), i.e. to actively participate in efforts of maintaining the world's peace and orderliness. This is also an opportunity for Indonesia to show its commitment that it can effectively and efficiently implement human rights protection through human rights court by assuring principles of individuals' responsibility, and prosecution and punishment to crime perpetrators.

Politically, it can improve Indonesia's status in the eye of the international relation. With the ratification of the Statute of Rome, which is accompanied by the distribution of sructurized and sistematic information, it is hoped that the understanding about rules of human rights law and state responsibility in enforcing international law of human rights can be better.

International Criminal Court and the Protection of Indonesian Migrant Workers

Indonesia is one of the countries having highest numbers of migrant workers in the world, even though most of Indonesian migrant workers are concentrated in countries like Malaysia and Saudi Arabia. Not only that, some of Indonesian migrant workers now live in areas which are in conflicts, including armed conflicts. A problem which may be faced by Indonesian Government is the possibility of our migrant workers to be

victims of the conflicts.

International Criminal Court can be an option for Indonesian Government to protect them when serious crimes, which have been under the Court's jurisdiction, take place. This will happen if Indonesia, as soon as possible, ratifies the Statute of Rome on International Criminal Court.

As a party state, Indonesia will be able to encourage the Court's Prosecutor to immediately perform an investigation into crimes under the Court's jurisdiction, which affect Indonesian migrant workers. Certainly this impetus will appear when the crime perpetrators come from countries which have become parties in the Statute of Rome. It is necessary to remember, however, that Indonesia will not lose its opportunity to seek justice, even if the perpetrators are not from the Party States.

However, it doesn't mean that the opportunity to bring justice for Indonesian citizens, who are migrant workers, has been closed. Indonesian Government still can push the Court to start the investigation if the states of the perpetrators are unwilling, or unable, to bring them to justice.

Based on this reason, it can be said that Indonesia can use the mechanism of the International Criminal Court in accordance with the spirit of Indonesian Government as written in the Preamble of UUD 1945, i.e. to protect all People of Indonesia and all elements of the mother land of Indonesia.

f. Diplomatic Position

Ratification by Indonesia will place Indonesia as one of the main advocators of international justice. In its implementation, Indonesia will join more than a half of the world community to make sure that an effective system of justice will prevent the reoccurrence of the worst crimes against humanity and to gurantee a protection for all peoples of the world, including Indonesia.

By ratifying the Statute of Rome, Indonesia as the biggest democratic country number three in the world, and also one of the most important countries in Southeast Asia, can be a good example of efforts for human rights protection, particularly for its neighbor countries and for the other big countries in the world as well. Politically, this ratification is important for international relation for it will show high commitment of Indonesia to the advancement and protection of human rights, especially in enforcement of international criminal law and, most importantly, it will show that Indonesia participate along with the international community in abolishing practices of impunity.

Disadvantages of Not Ratifying the Statute of Rome in 2008

a. Commitment to Human Rights Protection

As mentioned above, ratification of the Statute of Rome containing rules about forms of extraordinary crimes, which are dynamic, but are not regulated in KUHP, can motivate the State to improve its judicial system, including its law of procedures. This is by consideration that after ratifying the Statute, a party state must have rules of implementation which work in accordance with contents of the Statute. Learning from the experience of law enforcement in Indonesia, we can see that a lot of practices of impunity still happen.

Those in state power, or commanders (or those in higher positions), still can escape the law by hiding behind the rhetoric of performing duties assigned by the state, or due to insufficiency of legal instruments of Indonesia. If Indonesia does not immediately ratify the Statute of Rome as an effort to break the chains of impunity, then its commitment to human rights protection can be considered merely a political rhetoric since, in practice, it doesn't support efforts toward the advancement of human rights protection. In this context, it is necessary to build a mutual understanding that Indonesia's national interest is not only to defend its

sovereignty of the state, but also to respect human rights. Moreover that respecting human rights is also a part of the national interest, which is recognized in the Constitution.

b. Indonesia's Commitment to Break the Chains of Impunity

If Indonesia postpones to ratify the Statute of Rome this year, it can be said that the Government of Indonesia breaches its commitment to the People of Indonesia and to internasional community that it will participate in efforts to break the chains of impunity. The Government's commitment has been asserted in President's Decree No. 40 of the Year 2004 about the National Plan for Action on Human Rights (RANHAM) 2004-2009. The Government always uses it on various occasions, both at national and international levels, as their effort to gain trust from the people and international community, and as an improvement of Indonesia's image as a nation who respect human rights.

The Government should as soon as possible realize the ratification of the Statute of Rome as has been planned in RANHAM 2004-2009. The following is just to remind the Indonesian Government of its commitment and support to break the chains of impunity, which can be seen from a statement by Indonesia's Permanent Ambassador for the United Nations, Marty Natalegawa, as one of non-permanent members of UN's Security Council in responding a report by Prosecutor of the International Criminal Court about Darfur to UN's Security Council in December, 2007:

> "*My delegation condemns the continued gross violations of human rights and international humanitarian law in Darfur.* ***These crimes are egregious affronts to the norms, rules and collective conscience of the international community. The perpetrators of those acts must be brought to justice****…Finally, we wish to underline the independence of the Court on the*

conduct of its work . We believe that once case has been referred to the Court, including by the Council, there should be no interference in the legal process. At the same time, we recognize and underline the responsibility of the Security Council to ensure that Government of Sudan complies fully with the provisions of Security Council resolution 1593 (2005). ***There cannot be any impunity****."*

This statement will properly be more meaningful if the Government immediately ratifies the Statute of Rome this year. Thereby, the Government of Indonesia will be able to prove its commitment and realize words into concrete action.

III. INDONESIA IS READY TO RATIFY THE STATUTE OF ROME BY THE YEAR 2008

Based on the preamble of the Statute of Rome, International Criminal Court (ICC) is a complement to the national judiciary. This asserts one of important principles of the ICC, that is the complementarity principle. Based on Article 17 (1) of the Statute of Rome, national court cannot be controlled by the ICC.

The prohibition for the ICC to intervene into the national law jurisdiction is in a situation when a state is performing an investigation, or prosecution, about a case of crime, and the case is not urgent enough to justify a follow-up action by the ICC, and also the case has been settled by a proper and fair court. Based on this provision, the ICC is actually aimed at making a national criminal judiciary of a state run effectively.

Thereby, there is no need to worry that the ICC will reduce the sovereignty of legal system of Indonesia. The condition to bring cases to the ICC will really be based on: breaches in the process of domestic judiciary which is only aimed at protecting perpetrators, unwillingness of the state, and legal system of a state which is unable to bring to justice crimes under the ICC's jurisdiction. National legal mechanism remains the main and the first step (the forum of first resort) to perform prosecution against the crimes.

Based on the compatibility between the objectives of the ICC establishment and Indonesia's Constitution, it is important to ratify the Statute of Rome as a manifestation of the implementation of constitutional responsibility and also as a commitment of the People of Indonesia to contribute to the world's peace.

When seeing Indonesia's commitment to human rights protection, it can be said that at present, Indonesia is ready to ratify the Statute of Rome. The readiness is related to the politics of human rights law in Indonesia at present, preparedness of legal instruments, preparedness of infrastructures and Indonesia's experience in bringing international crime to justice, and also the readiness of the people.

1. Commitment to Human Rights Protection

*a. The Constitution of Indonesia (*Undang Undang Dasar 1945*)*

UUD 1945 has formulated regulation about human rights protection both in its Preamble and in its main content. In the Preamble, Indonesia explicitly and implicitly expresses its statement of—and its commitment to—efforts for human rights protection. One of the them is pursued through active participation in efforts to keep the orderliness of the world, which is based on freedom, everlasting peace, and social justice, which is also one of the aims of the People of Indonesia.

After "reformation", UUD 1945 went through important changes in order to guarantee human rights protection, both in field of civil and political rights, as well as field of social, economic, and cultural rights. In 2002, second amendment to the UUD 1945 added more detailed rules regarding the arrangement of human rights protection, particularly in field of civil and political rights, i.e. in Chapter X A, Articles 28A – 28J.

Previously, detailed rules related to protection and enforcement of human rights are only regulated in Laws and other legal instruments under the Constiitution. Then, in 2002, human rights protection emphasized more in field of economic, social, and cultural rights.

b. RANHAM 2004-2009

National Plan for Action on Human Rights (RANHAM) 2004-2009, which was based on President's Decree No. 40, 11 May 2004, includes, among others, preparation for ratification of international human rights instruments and application of human rights norms and standards. Ratification of the Statute of Rome, which is in accordance with the implementation of RANHAM 2004-2009, will assert good will and commitment of Indonesia toward international human rights protectian which is in harmony with national law. Agenda for ratification of

the Statute of Rome, as stated in RANHAM, will be carried out in 2008, which means this year.

Urgency of ratification of the Statute is increasing, that is to complement the resolution mechanism of human rights violations and Indonesia's commitment to efforts of protection and law enforcement of human rights. Ratification of the Statute is necessary in order to encourage the advancement of human rights protection and law enforcement, especially in the context of improving Indonesia's judicial system.

2. Compatibility Between Regulation and Efforts of Improvement

a. Compatibility Between Principles and General Provisions of the Criminal Law

- *Application of non-retroactive principle (principle of legality)*

Article 24 of the Statute of Rome states that no body will be responsible in term of penal law according to this Statute for things done before this Statute is put into effect. This provision shows that the Statute of Rome does not prevail retroactively, and that it holds high the principle of legality as a cardinal principle in criminal law.

The provision on inapplicability of the ICC is in accordance with a basic principle in criminal law that there is no punishment without previous condemnation. This is in accordance with the national criminal law, i.e. Article 1 of the KUHAP, stating that there is no misconduct that can be punished unless it is based on criminal provisions according to a Law, which has been provided before.

A guarantee to uphold the non-retroactive principle is also written in Article 4 of Law No. 39 of the Year 1999 about Human Rights, and Article 28 I of the

UUD 1945, which says that the right not to be prosecuted on the basis of a retroactive law is a human right that cannot be reduced under any circumstances. This right not to be prosecuted on the basis of a retroactive law is also in accordance with Article 11 (2) of the International Covenant on civil and political rights, which has been ratified by Indonesia with Law No. 12 of the Year 2005 saying that no body can be blamed of having committed a criminal act for a conduct, or a carelessness, which was not a criminal act according to national or international laws when it was committed. Also it is not allowed to pass a sentence which is severer than the one that should be passed when the crime was committed.

Thereby, both the Statute of Rome and national law of Indonesia have the same principle, i.e. protecting every individual from prosecution against a certain criminal act, which previously was not a criminal act according to both national and international laws. In this case, if Indonesia ratifies the Statute of Rome, then it will apply only since the ratification. ICC can only apply its jurisdiction to suspicion of the most serious crimes taking place after the ratification.

- *Individual responsibility and ability to be punished for perpetrators committing an attempt, assistance, and deliberation of a crime*

According to Article 25 (2) of the Statute of Rome, criminal responsibility is the one which is individual. Still in verse (2), it is also stated that perpetrators can be charged and punished for misconducts committed together (giving order, attempting, assisting, or making a plot to commit crimes under the ICC's jurisdiction).

The provision, as regulated in the Statute of Rome, is also regulated in Article 1 (4) of Law No. 26 of the Year 2000, which says that every person is an individual person, either civilian, military, or police, who is responsible

individually. Meanwhile, misconducts in forms of attempt and deliberation to commit a crime are regulated in Article 41 of Law No. 26 of the Year 2000 and in various provisions of the KUHP.

- *Ne bis in Idem*

Article 20 of the Statute of Rome prohibits any court coming after the ICC, or when the suspected person has been declared guilty, or free, by the ICC. The provision can be exempted if there is another court administering justice for the case, and its process is performed: 1) with the aim of protecting the person from penal responsibility, and 2) not independently and not in a way of taking sides, in accordance with norms about the process which is recognized by international law, and which is performed with a purpose of bringing the person to justice.

The prohibition to hold a court for a second time is one of important principles in criminal law, i.e. the principle of *ne bis in idem*. This principle is recognized in Indonesia's criminal law, and is even regulated clearly in Article 18 of Law No. 39 of the Year 1999 on Human Rights, which says that every person cannot be charged for a second time for the same case, or for a conduct that has been declared a settlement by the court—settlement which has a permanent legal power.

- *Expiration*

Crimes regulated in the Statute of Rome do not have expiration, i.e. a certain period of time when a criminal act cannot be administered for justice, or cannot be brought to the court. As a matter of fact, Indonesia's KUHP follows this principle of expiration as a principle in its criminal law. However, based on the provision of Article 46 of Law No. 26 of the Year 2000 about Human Rights Court, which overtakes this principle, it is stated that for serious human rights violations, the provision on expiration does not apply.

b. Harmonizing of National Law products

1. KUHP, RUU KUHP, and KUHAP

Indonesia's KUHP hasn't regulated things about Crime of Genocide, Crime against Humanity, and War Crimes, as those crimes are regulated in the Statute of Rome. Only in the year 2000, Crime of Genocide and Crime against Humanity were included in the lexicon of the national law as serious human rights violations, which are specifically regulated in Law No. 26 of the Year Tahun 2000 about human rights court. However, principles of criminal law followed by the ICC, i.e. principle of legality (non-retroactive principle); individual responsibility; and things about accompaniment, attempt, assistance, and deliberation to commit a crime, have been regulated in Indonesia's KUHP.

In law of procedures, there is a considerable difference. In the Statute of Rome, all elements of law enforcement in the ICC's judicial system are independent, stand alone without influence from any party. It is also the case with its process of procedures which is different from the ordinary criminal case, which is a combination of Anglo Saxon and Continental Europe models. Meanwhile, in our human rights court, which is regulated by Law No.26 of the Year 2000, the law of procedures used is same as that which is contained in KUHAP, with our system following the Continental Europe model.

In the Bill of KUHP of the Year 2006, crimes under the ICC's jurisdiction (crimes of genocide, crimes against humanity, and war crimes) have been included as parts of RKUHP. This regulation appears, for example, in the Second Book on "Criminal Acts against Human Rights", containing regulation from the side of the material of criminal acts along with sentence that can be passed on the crime perpetrators. If this RKUHP is legalized immediately, it means that we don't need to worry about bad possibilities that might arise

from the ratification of the Statute of Rome in relation to the regulation of jurisdiction which is different from that of Law No.26 of the Year 2000 abouv Human Rights Court, which only includes crimes of genocide and crimes against humanity in its jurisdiction. This RKUHP shows Indonesia's commitment to—and Indonesia's preparedness in—efforts for human rights protection which are in accordance with rule standards of international law.

2. Law No. 39 of the Year 1999

This Law is a milestone of human rights regulation in Indonesia for it regulates fundamental rights that must get protection, such as those belonging to civil and political rights and those belonging to economic, social, and cultural rights. This Law regulates KOMNAS HAM (Indonesia's National Commission of Human Rights) as an independent institution. This institution has functions of studying, doing researches, providing information, monitoring, and mediating things about human rights.

In relation to international forums, this Law does not oppose efforts to refer to international forums in the framework of human rights protection whenever efforts performed in national forums fail to receive response. Article 7 (1) of this Law states that every person has a right to exert all efforts of national law and international forums for all violations against human rights which are guaranteed by Indonesian law and international law on human rights, which have been adopted by the State of Republic of Indonesia. It means that those who want to uphold their human rights and basic freedom are obliged to firstly take all measures of Indonesian law (exhaustion of local remedies) before making use of forums in regional and international levels. This is in accordance with the complementarity principle followed by the ICC.

Although not mentioning in detail sorts of crime as included in the ICC's jurisdictiion, this Law (in Article 104) has mandated establishment of Human Rights Court to bring serious human rights violations to justice. According to

this Law, crimes considered serious human rights violations are mass killings (genocides), arbitrary extra judicial killings, torture, and forced disappearing.

3. Law No. 26 of the Year 2000

This Law was made on the basis of awareness and interest of Indonesia as a sovereign state. Based on the nation's philosophical foundation, this Law was made as the application of the People's ideals, initiated by the founding fathers, that is to achieve the aim of the nation, of which among others is to bring prosperity to the life of Indonesian people through human rights protection. Juridical consideration becomes a basis for this Law, that is to guarantee the fairness and certainty of law, since Indonesia's KUHP does not regulate serious human rights violations which are extra ordinary crimes. In Indonesian legal system, an issue that hasn't been regulated in KUHP can be regulated in a separate rule. Therefore, Law No. 26 of the Year 2000 contains a lot of breakthroughs of rules of law, which previously were not regulated in KUHAP.

Sociological basis for this Law is efforts to maintain and improve human rights protection and to prevent serious human rights violations of the past from happening again. Meanwhile, political basis for this Law is that, serious human rights violations are political in nature, which are committed by a group of people in power.

This Law has defined sorts of serious human rights violations, i.e. Crimes of Genocide and Crimes against Humanity, which are extra ordinary crimes. Serious human rights violations defined in this Law are adopted from the Statute of Rome, as stated in its Explanation.

This Law is one of the efforts done by Indonesia to show that it is able to perform its own judiciary, which is in accordance with the international

standard (Statute of Rome), and to strengthen the complementarity principle followed by the ICC. This Law shows intention and good will of Indonesian Government to impose punishment on perpetrators of serious human rights violations in its country.

4. Law No. 13 of the Year 2006

Since 2006, Indonesia has had a special Law on Witness and Victim Protection. This Law regulates the rights of victims and witnesses, including those of serious human rights violations. Rights of witnesses regulated, among others, are right to be given protection in forms of changes in identities and relocation (Article 5). Besides, it also adopts various provisions from the Statute of Rome on witness protection, such as investigation on witnesses in front of camera, or testimonial through other electronic media (Article 9).

In this Law, victims of crimes, which are included in human rights violations, have rights to receive compensation, restitution, and rehabilitation. This is in accordance with the provisions in the Statute of Rome about rights of victims of crimes under the ICC's jurisdiction.

In order to protect witnesses and victims better, this Law also mandates the establishment of the Institution for Witness and Victims Protection (*Lembaga Perlindungan Saksi dan Korban*/LPSK). This is an independent institution with membership from representatives of law enforcing institution and common people, and with system of work which coordinates with the other law enforcing institutions. Although different in its concept from that of the ICC's unit of witness and victim protection, in several things this institution has similarities of objectives and functions to that of the ICC.

The existence of this Law shows Indonesia's commitment to fulfil its responsibility in prosecuting crimes which are included in serious human

rights violations, with an instrument of a system for witness and victim protection. It is also the case with Indonesia's commitment to provide the victims with rights for reparation, which is in accordance with international law and the Statute of Rome.

VI. CONCLUSION

Various legal instruments, which have been owned by Indonesia, are strong points and 'capital' of Indonesia which shows the preparedness of our legal system in the enforcement of human rights. This is when compared to other states such as Norway and Cambodia, or states which are members of European Union, which have ratified the Statute of Rome, but which haven't had the rules for its implementation, or legal instruments which support the implementation of the Statute. Nevertheless, such situation didn't hinder their good will to realize their strong commitments to efforts for human rights protection as well as its law enforcement. It can be seen from the commitment made by Norway which will perform a review toward its various legal instruments that will be made compatible with regulation in the Statute of Rome, such as the Book of Criminal Law (*KUHP*), the Book of Civil Law (*KUHPerdata*), and also its military rules. Such is also the case with Cambodia, which firstly ratified the Statute, and then made rules for its implementation.

Another strong point Indonesia has is the practice of human rights court which administers justice for crimes against humanity. Although still not perfect, this court keeps on improving itself, either from the side of the completeness of its legal instruments, its apparatus of law enforcement, and thecourt itself. The ratification of the Statute of Rome will strengthen the process of the improvement of human rights court as well as the other legal instruments.

Another importan factor is the Government's commitment and preparedness to ratify the Statute of Rome. This commitment, as written in Ranham 2004-2009, is

then followed by a series of efforts to prepare the ratification of the Statute of Rome performed by Department of Foreign Affairs and Department of Law and Human Rights. Meanwhile, Department of Defence also gives a positive impetus to the efforts of ratification since it is in accordance with the internal reformation which have been, being, and will be performed in the scope of the Department of Defence and the National Army of Indonesia (TNI). This was stated by Minister of Defence, Juwono Sudarsono, during an event of Socialization and Workshop on the Statute of Rome/ICC.

Among the high rank officers of TNI, it was stated in Makassar, Banda Aceh, Palembang, Jayapura, Ambon, Padang, Balikapapan, and Surabaya. The other supports also come from Komnas HAM and members of the Indonesian Parliement.

From the description above, it is obviously seen that Indonesia is really ready to ratify the Statute of Rome this year as a manifestation of the aim of the People of Indonesia, as written in the Preamble of the Constitution (UUD 1945), i.e. to actively participate in maintaining peace, orderliness, and security ofthe world.

Ratify the Statute of Rome on International Criminal Court, Right Now!