The ICC and the commitment to human rights

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There were at least two main reasons for the establishment of the International Criminal Court (ICC). First, the world affirmed that the most serious crimes of concern to the international community as a whole namely; the crime of genocide, crimes against humanity, war crimes and crimes of aggression, must not go unpunished and that their effective prosecution must be ensured by taking measures at the international level and by enhancing international cooperation.

Second, since 1948, when the Convention on the Prevention and Punishment of the Crime of Genocide was adopted, the United Nations General Assembly recognized the need for a permanent international court to deal with the kind of atrocities which had just been perpetrated.

This idea of a system of international criminal justice reemerged after the end of the Cold War. Subsequently, an ad hoc international tribunal for serious crimes in the territory of the former Yugoslavia and in Rwanda established by the UN Security Council had the most significant impact on the decision to convene the conference which established the ICC in Rome on July 1998. Currently 122 countries are parties to the Rome Statute.

The Rome Statute recognizes two important principles: non-retroactivity and complementarity. Non-retroactivity means that the ICC has jurisdiction only with respect to events which occurred after the entry into force of its
statute on July 1, 2002.

If a state becomes a party to the statute after its entry into force, the court may exercise its jurisdiction only with respect to crimes committed after the entry into force of the statute for that state, unless that state has made a declaration
accepting the jurisdiction of the ICC retroactively.

However, the court cannot exercise jurisdiction with respect to events which occurred before July 1, 2002. For a new state party, the statute enters into force on the first day of the month after the 60th day following the date of the deposit of its instrument of ratification, acceptance, approval or accession.

The second most important principle is complementarity which means the ICC does not replace national criminal justice systems — rather, it complements them. States retain primary responsibility for trying the perpetrators of the most serious crimes.

If we fully understand the essence of these two main principles — non-retroactivity and complementarity — the ICC is not a threat to our nation’s sovereignty, but an instrument to pursue

global justice and security by ending the impunity for the most serious crimes of concern to the international community.

Is there any exception to the principle of complementarity? There are at least four different ways that the ICC can initiate investigation or prosecution.

First, a situation of inability or unwillingness. The ICC can investigate and, where warranted, prosecute and try individuals only if the state concerned does not, cannot or is genuinely unwilling to do so. This might occur where proceedings are unduly delayed or are intended to shield individuals from their criminal responsibility.

In order to determine inability in a particular case, the ICC can only take over the investigation and prosecution if the particular state has suffered a total or substantial collapse in its national judicial system or the system is unavailable thus preventing the state from carrying out its criminal enforcement proceedings.

To date, none of the cases investigated and prosecuted by the ICC have been based on unwilling-or-unable situations.

Second, by request of the UN Security Council. The UN Security Council, acting under chapter 7 of the Charter of the United Nations may also request the ICC prosecutor to investigate any serious crime under the Rome Statute whenever such crime appears to have been committed in any country. Such referrals have been made by the UN Security Council on Darfur/Sudan on March 31, 2005 and Libya on Feb. 26, 2011.

Third, referral of a situation by a state party. A state party may voluntarily refer a case to the ICC prosecutor to investigate where one or more serious crimes appear to have been committed.

As far as possible, a referral shall specify the relevant circumstances and be accompanied by supporting documents. There have been at least three referral cases to the ICC; from the government of Uganda (2003), Central African Republic (2004) and Democratic Republic of Congo (April 2004).

Fourth, the ICC Prosecutor's Initiative to Investigate (proprio motu). The ICC prosecutor may initiate investigations proprio motu (on one's own initiative) on the basis of information on crimes within the jurisdiction of the ICC. Proprio motu should be based on the seriousness of the information received and there being a reasonable basis to proceed.

If these two elements are satisfied then the prosecutor should request an authorization to the Pre-Trial Chamber, consisting of three independent judges, to get authorization for investigation. Proprio motu has been applied so far in Cote d' Ivoire (2011) and Mali (2013).

For Indonesia, which has planned to ratify the Rome Statute as outlined in the National Human Rights Action Plan (RANHAM 2011-2014), two of the four ways for the ICC to initiate investigations namely; the unable-or-unwilling situation, and proprio motu (ICC prosecutor's initiative), should be studied

objectively and carefully, so as to include intensive consultation with the ICC itself (the ICC president and prosecutors) and relevant state parties, particularly parties from ASEAN who have already ratified the statute: the Philippines, Cambodia and Timor Leste.

The government of Indonesia can commission a team consisting of international law and human rights experts who have not been influenced by any predetermined interests to come up with a strong analysis, especially with regard to how the two issues could impinge on national interests and how the risks could be prevented and resolved.

There are some potential benefits for Indonesia ratifying the Rome Statute: Strengthening our commitment to promoting and protecting human rights at the domestic as well as global level; strengthening Indonesia's commitment to participating actively in creating global peace and security as mandated in the 1945 Constitution; motivating ourselves to protect human rights, uphold the rule of law and strengthen our democratic system through, among other things improving our criminal justice system, and finally widening access to international law and human rights cooperation.

Undoubtedly as a country which is committed to the protection of human rights and an important global player, Indonesia will enjoy benefits from the ratification of the Rome Statute. However, in this context we need to have a clear outline and roadmap for strengthening our democratic system by accelerating the independence of the judiciary, ensuring that the strategy of peaceful social-conflict prevention and resolution as outlined in the law on social conflict handling (Law No. 7/2012) is consistently implemented, and by improving the professionalism, independence and even-handedness of law enforcement.

Close coordination among the executive, legislature and judiciary with support from civil society organizations is a must in order to answer the challenges above.

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