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The International Criminal Court: An Analysis of Republican Liberalism Perspective

Bhatara Ibnu Reza¹

*Pembentukan Mahkamah Pidana Internasional atau International Criminal Court (ICC) merupakan perwujudan terpendam setelah 50 tahun digelarnya Mahkamah Militer Internasional pada 1946. Sungguhpun Mahkamah menghadapi sejumlah rintangan dari beberapa negara besar namun mereka telah menjalankan fungsinya dalam penegakkan keadilan internasional terhadap kejahatan serius hak asasi manusia (HAM) sebagaimana dikenal dalam hukum internasional. Saat ini, Mahkamah mengadili kasus di Republik Demokratik Kongo dan beberapa kasus lainnya pada sesi Pre-Trial Chamber. Secara fakta, banyak peserta Statuta Roma 1998 merupakan negara pelanggar HAM. Negara-negara seperti Republik Demokratik Kongo, Uganda, Republik Afrika Tengah dan Colombia merupakan Negara pihak dalam Statuta Roma 1998 namun memiliki permasalahan terhadap pelanggaran HAM di dalam negeri mereka. Dibandingkan dengan Indonesia yang bukan negara peserta akan tetapi memiliki permasalahan yang sama. Indonesia sendiri berniat untuk menjadi pihak dalam Statuta Roma 1998 pada 2008. Tulisan ini menjelaskan bagaimana reaksi negara khususnya yang sedang menghadapi konflik bersenjata internal serta dalam masa transisi—baik telah menjadi pihak maupun belum—dengan perkembangan baru dalam hukum internasional khususnya HAM. Penulis menggunakan teori dari Andrew Moravcsik dalam artikelnya *The Origins of Human Rights Regimes: Democratic Delegations in Postwar Europe*, dimana negara-negara tersebut berada dalam fase tradisional menuju demokrasi dan mencoba untuk “lock in” dengan hukum internasional. Dengan cara inilah menurut Moravcsik negara tersebut tidak dapat kembali pada masa otoritarian.*

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I. Preface

The establishment of the International Criminal Court (ICC) is buried goals after 50 years of International Military Tribunal in 1946. Today, the parties of ICC have reach 100 states and will be flourished in the future. Even the court has to face several obstacles from several major power states, but still they run their functions to bring justice in serious violations of human rights recognized by international law. Now, they already have a case in Democratic Republic of the Congo (DRC) and several cases in Pre-Trial Chamber session.

In the first place, the creation of the ICC made several questions and suspicious from the states which describes as one of the imperialist agenda after the end of the cold war. But after UN Diplomatic Rome Conference in July 1998, most of the member of UN agreed to adopt the Rome Statute for International Criminal Court² as legal basis of the court.

In fact, most of parties in the statute are the states recognized as the violators of human rights. The states such as DRC and Uganda are parties to this court but refer the situations of their internal affairs to the court for investigation and prosecution. Besides those countries, prosecutor already receives referral regarding situation in Central African Republic (CAR) and also starts the pre-trial process. Colombia who still suffers in civil war almost 40 years is also a party in ICC. The war between government soldier and rebellion deliver several serious crimes under international law.

Compare with Indonesia where this country is still in transitional condition after the fall of Soeharto in 1998. After seven years in transition and several government change, Indonesia still does not out from the list as human rights abuse. As a matter of fact, Indonesia trying to deal with human rights abuse cases in the past

² Rome Statute of the International Criminal Court, UN Doc, A/CONF/183.9, July 17, 1998 (hereinafter 'Rome Statute').

and the future by created the Human Rights Court and the truth and Reconciliation Commission.³

Impunity is also become the main problem in developing human rights in Indonesia. Indonesia also one of the country does not party of ICC. According to Human Rights National Action Plan, Indonesia will ratify the Statute in 2008, ten years after the establishment of the court.

This article describes how the states parties (DRC, Uganda, CAR, and Colombia) react with the new develop of the international law especially human rights in international arena. Those situations are unique to research because how the state violator should be deal with this matter. What was their self-interest in doing so? Why they are joint the ICC? Are they realized for what they done? How should these countries deal with human rights situation in their own country by 'being subject' of the ICC.

In Indonesia case which is not a party but willing to be a party in 2008. How they can deal with human rights abuses by hold to ratify the statute? What Indonesian government done to deal with human rights violations. Why Indonesia choose to become the party in 2008? Is this the 'real' willing of Indonesia to become a party in 2008? How republican liberalism views in case of Indonesia?

II. International Criminal Court: Perspectives in International Relations

There are three perspectives in analyzing the establishment international criminal tribunals or ICC in international relations. *First*, realism which is believes of the security issues and sovereignty. According to this perspective, the establishment of the

³ The Truth and Reconciliation Commission Law has passed by People of Representative Assembly to be Law No. 27/2004. However, the Indonesian Constitutional Court invalidated it on December 7, 2006 because this law is undermining the Indonesian Constitution 1945 and its Amendment. See Petra Stockmann, *The New Indonesian Constitutional Court: A Study into Its Beginnings and First Years of Work*, (Jakarta: Hans Seidel Foundation, 2007).

permanent ICC or ad hoc international criminal tribunal would be interfered with states existence and international politics based on states sovereignty and also rejected interference of the internal affairs of states sovereignty. Having said that, this perspective is prevented the establishment of the international criminal tribunal or ICC.⁴

Second is pragmatism. Pragmatism also has problems with the establishment of the international criminal tribunal, especially the ICC. In their view, the present of the permanent ICC either does not have the power to force also the court would be used as a political tool by others entity. In addition, according to this perspective, need of plenty of time for the ICC to be an effective court since using of international treaty mechanism. As the consequences, the permanent ICC cannot reach the jurisdiction of the crimes occurred. The pragmatism prefer and ad hoc international criminal tribunal to the permanent ICC.⁵

Third is liberalism. Liberalism is welcome to both ad hoc international criminal tribunal and also the permanent ICC especially for purpose on upholding the international humanitarian law and the laws of war. This is because the establishment of the ICC is necessity in recent of develop international society which is in fact support the present of the ICC. It is proof by the establishment of two ad hoc international tribunals in former Yugoslavia and Rwanda.⁶

In this article, the writer use theory from Andrew Moravcsik describes in his article, *The Origins of Human Rights Regimes: Democratic Delegations in Postwar Europe*, those state is under transitional phase to democracy and try to "lock in" with

⁴ Barry Paskin dan James Gow, *The Creation of International Tribunals From The Perspectives of Pragmatism, Realism and Liberalism, International Relations*, Vol. XV, No. 3 (December:2000) at 13.

⁵ *Id.* at 12-13.

⁶ *Id.* at 13.

international law.⁷ With this way, the state cannot return to authoritarian rule. According to Moravcsik with his republican liberalism theory, the impact of state 'lock in' cost their sovereignty.⁸

Moreover, according to this theory, governments turn to international enforcement when an international commitment effectively enforces the political preferences of a particular government as a particular point in time against future domestic political alternatives.⁹ Moravcsik also argue that governments will resort to that tactic when the benefits of reducing future political uncertainty outweigh the "sovereignty cost" of membership.¹⁰

Besides reducing political uncertainty the governments weigh another consideration which is restricting government discretion.¹¹ It follows that "self binding"; is most use to *newly established democracies* which have the greatest interest in the further stabilizing the domestic political status quo against democratic threat.¹²

III. Domestic Conditions

If we take a look with domestic conditions, we could realize that several states such as DRC, Uganda and CAR are under bad situations which effect the violations of human and the governments

⁷Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, International Organization 54, 2, Spring (2000) at 220.

⁸ *Id.* at 227.

⁹ *Id.* at 220.

¹⁰ *Id.* at 220.

¹¹ *Id.* at 227.

¹² *Id.* at 220.

are also incapable to settle the conflicts in their territory. Besides, these three states also involved with war in their region in very long time.

DRC is rule by new regime after the rebellion lead by Laurent Kabila took the power over President Mobutu in First Congo War (1996-1997).¹³ In this war, several states involved such as Uganda and Rwanda. Both countries support the rebel to overthrow Mobutu after his regime support the atrocities in Rwanda. But after that, DRC suffered against with Second Congo War (1998-2003) which in this time against the old allied of President Kabila.¹⁴ Even though, Kabila got his support from several countries such as Angola, Zimbabwe, Chad and Namibia.¹⁵

Besides supporting the war outside the country, Uganda had to face with it own war with Lord Resistance Army (LRA) since 1986 in northern part of its territories.¹⁶ The LRA rebel based in Acholiland and very notorious with their atrocities by abducted children and made them as the child soldiers.¹⁷ They are also forced women to become slave labor, to force them as the comfort women and sometimes they raped them. In 2000, the Ugandan Government released the Amnesty Law and promised to grant amnesty to all rebellion if they surrender.¹⁸ But this law is failure to reach their

¹³See First Congo War available at http://en.wikipedia.org/wiki/First_Congo_War.

¹⁴See Second Congo War available at http://en.wikipedia.org/wiki/Second_Congo_War.

¹⁵ *Id* at http://en.wikipedia.org/wiki/Second_Congo_War.

¹⁶ Payam Akhavan, *Development at the International Criminal Court: The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to International Criminal Court*, 99 A.J.I.L. 403 3 (2005).

¹⁷ *Id.* at 4.

¹⁸ *Id.* at 5.

purpose since not all the LRA high ranking commanders took advantage of its.¹⁹

In CAR, this country also suffered from internal armed conflict between political factions. Like in Latin America, the political history of CAR also colored by several coups by army or political factions.²⁰ The last armed conflict who also had impact with human rights violations was happened during the armed conflict in October 2002 until March 2003 between the ex Chief of Armed Forces and currently President of CAR, Bozizé with the forces former President, Ange-Félix Patassé.²¹

In case of Colombia, this country had suffered with war between government armed forces with several paramilitary groups including the drug lords. The paramilitary group is divided in three major groups are *Fuerzas Armadas Revolucionarias de Columbia* (FARC), *Ejército de Liberación Nacional* (ELN) and *Autodefensas Unidas de Colombia* (AUC).²²

This paramilitary groups especially FARC already uprising against the government for 40 years.²³ During the cold war, some of them got support from Soviet Bloc and Cuba but after end of the cold war they turns to produces the drug for financing their group to maintain their fighting against government troops.²⁴ Besides, the paramilitary groups responsible for abduction or kidnapping and

¹⁹ *Id.* at 5.

²⁰ See Central African Republic available at http://en.wikipedia.org/wiki/Central_African_Republic.

²¹ See Central African Republic: Referral to the International Criminal Court should be accompanied judicial reforms to address impunity, Amnesty International available at <http://web.amnesty.org/library/Index/ENGAFR190012005?open&of=ENG-CAF>.

²² See Information about Combatans as found in Center for International Policy <http://www.ciponline.org/colombia/infocombat.htm>.

²³ See www.farcep.org.

²⁴ *Supra* note at <http://www.ciponline.org/colombia/infocombat.htm>.

demand ransom. In recent development, for maintaining peace in Colombia, the government under President Alvaro Uribe released the law called Justice and Peace Law which is approved also by Colombian Parliament.²⁵

Indonesia already passed the law concerning the Truth and Reconciliation Commission in 2004.²⁶ After all, the purpose of this law is to reconcile between the perpetrator of human rights abuses in the past with the people, in this case is victims. Before that, Indonesia also released the Law No.26/2000 concerning Human Rights Court Law and started with it East Timor Case.

Basically the purpose of this law is to deter the international community to set up international tribunal for East Timor case in 1999. Besides that case, the court also tried Tanjung Priok case in 1984. Both of the cases end with the sad story where all perpetrators were freed by the court. In East Timor case, Government of Indonesia and Government of Timor Leste had agreed to resolve the past human rights abuses by establishing the Truth and Friendship Commission.²⁷ It is also to deter the UN Commission Expert who stressed the establishment of international tribunal.²⁸

IV. How the States "Lock In" the Rome Statute

1. Uganda, DRC and CAR Cases

²⁵ Letter from Luis Alberto Moreno, Colombian Ambassador to the United States, to US House of Representatives (July 12, 2005) (on file with the Center for International Policy) at 2.

²⁶ See *Tempo*, *RUU Komisi Rekonsiliasi Disetujui DPR Dengan Catatan* (The Draft of Reconciliation Bill Passed with Conditions), <http://www.tempointeraktif.com/hg/nasional/2004/09/07/brk,20040907-45,id.html> (Sept. 7, 2004).

²⁷ See U.N. Security Council Must Ensure Justice, Human Rights Watch available at <http://hrw.org/english/docs/2005/06/28/eastti11231.htm> (June 29, 2005).

²⁸ *Id.* at. <http://hrw.org/english/docs/2005/06/28/eastti11231.htm>

Even though under bad circumstances, the first three states are parties in International Criminal Court. DRC became a member of ICC on 11 April 2002 and signed the treaty on 8 September 2000, Uganda became a member on 14 June 2002 and before that signed the treaty on 17 March 1999 and Central African Republic ratified statute on 3 October 2001 and before that was already signed the statute on 7 December 1999.²⁹

In the first three countries cases, the republican liberalism perspectives see that those countries tried to locking in democratic rule through the enforcement of human rights. Besides their locking in by becomes a party in ICC also they are locking in with very unique way by referring the situations of their country to the Prosecutor of the ICC.

DRC and Uganda are the first country referred the situations to the Office of the Prosecutor. DRC is the first country to investigate by Office of the Prosecutor after President Kabila sent his referral after the prosecutor review the situations in Ituri, DRC.³⁰ Uganda sent its referral letter on 16 December 2004 regarding the LRA.³¹ And the last is CAR where President Bozizé sent her referral letter on 21 December 2004 to Office of the Prosecutor regarding crimes in their jurisdiction since 1 July 2002, the date of the entry into

²⁹ See The States Parties to the Rome Statute, the International Criminal Court available at <http://www.icc-cpi.int/asp/statesparties.html>.

³⁰ See Prosecutor receiveds referral of the Situation in the DRC, Office of the Prosecutor available at http://www.icc-cpi.int/pressrelease_details&id=19&l=en.html (April 19, 2004).

³¹ See President Uganda refers situation concerning Lord's Resistance Army (LRA) to the ICC, Office of the Prosecutor available at http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html (January 29, 2004).

force of the Rome Statute.³² The first three cases before the ICC were submitted under Articles 13 (a) and 14 of the Rome Statute.³³

This is the first time that the complementary as a state right to exhaust the domestic remedies is being waived by the state. Or it can be said that the state is unable genuinely to investigate and to prosecute the crimes under its jurisdiction is to carry out the investigation or prosecution as stated in Article 17 of the Rome Statute.

Why they are not exercising their domestic remedies? Those three states are in unstable democracy category where most of the government officers were members of rebel forces used to against the old regimes. Besides, after their victory took the power they could not automatically maintain the whole national territory.

Relating to the ICC, in DRC case, the new regime is willing to give the evidence that they are democratic regime by referred the situations to the Office of the Prosecutor. Besides, they are realized that they cannot maintain their power over the territory since many of rebellion groups are trying to topple them. Also they also show to the international community their willingness to prosecute the perpetrators but unable to do it themselves.

It is also the same in Uganda where the President Museveni is failed to deliver justice by giving the blanket amnesty to LRA even

³²See Prosecutor receives referral concerning Central African Republic, office of the Prosecutor available at http://www.icc-cpi.int/pressrelease_details&id=87&i=en.html (January 7, 2005).

³³Article 13(a) of the Rome Statute reads in full: "A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14". And Article 14 of the Rome Statute reads in full: "1) A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes. 2) As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation."

this way was also failed.³⁴ It proof by not so much of the high ranking officer of LRA took advantage of it and the rebellion still continue.³⁵ Moreover, the government troops also failed to eradicate the rebel in Acholiland and maintain law and order in northern part of its territories.³⁶

Since Uganda is party of the ICC, they also declare self-referral to Office of the Prosecutor to investigate the LRA atrocities.³⁷ In fact, President Museveni himself declare that he was ready to be investigated for war crimes but in the last statement, Museveni gave ambiguity with his statement regarding the case which brought Uganda attention would be tried by themselves.³⁸

In CAR case, the new regime under President Bozizé is trying to show the in international community that his regimes also willing to prosecute the crimes under his territory after the coup.³⁹ But again they cannot prosecute themselves since they cannot control the whole territory.

Regarding the case, if we look the republican liberalism perspectives that besides become a party, the motivation of those countries the self-referral is also a tactic used by governments to "lock in" and consolidate democratic institutions, thereby enhancing their credibility and stability vis-à-vis non democratic political threat (in its internal affairs) or this case is political armed

³⁴ *Supra* note 14 at 5.

³⁵ *Id* at 6.

³⁶ *Id* at 6.

³⁷ *Supra* note 29 at http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html.

³⁸ See Agence France Press *Museveni Pledges to Cooperate with the ICC and to Probe Uganda War Crimes*, (Feb 25, 2004) available at <http://www.spacewar.com/2004/040225143401.8peoxfh1.html>.

³⁹ *Supra* note 30 at http://www.icc-cpi.int/pressrelease_details&id=87&l=en.html.

movement or rebellion in the future.⁴⁰ It can be said that government seek to prevent domestic oppression and also international conflict through international symbol, standards and procedures that secure domestic democracy.⁴¹

But in Arsanjani and Reisman article, they have several comments especially regarding the self referral case. Mostly, they are not agree with the voluntary referral which is they argue refer to situation in which the sole basis for satisfying the ICC admissibility test is the referral—whether effected formally or implicitly—by state in which a crime or the situation subject to investigation has taken place.⁴²

They argue that prosecutors may find it particularly difficult if they have to negotiate and reach accommodations or agreements with the agencies or actors responsible for resolving the security problem, including by abandoning an otherwise admissible action for which there were reasonable grounds to proceed.⁴³ Besides, the prosecutor also will find difficulty to run his or her duties to investigate and to prosecute including has to negotiate with actor which also presumably as a perpetrator.

Again, Arsanjani and Reisman also refer to Article 17 of the Rome Statute regarding this case. They are not agreed the voluntary referral based on inability of the states. According to both scholars, a finding of inability of state to prosecute depends on any three disabling circumstances such as⁴⁴:

1. Total collapse of the national judicial system
2. A substantial collapse of the national judicial system or
3. The unavailability of the national judicial system.

⁴⁰ *Supra* note 6 at 220.

⁴¹ *Id.* at 222 .

⁴² Mahnnoush H. Arsanjani and W. Michael Reisman, *Development at International Criminal Court: The Law-in-Action of the International Criminal Court*, 99 A.J.I.L. 385, 2 (2005).

⁴³ *Id.* at 2.

⁴⁴ *Id.* at 3.

Especially in the case of Uganda, both Arsanjani and Reisman argue that state has not made that claim that a "total or substantial" collapse of their national judicial system has occurred or that its national judicial system is unavailability. The inability of government to capture the accused or to conduct investigations in the area seized by rebellion is not "due" to any problems of the national judicial system.⁴⁵ It is also the question for others two countries since they are not declare the situations regarding their national judicial system.⁴⁶

Regarding the prosecutor duties, it is to be noted that those countries failed to prosecute the rebellion. Uganda is failed to prosecute the LRA high ranking officer. DRC even failed to investigate the rebel and also CAR failed to prosecute the former President, Ange-Félix Patassé which is still in fighting with the governments.

Because the ICC does not have the forces such military forces and police forces, again it depends on the willingness of full co-operation with the state include the assistances by state parties. However, with respect of ICC whether they—the rebellion—had to prosecute but the Office of the Prosecutor must prepare the investigation for the "governments" with already agree to cooperate with them. Several conditions have to be approved by the governments such as access to all records regarding the crimes by both sides, the data in all government institutions including government armed forces.

Also if it is necessary and also common for international justice maintenance, it is also needs support from UN Security Council or multinational forces or regional forces—it depends on situation and agreement—to back up the prosecutor activities. We cannot close our eyes that the military assistances by those countries are not independent and impartial since they are also being investigation. Besides, sometimes they cannot operate in such area seized and controlled by rebellion.

⁴⁵ *Id.* at 7.

⁴⁶ *Id.* at 7.

From the illustrations above, using Moravcsik arguments in this case, those three governments are trying to play with the ICC as tactic to reduce the future political uncertainty in their internal affairs. Those three states turn into international enforcement by using self referral to ICC because they cannot maintain their government and to risk for ask "intervention" in forms of military forces. In the case of DRC and Uganda, we can see the military intervention of the neighboring countries cannot prevent the human rights violations. But the actually the case, those governments cannot assume that prosecutor investigation and prosecution only for rebellion but consider with all both parties.

It is true that self-referral cannot automatically restrict the government discretions. It can be seen with the President Museveni ambiguity statement regarding the case.⁴⁷ Also in DRC and CAR would be hard to the government side to accept the investigation. It is also too early for judging that the step of those countries with self referral to ICC is to reduce the political uncertainty in the future. Also, the involvement of the ICC cannot automatically reduce the political uncertainty since the government cannot prevent the conflict and failure to investigate and to prosecute the rebellion.

However, it can be happened when the government willing to be subject to investigation and prosecution and it will trigger the political changes in those countries. The political changing means the new regimes would be raised when the leader of the states included his or her high ranking officials together with rebel leader become subject to ICC. The old regimes—who agreed to bind in with the ICC—cannot avoid the fact that they will not have support even from their people and international community and they have no choice to give up their position.

Also the new democratic regimes cannot fall back by withdraw their consent to ICC or their self referral but precisely support all mechanism without conditions. That is Moravcsik means by lock in

⁴⁷*Supra* note 36 at <http://www.spacewar.com/2004/040225143401.8peoxfh1.html>.

and to international standards for preventing the “backsliding” into tyranny.⁴⁸

As an example we can look the role of the International Criminal Tribunal for Former Yugoslavia (ICTY) as a trigger of political changing in Slobodan Milosevic case.⁴⁹ In 2001, political changing was occurred in Yugoslavia when Vojislav Kostunica won the general election and defeated the President Slobodan Milosevic. In spite of Milosevic defeated, he was still a strong man in that country with support from several civil and military high officials ranking who was still in power. The new governments under President Kostunica want to raise Yugoslavia from its position as pariah state in international community. For this reason, on 11 April 2002 Kostunica released a presidential decree to extradite Milosevic to ICTY to stand trial.⁵⁰

Milosevic is the only person of the ex-head of state to stand trial in the history of the establishment of international criminal tribunal. He indicted based on his policies during the war especially crimes of genocide to Bosnian ethnic.⁵¹ Besides, he also indicted for his policy on the war in Kosovo in 1999.⁵²

⁴⁸ *Supra* note 6 at 228.

⁴⁹ Slobodan Milosevic found dead in cell at the ICTY prison in The Hague when his case still in process by court. See ‘Butcher of the Balkans’ found Dead available at <http://www.cnn.com/2006/WORLD/europe/03/11/milosovic/>.

⁵⁰ Former Yugoslavia President Handed Over to war crimes Tribunal available at http://english.people.com.cn/200106/29/eng20010629_73782.html.

⁵¹ Slobodan Milosevic indicted for crimes against humanity and violations of the laws of war or customs of war during the war in Kosovo. See International Criminal Tribunal for former Yugoslavia available at <http://www.un.org/icty/indictment/english/mil-ii990524e.htm>. See also Ilias Bantekas, “The Interest of States versus the Doctrine of Superior Responsibility”, *International Review of the Red Cross*, Vol. 82, No. 838, (June : 2000).

⁵² *Id.* at <http://www.un.org/icty/indictment/english/mil-ii990524e.htm>.

Although the extradition of Milosevic based on presidential decree, Yugoslavia also adopted the law concerning the extradition to ICTY for Yugoslavian official who indicted for crimes during the war.⁵³ Before that, Yugoslavia was failure to fulfill the time limit to hand over the indicted people which trigger the holding of US assistance to Yugoslavia.⁵⁴ It is refer to arrest warrant which was released by ICTY on 27 May 1999 indicted the involvement several senior Federal Republic of Yugoslavia (FRY) such President of the FRY, Slobodan Milosevic; President of Serbia, Milan Milutinovic; Deputy Prime Minister of the FRY Nikola Sainovic; Chief of Staff of Yugoslav Army, General Dragoljub Ojdanic and Minister of Internal Affairs of Serbia Vlatko Stojilkovic for murder, persecution and deportation in Kosovo.⁵⁵

Regarding the case the Republican liberal perspectives has suggestion concerning the international commitments, *first*, government fear future domestic uncertainty; *second*, the position of the national government is supported by a consensus of foreign governments and *three*, international cooperation helps induce domestic actors to support the maintenance of current policies.⁵⁶

Moravcsik is right in terms of state impact by locking in international standards will cost their sovereignty.⁵⁷ Although in the case of the ICC is different because the establishment of the ICC does not replace the national judicial system since the Rome Statute recognized the complementary principle in the same manner as I

⁵³Yugoslav Cabinet approves Draft Extradition Law available at http://english.people.com.cn/200106/15/eng20010615_72708.html.

⁵⁴US Urges Yugoslavia President to hand Over Milosevic available at http://english.people.com.cn/200105/10/eng20010510_69555.html. See also US Announces Assistance to Yugoslavia, http://english.people.com.cn/200104/03/eng20010403_66653.html.

⁵⁵ President Milosevic and Four other senior FRY Officials Indicted for Murder, Persecution and Deportation in Kosovo available at <http://www.un.org/icty/pressreal/p463-e.htm> (May 27, 1999)

⁵⁶ *Supra* note 6 at 247.

⁵⁷ *Id.* at 227.

said in the in the beginning regarding this cases, those countries is waive to use their right.

In his hypothetical view on republican liberalism, Moravcsik believe that the strongest support for binding human rights regimes should comes not from established democracies but recently established and potentially unstable democracies.⁵⁸ It is true that in unsiable democracies support human rights regime such as the establishment of the ICC but it depends in the cases of self referral. Again, self referral only can be seen as inability of the state party to investigate and to prosecute the perpetrator in its territories. Hence, in the involvement of the ICC is very significant but again it has to be considered that prosecutor would be need support from all sides including independent and impartial third party in this case is military forces and police forces.

2. Colombia

Colombia is also the party of the Rome Statute on 5 August 2002 and signed the treaty on 10 December 1998. Even suffered for 40 years with war, Colombia with support of US Government is trying to resolve the problem regarding the rebellion and the drug-traffickers by making the Justice and Peace Law in June 2005.⁵⁹ Besides, since the Office of the Prosecutor has not receives referral condition from Colombia Government and also from other party members.

The law itself constitutes of Colombia Government to continue its efforts to demobilize member of "terrorist" organizations which means the paramilitary groups. Prior to President Uribe administration, the government already meet with the leader of *Fuerzas Armadas Revolucionarias de Colombia* (FARC) for

⁵⁸ *Id.* at 229.

⁵⁹ *Supra* note 24 at 2.

dialogue and peace negotiation since 1998.⁶⁰ Also with the leader of *Ejército de Liberación Nacional* (ELN), began in 2000 with several statements by both sides and last they meet in Havana, Cuba to negotiate cease fire.⁶¹ And last, the government of President Uribe also had peace talk with *Autodefensas Unidas de Colombia* (AUC) regarding paramilitaries' demobilization in December 2002.⁶²

There are key provisions of this law such as⁶³:

1. Combatants will come forward, either as individuals or groups, identify themselves, and admit to past crimes.
2. Any crimes the individual intentionally does not confess to can be investigated and tried by ordinary courts with no benefits from the law and stiffer prison sentences if found guilty.
3. Combatants must turn in weapons release kidnap victims and identity and handover illegally-gained assets.
4. If they fulfill all these conditions, they become eligible for a reduced sentence of five to eight years for crimes committed with no possibility of further reductions in time served.
5. The law does not grant amnesty for serious crimes committed nor does it provide a statute of limitations or any other legal benefits for crimes not confessed.
6. No drug traffickers can receive legal benefits under the law. The governments will continue to fully investigate and prosecute narco-trafficking activities.
7. The question of extradition is not addressed in the law preserving the Colombian government's discretionary authority to comply with extradition requests from other countries. The Uribe governments has used extradition as a

⁶⁰ Dialogue with FARC as found in Center for International Policy available at <http://www.ciponline.org/colombia/farc.htm>.

⁶¹ Dialogue with ELN as found in Center for International Policy available at <http://www.ciponline.org/colombia/eln.htm>.

⁶² Information about Combatant as found in Center for International Policy available at <http://www.ciponline.org/colombia/infocombat.htm>.

⁶³ *Supra* note 24 at 2.

powerful tool against drug trafficking, sending 270 suspect to the United States over the past three years—more than any other country in the world. Colombia's extradition policy has never been subject to negotiation with illegal armed groups and will remain unaltered.

8. The rights of victims are fully guaranteed. The law establishes new institutions to implement key aspects of the peace process, such as National Reparation and Reconciliation Commission, which will be led by Colombia's Vice President and will include representatives of the victims. In addition it creates a Fund for the Reparation of Victims and Regional Commissions for the Restitution of Property.
9. The law does not affect the application of the asset forfeiture legislation in force, which to date has allowed the State to recover 5,042 illegal assets.

Although that law does not give the perpetrator which in this case is leader and member of paramilitary the amnesty but human rights groups such Amnesty International and Human Rights Watch had already critics the substance of that law. The main point of their critics is the Justice and Peace Law would benefit human rights abusers and end with impunity.

Amnesty International (AI) in their press release views that law grants procedural benefits, such as significantly reduced prison sentences, to members of illegal armed groups who are implicated in human rights abuses and who have agreed to demobilize.⁶⁴ In addition, this law also has limited timeframes concerning investigation and prosecution which is gives judicial investigators only 36 hours to charge suspects, and only 60 days to investigate a

⁶⁴ Colombia: The Justice and Peace Law will Benefit Human Rights Abusers as found in Amnesty International, available at <http://news.amnesty.org/index/ENGAMR230302005>. (Sept. 13, 2005).

case, even if it involves war crimes or crimes against humanity.⁶⁵ With that time limit it will possible for investigations to be dropped, even if the combatants are implicated in human rights abuses and also this could, in effect, grant many demobilized guerrillas or paramilitaries de facto amnesties.⁶⁶

Human Rights Watch (HRW) in their press release views that law provides enormous sentence reductions to those responsible for the most heinous atrocities ever committed in Colombia.⁶⁷ Besides, Human Rights Watch argued that paramilitaries group such as FARC is considered as the terrorist groups by several states.⁶⁸

⁶⁵ *Id* at <http://news.amnesty.org/index/ENGAMR230302005>. (Sept. 13, 2005). See Article 18 of Justice and Peace Law provide, "When, on the basis of available evidence, legally obtained information or the voluntary statement referred to above, a reasonable inference can be made that the person demobilized is the perpetrator or a participant in one or more crimes under investigation, the prosecutor in charge shall request from the competent judge to convene a preliminary hearing concerning the indictment.

In this hearing the prosecutor will formulate the charges and request from the judge the provisional detention of the accused in a given detention center, in accordance with the provisions of this law. He will also request the adoption of provisional measures with regard to illicit assets that have been turned over for reparations to victims.

Starting on the date of this hearing and within the next sixty (60) days the National Unit for Justice and Peace of the Attorney's Office, with the support of the Judicial Police, will carry out the investigation and verification of the facts admitted by the accused and all those facts that come to be known to it within the sphere of its competence. Upon the expiration of this time limit, or before if it were possible, the competent prosecutor will request from the judge convening a hearing for the formal charging. In case this hearing is in order it will take place within ten (10) days of the request."

⁶⁶ *Id.* at <http://news.amnesty.org/index/ENGAMR230302005>.

⁶⁷ U.K. Should Reject Pro-Paramilitary Law as found in Human Rights Watch available at <http://hrw.org/english/docs/2005/07/13/colomb11325.htm>. (July 14, 2005).

⁶⁸ *Id.* at <http://hrw.org/english/docs/2005/07/13/colomb11325.htm>.

HRW also demanded that the top of commander of paramilitaries must held their accountability because they responsibility for ordering countless massacres, targeted killings, forced disappearances, and acts of torture and extortion over the course of the last two decades.⁶⁹ Human Rights Watch argued that law it will end with impunity because of drastic limits on the timeframe for investigations of paramilitaries' crimes, and fails to require their cooperation.⁷⁰

In relations with the ICC, it clearly stated in their declaration of the Governments of Colombia to the ICC stated regarding their position. The declaration stated that no one of the Rome Statute provisions concerning the exercise of jurisdiction by the ICC prevent the Colombian State from granting amnesties, reprieves or judicial pardons for political crimes, provided that they are granted in conformity with the Colombian Constitution and with the principles and norms of international law accepted by Colombia.⁷¹ Regarding the transitional provision as stated of Article 124 of the Rome Statute, the Governments of Colombia also declares does not accept the jurisdiction of the ICC for category of war crimes as stated in Article 8 of the Rome Statute when a crime is alleged to have been committed by Colombian nationals or on Colombian territory.⁷²

⁶⁹Colombia: Bill Leaves Paramilitary Structure Intact as found in Human Rights Watch *available at* <http://hrw.org/english/docs/2005/06/15/colomb11141.htm>. (June 15, 2005).

⁷⁰*Supra* note 67 at <http://hrw.org/english/docs/2005/07/13/colomb11325.htm>.

⁷¹ William Schabas, *Introduction to the International Criminal Court, Declarations and Reservations* Section Colombia Declaration no.1 at 422 (2nd ed. Cambridge University Press 2004).

⁷² *Id.* at Section Colombia Declaration no. 5 at 422. Article 124 of the Rome Statute reads in full: "Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in

Except the declaration allow by the Rome Statute, basically that declaration is not effect the jurisdiction of the ICC since the Rome Statute prohibited state's reservation as stated in Article 120.⁷³ This declaration must be interpreted as state position in several provisions of the Rome Statute and what they want to be interpreted by the ICC.

Regarding the Colombia Case relating the Republican Liberalism perspective, we cannot really seen the Colombia Governments "lock in" to ICC as tactic used and consolidate democratic institutions, thereby enhancing their credibility and stability vis-à-vis non democratic political threat political uncertainty. It is different with previous three cases because it can be interpreted that Colombia Governments is using their ability and willingness to solve the problem with their legal mechanism in dealing with paramilitary groups.

With Justice and Peace Law, Colombia Governments is trying to combine between distributive justice and restorative justice which describes with the role of the court to preserve the legal justice and the present of National Reparation and Reconciliation. According to that law, both of institutions can work side by side to maintain peace in Colombia.

But if we take a look the substance of the law, it seems the Colombia Governments forgets several essentials points regarding the purpose of justice. There is ambiguity in dealing with the paramilitary groups since they are also the drug dealer. The law cannot strictly put in order if the leader or member of paramilitary who deal with drug dealer and drug trafficker cannot enjoy the benefit of law.

article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1."

⁷³ Article 120 of the Rome Statute reads in full: "No reservations may be made to this Statute."

In addition, the law is also weak regarding the timeframe which might use by perpetrator as loophole to responsible of their crime. Also since the law provides confession, the perpetrators also use this mechanism for reducing the sentence. Even the law stated that they do not grant an amnesty for serious crimes but since the limit of time frame and the confession mechanism, it will be risk for de facto amnesty. It cannot be accepted since the paramilitary groups also committed crimes which also recognized as serious violations of international law. Yet, Colombia Governments use the exception provide by the Rome Statute in relations to war crimes as they declare it. That is why the Justice and Peace Law is opportunity for the governments and the paramilitary groups together to conceal the war crimes issues.

As Moravcsik with his theory argued that domestic commitment will reach democratic peace. In this case, I worry about the future of the Colombian people especially the victims. The governments through the law fully guaranteed the right of victims. In fact, the spirit of the law is not really the guaranteed the right of victims especially to see justice done with legal justice mechanism. It seems the Colombian Governments promotes other mechanism by establishing National Reparation and Reconciliation as the key of the peace process. As I describes before, one of the weaknesses of the law to investigate and to prosecute the perpetrator will end with impunity. This is the expensive price have to be paid by victims in Colombia for the sake of peace.

3. Indonesia

Only Indonesia is not the party of the Statute since its position as the one the states who vote abstain at UN Diplomatic Conference in 1998. The Indonesian Governments in its views and comments regarding the Rome Statute stressed that the statute must respect the

principles of state sovereignty, territorial integrity and non-interference in the internal affairs of the states.⁷⁴

In facts, the upholding of human rights portrait in Indonesia is still colored by black ink of a series of violation acts of human rights. The democracy transition in Indonesia is a form of a complicated and fragile process. Even though politics reformation has opened a space for democracy since 1998 but the practice and culture of democracy has not been completely formed, for example; human rights protection has not been up right completely and the public control toward state's authority hasn't been guaranteed of its continuation. In other words, even though the citizen rights have begun to be approved, the excessive authority and state's hegemony have not been completely disappears.

After Suharto reign fell in May 1998, Indonesia has come in to the era of people's rights. It is proven by the politic reformation spirit that needs approval and respect toward human rights as a part of citizen rights. The politics dynamics in Indonesia has created a significant politics changing especially in the matter of protection and respecting toward Human Right. The roles of international community, Indonesian citizen, NGO's in helping Indonesian government in promoting and disseminating toward human rights is also undeniable.

As I describe above that the purpose of the presence of the human rights court is related to the international community pressure in the case of gross violations of human rights post referendum in East Timor in 1999. Human Rights Court failed to give hope on the justice enforcement especially to the victims' families. This situation has been predicted far in advance regarding the regulation of law does not adopt standard provided by international law and the court did not go fair, independent and impartial.

Basically, this regulation of law is trying to adopt Rome Statute International Criminal Court 1998. But unfortunately the adoption process was done in a manipulative way by the law maker which

⁷⁴ Views and Comments as found in Roy S. Lee ed., *The International Criminal Court: The Making of the Rome Statute Issue,s Negotiations and Result* at 600 (Kluwer Law International 1999).

caused perception disagreement about the main goal everyone wanted to reach.⁷⁵ The other matter is that this regulation of law only approves two crimes that are considered as gross violations of human right that is genocide and crime against humanity.⁷⁶

It was proved in 2004 was also the year of freedom and liberty for human rights perpetrators. But contradictory to the victims and their families. The year 2004 was the year of defeat for the second times for the victims and their families. The Human Rights Court was hoped to give the fairest verdict for the victims and their families but wiped out those dreams instead. It can be seen from the journey notes of Human Rights Ad-hoc Tribunal on Tanjung Priok Case organized and run since September 2003.⁷⁷

The wave of "freedom" also happened during Human Rights Ad-hoc Tribunal on the Gross Violations on Human Rights in Timor Timur where all of the suspects were freed by the court both level one and supreme court. All of the perpetrators freed were middle and high rank officers of Indonesian National Defense Forces (*Tentara Nasional Indonesia-TNI*) and Indonesian National Police (*Polisi Republik Indonesia-Polri*).⁷⁸

After the failures of the human rights court to present justice to the victims and their families, the effort to form the moral society

⁷⁵ One of the example is the intepretation of the criminal activity upon human rights wher in the Article 7 Law No. 26 / 2000 is stated,"... *attack directed to any civilian population...*". Compare it to the Article 7 Rome Statute,"...*attack directed against any civilian population...*". The mis-interpretation will cause only the field accomplicher to be caught by the law and not the policy maker.

⁷⁶ Article 7 Law No. 26 / 2000 compared to article 5 Rome Statute that includes war crimes and agression crime. For crime of aggression it has not been defined by Rome Statute.

⁷⁷ See *Bulan Kemerdekaan Pelanggar HAM* (The Independence Month of Perpetrators) as found in Buletin KontraS (The Commission for Disappearances and Victims of Violence), <http://www.kontras.org/buletin/indo/2004-07-08.pdf> (July-August, 2004).

⁷⁸ *Id.* at <http://www.kontras.org/buletin/indo/2004-07-08.pdf>.

that is able to give denial toward human rights violations was cramp by the legalization of Draft Bill of Truth and Reconciliations Commission. During its draft form, there were already so many critics presented because this reconciliation was the facility for forgiveness for past human rights perpetrators who have military background. Finally, the parliament passed the draft became the law on 27 October 2004.⁷⁹

The Indonesian Governments already set the plan for "lock-in" the ICC. During President Megawati Soekarnoputri period, there was Human Rights National Action Plan (NAP) 2004-2009 as it was legalized in Presidential Decree No. 40/2004. It was a "continuation" of National Action Plan 1998-2003. Where actually, Human Right NAP 2004-2009 was not really the continuation of the previous Human Rights NAP but it was no more than a left behind home work especially in the relation of the government's plan in making ratification or accession toward several international human rights instruments.

During 2004-2009 period, the government would make ratification toward several unfinished ratification of previous law of international human rights instruments step by step. And in its appendix, Indonesia would make ratification on the international human rights instruments, such as International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR) and the Rome Statute in the fifth year.⁸⁰ In order to apply the Human Rights NAP, therefore, The National Committee was formed. This committee works under the authority of and is responsible to the President.

In order to apply the Human Rights NAP, therefore, the National Committee was formed. This committee works under the

⁷⁹*Supra* note 3 and 25 at <http://www.tempointeraktif.com/hg/nasional/2004/09/07/brk,20040907-45,id.html> (Sept. 7, 2004).

⁸⁰ Indonesian already ratified both international covenant in 2005 by Law No. 11/2005 concerning Legalization of International Covenant on Economic, Social and Cultural Rights and Law No. 12/2005 concerning legalization of International Covenant on Civil and Political Rights.

authority of and is responsible to the President. The duties of the committee is to establish coordination of the application on the Human Rights NAP activities which includes to implement Human Rights NAP and responsible to President⁸¹.

The job desk is to coordinate Human Rights NAP that contain:⁸²

1. To establish and strengthen the Human Rights NAP implementing institutions;
2. To prepare the ratification of International Human Rights instruments;
3. To prepare the harmonization of relevant legislations;
4. To disseminate and launch Human Rights education;
5. To apply Human Rights standards and norms; and
6. To monitor, evaluate and report.

There are two problems related to the application of human rights in Indonesia. *First* is the procedure of ratification/accession of International human rights instrument. Nowadays, it is not easy make immediate ratification/accession of human right istruments due to the long process of procedures taken especially the argument in the parliament. The slow rate of discussion in the parliament about a regulation of law to legalize an international instrument is a perception that human rights instruments are not the political priority of the Indonesian political elite in the parliament. Not to mention about the parliament that become suspicious of an instrument which will give disadvantages to Indonesian position.

That is why nowadays, Indonesia prefer using adoption procedure to making ratification. It is reflected in the 1945 Constitution Amendment especially those are related to the human rights are put into separate chapter. Some of those chapters adopted the basic International Human Rights Law instrument such as: Universai Declaration of Human Rights, ICCPR and ICESCR.

⁸¹Article 1 Presidential Decree No. 40/2004 concerning Human Right NAP 2004-2009.

⁸²*Id.* note 76 at 2.

But, the amendment was mis-intrepreted by the lawyers of Timor-timur human rights violators by using article 28 I(1) Indonesian Second Amendment Constitution 1945⁸³ to defend their clients in the non-retroactivity issue. UN has arranged far in advance a convention called UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity in 1968. Knowing this matter, on August 24, 2000, the UN secretary spoke person, Fred Eckhart stated: "...a recent amandement to Indonesian Constitution might force the UN to hold an international inquiry into human rights abuses in East Timor".⁸⁴

Second is the implementation on national law and the difficult process of harmonization and also the revision toward regulation of law which is still valid until now. Especially on the last item, the government has effort to maintain the old regulation of law and at the same time issued the new regulation of law but it was contradictive to the government's obligation in protecting the human rights.

What happened in Indonesia now is different from Republican Liberalism view regarding the will of the governments to "lock in" and consolidate democratic institutions, thereby enhancing their credibility and stability vis-à-vis non democratic political threat. It should be understand that many actors in the present governments are the same actors in Soeharto regimes.

⁸³ Article 28 I (1) Second Amandment of Indonesian Constitution 1945 reads in full: "The rights to life, to remain free from torture, to freedom of thought and conscience, to adhere to a religion, the right not to be enslaved, to be treated as an individual before the law, and the right not to be prosecuted on the basis of retroactive legislation, are fundamental human rights that shall not be curtailed under any circumstance."

⁸⁴ Bhatara Ibnu Reza, *Once again, Human Right is Universal !! Perspective toward the application of respecting and enforcement of human rights in Indonesia: Responses toward 1945 Constitution amendment article 28 I and the relation to the International Relations*, (this paper is presented during the course of Capita Selecta of International Relations, Graduate Program of Faculty of Politics & Social Sciences, University of Indonesia Specialization in International Relations, Jakarta , August 2000), page 2-3.

Again it is true that in the first day after Soeharto fall, the new regimes immediately ratify several international human rights instruments. But after the 9/11 it changes a lot when big influence related to the implementation is the trend to fight terrorism. The governments is become more conservatives and trying to turn the clock back to authoritarian rules. The ignorance of the respect toward human rights and the fundamentals freedoms starting to feel strong when the government put forward the safety policy in order to participate in the global war against terrorism especially after the Bali bombing on October 12, 2002. This tendency does not only happen in Indonesia but also in other industrial and developing countries.⁸⁵

The government of President Megawati Soekarnoputri, in rushed, issued Government Regulation in Lieu of Law No. 1/2002 on the Eradication of Criminal Acts of Terrorism. And Government Regulation in Lieu of Law No 2/2002 on the Eradication of Criminal Acts of Terrorism in Relation to the Bomb Explosion Incident in Bali, 12 October 2002.⁸⁶

This Government Regulation in Lieu of Law was legalized by People Representative Assembly on March 6, 2003 to be Law 15/2003 about eradication of terrorism activities. Before that, together with the Government Regulation in Lieu of Law being issued, President Megawati also issued Presidential Instruction No. 15/2002 which approved the head of National Intelligence Body as the coordinator of all intelligence activities in Indonesia. This

⁸⁵ Amnesty International has researched the globalisation of state repression after the September 11 attacks and threats to civil liberties and the judicial process. See Amnesty International available at "Charting the War on Terrorism", www.amnestyusa.org/amnestynow/war_terrorism.html.

⁸⁶ *Supra* note 3. This Government Regulation in Lieu of Law has passed by People of Representative Assembly to be Law No. 16/2003. The Indonesian Constitutional Court invalidated it because of this law undermining the Indonesian Constitution of 1945 and its Amendment.

presidential instruction was used by National Intelligence Body (BIN) to present Draft Bill of State Intelligent.⁸⁷

The safety of civil liberties will be endangered together with the entrance of non-judicial into the law system. Non-judicial Intelligence involvement will endanger the political civil rights which is included in the area of non-derogable rights, especially the rights to be treated equally before the law.

Based on that, in relations with Indonesia will to "lock in" to the Rome Statute, it is difficult to say that Indonesia is really want to join the international justice institution. The recent development in Indonesian politics and law reflects does not support the present of the ICC. It is true that Indonesia has own Human Rights Court but it is far from the international standards since the law maker manipulated the Rome Statute.

Since Indonesia does not ratify the Rome Statute, the US was interesting to make the bilateral agreements Indonesia in the frame of the Article 98 of the Rome Statute.⁸⁸ But Indonesian Foreign

⁸⁷ Far before Bali Bombing in October 2002, BIN already had a draft in January 2002 with secret status which means people did not know the draft. This draft was disclosed by Murni, Executive Director in front of Special Committee of the DPR in debating Law on Eradication of Terrorism Crimes in 2003. After that BIN released a draft in September 2003 and this was also in secret status. See Rusdi Marpaung dan Ai Araf, Ed., *Terrorisme: Definisi, Aksi dan Regulasi*, (Jakarta, Imparsial, 2003).

⁸⁸ Article 98 of the Rome Statute regulate Cooperation with Respect to Waiver of Immunity and Consent to Surrender is interpreting by US Governments under President Bush Administration as a loophole for develop the bilateral agreement with state party and /or non-state party of the ICC as its efforts of the US to reject the jurisdiction of the court since the US is not party to the ICC. Article 98 reads in full: "1) The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. 2) The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is

Minister, Hasan Wirayudha stated Indonesia's position is clear and since Indonesia does not a party to the ICC it was not necessary for the Indonesian Governments to have bilateral agreements and also to ratify the Rome Statute immediately.⁸⁹ This ambiguity statement was also signed the lowest point of the Indonesian efforts as a part of international society to respect humanity in joining the ICC.

The obstacle in the application of human rights in Indonesia is the unfinished reformation on the influencing security actors who still have influence in the internal politics of Indonesia. The reformation toward security actors is the reformation of Indonesian military and police. So far, the reformation done is still not maximums which caused them to repeat the human rights violation again.

Until now, reformation on TNI and POLRI has not finished yet. In the law enforcement area toward human rights violation, TNI always uses Military Court to protect their corps. Therefore, the presence of Military Court becomes the part of impurity which made them untouchable by law. While in the reformation on Indonesian National Police is focused on government's effort of protecting citizen's rights from other parties' abuse. Many times the police corps themselves misused their authority for excessive power abuse which then resulted on police brutality.

V. The Outcomes

Regarding the theory, it is surprisingly that the outcome is far from the normative principle intention such as democratic peace and domestic commitment. Based on the description above we can divided the states into two major sort of states such the newly

required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."

⁸⁹ See *The Jakarta Post* (March 17, 2004).

democracy states and the unstable democracy. The reason is those several states still in unstable democracy which threat of the political opponent with armed struggle movement. Indonesia is counted as newly establish democracy even there are several armed struggle movement in such an area but not threat the position of the governments only threaten the territorial integrity.

Other states such as Uganda, DRC, CAR and also Colombia are counted into the unstable democracies. The unstable democracies have their own characteristics one of them is they cannot prevent the conflict and failure to develop the democratic peace in its internal affairs. Regarding the Moravcsik theory which seen the states' locking in to the international human rights instrument to bring democratic peace from condition of political uncertainty.

In case of Uganda, DRC and CAR, the governments of those states extremely have different intention by sending the self-referral letter to Office of the Prosecutor. Those states' assumed that the self-referral intention can be to protect their regimes because the respect of international justice is less. Even though, it is a challenge to the prosecutor to run his or her duties in those countries considering the exception of the self-referral.

Surprisingly what we have look is also different outcomes when the states like Colombia is trying to solve the problem with denying the standards and end with possibility of impunity. The substance of the Justice and Peace Law is far from the benefit to the victims but more stress the peace to the paramilitary groups. In addition, the law itself is not specific refer to others law such as the prosecution for serious crimes under international law.

While Indonesia is willing to be part of the ICC but the recent development of politics and law are not supports the present of the court. The actors in governments, parliament spirit and some experts in international law and international politics are opposing the international criminal justice issues. It is true if we looked they agree to choose other way which is ending with impunity such as the Commission Truth and Friendship with East Timor Governments. They are not prepares for legal reform in supporting the international criminal justice such as the reform of the Human Rights Court Law.

Situations/Positions of the State in relations with the ICC	Unstable Democracy	The New Establish Democracy
Party to the ICC (Self-referral to the Office of the Prosecutor)	Uganda, DRC, CAR	—
Party to the ICC (Trying to solve the problems with National Instruments)	Colombia	—
Willing to be Party to the ICC (In the year of 2008)	—	Indonesia

Table of Relations of Unstable Democracy States and New Democratic States with the ICC

Many critics already deliver by Indonesian and international non governmental organization and also international community before the law is released when the Human Rights Court failures for delivering justice in East Timor case and Tanjung Priok case. Whereas, the important thing for preparation to be bind in to the ICC is reformation of the Human Rights Court Law with international standards immediately for harmonization to the court.

V. Conclusion

On conclusion, we can see that the republican liberalism theory that in several circumstances the theory can really work. In this

cases, the purpose to bring democratic justice by locking in to the ICC are based on different purpose. For countries such as Uganda, DRC and CAR, their self-referral to the ICC is to maintain their regimes. With or without their conscience, the prosecutor will aim at their place and put them into his or her target for investigation and prosecution. On this case, I argue even the self referral is become problem in those regimes but their consent to be binding to the ICC have its own values. The main purpose of the ICC is to bring justice and this is the challenge for the ICC especially for the prosecutor.

In Colombia case, the prospect of the Justice and Peace Law will end with impunity. Justice in that law is meaningless since the law itself is not enough to bring justice and "peace" to the people especially the victims. The Colombian Governments emphasize the fake peace rather than the essential justice. What I mean essential justice is legal justice for maintain accountability of the perpetrator even from the governments side or from paramilitary groups. In relation with the ICC, even though the Colombia already declare does not accept the jurisdiction of the ICC for category of war crimes it will be cost of the future of that country.

It is reverse in Indonesia case when Moravcsik stated the government purpose to locking in the international human rights instrument from the threat of political uncertainty in the future. Since many of the actors in the governments is part of the old regimes and they are always obstruct the people demand for binding to international human rights instruments. Even in parliament, if the issues regarding the human rights issues, it is almost certain to oppose it.

Also it is true in several cases in several conditions the states will locking in the international human rights instruments as a domestic commitments and for the develop of democratic peace such as Indonesia in the first day of after Soeharto fell. But it drastically changes when the world goes to war against terrorism and this opportunity used by the actors in the governments to bring back the time to authoritarian rule.

However, Indonesia's plan to join the ICC in 2008 must have support from all elements of nation. As a party, Indonesian could

participate to review the Rome Statutes and deliver several ideas and amendment. Since Indonesia still in transition, I argue that the present of the ICC is one of the protections for smooth transition to democracy. In addition, to respect human rights, it is not enough by only making ratifications on international human rights instruments but it has to be followed by reforming the Indonesian national laws as a legal basis of implementation. The aim of the legal reform is the correction upon the law system itself and the regulation of law. The future Indonesian law reformation is to build a responsive civilized law which does not only reflect the justice feeling but also guarantees the human rights. On the other hand, it is necessary to reach harmony between national law and the universal international human rights instruments of law.

Legal reform also must be followed by security sector reforms. In other words, it is important to have guarantee for them for using violation as security actor only for rights protection and punish them if they abuse. With the reformation on security sector reform in Indonesia will be pushing to cut off the cycle of impunity which is until today is being enjoyed by the perpetrator.

As always I stated as ending in all my articles regarding international law, I agree that international law is the product of international level politics which is related to the influences of the established democracy, super power and modern countries. However, it is not an excuse that in the case of human rights violation, a country uses international law partially to protect itself and ignores the other international law family root such as International Human Rights Law and International Humanitarian Law.

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