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The Duty of State To Punish Gross Violations of Human Rights

Yustina Trihoni Nalesti DEWI

Abstract—Gross violations of human rights consisting of crime against humanity, genocide and war crime, are serious international crimes. Prohibition such crimes has obtain to level of international norms of *jus cogens* based on conventions and customary international law. Therefore, the duty of state to punish the crimes is obligatory. Legal consequence of *jus cogens* is *obligatio erga omnes* which is a matter of state responsibility. When a state is not willing or neglects to do in its national law, it results in state responsibility to be imposed by international human rights and humanitarian law. This article reviews the concept of *jus cogens* and *obligatio erga omnes* that appear as two sides of the same coin. It also explains how international human rights and humanitarian law set down the duty of state to punish gross violations of human rights.

Keywords—Duty of States, Gross Violations of Human Rights, *Jus Cogens*, *Obligatio Erga Omnes*.

I. INTRODUCTION

In the era of classical approach of international law, the concept of a sovereign state as a unitary authority which is not subject to any of the parties is a buffer of international law system which upholds the principle of non-intervention and state agreements. State sovereignty and inter-state equality are the concepts recognized and become the basis for the operation of international law system. During its development, the domestic jurisdiction inherent in independent and sovereign state is not an absolute concept but instead is a relative concept. The changes or developments occurred in the principles of international law, especially in terms of respect and enforcement of human rights and international humanitarian law, have proven that the concept of domestic jurisdiction by state is strongly influenced and limited by international law. Based on the principles of international law, state behavior in respect of human rights and international humanitarian law has been internationalized. Thus, the concept of such sovereignty confirms that even if a state is independent but it should always make adjustments and responsive to global trends and changes as well as taking transitional measures including in the promotion and protection of human rights[1].

Since the establishment of the United Nations, the issues of the respect and fulfillment of human rights can not be separated from the attention and concern of the international community. Since 1948 and further developed since 1976 when the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Right

imposed, sovereign state becomes increasingly constrained by the obligation to respect human rights and the prohibition against aggression[2]. The global trend also shows that the issue of human right enforcement in a country can not be separated from the domain of international law.

The agenda on the promotion and protection of human rights often resulted in the suspension of state sovereignty for a while because the government conducted mass human rights violations. Based on the doctrine of humanitarian intervention, the intervention by a state or more to a region of another state is considered valid when it is conducted to stop the occurrence of gross violations of human rights. One of the thoughts that support this doctrine is that state sovereignty is carried out legally when it is also accompanied by the respect and compliance with international human rights and humanitarian law. In such a context, domestic jurisdiction can not be used as an excuse for not enforcing and revealing gross violations of human rights in a region of a state so that state sovereignty should be put in the context of and associated with the principles of international law. Thereby, the basis of sovereignty shifts from state's absolute rights to sovereignty which is limited by the obligation to respect people's will based on international standards, democracy, and human rights, so that it means that the sovereignty of a country does not stand higher than human rights of the people.

International legal order is increasingly concerned with the punishment to gross violations of human rights. One example is shown by the involvement of the UN Security Council performing its powers to conduct military intervention in order to stop the human rights violations occurred in some parts of the world, such as Cambodia, Somalia, Rwanda, Bosnia, Central Africa, Uganda, Sudan, Kenya, and Libya. Ad hoc and permanent International Tribunal have been created to prosecute gross violations of human rights in order to demonstrate the supremacy of international law to national law so that it reinforces the notion that state sovereignty has its limits in international law.

II. THE IMPORTANCE OF PUNISHING GROSS VIOLATIONS OF HUMAN RIGHTS

Gross violations of human rights consist of aggression, crimes against humanity, genocide, war crimes, piracy, slavery and torture. In legal literatures, they are termed as international crimes categorized as *jus cogens*. The most important and fundamental thing in the punishment of gross violations of

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human rights³⁴ in addition to providing justice for the victims and holding the perpetrators' responsibilities related to social memory. The importance of social memory needs to be emphasized because the authorities often tried to forget the human tragedy occurred with the pretext for the creation of peace. The expression of *peace now justice some other time* is often used as an excuse which then hurts the feelings of the victims because it could not create justice for them. In fact, a policy for justice can make a significant contribution to the achievement of peace[3], which was regarded by Immanuel Kant as the highest goal of man that should be pursued by all political leaders[4]. In relation to this case, impunity does not provide deterrent effect for offenders and will result in continuous crime that can threaten peace and justice[5]. The important reason that states the need to do the punishment of gross violations of human rights is primarily a moral obligation for the state to guarantee the protection of its citizens in all circumstances both in peacetime and in time of war so that state is also obliged to strictly limit the use of violence and provide sanctions for those who break them. Thus, state should provide the means to ensure that the respect for human dignity will be upheld²⁴ by the punishment for the perpetrators of gross violations of human rights.

Since the beginning of the modern understanding of international law, the association between morality and law has been attracting the attention of legal experts and philosophers, citing the importance of the reference of fundamental rules with higher authority than the laws specified in international treaties or developed as convention.³ With regard to its binding obligations under positive law, the evolution of law with regard to moral and law have³ been traced back to the 19th century with the prohibition against slavery, the development of protection for the victims of armed conflict in the First Geneva Convention of 1864 and The Hague Conference. Some experts of international law at the time stated that there was a common international order placed on higher ranks than international agreements. In addition, in the era between the two World Wars, the idea is raised again, but after the end of World War II the development focused more on international crime and state responsibility for such international crimes[6].

The fundamental rule in its development is often referred to as *jus cogens*. Even if there is the minimum standard to define *jus cogens*, the criterion which helps identify *jus cogens* norms is not entirely clear. Before² the 1969 Vienna Convention on the Law of International Treaties, different theories have been found in the various works of international legal experts. Positivist approaches put forward *jus cogens* as part in the norm hierarchical structure of international legal order which is in the highest position. Meanwhile, natural law scientists tend to emphasize *jus cogens* as moral-based obligation, such as human rights law derived from human dignity; or to explain *jus cogens* as any rules in which each rule of law have to include it. The existence of *jus cogens* in public international law has already been recognized in state practices through the codifications in treaty laws and the application in the jurisprudences and in legal theories. However, there is a reluctance to apply this concept until the community of states forms an international community in a more established organizational structure. Sinclair said that the growth and development of the concept of *jus cogens* are parallel with the overview of the growth and development of

international legal order which is still incomplete and imperfect[7].³ The drafters of the 1969 Vienna Convention adopted a formal definition and described *jus cogens* as, "norms as peremptory which are recognized by the community of States as a whole as norms from which no derogations are permitted and which may be replaced only by norms having the same character". Thus the term of *jus cogens* (peremptory norm of general international law) is defined as the basic norm of general international law accepted and recognized by the international community as a whole[8], transcending the limits of cultural differences and ideologies. The need for the concept of *jus cogens* can be regarded as a consequence of the frequent unsatisfactory results arising from the identification of customary international law[9]. *Jus cogens* norms are coercive and have the highest level in the hierarchical positions between norms and other principles. As a consequence, the norm of *jus cogens* is considered as the absolute norm that should not be circumvented and must be adhered to.

Various human rights conventions and international humanitarian law provide the examples that give the guarantee for the application basis of *jus cogens*. State can not suspend even in the situations of national emergency, such as the right to life and prohibition of torture, arbitrary detention, and slavery contained in the Conventions on Human Rights. Specific international treaties overriding the basic guarantees and even the suspension of the basic guarantees by protected people or their states are prohibited.

The legal consequence for of the concept of *jus cogens*²⁰ is the emergence of the concept of *obligations erga omnes* which is a matter of state responsibility. The legal implication of *jus cogens* is that state obligation is not just an optional right because if it is only an optional rights, the nature of 'peremptory norms of international law' will not be met. With this in mind, the obligation of every state (*obligatio erga omnes*) on *jus cogens* is a legal obligation that can⁴ not be avoided both in times of peace and war. The concepts of *jus cogens* and *erga omnes* often appear as two sides of the same coin. The issue of *jus cogens* will always be associated with the concept of *obligations erga omnes* which contains a forcing obligation. Based on this concept, the violation of *jus cogens* is considered an offense not only for the state which is directly affected but also the violation against all members of the international community[10]. *Erga omnes* is a consequence of certain international crimes.

The concept of *erga omnes* as well as *jus cogens* is not precisely defined and does not have a clear meaning[11]. Besides, it is still very difficult to find common criteria¹⁹ for the identification of the provisions with the character of *erga omnes*. The concept of *erga omnes* first appeared in the Barcelona Traction paragraphs 33 and 34, which states that this concept is derived from the principles of contemporary international law that provides protection for the important values of human rights. The concept of obligations *erga omnes* enhance the prospect of law enforcement as the legal consequences of an offense that does not require the action of the international community as a whole and not act collectively or through international institutions.

The International Court of Justice has mentioned the²⁹ term of *obligatio erga omnes* repeatedly and described it as the obligation of all states as the members of the international

community as a whole. In relation to gross violations of human rights especially in the armed conflict called as a war crime, The International Court of Justice argued that the Common Article 1 of the 1949 Geneva Conventions, which demand to "respect and to ensure respect ... under all circumstances" is the indication of the character of *erga omnes*[12].

To see further the character of gross violations of human rights in view of public international law and the community of nations, it is necessary to see whether gross violations of human rights are one of the international crimes, due to its repression, therefore constitute a norm of *jus cogens* in nature. According to the Draft of the International Law Commission on State Responsibility, the basic criteria for determining the existence of an international crime is a violation against the protection of fundamental interests of the international community so as to make the entire international community has a responsibility to punish it[13]. International crime emerges as a result of a gross violation of international obligations on the importance to[14]:

- a. maintain international peace and security such as the prohibition of aggression
- b. maintain the right of self-determination, such as the prohibition against the use of force (armed forces) in the framework of colonial domination
- c. Maintain human dignity, such as the gross violations on a scale that extends to the prohibition against slavery, genocide and apartheid
- d. Maintain and preserve the natural environment such as the prohibition against environmental pollution on a large scale to the atmosphere or sea.

According to Bassiouni, there are five criteria to determine an international criminalization, i.e.[15]:

- a. The prohibited conduct affects a significant international interests, in particular, if constitutes a threat to international peace and security;
- b. The prohibited conduct constitutes an egregious conduct deemed offensive to the commonly shared values of the world community, including what has historically been referred to as conduct shocking to the conscious of humanity;
- c. The prohibited conduct has transnational implications in that it involves or effects more than one State in its planning, preparation, commission, either through the diversity of nationality of its perpetrators or victims, or because the means employed transcend national boundaries;
- d. The conduct is harmful to an internationally protected persons or interest;
- e. The conduct violates an internationally protected interest but it does not rise to the level required by (a) and (b), however, because of its nature, it can best be prevented and suppressed by international criminalization[16].

Of the criteria mentioned above, there are the principal characteristics that distinguish an action or engagement constituting an international crime or not. The principal characteristic is that the action must be referred to an element of transnational and or international and should contain the element of necessity. It means that such actions shall meet the

requirements the violations against the interests of the community of nations (*jus gentium delicto*) and therefore requires the handling internationally in which every country is obliged to arrest, detain, prosecute, and try the perpetrator wherever the crime is committed. More clearly, Bassiouni mentions the content contained in international crimes including:

- a. International elements, i.e.:
 - 1) direct threat on world peace and security
 - 2) indirect threat on world peace and security
 - 3) offending the sense of humanity
- b. Transnational elements, i.e.:
 - 1) actions that have the impact on more than one country
 - 2) actions that involve or give effect on the citizens of more than one country
 - 3) infrastructures and methods used beyond the territorial borders of a country
- c. The element of necessity, that is, the need for cooperation among states to conduct preventions.

In addition to mentioning the content of international crimes, Bassiouni also distinguishes three levels of seriousness of each international crime by the ranks of significant, important and potentially significant or important. For example, Bassiouni put the crime of aggression as the only international crime that has the element of direct threat to peace and security in the world with important positions, while gross violations of human rights, in Bassiouni's explanation, are regarded as an international crime that offends the sense of humanity with the rank of significant[17].

The above opinion is very understandable since gross violations of human rights in terms of the place may be only in the territory of a country where all the perpetrators and the victims are the nationals of the country concerned. In such cases, there is no international dimension in the case of gross violations of human rights, but due to its offense on the sense of humanity, in a very large number, or because of the terrible nature of the crime, then gross violations of human rights can be categorized as an international crime.

Sufficient legal basis has stated that human rights violations are part of international crime and therefore the prosecution of gross violations of human rights is the norm with the character of *jus cogens*. The legal basis includes:

- a. The international decision that reflects the recognition that the repression of gross violations of human rights to be considered as part of customary international law. Some UN General Assembly resolutions have called on the need for such punishment of gross violations of human rights[18].
- b. The statement in the preamble or other provisions of international agreements that would indicate that gross violations of human rights have the status of high threat to the community and international law.
- c. A number of countries have ratified the international agreement relating to gross violations of human rights.
- d. International ad hoc investigation and prosecution against the perpetrators of crimes have been committed.

To determine whether gross violations of human rights are included in international crime and when, in the history of evolution of law, it can be stated that such a crime has the status of *jus cogens*, and then the basis of two elements is used. These elements are (1) whether gross violations of human rights have resulted in the disruption of the world community's interests as a whole because it threatens peace and human security, and (2) whether gross violations of human rights have offended the sense of humanity. If both of these elements are contained in gross violations of human rights, the crime can be categorized as part of *jus cogens*. A question arises; is it possible if gross violations of human rights only meet one of the elements of the crime, can it be classified as *jus cogens*? For example, gross violations of human rights are only a threat against humanity that shook the conscience, but such measures will not threaten any peace and international security. It only aggravates the situation of pre-existing conditions.

The following three additional elements should be considered in determining whether gross human rights violation is classified as *jus cogens*; first, the history of the evolution of law. The existence of a large number of legal instruments which do condemnations and bans on gross violations of human rights prove that these crimes have reached the level as the crime of *jus cogens*. Secondly, a number of countries have jointly made a statement that gross violations of human rights in their national laws are dangerous. Third, a number of malicious statements are made internationally and nationally on gross violations of human rights. The additional sources that can support is the presence of the proofs of the principles of common law and the legal works eminent legal experts that categorize gross violations of human rights as *jus cogens*. Briefly, it can be added that a norm of *jus cogens* arises when the principle is universally accepted through consistent practice accompanied by adequate *opinio juris*[19].

III. THE ARISING OF STATE OBLIGATION

Gross violations of human rights are serious international crimes based on conventions and rules of customary law and have obtained an adequate legal basis to be part of *jus cogens*[20]. Thus, the prohibition against such action is the norm that must be adhered of general international law, recognized in Article 53 of the 1969 Vienna Convention on the Law of Treaties[21]. that should not be changed or canceled (withdrawn) by an international treaty. The recognition that gross violations of human rights is an international crime contains the consequences of several obligations; (1) to sentence or to extradite perpetrators of crime, (2) to implement the non-statutory limitation, and (3) to implement universal jurisdiction which is a shared responsibility of each country and the international community to break the chain of impunity against the perpetrators of the crimes even if they are the ones who have the status of the head of a state or the officials who have authority in the territory of a country[22].

The term of *erga omnes* means flowing to all and, hence, the obligations derived from *jus cogens* are considered *erga omnes*[23]. The logic of law supports the proposition that the obligatory law should cause state obligation to the international community as a whole. As the rule which has obtained the legal

status with the character of *jus cogens*, gross violations of human rights inflict binding legal obligations under international law and have the legal implications of obligation *erga omnes* (the obligation of all states to obey and enforce). The International Court of Justice has recognized the gross violations of human rights which are included as part of *jus cogens* have caused *obligatio erga omnes* as the obligations that all states have legal interests in ensuring their compliance, especially in making the punishment or extraditing the offenders[24]. As the crimes included in *jus cogens*, the gross violations of human rights which are the violations of the rules relating to the basic rights of human beings need to be set in the category of *obligatio erga omnes* so that the consequence should apply universal jurisdiction to it.

The application of universal jurisdiction has led the obligation for countries to punish or extradite perpetrators, the obligation to provide legal aid, the obligation to apply non-statutory limitation and the obligation to remove superior's immunity to the level of head of state. In other words, the obligation to prosecute or extradite is in the absence of the provision of restriction and regardless of where the crime is committed, who the perpetrators of crimes including heads of state, against any category of victims, and regardless of the context of the situation of both peace and war. The characterization of such crimes as *jus cogens* put state obligation not to extend the chain of impunity for perpetrators[25].

Impunity for gross violations of human rights constitutes the denial of a state against human solidarity for the victims of crime. On this basis, for example, the designers of the 1949 Geneva Conventions have considered the importance of compliance with the Geneva Conventions for the protection of the victims of armed conflicts from gross violations of human rights. Common Article 1 of the Geneva Conventions I-IV and Article 1 (1) of Additional Protocol I of 1977 states that, "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances," This article confirms that the Contracting States undertake to respect and to ensure respect for international humanitarian law in all circumstances.

The placement of the aforementioned provisions in Article 1 shows an emphasis on the importance of the obligation for states to respect the provisions of the Convention. The addition of the words 'to ensure respect' emphasizes state obligation to respect the Convention and are responsible for its implementation. The word "guarantee" means that state must order military and civilian personnel to comply with the provisions of the Convention, state must oversee the implementation of the order and state must take action in case of violation of the provisions of the Convention. In relation to gross violations of human rights, the definition of 'take action' means giving punishment to the perpetrators of gross violations of human rights, but certainly before giving punishment, the national criminal laws containing punitive rules should have been provided.

The International Court of Justice in the Advisory Opinion on 9 July 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, paragraph 158 states that,

1 The Court would also emphasize that Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.' It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.

It can be concluded that Article 1 of the 1949 Geneva Conventions that demand for "respect and to ensure respect ... under all circumstances" is the indication of the character of *erga omnes*, which gives obligation to all countries to implement the provisions of the Convention including the punishment to gross violations of human rights. In addition, a number of 192 to 193 countries[26], in the world have ratified the 1949 Geneva Convention, which gives the sense that all states are bound to comply with the 1949 Geneva Convention as the ratification provides the legal implications to comply with the provision in the Convention.

12 Obligations lie in the countries in upholding international human rights and humanitarian law to bring the credibility of laws itself. Law enforcement is first done by establishing 22 legislation to prosecute and punish the guilty person of the violations of international human rights and humanitarian law. The basic considerations on the obligation to make the laws is due to the need to punish the offenders. The duty to prosecute is the state obligation to conduct legal proceedings against the perpetrators of gross violations of human rights and must not grant amnesty[27]. The state roles in this case are very important in advancing international human rights law.

IV. CONCLUSION

There are three fundamental reasons concerning state obligation to carry out the punishment of gross violations of human rights. First, human rights law requires state's commitment to sentence human rights violations occurred in its territory. The obligation to 15 punish has already included in the state's general obligations to respect and to ensure respect for international human rights and humanitarian law. Secondly, the obligation to 6 punish the perpetrators of gross human rights violations has also been stipulated in international treaties agreed upon countries, at least when gross violations of human rights occurred in the territory of its country. Third, the law of state responsibility also includes the state responsibility against international crimes; one of which is gross violations of human rights which give rise to state responsibility to punish the perpetrators.

The laws governing the punishment of gross violations of human rights have mandatory character. With this character, states can not evade their obligation to make the 36 rules of law in their national law that allows the punishment of gross human rights violations. The forcing character is shown through:

- a. Gross violations of human rights is an international crime that has the character as *jus cogens* and therefore has consequences for *obligatio erga omnes*, which is the obligation of all states to punish.

- b. *erga omnes* character of the regulation of gross violations of human rights is also shown by several international provisions; one of the provisions is Article 1 paragraph (1) of the 1949 Geneva Convention I - IV which obliges all states to ensure that the provisions of international humanitarian law within it. By the ratification of this convention by almost all countries, it results in the obligation of all states to abide by and to implement the 1949 Geneva Conventions, particularly in the punishment of gross violations of human rights.
- c. When a state is not willing or neglects to implement the provisions relating to gross violations of human rights in its national law, it results in state responsibility to be imposed by international human rights and humanitarian law.

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