CHAPTER I

INTRODUCTION

A. Context Of Study

The never-ending adjudication of past criminal cases marks the failures in systemic law enforcement. The legal procedures that were neatly arranged and became the main consideration have no effect on the improvement of justice substantive, thus produced many new problems with the resolution of the cases itself.

Indonesia is a state of law (*rechtstaat*).[1] State of law means a state that stands on the law that guarantees justice to its citizens, which is manifested through legal regulations,[2] such as Supremacy of law, equality before the law, and due process of law.[3] The exposition about Indonesia, as a state of law, is reinforced by rejecting the concept and implementation of state power (*machstaat*).[4] Therefore, as a society, nation and state, Indonesia, as a state of law, is aware of the legal system.

The statement of the Universal Declaration of Human Rights (UDHR) states that the protection of Human Rights must be conducted through legal means. The opening states as follows:

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[1] Seeing Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia.

[2] M. Kusnardi and Harmaily, *Hukum Tata Negara Indonesia*, Sinar Bakti, Jakarta, 1998, Pg. 153.

[3] Jimly Asshidiqie, Mahkamah Konstitusi dan Cita Negara Hukum Tata Indonesia Kontemporer, Pelaksanaan Kekuasaan Kehakiman Pasca Amandemen UUD 1945, *Journal of Law*, Jakarta.

[4] Sudikno, *Mengenal Hukum Satu Pengantar*, Liberty, Yogyakarta, 2005, Pg. 23.

"Whereas it is essential, that human rights should be protected by the rule of law".

This can be interpreted that in the national level or in a state, a human rights protection should be regulated further through legal means. It means that the state should regulates human rights legislation with *legislative measures.*

The Republic of Indonesia recognizes and upholds human rights and basic human freedom as inherent and inseparable rights from humans, which must be protected, respected and upheld to increase human dignity, welfare, happiness, intelligence, and justice.[5] This is proven by various sets of created laws and regulations, such as the 1945 Constitution of Indonesia. However, as it is known, the implementation is still far from people's expectations in Indonesia.

By definition, human rights are a basic humanity. Human rights are natural law and are a direct gift from God. Hence, every human being, to get life and dignity, should see human rights as human nature. Human rights are not given by regulations, regimes, laws or anyone else. Therefore no individual or group can take it. This is based on the idea that the struggle for human rights is a sacred duty and gift for mankind.[6]

Regarding the enforcement of human rights law in Indonesia, institutionally there are specific institutions that have a pivotal role in this

[5] Seeing Article 2 of Law Number 39 of 1999 concerning Human Rights.

[6] Artidjo Alkostar, *Pengadilan HAM, Indonesia dan Peradaban*, PUSHAM UII, Yogyakarta, 2004, Pg. 1.

matter, such as the National Human Rights Commission (*Komnas HAM*), the Attorney General of Indonesia and the Human Rights Court.

The National Human Rights Commission was established based on the Presidential Decree of Indonesia to help to develop conducive conditions for the human rights implementation and to increase human rights protection.[7] To implement this goal, The National Human Rights Commission shall carry out a number of activities which in essence include three main points: spreading human rights information to Indonesians and outside world; reviewing various UN human rights instruments in the context of accession/ratification; monitoring and investigating human rights execution.[8]

In a subsequent development, the existence of the National Human Rights Commission is further strengthened by the detailed regulations in the Legislations of the Republic of Indonesia regarding Human Rights.[9] Even the National Human Rights Commission has the authority as an investigator on gross human rights violation cases from the past.[10]

The Human Rights Court is a special court within the General Courts. It was established through the mandate of Law Number 39 of 1999 regarding Human Rights. The human rights court has a duty and authority to

[7] Seeing Presidential Decree Number 50 of 1993 regarding the National Commission on Human Rights, that Indonesia as a member of the United Nations has the moral and legal responsibility to uphold and implement the Universal Declaration on Human Rights established by the United Nations, as well as another various international instrument of human rights that have been accepted by the Republic of Indonesia.

[8] Seeing Article 4 of Presidential Decree Number 50 of 1993 concerning the National Commission on Human Rights.

[9] Seeing Chapter VII, Articles 75-99 of Law 39/1999 concerning National Human Rights Commission Regulations that strengthen National Right Commission.

[10] Seeing Article 18 of Law Number 26 of 2000 concerning Human Rights Courts.

examines and cut off gross human rights violations cases.[11] The gross violation in question only covers genocide crimes and crimes against humanity.[12] During the adjudication of the past gross human rights violation, before the Human Rights Legislations was legislated, the human rights court will be examined and decided upon by the *ad-hoc* human rights court from the recommendation from the House of Representatives (*DPR*) based on unusual event with the President's decision. This court is also within the General Courts.[13] In the eyes of history about the resolution of gross human rights violations in the past, an ad hoc human rights court was formed to resolve gross human rights violations cases such as 1984 *Tanjung Priok* and 1999 East Timor.[14]

Therefore, with the enactment and establishment of law instruments that have been described above, the court is expected to be a solution for gross human right violation cases from the past and the future; as to establish the law enforcement process that do not have deadlock, which when a case is locked and or almost certainly cannot be reopened by the law.[15]

The existence of human rights law enforcement on national scale is strengthened on the basis of the universal jurisdiction principle. Therefore, every State has the right to adjudicate and punish international criminals.

[11] Seeing Law Number 39 of 1999 on Human Rights and Law Number 26 of 2000 on Human Rights Courts use the term Serious Human Rights Violations.

[12] Seeing Article Number 7 of Law Number 26 of 2000 concerning Human Rights Courts.

[13] Seeing Article Number 43 of Law Number 26 of 2000 concerning Human Rights Courts.

[14] Seeing Presidential Decree Number 53 of 2001 and Preseidential Decree Number 96 of 2001.

[15] Eddy Hieriej, *Asas Legalitas dan Penemuan Hukum dalam Hukum Pidana*, Erlangga, Jakarta, 2009, Pg. 213.

International crime is a crime against people, categorized by the Rome Statute as the crimes of: genocide, Crimes against humanity, War crimes and the crime of aggression.

On the international scale, the aftermath of the world war has become an important momentum in resolving gross human rights violations. It is proven by the formation of the International Military Tribunal (IMT) or known as the Nuremberg Tribunal which was created to prosecute Nazi war criminals and the International Military Tribunal for the Far East (IMTFE) or known as the Tokyo Tribunal which was created to prosecute Japanese war criminals during World War II.[16] After the formation of the IMT and IMTFE, the United Nations (UN) also became one of the pioneers playing a central role and crucial contribution to the enforcement of gross human rights violation resolution. This UN role is evidenced by the establishment of International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993, International Criminal Tribunal for Rwanda (ICTR) in 1994 and International Criminal Court (ICC) in 1998. Another medium alternatives that was formed by UN role and contribution is the Hybrid Tribunal, such as the Extraordinary Chambers in the Courts of Cambodia.

Rumoh Geudong, alternatively called *Operasi Jaring Merah,* was a tragic gross human rights violation from the past which began when Aceh Province was appointed as an area for military operations (*Daerah Operasi Militer/DOM*) in 1990-1998. DOM is a counter-insurgency movement,

[16] Mauna, *Hukum Internasional* (*Pengertian Peranan dan Fungsi dalam Era Dinamika Global*), PT Alumni, Bandung, 2013, Pg. 290.

which was launched in the early 1990s to combat separatist movements by the Free Aceh Movement/*Gerakan Aceh Merdeka* (GAM) in Aceh. During this time, Aceh was declared as *DOM*, where the Indonesian national armed forces ran operations that were allegedly violating human rights on a systematic and large scale against GAM troops and innocent people. This operation marked the grossest war in Indonesia involving arbitrary executions, kidnappings, torture, forced disappearance, and village burnings.[17]

Amnesty International said the launch of the military operation was *shock therapy* for GAM.[18] This operation ended in 1998 during BJ Habibie's presidential term after the fall of President Soeharto and the end of the New Order era.

This allegation ought to be the key to take down the lies over the human rights violations hidden in that bloody tragedy. The initial element that was categorized as gross violations in terms of crimes against humanity has met a common ground by National Human Rights Commission such as:[19] rape or sexual assault, torture, murder, forced disappearance and arbitrary expropriation of liberty or physical freedom.[20] From the investigation results above that were obtained through the concatenation of investigation on the events, witness testimony and other documents

[17] Rizal Sukma, *Security Operation in Aceh: Goals, Consequences and Lessons*, East West Center, Whasington, 2004, Pg. 34.

[18] Seeing Amnesty International, *Indonesia Shock Theraphy*: *Restoring Order in Aceh*, 1993.

[19] Seeing Adi Briantika, *Komnas HAM: Kasus Rumoh Geudong Masuk Pelanggaran HAM Berat*, Online Media, Tirto ID, Quoted on December 22, 2018.

[20] Seeing Article 7 letter (b) Jo. Article Number 9 of Law Number 26 of 2000 concerning Human Rights Courts.

reinforcing. This meeting point is expected to be used as an introduction/ initial fact that gross human rights violation incidents at the *Rumoh Geudong* are real.

The national Human Rights Commission (*Komisi Nasional Hak Asasi Manusia/Komnas HAM*) as law enforcing instrument with the power of legislation certainly does not stop at the investigation stage; the result from the examination should be forwarded in the form of recommendations by National Human Rights Commission to the Attorney General of Indonesia so the legal process can be upgraded to the investigation level. This should be done more cautiously by National Human Rights Commission in order for the Attorney General Office to process the results of an investigation by National Human Rights Commission so the Attorney General will process the report of the examination results.[21] Along with this, the Chairman of National Human Rights Commission Ahmad Taufan Damanik, said that the duties and obligations of National Human Rights Commission are to examine various. Furthermore, it is the duty of the Attorney General to investigate. If there is no investigation, the case will be stagnant.[22] Head of the Attorney General's Office for Legal Information Mukri, said that there is a stagnancy in the investigation process that led to the return of the National Human Rights Commission examination results by the Attorney General because there are formal requirements and material evidence that had not

[21] Seeing Yoga Sukmana, *Pelanggaran HAM Rumoh Geudong, Tak Ada Alasan Kejaksaan Agung untuk Diam,* Online Media, Kompas, December 22, 2018.

[22] Seeing *Tak Kunjung Beres Karena Berkas Perkara Bolak-balik*, Print Media, Jawa Pos, Quoted on 10 January, 2019.

been fulfilled by National Human Rights Commission.[23] From the description above it could concluded that National Human Rights Commission and the Attorney General is like teams in football match. They kick each other in the opponent's area.[24]

If examined closely, the “throwing ball” analogy exists because there is no clarity in the legislation that governing the investigation of human rights cases. As stated in *Kitab Hukum Undang-Undang Hukum Acara Pidana (KUHAP)*, the investigation files from the police that have been submitted to the prosecutor's office can be returned to the police with several requirements that must be filled. And so on, the disadvantage of this mechanism is that there is no limit regarding how many times a file can be returned or the requirement of the completeness of the file. This disadvantage causes the potential of "certain interests" or "certain deals" that stain the sense of justice of the community. Therefore, the formulation and refinement of *legal substance* become an important thing to do.

Based on the description above, the author intends to conduct research under the title **The Future Settlement of Past Human Rights Violation (Study *Rumoh Geudong* Case)**. The author imports on about the research in the form of a report to filled the requirements for getting a law bachelor degree.

[23] *Ibid.*
[24] *Ibid.*

B. Problem Formulation

1. Could the *Rumoh Geudong* case be allegedly a gross violation of human rights ?
2. What are the chances for setting *Rumoh Geudong* case through judicial mechanism ?

C. Research Objectives

1. To find out whether the *Rumoh Geudong* case was a gross violation of human rights.
2. To identify whether the *Rumoh Geudong* case can be completed through judicial mechanisms.

D. Literature Review

As an effort to dissect the future of resolution of gross human rights violation from the past (Study *Rumoh Geudong* Case) the writer uses several theories as analysis knives, which are:

1. Gross Human Rights Violations

The enactment of Law number 39 of 1999 concerning Human Rights and Law number 26 of 2000 concerning the Human Rights Court[25] as basic law of human rights in Indonesia. To find out if an event is a gross human rights violation, it is necessary to understand in

[25] Sefriani, *Pengadilan HAM dan Yurisdiksi Pengadilan Internasional*, Law Journal : Ius Quia Iustum, 2001, Pg. 125-137.

advance the definition of it. Based on its nature, violations can be divided into two categorize namely:

a. Human Rights Violations.

b. Gross Human Rights Violations.

The Rome Statute defines gross violations of human rights as the most serious crimes of international concern. This statute with respect to the following crimes:[26]

a. Genocide

b. Crimes against humanity

c. War crime

d. Aggression.

Gross human rights violations, according Indonesian Law, can be classified into 2 namely:[27]

a. Genocide.

b. Crimes against humanity.

As for the explanation of two (2) types of gross human rights violations as follows, the crime of Genocide is any act committed with intent to destroy or destroy all or part of a group of nations, races, groups and religions by:

a. Kill any each group member.

b. Resulting in severe physical and mental suffering for group members.

[26] Seeing Article 5 Rome Statute 1998.
[27] Seeing Article 1 (2) Law number 26 of 2000 concerning Human Rights Court.

c. Creating group living conditions that can result in physical destruction in whole or in part.

d. Forcibly transferring children from one group to another.

While Crimes, Against Humanity are an action carried out as part of a widespread or systematic attack which he knows the perpetrators attack is directed directly against the civilian population, in the form of:

a. Murder;

b. Extermination;

c. Slavery;

d. Deportation or forcible transfer of residents;

e. Imprisonment or heavy seizure of physical freedom by violating the basic rules of international law;

f. Torture;

g. Rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization, or other forms of sexual violence that are quite severe;

h. Persecution of an identifiable group or collectivity on the basis of politics, race, national, ethnicity, culture, religion, gender, or on other grounds universally recognized as not permitted under international law, which relates to every act referred to in this paragraph or any crime that falls within the jurisdiction of the court;

i. Forced disappearance;

j. The crime of apartheid.

Law number 26 of 2000 concerning human rights courts in article 9 refers to the same definition of crimes against humanity as the contents of article 7 of the Rome Statute, except for points (k) or (11)[28] which are not included in article 9. Regarding widespread or systematic attacks themselves are not explained by law number 26 of 2000 concerning human rights courts. The idea of widespread or systematic attack developed in court practice as stated in the judge's decision.[29] Whereas in its classification, to prove that the violation is a gross human rights violation based on the nature of the crime, namely **systematic**[30] and **widespread**[31] to the civilian populations.[32]

2. National Judicial Mechanism

a. Human Rights Court (*mekanisme penyelesaian pelanggaran HAM berat setelah di sahkannya UU nomor 26 tahun 2000 tentang pengadilan HAM*) **Permanet**

Based on the provisions of Law number 26 of 2000, the Human Rights Court regulates jurisprudence in cases of gross

[28] Article 7 point (k) Rome Statute *"other in human acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health"*.

[29] In article 7 of the Rome Statute, Crimes against humanity are: "For the purpose of this Statute," crimes against humanity "means any of the following acts when committed as part of a widespread or systemic attact directed agaist any civilian population, with knowledge of the attack

[30] Systematically constructed as a policy or a series of planned actions.

[31] Widespread refers to the effects of actions that cause a lot of casualties and extensive damage.

[32] Suparman Marzuki, *Pengadilan HAM di Indonesia Melanggenkan Impunity*, Erlangga, Jakarta, 2012, Pg. 42.

human rights violations. The procedure for establishing this court differentiation from the procedure for establishing an ad hoc human rights court. In handling cases of gross human rights violations after the enactment of this law without going through recommendations and presidential decrees as in the formation of an ad hoc human rights court.[33]

The procedure for establishing a human rights court is based on the allegation that there have been cases of gross human rights violations. The alleged human rights violation was later investigated (*penyelidikan*) by National Human Rights Commission (*Komnas HAM*), by forming a Commission on the Investigation of Human Rights Violations (*KPP HAM*). The results of the investigation (*penyelidikan*), if there is evidence that there are allegations of gross human rights violations will be delegated to the Attorney General's Office (*Kejaksaan Agung*) to proceed to the investigation (*penyidikan*) stage, at this stage if the results of the investigation show that there are gross human rights violations then proceed to the prosecution (*penuntutan*) stage which is also the authority of the Attorney General.[34]

Based on the evidence and prosecution embodied in the indictment, a human rights court is held based on the court's relative competence. The place of this court is in the district

[33] *Ibid.,* Pg. 104.

[34] Rhona Smit, *Hukum dan Hak Asasi Manusia*, PUSHAM UII, Yogyakarta, 2008, Pg. 309-310.

court where the *locus* and *tempos delictie* have committed gross human rights violations.

b. Ad Hoc Human Rights Court

An ad hoc human rights court is a court that was formed specifically to examine and adjudicate cases of gross human rights violations committed before Law Number 26 of 2000, this type of court is in contrast to the permanent Human Rights Court which can examine and adjudicate cases of gross human rights violations that occurred after the enactment of Law Number 26 of 2000.

As for the provisions concerning the establishment of an ad hoc Human Rights Court, namely:[35]

1) Gross human rights violations that occurred before the enactment of this Law, were examined and decided by the ad hoc Human Rights Court.
2) The ad hoc Human Rights Court as referred to in paragraph (1) shall be established at the suggestion of the House of Representatives (*DPR*) Republic of Indonesia based on certain events by Presidential Decree.
3) The ad hoc Human Rights Court as referred to in paragraph (1) is located in the General Court environment.

[35] Seeing Article 43 of Law Number 26 of 2000 concerning Human Rights Court.

As for the provisions regarding the existence of several stages for the establishment of an ad hoc human rights court for cases of gross human rights violations that are different from ordinary human rights courts. Matters which are a requirement for an ad hoc human rights court are:[36]

1) There are allegations of gross human rights violations on the results of investigations (*penyelidikan*) of past cases by the *Komnas HAM*.
2) The results of investigations (*penidikan*) from the Attorney General's Office.
3) The DPR's recommendation to the government to propose an ad hoc human rights court with *tempos* and certain *locus delicti*.
4) A presidential decree for the establishment of an ad hoc human rights court.

3. International Judicial Mechanisms

a. The ICC as a complementary institution

The International Criminal Court has the authority to handle gross human rights violation cases, but if a case has not been or is still being carried out at the national level, the International Criminal Court is not authorized to handle it. If a country is unable to handle the gross human rights violation case,

[36] Zainal Abidin, *Pengadilan Hak Asasi Manusia di Indonesia*, ELSAM, Jakarta, Pg. 9.

the new International Criminal Court will take over the case and adjudicate it according to the rules in the 1998 Rome Statute.[37]

In the Preamble of the Rome Statute and its Article 1, it is stated that the ICC is a complement to criminal jurisdiction at the national level. It means that the ICC shall not enforce its jurisdiction if the judicial process at the national level hasn't started yet or is being carried out. This is also to ward off fears that a country's sovereignty over the territory and its own population will be violated by the interference of the ICC.[38]

E. Originality Of Research

The writer had searched the various thesis archives that the writer can reach, and found no thesis with a title and discussion similar to this thesis.

F. Method Of Research

1. Type of Research

This type of research is normative legal research. Normative legal research is legal research that examines written law from aspects of the theory and principles of law to find solutions to resolution through the courts in the *Rumoh Geudong* case.

[37] Suparman Marzuki, *Pengadilan HAM…, Op. Cit.,* Pg. 64.
[38] *Ibid.*

2. Object of Research

The object of this research is the Future Settlement of Past Human Rights Violation: Study *Rumoh Geudong* Case.

3. Source of Data

a. Primary Legal Materials:

1) Law number 26 of 2000 concerning human rights court;
2) Presidential decree number 50 of 1993 concerning national human rights commission;
3) Rome statute concerning international criminal court;
4) International criminal tribunal for the former Yugoslavia statute;
5) International criminal tribunal for the former Rwanda statute.

b. Secondary Legal Materials

Secondary legal materials used are the literature, papers and writings of the work of the legal community or related agencies relating to this research.

c. Tertiary Legal Material

The tertiary legal materials used in this study are the Large Indonesian Dictionary, the Law Dictionary, and the mass media.

4. Method of Data Collection

Methods of data collection methods used in this study are as follows:

a. Literature Review

This method is carried out by carrying out a series of activities such as reading, studying, taking notes, and making literature reviews that are related to the problem that will be examined.

b. Study documents

Study documents by reviewing the laws and regulations related to research.

5. Research Approach

This research uses a legal/statute approach. The legal/statute approach is applied because it will examine the laws and regulations related to the object of research. In cases of gross human rights violations the case of *Rumoh Geudong* does not yet have a court decision because there is a law enforcement process that has stalled at the relevant institutions.

6. Legal Materials Analysis

This research used qualitative analysis methods. The data obtained in this study were then analyzed qualitatively. Qualitative analysis is done by describing and describing data and facts generated from field research by interpreting the data and describing it in sentence form to answer the

problems in the following chapters. The data is then analyzed by the inductive method, which is a way of thinking based on specific facts followed by drawing general conclusions.

G. Structure Of Writing

This research will be complied systematically into 4 (four) chapters with the following details:

CHAPTER I is the introduction which contains the background, formulation of the problem, research objectives, literature review, research methods and systematic writing.

CHAPTER II will describes the case of *Rumoh Geudong* and describes the theoretical basis of what is in the literature review in Chapter I.

CHAPTER III will contain analysis related to this research which aims to answer the problem formulation in Chapter I.

CHAPTER IV is the conclusion, consisting of conclusions and suggestions. This chapter will present conclusions from the results of the study as well as recommendations based on the results of research that are beneficial to the development of the nation's civilization especially the development of human rights law going forward.

CHAPTER II

GENERAL REVIEW ABOUT GROSS HUMAN RIGHTS VIOLATIONS AND JUDICIAL OF GROSS HUMAN RIGHTS VIOLATIONS MECHANISM

A. Gross Human Rights Violations

1. Definition of Gross Human Rights Violations

The relatively situation after safe the end of world war can be said to have not been felt by the international community. Nearly half a century after the end of the World War, the international community was again shocked by the practice of ethnic cleansing that occurred in Europe, namely in the former Yugoslavia, the act of ethnic cleansing seriously threatened international peace and security.[39] The tragic events that occurred in the country killed thousands of people including more than two hundred United Nations (UN) personnel and members of the UN peace keeping force, and resulted in the displacement of more than 2.2 million people. A year later, inter-ethnic conflict in Rwanda again shocked the world, in a short period of time killing around 800,000 people and resulting in displacement of around 2 million people.[40] Even today there are still terrible crimes that occur in various parts of the world.

After the end of World War II had an extraordinary impact before the international community. International human rights law is

[39] Roy Gutman and David Rief, *Crime of war; what public should know*, W.W Norton Company, New York, 1999, Pg. 53.

[40] *Ibid.*

experiencing rapid development in the hope that it could become a reference for various actors in responding to human rights violations.

Gross violations of human rights in international law related to several provisions that developed after the World War II, which can be seen in the Nuremberg Trials covering Genocide, War crimes and Crimes against humanity, regulated in the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

Cecilia Meidina Quiroga,[41] explained the term of gross human rights violations as an offense that leads to violations, as a tool for the achievement of government policies, which are carried out in certain qualities in a way to create a situation of the right to life, the right to personal integrity or the right to personal freedom from a resident of a State which is continually violated or threatened. Whereas according to Peter Baehr[42], gross violations of human rights will involve issues including the prohibiton of slavery, the right to life, torture and cruel, inhuman or degrading treatment or punishment, genocide, dissappearences and ethnic cleansing.

Various forms of gross violations of human rights are not sufficiently explained in one legal definition. Serious human rights crimes are also mentioned in the Nuremberg International Military (IMT)

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[41] Andrey Sujatmoko, *Tanggungjawab Negara atas Pelanggaran Berat HAM*, Gramedia, Indonesia, 2005, Pg. 71.

[42] Peter R. Baehr, *Human Rights Universality in Practice*, St. Martins Press, New York, 1999, Pg. 20.

Court Charter, crimes which are categorized as gross human rights violations as follows:[43]

a. Crimes against peace;

b. War crimes;

c. Crime against humanity.

The international Criminal Court (ICC) established under the 1998 Rome Statute has jurisdiction over gross violations of human rights, follows:[44]

a. Genocide;

b. Crimes against humanity;

c. War crimes;

d. Crime of aggression.

Serious crimes against human rights include crimes within the ICC jurisdiction, states the jurisdiction of the court shall be limited to the most serious crimes of concern to the international community as awhole.[45]

From various perspectives of gross human rights violations as described in above. Gross human rights violations, it can be concluded that it refers to 3 things that are cumulative, namely:[46]

a. Referring to the seriousness of the action (*perbuatan*) or action (*tindakan*), both in the sense of the type of action (*perbuatan*), method (*cara*) and method of action (*cara tindakan*);

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[43] Seeing Article 6 Nuremburg International Military Court Charter.
[44] Seeing Article 5 Roma Statue 1998.
[45] *Ibid.*
[46] Suparman Marzuki*, Pengadilan HAM ....., Op. Cit*., Pg. 43.

b. The consequences (*akibat yang ditimbulkan*), and

c. On the number of victims (*pada jumlah korban*).

The differentiation of rights in the *derogable*[47] and *non-derogable*[48] categories is an example of differentiation based on the seriousness of one crimes of humanity compared to other crimes of humanity. Peter Baehr excludes gross human rights violations, the prohibition of slavery, the right to life, torture and cruel, inhuman or degrading treatment or punishment, genocide, disappearances and ethnic cleansing.[49]

As for the other qualifications to declare a violation of human rights categorized as gross/severe (*berat*) or not, it is also based on the nature of the crime, namely:[50]

a. Systematic: constructed as a policy or a series of planned actions.

b. Widespread: This refers to the consequences of actions which have caused large numbers of victims and extensive damage.

In Indonesian national law, based on Law Number. 26 of 2000 concerning human rights court does not explain the definition of gross human rights violations in detail, Article 1 Number 2 of Law 26 of 2000 only states, that gross human rights violations are referred to in this law.

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[47] The term derogable rights is defined as rights that can still be suspended or limited (reduced) by the state under certain conditions.

[48] Non-derogable rights are human rights that cannot be reduced under any circumstances. The rights included in non-derogable rights are regulated in Article 28I paragraph (1) of the 1945 Constitution which includes: *"Hak untuk hidup, hak untuk tidak disiksa, hak kemerdekaan pikiran dan hati nurani, hak beragama, hak untuk tidak diperbudak, hak untuk diakui sebagai pribadi di hadapan hukum, dan hak untuk tidak dituntut atas dasar hukum yang berlaku surut adalah hak asasi manusia yang tidak dapat dikurangi dalam keadaan apapun."*.

[49] Peter R. Baehr, *Human Rights Universality ……, Op. Cit.,* Pg. 20.

[50] Suparman Marzuki, *Pengadilan HAM ……, Op. Cit.*, Pg. 42.

Meanwhile article 7 of Law 26 of 2000 only contains categories of crimes that include gross human rights violations, namely:

a. Crimes of Genocide.

b. Crimes Against Humanity.

The elucidation of article by article governing the two types of gross human rights violations also only mentions the definition of genocide crimes and crimes against humanity in accordance with what is contained in the Rome Statute "crimes under international law", that gross human rights violations contain an element of intent and attitude to allow an act which should be prevented, the systematic element that has widespread consequences and extreme fear, and the element of attack on the civilian population.

As explained in Article 7 paragraph (1) of the Rome Statute, one important element in the crime of immorality is the existence of widespread or systematic attacks. Regarding the elements of widespread attacks, ICTY in the Blaskic[51] case has concluded that widespread attacks can be seen from the number of victims and the massive scale of the attacks, which has a serious effect. Still in the same case, ICTY states that the systematic element is reflected by a certain pattern or method which is organized thoroughly and uses a fixed pattern.[52] In the Kunarac case, the ICTY stated that attacks on civilian populations that did not participate in the war were sufficient to fulfill the provisions related to

[51] Seeing https://www.hukumonline.com/klinik/detail/ulasan/lt58eb05ff5601a/tindakan-tindakan-yang-termasuk-kejahatan-terhadap-kemanusiaan/, Accessed on October 9, 2019.

[52] Seeing Article 7 paragraph (1) of Rome Statute.

'attacks' as explained in the Rome Statute. No attack must be carried out by members of the military.[53] Regarding population, in the Kunarac case it is stated that the concept of 'population' is having the same distinctive features that target them. According to Mettraux, a group of people who are gathered without having the same distinctive features, such as spectators at a soccer match, do not fulfill the population element of the Rome Statute.[54]

2. National Law and International Law Approaches Concerning on Gross Human Rights Violations

Gross violations of human rights as explicitly stated in the 1949 Geneva Conventions and their protocols, are not known in Law Number 39 of 1999 concerning Human Rights. In the 1998 Rome Statute there is an equivalent but with another term, namely *"the most serious crimes of concern to the International community as a whole"*. In the Rome Statute 1998 this definition is emphasized including Genocide, Crimes against humanity, War crimes, and Aggression which are the jurisdiction of the International Criminal Court. Law Number 26 of 2000 concerning how the Human Rights Court regulates gross human rights violations which include genocide and crimes against humanity.[55]

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[53] *Ibid.*
[54] *Ibid.*
[55] Seeing ELSAM, *Pengadilan HAM di Indonesia*, https://referensi.elsam.or.id/2014/09/pengadilan-ham-di-indonesia/, Accessed on August 26, 2019.

a. Genocide

Genocide as an act committed with the intent to destroy, in whole apart, a national, ethnic, racial, or religious group.[56] The definition of Genocide Crime itself is still being debated even though human history has witnessed many genocidal crimes, the concept of the crime itself is still relatively new and has only been developed as a result of Nazi atrocities in World War II.

Starting with a proposal from Raphael Lemkin submitted at the fifth International Unification of Criminal Law Conference in 1933 the idea of criminalizing genocide began to be formulated internationally. At the conference in Madrid, Spain, he advocated that the destruction of racial, religious or social collectivity was declared an international crime, because of barbaric (*barbatary*) and the amount of destruction done (*vandalism*). However, this proposal was not accepted.[57]

Eleven years later Lemkin, whose family members were also victims of Nazi cruelty, published a book and introduced the term Genocide. In its definition Genocide is a planned action aimed at destroying the basic existence of a nation or group of entities, directed at individuals who are members of the group concerned.[58]

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[56] Seeing Definition of Genocide, Black's Law Dictionary.

[57] Steven R. Ratner and Jason S. Abrams, *Melampaui Warisan Nuremberg: Pertenaggungjawban untuk Kejahatan terhadap Hak Asasi Manusia dalam Hukum Internasional*, ELSAM, Jakarta, Pg. 40.

[58] ELSAM, *Pengadilan HAM ……., Loc Cit,* Qouted on August 26, 2019.

On October 8, 1945, the concept of genocide was first legally accepted in a formal document. During the trial a number of defendants were charged with genocide. One of them was accused of intentionally and systematically committing Genocide, namely,

> *"theex termination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups".*[59]

This idea became stronger in the international system on December 11, 1946 where the UN General Assembly unanimously issued a resolution saying that,

> *"Genocide is a denial of the existence of a whole group of people ... that destabilizes humanity".* [60]

It also unanimously affirmed the *'status'* of Genocide as a crime in international law. Based on the resolution of the UN Economic and Social Council an ad hoc committee on Genocide was formed which was tasked with formulating the draft Genocide convention. In just 8 months the Convention on the Prevention and Punishment of Genocide Crimes (Genocide Convention) is accepted by the Assembly to be signed or ratified. And precisely, the day

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[59] Seeing Article 6 letter (c) of the Nuremberg Charter.

[60] Seeing, https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1418&context=facpubs, the Crime of Political Genocide: Repairing the Genocide Convention Blind Spot, *Law journal*, accessed on October 8, 2019.

before the General Declaration of Human Rights this convention was opened for ratification which on January 12, 1951 came into force.[61]

The Convention for the Prevention and Punishment of the Crime of Genocide states that genocide is intentional acts to destroy all or part of national, ethnic, racial, or religious groups such as:[62]

1) Kill members of the group;
2) Causing serious physical and mental damage to members of the group;
3) Deliberately inflicts on the group the living conditions that are thought to bring about the physical destruction of all or part of the group;
4) Drop the actions that aim to prevent births in the group;
5) Forcibly transferring children from one group to another.

Article 6 of Rome Statute, The International Criminal Tribunal for Rwanda Statute in article 2, and article 8 of Law Number. 26 of 2000 concerning the Human Rights Court is also in line with the Convention for the Prevention and Punishment of the Crime of Genocide on the definition of genocide. The provisions of these instruments do not require the annihilation of groups that are referred to as a whole to be called a crime of genocide. Indonesia itself in Law Number. 26 of 2000 concerning the Human Rights Court

[61] Seeing Genocide Convention, https://www.un.org/en/genocideprevention/genocide-convention.shtml, Accessed on October 8, 2019.
[62] Seeing Article 2 Convention for Prevention and Punishment of the Crime of Genocide.

mentioned elements of genocide in Article 8 which are the same indicators as Article 6 of the Rome Statute.

b. Crimes Against Humanity

According to Jean Graven, crimes against humanity are as old as humanity itself. Countries use concepts about humanity to justify intervening events to help minority groups who are persecuted by their own governments in the period before the United Nations charter was arranged. This concept is also related to the way the State fought, which culminated in the inclusion of the *Jus in bello*[63] principle in the first important modern treaties, the Hague conventions on the laws and customs of war.[64]

The concept of a crime against humanity begins with the inclusion of humanitarian principles in the Martin Clause at the opening of Hague Convention in 1899 and then the Fourth Hague Convention in 1907 which contains:

> *"Until a more complete code of laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection an the rule of the principles of law of nations, as*

[63] *Jus in bello* is a set of laws that will take effect once the war starts. The aim is to regulate how the war is carried out, without any suspicion of the reasons for how or why the war began.

[64] Steven R. Ratner and Jason S. Abrams, *Melampaui Warisan Nuremberg…*, *Op Cit,* Pg. 71-72.

they result from the usages among civilized peoples, from the laws of humanity, and the dictates of the public conscience".[65]

In the phrase "laws of humanity", humanitarian law is understood as a source of principles from various laws of nations and does not indicate other categories of norms that are different from the norms that can be applied to the object of this agreement, it only functions as a rule general to cover cases not explicitly covered by those rules which rely on the Hague Convention.[66]

According to the Nuremberg Charter, Crimes against humanity are: Murder, extermination, slavery, deportation, and other inhumane acts committed against the civilian population, before or during the war, or persecutions on the basis of politics, taste or religion as the implementation of or relating to any crime within the jurisdiction the court violates whether or not the law of the local State in which it is conducted.[67]

In the subsequent provisions relating to the definition of crimes against humanity, such as the Statute of the ICTY still guided by the Nuremberg Charter, only then in the Statute of the ICTR the addition

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[65] Erikson Hasioholan Gultom, *Kompetensi Mahkamah Internasional dan Peradilan Kejahatan terhdap Kemanusiaan di Timor timur: Tinjauan Hukum Internasional Terhadap Kompetensi Mahkamah Pidana Internasional dalam Mengadili Individu-Individu yang Bertanggungjawab atas terjadinya kejahatan terhadap kemanusiaan dan relevansinya dengan peradilan kasus timor timur pada referendum 1999*, Tatanusa, Jakarta, 2006, Pg. 39.

[66] *Ibid.*

[67] Seeing Article 6 letter (c) Nuremberg Charter, Explantion: The formulation of this article is the first precedent in positive international criminal law where the special term "crimes against humanity" is introduced and defined, but, as has been said in article 2, this concept is not new, nor is the idea of protecting civilians in wartime. And the most important thing to know, this Charter appeared for the first time and was used as an example (model) and a legal basis for further developments.

of the substance that, the humanitarian crimes in question it must be carried out as part of a widespread and systematic attack on the civilian population, the article also includes a requirement that all such acts must have been carried out on the basis of nationality, politics, ethnicity, racialism, or religion.[68] In addition, it was only at the ICTR that the requirements regarding the existence of the link between these crimes and armed conflict were abolished.

The next era is the formation of the Rome Statute. The Rome Statute states that, crimes against humanity are crimes committed as part of a widespread and systematic attack aimed at a civilian group, knowing of the attack.[69] As for those included in the scope of crimes against humanity the Rome Statute:[70]

1) Murder;
2) Extermination;
3) Slavery;
4) Deportation or forcible transfer of residents;
5) Imprisonment or heavy seizure of physical freedom by violating the basic rules of international law;
6) Torture;
7) Rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization, or other forms of sexual violence that are quite severe;

[68] Seeing Article 3 Nuremberg Charter.
[69] Seeing Article 7 Rome Statute 1998.
[70] *Ibid.*

8) Persecution of an identifiable group or collectivity on the basis of politics, race, national, ethnicity, culture, religion, gender, or on other grounds universally recognized as not permitted under international law, which relates to every act referred to in this paragraph or any crime that falls within the jurisdiction of the court;
9) Forced disappearance;
10) The crime of apartheid; and,
11) Other inhumane acts of the same nature that intentionally cause severe suffering, or serious injury to body or mental or physical health.

Whereas Law Number 26 of 2000 concerning the Human Rights Court in article 9 refers to the same definition of crimes against humanity as the contents of article 7 of the Rome Statute, except for point *(k)* which is not included in article 9. Regarding the widespread or systematic attack itself is not explained by the Rome Statute and Law number 26 of 2000 concerning the Human Rights Court. The notion of widespread or systematic attack developed in the practice of the courts as stated in the Judges decisions. An Ad Hoc Human Rights Court Judge in Central Jakarta explained the meaning of the widespread attack or systematic of crime against humanity is also found in several cases, as follows:

1) The case of defendant Abilio Jose Osorio. S, argued as follows:[71]

What is meant by an attack is that the attack does not have to always be a military attack, as interpreted by the International Humanitarian Law in the sense that the attack does not need to include military force or the use of weapons. In other words if there is a murder as a result of a deployment force or operation carried out against civilians. This kind of clash can go into attack terminology; that what is meant by an attack on a civilian population does not mean that an attack must be directed at the population as a whole, but rather on a certain group of civilians who have certain political beliefs.

While, the understanding the widespread and systematic as follows: What is meant by "widespread" because on events that are alleged to have occurred large-scale, repetitive, massive, frequent, large scale killings carried out collectively with very serious consequences in the form of the number of fatalities big; what is meant by systematic is the formation of an idea or principle based on research or planned observation with general procedures. In relation to gross violations of human rights, a systematic definition can mean activities that are patterned equally and consistently. “Pattern” here means the structure or

[71] Seeing Laporan Pemantau Kelompok Kerja Pemantau Pengadilan Hak Asasi Manusia ELSAM – KONTRAS – PBHI concerning Court Decision Number 01 / PID.HAM / AD.HOC / 2002 / PH.JKT.PST. Pg 6.

design that are interconnected. While consistent here means an idea that is marked by not changing the position or interconnected, can also be certain characters that have been formed and shown repeatedly. The systematic understanding is as follows:[72]

a) The existence of political objectives, plans for attack, an ideology, in the broad sense of destroying or weakening a community;
b) Committing a large-scale criminal act against a group of civilians, or the repeated and perpetual inhumane actions which are interconnected with one another;
c) Significant preparation and use of public or private property or facilities;
d) High level political implications or military authority in interpreting or realizing a methodological plan.

2) The case of defendant *letnan kolonel* Infantri Soedjarwo, argued as follows:[73]

What is meant by a widespread attack does not necessarily have to be a military attack as interpreted by International Humanitarian Law so that the understanding of the attack does not need to include military or armed forces, in other words if

[72] *Ibid.*
[73] *Ibid.*

there is a murder as a result of a mobilization of power or operations carried out against the civilian population. This kind of clash situation is included in the terminology of the attack;[74]

a) That what is meant by an attack on a "civilian population" does not mean that an attack must be directed at the population as a whole, but rather at a certain group of civilians who have faith certain politics;
b) That one of the Judges of the ICTY, Jean Jaques Heintz stated that what is meant by "widespread attacks" is a mass attack;
c) Large-scale actions, carried out jointly with genuine intent and directed at large numbers of victims, while according to Arne Willy Dahl, states that "widespread attacks" should be directed at large numbers of victims or widespread attack is one that is directed against a multiplicity of victims.

3) The case of defendant Drs. Timbul Silaen, argued as follow:[75]

A panel of Judges in line with referring to the opinion of Arne Willy Dahl. Widespread attack is one that is directed against a multiplicity of victims. Furthermore, according to the

[74] *Ibid.*
[75] *Ibid.*

Panel of Judges, there are also those who argue that the meaning of widespread attacks is referring to the number of victims (massive), the scale of crime and the distribution of places (geographical), and in crimes against humanity, although the acts are carried out individually but there are as a result of collective action.

The Panel of Judges stated that the definition of a systematic attack is an attack carried out in accordance with policies that have been prepared in advance or planned and according to Arne Willy Dahl, a systematic attack means carried out pursuant to a preconceive policy or plan.[76]

B. Judicial of Gross Human Rights Violations Mechanism

1. National Judicial Mechanism

In accordance with the nature of international law that is not supranational, national authorities will continue to take precedence in resolving a case of human rights violations. This is an encouragement to carry out good initiatives from the State against gross human rights violations themselves.

a. Ad Hoc Human Rights Court

[76] Abdul Hakim G Nusantara, *Penerapan Hukum Internasional dalam Kasus Pelanggaran Hak Asasi Manusia Berat di Indonesia*, https://www.neliti.com/id/publications/66229/penerapan-hukum-internasional-dalam-kasus-pelanggaran-hak-asasi-manusia-berat-di, Pg, 9-12, accessed on October 8, 2019.

At the national level, the settlement of cases of gross human rights violations is through an Ad Hoc Human Rights court which is regulated in Law Number 26 of 2000 concerning the Human Rights Court. The Human Rights Court recognizes the principle of retroactivity, so as to handle cases of human rights violations that occurred before the formation of Law Number 26 of 2000 concerning the Ad Hoc Human Rights Court for the fulfillment of its legal channels through an ad hoc human rights court.

According to the provisions of article 43 paragraph 1 of law number 26 of 2000 concerning the Human Rights Court, gross violations of human rights that occurred before the enactment of the Act can be resolved through an Ad hoc Human Rights Court established by Presidential Decree on the proposal of the House of Representatives.

Regarding the resolution of past human rights violations, Jose Zalaquett argues, that the state basically has a discretion to determine the substance of policies to deal with past human rights violations. But in all cases the substance of the policy must meet certain conditions of legitimacy as follows:[77]

1) Truth must be known or revealed in full, and exposed and announced to the public;

[77] *Ibid.,* Pg 14-15.

2) The human rights policy must represent the will of the people, for example the national policy must obtain people's approval through a referendum;
3) The human rights policy does not violate international human rights law. Which means on the one hand it is the duty of every country to act in accordance with international law. If the state takes steps to provide forgiveness for human rights violators, the policy must comply with the limits set by international law. On the other hand, if the human rights policy leads to punishment, international standards regarding fair trials, the treatment of suspects and punishment must be respected; and,
4) The human rights policy contains goals to repair the losses suffered by victims and prevent the recurrence of human rights violations in the future.

Talking about the truth is talking about justice, so if the truth is set aside, justice will be the one who will be injured because it will benefit one party. In realizing truth and justice, Indonesia as a rule of law must surely start through legal rules which are then not annulled by the political interests of power but must involve the interests of the people. and in the establishment of legal rules related to law enforcement in cases of past gross human rights violations, Indonesia must also review pre-existing legal rules, namely

international law regarding gross human rights violations regulated in the international criminal court as a reference for the formation of rules the law deals with gross human rights violations so that upholding human rights in Indonesia uprightly. And equally important is the focus on reparating the losses suffered by victims and preventing the recurrence of human rights violations in the future.

2. International Judiciary

Everyone has the right to use all national legal remedies and international forums for all human rights violations[78] guaranteed by Indonesian law and international human rights law that has been accepted by the Republic of Indonesia.

In addition, State authority is not absolute but limited by international law. International law no longer uses and accepts the notion that human rights violations committed by the State against its own people are solely an internal problem. Once human rights have become an international concern, States can no longer claim that human rights are an issue within their domestic jurisdiction.[79] Objectively, human rights must be placed above the interests of the State, meaning that the rights of the State, including its sovereignty, must be positioned subordinate to human rights. Interference with the sovereignty of a State can be justified

[78] Seeing Article 7 Law number 39 of 1999 concerning human rights.

[79] Scott Davidson, *Hak Asasi Manusia, Sejarah, Teori dan Praktek dalam Pergaulan Internasional*, diterjemahkan oleh Pustaka Utama Grafitti, 1994, Pg. 69.

and badly needed when the violence committed by the State has reached a level that is so severe or serious that it disrupts the integrity of peace and world peace in general.[80] Therefore, humanitarian intervention to stop or punish a State that commits crimes against humanity is reasonable.[81] And Principles of Universal Jurisdiction International law through its instruments and through jus cogens also shows that humanitarian intervention from other countries is justified.[82]

a. International Courts

The international court forum which is intended to prosecute individual perpetrators who have committed gross human rights violations of international law whose formation is related to / within the United Nations framework, basically can be divided into: International courts that are permanent, ad hoc, and mixed (hybrid / mixed).[83]

1) International Criminal Court as Permanent Court[84]

The International Criminal Court (ICC)[85] was established through the Rome Statute in 1998. The new statute came into force on July 1, 2002 after being ratified by 60 countries, this

[80] Erikson Hasiolan Gultom, *Kompetensi Mahkamah Internasional…, Op. Cit.*, Pg. 157-158.
[81] *Ibid.*, Pg. 159.
[82] *Ibid.*
[83] Andrey Sujatmoko, Pengadilan Campuran Sebagai Forum Penyelesaian atas Kejahatan Internasional, *Humaniter Law Juornal*, Volume 3 number 5, 2007, Pg. 975.
[84] Seeing Article 3 Pharagraph 1 Rome Statute said ICC is Permanent Court.
[85] Paragraph 10 of the Opening of the Rome Statute states that ICC is a complementary to the national court, Suparman Marzuki also agrees with paragraph 10 of the opening of the satuta rome which confirms that the ICC is a complementary to the national court, which means that the ICC can be used if the national court is unable and or unwilling. ICC also cannot be used if the case is still proceeding at the stage of a national court, but if the national court has stated that it is unable to resolve it, then the ICC can be used as a complementary court.

court has shown great progress in upholding the rule of law (supremacy of law).[86] The purpose of the establishment of the ICC based on the opening of the Rome Statute is to:

a) Break the chain of impunity for individuals responsible for human rights crimes referred to in the Rome Statute;
b) Guarantee lasting respect for the implementation of international justice, and
c) And increase the power to prevent the possibility of occurring or the recurrence of these crimes in the future.

The jurisdiction of the ICC is limited to the most serious crimes of concern to the international community as a whole, namely:[87]

a) Genocide;
b) Crimes against humanity;
c) War crimes, and
d) And crimes of aggression.

Regarding this jurisdiction itself[88], it can use it if it has been given authority to the prosecutor through: the Security Council acting under the authority of the UN Charter[89], the State party of the Rome Statute, or at the initiative of the claimant itself based on information received from certain sources.

[86] Suparman Marzuki, *Pengadilan HAM ……., Op. Cit.,* Erlangga, Jakarat, 2012, Pg. 65.
[87] Article 5 Rome Statute.
[88] Seeing Article 13 Rome Statute.
[89] Seeing Chapter VII of the UN Charter.

2) International Ad Hoc Courts

An ad hoc international court under the United Nations framework that was once established and still exists today is:

a) International Criminal Tribunal for Yugoslavia (ICTY)

This court was formed based on UN Security Council resolution Number 827 May 25, 1993[90] located in The Hague, Netherlands, and has been tasked with prosecuting those responsible for gross violations of international humanitarian law that occurred in the former Yugoslavia in armed conflict in Bosnia since 1991.

As formulated in its statute, ICTY competencies include the mandate to try those responsible for serious violations of international humanitarian law, namely the 1949 Geneva Convention; Customary laws of war, as well as committing genocide crimes; Crime against humanity.[91] In other words, this former Yugoslav court has four missions, namely:

(1) To bring to justice persons allegedly responsible for serious violations of international humanitarian law;

(2) To render justice to the victims;

(3) To deter further crimes;

[90] Suparman Marzuki, *Pengadilan HAM ....., Op. Cit.*, Pg. 77.
[91] *Ibid.*, Pg. 77-78.

(4) To contribute to the restoration of peace by promoting reconciliation in the former Yugoslavia.[92]

Since this court was established, 84 people have been accused of serious violations and 20 of them have been detained.[93] In fact, this court has issued accusations of committing crimes against humanity and violating laws or customs of war such as the indictment of, Slobodan Milosevic,[94] Milan Milutinovic,[95] Nicola Sainovic,[96] Dragoljub Ojdanic,[97] and Vlajko Stojiljkovic.[98] Slobodan Milosevic himself was arrested on 29 July 2001. However, the obstacle faced by this court was the non-cooperation of the Countries around Yugoslavia in surrendering the defendants in their countries, such as Serbia and Herzegovina.[99]

As an international tribunal, the Yugoslavia tribunal was in some ways an amendment to the Nuremberg trials, especially in terms of the rights of the suspects. If the Nuremberg court is called the court of the victors (victor justice), this is not the case with the Yugoslavia court because the public prosecutors and judges at the court are

[92] Seeing http://www.un.org./1cty/glance/index/.htm, Accessed August 31, 2019.
[93] *Ibid.,* Pg. 77.
[94] President of the Federal Republic of Yugoslavia.
[95] President of Serbia.
[96] Deputy Prime Minister of Yugoslavia.
[97] Staff of the Yugoslav Army.
[98] Serbian Interior Minister.
[99] Dr. Boer Mauna, *Op. Cit*, Pg. 264.

all international officials who are not involved in the conflict.[100] In addition, prosecutors and judges investigate and prosecute war crimes committed by people from the two warring parties.[101]

b) International Criminal Tribunal for Rwanda (ICTR)

This court was established through the UN Security Council Resolution Number. 955 on November 8, 1994 and located in Arusha, Tanzania related to a serious violation of humanitarian law in Rwanda. The task of this court was to hold accountable the perpetrators of the mass killings of around 800,000 Rwandans from the Tutsis[102] in the period between 1 January 1994 and 31 December 1994.[103] ICTR itself has jurisdiction including:[104]

(1) Crime of genocide;

(2) Crime against humanity, and

(3) Violation of article 3 of the 1949 Geneva Convention and Additional Protocol II 1977.[105]

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[100] The judges on duty at ICTY represent various legal systems in the world originating from various fields of legal expertise, one of which is Theodor Meron as a judge.

[101] Suparman Marzuki, *Pengadilan HAM ……, Op. Cit*, Pg. 78-79.

[102] Budi Winarno, *Isu-isu Global Kontemporer*, CAPS, Yogyakarta, 2011, Pg. 234.

[103] Arie Siswanto, *International Criminal Law*, ANDI, Yogyakarta, 2015, Pg. 82.

[104] Anis Widyawati, *Hukum Pidana Internasional*, Sinar Grafika, 2014, Pg. 49.

[105] The Geneva Conventions and their Additional Protocols are at the core of international humanitarian law, an international legal body that regulates the behavior of armed conflict and seeks to limit its effects. They specifically protect people who do not take part in hostilities (civilians, health workers and aid workers) and those who no longer participate in hostilities, such as wounded, sick and shipwrecked soldiers and prisoners of war. Their Conventions and Protocols

The ICTR began sentencing in 1998 to Jean-Paul Akayesu, the former mayor of Taba, and also Clement Kayishema along with Obed Ruzindana who had both been accused of racial annihilation. In contrast to ICTY which does not get full support from several neighboring countries, the ICTR has the full support of other African countries and European countries in accelerating the prosecution of this case.[106]

c) Hybrid Tribunal

In addition to national and international mechanisms, another new mechanism for establishing justice in humanitarian crime cases is a hybrid tribunal.[107] This model of court emerged as a critique of national and international tribunals,[108] as demonstrated by the international criminal tribunals for the former Yugoslavia and the international criminal tribunal for Rwanda. In this case the mixed tribunal seeks to combine the legal substance and legal structure between national law and international law.[109]

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call for steps to be taken to prevent or end all violations. They contain strict rules for handling what is known as "grave offenses". Those responsible for serious violations must be sought, tried or extradited, whatever nationality they have

[106] Arie Siswanto, *International ……, Op. Cit,* Pg. 91.

[107] Jawahir Thontowi and Pranoto Iskandar, *Hukum Internasional Kontemporer*, Refika Aditama, Bandung, 2006, Pg. 250.

[108] Suparman Marzuki, *Pengadilan HAM ...., Op. Cit,* Pg. 68.

[109] Dr. Boer Mauna, *Op. Cit,* Pgaes. 12.

This court also tried to answer the ineffectiveness between national courts and international courts. As is well known, the main problem of national courts is lack of credibility and incompetence, while international courts have limitations in terms of authority and mandate.[110] Until now, there have been several hybrid tribunal established, for example:

(1) Sierra Leone

The special Court for Sierra Leone (SCSL) court was formed in January 2002 on the basis of an agreement between the government of Sierra Leone and the United Nations which is a Hybrid Tribunal, which is a court whose duty is to prosecute and try those responsible for crimes against humanity. War Crimes Other serious violations of international humanitarian law that occur in Sierra Leone since 30 November 1996. The beginning of the war occurred on March 23, 1991, the country in West Africa, in Sierra Leone, had been a fight and violence between the Revolutionary United Front (RUF) led by Foday Sankoh and the regime of the All People's Congress (APC).[111] As a result of the conflict, 2 million people were displaced and 100,000

[110] Andrey Sujatmoko, Pengadilan campuran …., *Op. Cit,* Pg. 977.

[111] Cholidah, Hybrid Court sebagai Alternatif Penyelesaian Pelanggaran Hak Asasi Manusia, *Law Juornal*, 2018, Pg. 73.

people were killed, and thousands of women became victims of sexual violence. Conflict in Sierra Leone is also famous for the practice of amputation of hands and feet, and forced recruitment of forced children of children by parties to the conflict.[112]

In 1999, the Sierra Leonean government and the RUF (rebel army) signed a peace agreement which also provided amnesty for all parties. But the war broke out again, and the amnesty was canceled. An international agreement between the Sierra Leonean government and the United Nations was signed to establish a special tribunal that would run for 3 years to try those most responsible for the most serious crimes.

This special court uses International legal standards developed at the ICTY and ICTR. The Sierra Leonean government asked the United Nations to establish an international tribunal to prosecute anyone responsible for international humanitarian law during the civil war. The Special Court for Sierra Leone was established by an agreement between the Sierra Leone government and the United Nations based on the request of the President of Sierra Leone to the UN

[112] *Ibid.*, Pg. 73-74.

Security Council. This Special Court was formed to try perpetrators of war crimes.[113]

On August 14, 2000 the Special Court for Sierra Leone was formed and had the jurisdiction to prosecute crimes under international humanitarian law and Sierra Leone's national law including:[114] Crimes against humanity, Violations of articles of the 1949 Geneva Convention along with Additional Protocol II, Violations of article 4 of the Geneva Convention.[115]

(2) Kosovo

United Nations Mission in Kosovo Court System (UNMIK) it was established by the United Nations through UNMIK Regulation 1999/24 and Regulation 2001/9 on May 15, 2001. This court itself was formed after the war between Yugoslavia and the North Atlantic Treaty Organization (NATO) and then the UN Security Council approved a resolution stating that

[113] Cyrer Robert and Firman Hakan, an Introduction to International Criminal Law and Procedure, Cambridge University Press, London, 2014, Pg. 151.

[114] Cholidah, Hybrid ……, *Loc. Cit.*

[115] Including deliberately targeting civilians, horse de combat, kidnapping and killing of personnel carrying peace missions, and forcing children under the age of 15 to actively participate in war

Kosovo would led by the UN Mission until the status of this region is determined.[116]

In this case, international judges play an important role in protecting local judges from undue pressure and influence, preventing the politicization of the judicial process and contributing to the greater trust of the public in the courts. All of this was done without contradicting international human rights standards, and local law was also applicable to the case. In addition, the mixed court also provides the opportunity to exchange the best ideas and experiences among judges with different legal systems.[117]

(3) East Timor

The United Nations Transitional Administration in East Timor (UNTAET) was formed in 2000 by the United Nations based on the authority set out in Chapter VII of the UN Charter through Resolution Number 1272 of 1999. The existence of UNTAET itself allows the people of East Timor to determine their own destiny through a referendum after being under Indonesian occupation since 1975. Special Panels

[116] Andrey Sujatmoko, *Pengadilan …..*, *Op. Cit.,* Pg. 978.

[117] Seeing http://www.victoria.ac.nz/nzcpl/HRRJ/vol3/costi.pdf, Pg. 11, Quoted on Sept 1, 2019

themselves are based in the Dili district court which consists of 2 courts for the first instance and one court of appeal. The jurisdiction of this court includes: Genocide, War crimes, Crimes against humanity, Murder, Sexual crimes, and Torture. Specifically regarding serious crimes in the form of murder and sexual crimes, Special Panels only have jurisdiction if the crimes were committed in the period of 1 January 1999 to 25 October 1999.[118]

[118] Andrey Sujatmoko, *Pengadilan….*, *Op. Cit.*, Pg. 980.