

# HUMAN RIGHTS LAW ENFORCEMENT ROHINGYA CASE

Hijratul Safi

Whashington University, Afghanistan

[hijratul1991@gmail.com](mailto:hijratul1991@gmail.com)

**Abstract.** Various forms of human rights violations against the Rohingya include acts of genocide since 1978 with the aim of expelling them from Myanmar. The right to freedom of movement for the Rohingya people is strictly limited and most of them are not recognized as Myanmar citizens, but as illegal immigrants. This research uses a normative juridical approach that is literature-based. The enforcement of international criminal law is essentially a discussion of international criminal law in the formal sense. There are at least three steps that can be taken by the UN in overcoming the Rohingya conflict. First, Peace Making. Peace Making is an action to bring the disputing parties to agree with each other, especially peacefully. Second, Peace Keeping. Peace Keeping is an action to mobilize the presence of the UN in maintaining peace and the agreement of the parties concerned. Third, Peace Building. Peace Building is the action to identify and support existing structures to strengthen peace. The acts of human rights violations that have been mentioned in the Human Rights Council Report have fulfilled the categories in article 7 of the 1998 Rome Statute on crimes against Humanity.

**Keywords:** Human Rights, Rohingya, Law Enforcement

## 1. Introduction

In October 2016, violence and discrimination against the Rohingya people shocked the public regionally and internationally. The world also highlighted the human rights violations that occurred in Myanmar. The result of these human rights violations was a massive exodus of Rohingya people who fled to countries around Myanmar such as Indonesia, Malaysia, Thailand and India. Surprisingly, the United Nations High Commission for Refugees (UNHCR) estimates that this mass exodus has started since 2012, since the emergence of the Rohingya Elimination Group movement which aims to erase and exterminate the Rohingya ethnicity from the land of Arakan. This movement forced thousands of Rohingya to live in concentration camps and caused hundreds of deaths.<sup>271</sup>

Article 1 of Law of the Republic of Indonesia No. 39/1999 on Human Rights states that human rights are a set of rights inherent in the nature of human existence as

---

<sup>271</sup> Kurniawan, N. Rohingya Case and State Responsibility in the Enforcement of Human Rights. *Jurnal Konstitusi*, Vol.14, No. 4, 2017, Page. 885-889

creatures of God Almighty and are His gifts that must be respected, upheld and protected by the State law, government, and everyone for the sake of honor and protection of human dignity. Article 3 of Law No. 39/1999 on Human Rights describes discrimination as any restriction, harassment or exclusion that is directly or indirectly based on human distinction on the basis of religion, tribe, race, ethnicity, group, class, social status, economic status, gender, language, political beliefs that result in the reduction, deviation or elimination of recognition, exercise or use of human rights and basic freedoms in life, both individually and collectively in the political, economic, legal, social and other aspects of life.<sup>272</sup> Thus factors such as race, gender, religion or language cannot affirm the existence of human rights in humans.<sup>273</sup>

Various forms of human rights violations against the Rohingya include acts of genocide since 1978 with the aim of expelling them from Myanmar. The right to freedom of movement for the Rohingya people was severely restricted and most of them were not recognized as Myanmar citizens, but as illegal immigrants. In 1978, there was also a massive military operation, known as Operation Naga Min (Dragon King) to eliminate illegal immigrants, even in 2012, since the June 10-28, 2012 conflict at least 650 Rohingya were killed, around 1200 were missing, and 50,000 were displaced.<sup>274</sup>

Ethnic Rohingya who experienced acts of discrimination in the form of torture and inhumane violence, make the state must be responsible by investigating the murder of ethnic Rohingya with transparency and honesty to be able to prosecute and punish the perpetrators. The escalation of conflict in Rakhine is happening again. Since 1982, when General Ne Wing issued a policy of citizen segregation, the Rohingya people have been discriminated against and persecuted. Not only are they threatened with genocide, but they are also denied their rights as citizens. The series of violence against Rohingya Muslims has basically met the definition of ethnic cleansing within the meaning of the 1948 United Nations Convention on genocide. Article 2 of the convention states that

---

<sup>272</sup> Ketut Arianta , Dewa Gede Sudika Mangku , Ni Putu Rai Yuliantini, *Perlindungan Hukum Bagi Kaum Etnis Rohingya Dalam Perspektif Hak Asasi Manusia Internasional, e-Journal, Komunitas Yustitia Universitas Pendidikan Ganesha Jurusan Ilmu Hukum*, Vol 3 No 2, 2020, Page 166-177

<sup>273</sup> Sujatmoko, Andrey. *Hukum HAM Dan Hukum Humaniter*. Jakarta: PT RajaGrafindo Persada. 2016, Page 19

<sup>274</sup> I Gede Angga Adi Utama, Dewa Gede Sudika Mangku, Ni Putu Rai Yuliantini, *Yurisdiksi International Criminal Court (Icc) Dalam Penyelesaian Kasus Rohingnya Dalam Perspektif Hukum Internasional, Jurnal Komunitas Yustitia Universitas Pendidikan Ganesha Program Studi Ilmu Hukum*, Vol 3 No 3, 2020, Page 208-220

genocide means acts with the aim of destroying, in whole or in part, a national, ethnic, racial and religious group by killing or restricting their rights and freedoms.<sup>275</sup>

For Thailand, the presence of Rohingya boat people in its territory is illegal and part of the crime of human smuggling and trafficking. Similar to Thailand, Indonesia also believes that the wave of refugees is a form of human trafficking and people smuggling. However, the Government of Indonesia cannot turn a blind eye to the plight of the Rohingya and seeks to find the best solution as mandated by the 1945 Constitution. Myanmar, as the country of origin, is indifferent to the fate of the ethnic minority and insists that the Rohingya are not its citizens. Meanwhile, Bangladesh as a poor country in the South Asian region feels burdened by the large flow of refugees from Myanmar. Australia, which is one of the destination countries, has an interest in preventing the influx of refugees due to its national security interests.<sup>276</sup>

## 2. RESEARCH METHODS

This research uses a normative juridical approach that is literature-based<sup>277</sup>This is by inventorying and reviewing or analyzing secondary data in the form of primary legal materials and secondary legal materials by understanding the law as a set of positive rules or norms in the legislative system that regulates human life. In addition, a comparative approach is also used as a consideration in determining the direction of future formulation policies.<sup>278</sup>

## 3. RESULTS AND DISCUSSION

### 1. Settlement of Human Rights Cases against Ethnic Rohingya People

International criminal law enforcement is essentially a discussion of international criminal law in the formal sense.<sup>279</sup>This means that what will be discussed are the international aspects of criminal law. Theoretically, international criminal law

---

<sup>275</sup> *Ibid*

<sup>276</sup>Jeremia Suluh Kaos Tampubolon, Perlindungan Dan Penegakan Ham Di Asean Terhadap Manusia Perahu Rohingya Dalam Status Sebagai Pengungsi Menurut Hukum Internasional, *Journal of USU International Law*, Vol 1 No 3, 2013, Page 1-21

<sup>277</sup>Sri Mamudji, *Metode Penelitian dan Penulisan Hukum*, Badan Penerbit Fakultas Hukum Universitas Indonesia, Jakarta, 2005, Page. 32.

<sup>278</sup> Rully Trie Prasetyo, Umar Ma'ruf, Anis Mashdurohatun, Tindak Pidana Korporasi Dalam Perspektif Kebijakan Formulasi Hukum Pidana, *Jurnal Hukum Khaira Ummah* Vol. 12. No. 4 Desember 2017, Page 727-741

<sup>279</sup> Andri Winjaya Laksana, Pemidanaan Cybercrime Dalam Perspektif Hukum Pidana Positif, *Jurnal Hukum: Fakultas Hukum Unissula*, Vol 35, No 1 (2019), page 52-76

enforcement is divided into direct enforcement system and indirect enforcement system. However, in its development there is what is called a hybrid model or mixed model that accommodates the enforcement of international criminal law through national criminal law and international law.<sup>280</sup>

The resolution of gross violations of human rights basically refers to the principle of exhaustion of local remedies through the mechanism of the national court forum. The mechanism for resolving gross violations of human rights at the national level is usually established by a state by establishing a special human rights court. These courts are either permanent or ad hoc based on the national legislation of the country concerned. The establishment of the court is carried out independently by the state concerned or in collaboration with international institutions such as the United Nations.<sup>281</sup>

Seeing the increasing complexity of the Rohingya problem, the ethnicity requires humanitarian action which, among others, can be carried out by the Association of South East Asian Nation (ASEAN) in the form of providing assistance for Rohingya, cooperation between ASEAN countries in accepting Rohingya refugees, and recommendations to the Myanmar government to respect the human rights of Rohingya and provide their citizenship status.<sup>282</sup>

The existence of Ethnic Rohingya if analyzed with the aspect of Human Security (freedom from fear, threat, or danger), currently many Ethnic Rohingya have left Myanmar to seek asylum or become refugees. The refugee phenomenon is one of the significant symptoms of the human insecurity crisis because homes, personal belongings and family ties are an important part of everyone's security. Any country to which refugees have fled should not repatriate them (nonrefoulement).

There are at least three steps that the UN can take in addressing the Rohingya conflict. First, Peace Making. Peace Making is an action to bring the disputing parties to agree with each other, especially peacefully. Second, Peace Keeping. Peace Keeping is an action to mobilize the presence of the UN in maintaining peace and the agreement of

---

<sup>280</sup> Eddy O.S Hiariej, *Pengantar Hukum Pidana Internasional*, Erlangga, Jakarta, 2009, Page.69

<sup>281</sup> Hartanto, Pengadilan Hak Asasi Manusia dan Mahkamah Pidana Internasional (ICC), *Jurnal Pranata*, Edisi September 2016, Page. 40

<sup>282</sup>SK, Ayub Torry, 2011. "Perlindungan Hak Asasi Manusia Pengungsi Internasional", *Jurnal Hukum Yustisia*, Vol.1 No.2, Surakarta: Universitas Sebelas Maret, Page 5

the parties concerned. Third, Peace Building. Peace Building is the act of identifying and supporting existing structures to strengthen peace.

## 2. Human Rights Law Enforcement Rohingya Case

Legally, the Rohingya do not have the same rights as other citizens. In line with this policy, the Myanmar government imposes various restrictions in the economic, social and political fields, it can be said that they do not get minority rights in Myanmar. Because of this, they leave Myanmar to get a better life in other countries or in other words, economic factors as the main driver of them becoming boat people. But behind the main economic motive, the Rohingya experienced various pressures, torture and human rights violations by being forced to work, without decent wages in various Myanmar infrastructure developments.<sup>283</sup>

The acts of human rights violations mentioned in the Human Rights Council Report fulfill the categories in article 7 of the 1998 Rome Statute on crimes against Humanity. These acts of human rights violations are evidence of a failure to promote and encourage universal respect and observance of human rights without distinction of race, sex, language or religion and must be held accountable. Article 4 paragraph 1 of the Convention against Torture and Inhumane and Degrading Treatment or Punishment 1965.

In addition, the Myanmar government's policies in issuing the Immigration Act of 1974 and the Citizenship Act of 1982 clearly contradict the 1965 Convention on the Elimination of All Forms of Racial Discrimination (CERD). In this case Myanmar made the 1982 Citizenship Law which aims to revoke the citizenship of ethnic Rohingya. This policy is certainly contrary to Article 15 paragraph 1 of the UDHR which states that everyone is entitled to a nationality. On the other hand, Myanmar has been a member of the United Nations since 1948. The legal consequence of a country that has become a member of the UN is that it is obliged to accept all the provisions contained in the UN Charter.<sup>284</sup>

---

<sup>283</sup> Myanmar, The Rohingya Minority: Fundamental right denied, amnesty International, Mei 2004, AI Index: ASA 16/005/2004 <http://www.amnesty.org/en/library/asser/ASA16/005/2004/en/domASA160052004en.pdf>.

<sup>284</sup> Putra, Yuliantini, & Mangku. Analisis Tindak Kejahatan Genosida Oleh Myanmar Kepada Etnis Rohingnya Ditinjau Dari Perspektif Hukum Pidana Internasional. *Jurnal Komunitas Yustisia*, 1(1), 2020, Page 66-76.

Looking at the case that occurred on September 3, 2017, in the absence of material losses suffered by the state, the responsibility that can be delegated to Myanmar is Article 30 of the ILC Draft, which requires the state to cessation, if it is continuing and offer appropriate assurance and guarantee of non-repetition. Because Myanmar still refuses to grant citizenship to every child born in the country, Myanmar is responsible to cease that act and immediately grant citizenship status to every child who is declared stateless as stipulated in Article 30 of the ILC Draft.<sup>285</sup>

The issue of state responsibility in the resolution of gross human rights violations (the most serious crimes of international concern) is interesting to study, because both in international law and national law what is adopted and known is individual criminal responsibility, and has not touched state criminal responsibility. Crimes against international law in this case are committed by people, not abstract entities, so that punishment can only be imposed on individuals who commit these crimes.<sup>286</sup>

According to Article 25 of the Rome Statute "A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment". It can be underlined that the jurisdiction of the International Criminal Court is individual responsibility (persons). Regardless of whether he is a leader or state apparatus or civilians. The dynamics of the development of the doctrine of command responsibility show a shift in the application of the mens rea standard (element of intent) from strict liability to limited liability. Although there are variations in international and national practice, three main elements of the doctrine of command responsibility are recognized, namely: the element of the relationship between superiors and subordinates; the element of intent (mens rea), and the element of the required act; and the element of command responsibility.<sup>287</sup>

Myanmar did not ratify the entire Rome Statute, however the International Criminal Court (ICC) can take over this case if Myanmar is deemed unable to resolve and prosecute this case as contained in Article 17 paragraph (1) letter (a) "The case shall

---

<sup>285</sup> Yolla & Aji Wibowo, *Perlindungan Dan Penegakan Hak Asasi Manusia Bagi Etnis Rohingya Yang Tidak Memiliki Kewarganegaraan Menurut Hukum Internasional*, *Jurnal Hukum Adigama*, Vol. 1, No. 12018, Page 1-25

<sup>286</sup> Krisdiana Katiandagho, *Kewenangan Mahkamah Pidana Internasional Untuk Mengadili Pelaku Kejahatanpelanggaran Ham Berat Dalam Suatu Negara Tanpa Adanya Permintaan Dari Negara Tuan Rumah*, Fakultas Hukum, Universitas Atma Jaya Yogyakarta, 2016, Page.7

<sup>287</sup> Natsri Anshari, *Tanggung Jawab Komando Menurut Hukum Internasional Dan Hukum Nasional Indonesia*, Dalam *Jurnal Hukum Humaniter*, Vol 1 No. 1 Edisi 2005, Jakarta, Pusat Studi Hukum Humaniter dan HAM Universitas Trisakti, Page. 50

be investigated or prosecuted by the State having jurisdiction over it, unless that State is unwilling or unable to carry out the investigation or prosecution."

Regarding the legal sanctions against Myanmar that can be given by the ICC, it can refer to Article 25 Paragraph (2) of the Rome Statute "A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute" and Article 27 "This Statute shall apply equally to all persons without distinction based on official capacity. In particular, the official capacity as Head of State or Government, member of Government or parliament, elected representative or government official in any capacity as a person who shall not be exempted from criminal responsibility in accordance with the present Statute, nor on his own behalf, shall not constitute a ground for mitigation of punishment."

Another mechanism can be done through the UN Human Rights Council with the Complaint Procedure mechanism which opens opportunities for individuals or organizations as whistleblowers and continued with the Special Procedure which can be carried out by independent experts with a mandate from the UN Human Rights Council. This whole procedure is called Charter Based Mechanism which uses the UN Charter as the basis for the UN Human Rights Council.<sup>288</sup>

#### **4. CONCLUSION**

The resolution of gross violations of human rights basically refers to the principle of exhaustion of local remedies through the mechanism of the national court forum. The mechanism for resolving gross violations of human rights at the national level is usually established by a state by establishing a special human rights court. The acts of human rights violations mentioned in the Human Rights Council Report fulfill the categories in article 7 of the 1998 Rome Statute on crimes against Humanity. According to Article 25 of the Rome Statute "A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment."

#### **BIBLIOGRAPHY**

- Andri Winjaya Laksana, Pemidanaan Cybercrime Dalam Perspektif Hukum Pidana Positif, *Jurnal Hukum: Fakultas Hukum Unissula*, Vol 35, No 1 (2019),  
Eddy O.S Hiariej, 2009, *Pengantar Hukum Pidana Internasional*, Erlangga, Jakarta,

---

<sup>288</sup> *Ibid*



- Hartanto, Pengadilan Hak Asasi Manusia dan Mahkamah Pidana Internasional (ICC), *Jurnal Pranata, Edisi September 2016,*
- I Gede Angga Adi Utama, Dewe Gede Sudika Mangku, Ni Putu Rai Yuliantini, Yurisdiksi International Criminal Court (Icc) Dalam Penyelesaian Kasus Rohingnya Dalam Perspektif Hukum Internasional, *Jurnal Komunitas Yustisia Universitas Pendidikan Ganesha Program Studi Ilmu Hukum, Vol 3 No 3, 2020,*
- Jeremia Suluh Kaos Tampubolon, Perlindungan Dan Penegakan Ham Di Asean Terhadap Manusia Perahu Rohingnya Dalam Status Sebagai Pengungsi Menurut Hukum Internasional, *Journal of USU International Law, Vol 1 No 3, 2013,*
- Ketut Arianta, Dewa Gede Sudika Mangku , Ni Putu Rai Yuliantini, Perlindungan Hukum Bagi Kaum Etnis Rohingnya Dalam Perspektif Hak Asasi Manusia Internasional, *e-Journal, Komunitas Yustitia Universitas Pendidikan Ganesha Jurusan Ilmu Hukum, Vol 3 No 2, 2020,*
- Krisdiana Katiandagho, *Kewenangan Mahkamah Pidana Internasional Untuk Mengadili Pelaku Kejahatanpelanggaran Ham Berat Dalam Suatu Negara Tanpa Adanya Permintaan Dari Negara Tuan Rumah, Fakultas Hukum, Universitas Atma Jaya Yogyakarta, 2016,*
- Kurniawan, N. Rohingnya Case and State Responsibility in the Enforcement of Human Rights. *Jurnal Konstitusi, Vol.14, No. 4, 2017,*
- Myanmar, The Rohingnya Minority: Fundamental right denied, amnesty International, Mei 2004, Al Index: ASA 16/005/2004 <http://www.amnesty.org/en/library/asser/ASA16/005/2004/en/domASA160052004en.pdf>.
- Natsri Anshari, Tanggung Jawab Komando Menurut Hukum Internasional Dan Hukum Nasional Indonesia, Dalam *Jurnal Hukum Humaniter, Vol 1 No. 1 Edisi 2005,* Jakarta, Pusat Studi Hukum Humaniter dan HAM Universitas Trisakti,
- Putra, Yuliantini, & Mangku. Analisis Tindak Kejahatan Genosida Oleh Myanmar Kepada Etnis Rohingnya DitinjauDari Perspektif Hukum Pidana Internasional. *Jurnal Komunitas Yustisia,1(1), 2020,*
- Rully Trie Prasetyo, Umar Ma'ruf, Anis Mashdurohatun, Tindak Pidana Korporasi Dalam Perspektif Kebijakan Formulasi Hukum Pidana, *Jurnal Hukum Khaira Ummah Vol. 12. No. 4 Desember 2017,*



- SK, Ayub Torry, 2011. “Perlindungan Hak Asasi Manusia Pengungsi Internasional”,  
*Jurnal Hukum Yustisia*, Vol.1 No.2, Surakarta: Universitas Sebelas Maret,
- Sri Mamudji, 2005, *Metode Penelitian dan Penulisan Hukum*, Badan Penerbit Fakultas  
Hukum Universitas Indonesia, Jakarta,
- Sujatmoko, Andrey. 2016. *Hukum HAM Dan Hukum Humaniter*. Jakarta: PT  
RajaGrafindo Persada.
- Yolla & Aji Wibowo, Perlindungan Dan Penegakan Hak Asasi Manusia Bagi Etnis  
Rohingya Yang Tidak Memiliki Kewarganegaraan Menurut Hukum  
Internasional, *Jurnal Hukum Adigama*, Vol. 1 No. 1, 2018,