

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 Medina 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 Baehr⁴², gross violations of human rights will involve issues including the prohibition of slavery, the right to life, torture and cruel, inhuman or degrading treatment or punishment, genocide, disappearances 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)

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 a whole.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*);

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.

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 Blaskic⁵¹ 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

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 or in part, 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 (*barbarity*) 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

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

⁵⁷ Steven R. Ratner and Jason S. Abrams, *Melampaui Warisan Nuremberg: Pertanggungjawaban 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

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 Marten 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, *Melampau 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

⁶⁵ Erikson Hasiolahan Gultom, *Kompetensi Mahkamah Internasional dan Peradilan Kejahatan terhadap 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 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 violations⁷⁸ 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 Court⁸⁴

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 Jurnal*, Volume 3 number 5, 2007, Pg. 975.

⁸⁴ Seeing Article 3 Paragraph 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 statute 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 itself⁸⁸, it can use it if it has been given authority to the prosecutor through: the Security Council acting under the authority of the UN Charter⁸⁹, 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, Jakarta, 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, 1993⁹⁰ 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 Vljako 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 Tutsis¹⁰² 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

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

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 Superman Marzuki, *Pengadilan HAM*, *Op. Cit*, Pg. 68.

¹⁰⁹ Dr. Boer Mauna, *Op. Cit*, Pgae. 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 tribunals 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 Jurnal*, 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

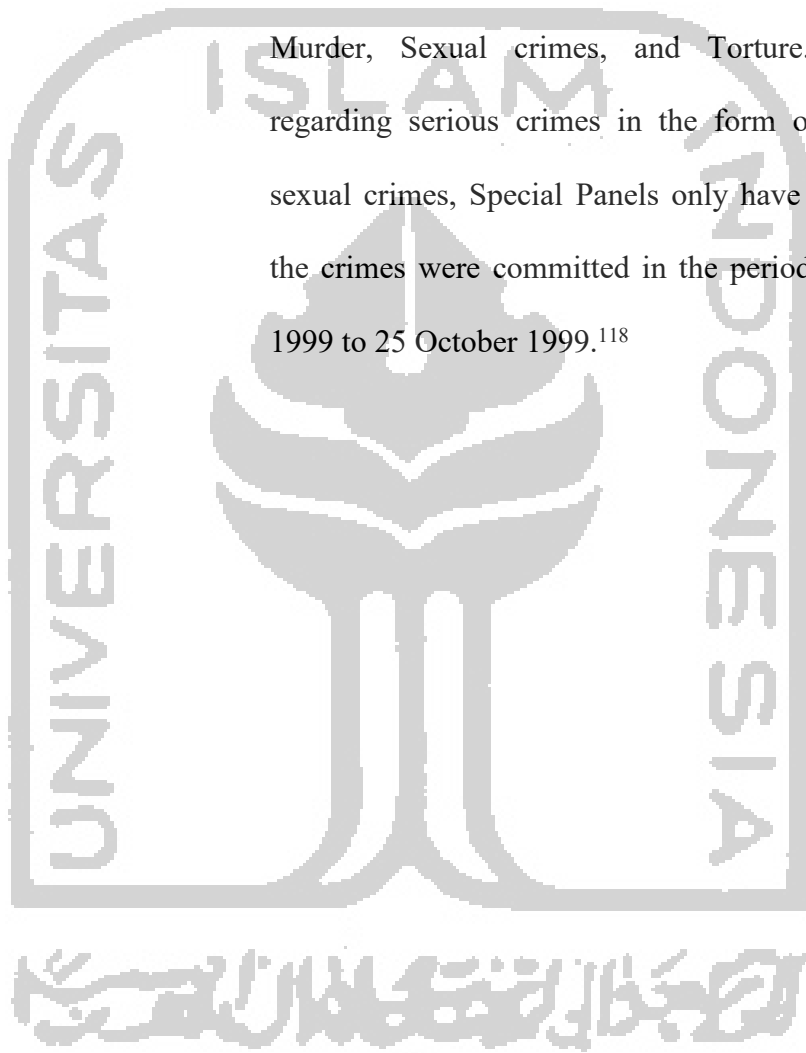
(3) East Timor

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,

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.