

CHAPTER II LITERATURE REVIEW

A. Conceptual and Legal Framework

1. The Review of Human Rights

a. The Definition of Human Rights

The term of rights has many meanings. Rights can be said the right thing, the authority, the power to do something, or it could also be interpreted as the power to not do anything and so on. While the fundamental means basic nature. So human rights are rights that are basic or fundamental rights possessed by humans, such as the right to speak, the right to life, the right to protection and so on. Human rights are rights inherent in humans by nature.

Recognition of human rights was born from the belief that all human beings are born free and have equal dignity between human beings one with another human being. Moreover, man was created with is accompanied reason and conscience, so human in treating other human beings should be good and civilized.²

Human rights according to United Nation are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, color, religion, language, or any other status.³ Universal human rights are often expressed

² Javaid Rehman, *International Human Rights Law*, 2nd edition (England: Pearson Education Limited, 2010), pg. 3.

³ OHCHR, "Human Rights Definition" <http://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>, downloaded 17 December 2014.

and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.

According to Prof. Koentjoro Poerbapranoto, human rights are rights that are fundamental, meaning that the rights possessed by human nature and can't be separated from the man himself so the identifying is nature.⁴ So it can also be said that human rights are fundamental rights which are owned by someone as a gift of God that is innate.

There are a number of inalienable rights such as the right to have freedom of speech and opinion, the right to freedom to choose their religion according to their beliefs, the right to freedom of association, the right to equal protection before the law and much more. The right to life, the right to liberty and security are examples of some of the rights that are universally recognized in the world. No one shall be enslaved, trafficked, abused, treat as inhuman or degrading.

⁴ Budyanto, *Dasar-Dasar Ilmu Tata Negara* (Jakarta: Erlangga, 2000), pg. 58.

2. Indonesia

a. Indonesia Legal System

Indonesia is a former of Dutch Colonial which was embracing the principle of concordance. Since Colonial was embraced the Europe Continental System, and we adhered the principle of concordance from Colonial, thus the legal system in Indonesia was organized and written legal system which is called Civil Law.⁵

This legal system was developing in mainland Europe countries. Actually, originally came from the codification of Roman Empire's law under *Justinianus* Empire century of VI B.C.

In its development, the legal principles contained in the *Corpus Juris Civilis*, became a basic formulation from the codification of law in mainland European countries, such as Germany, Netherlands, France, Italy, and as well as Latin America and Asia, including Indonesia during the Colonial Government.⁶

The main purpose from the Civil Law is obtained the legal binding force, as embodied in the form of regulations and laws systematically, which is arranged in a particular codification and compilation. Law assurance becomes a major purpose from this Civil Law system. Assurance only can be attained if the law is

⁵ R. Abdoel Djamali, S, *Pengantar Hukum Indonesia*, Revised Edition, (Jakarta: Rajawali Press, 2006), pg. 69.

⁶ Ibid

codified and written. With the aimed of law and Law Assurance purpose, a judge cannot be freely create the law that have binding legal force. The Judge functions only to set and interpreting the regulations within the jurisdiction. The last decisions of the Judge in a case just band the both Parties only (*doctrins Res Ajudicata*).⁷

b. Human Rights in Indonesia

1) Human Rights in Indonesia's Constitution

In the context of the Constitution which ever applies in Indonesia, explicit inclusion of awareness about human rights and diverse emerging consensus. Within the enactment of the Constitution in Indonesia, namely The 1945 Constitution, the 1949 RIS (Republik Indonesia Serikat) Constitution, the 1950 Provisional Constitution, and the Fourth Amendment to the 1945 Constitution in 2002, the inclusion of human rights have ups and downs. Political tendencies plus the "dryness" of the human rights guarantees to add a series of rulers who seem ambiguous attitude. Multi interpretation of constitutional texts can't be ignored so as not infrequently more impressed ruler subjective interpretation and hegemonic.⁸

⁷ Ibid

⁸ Artidjo Alkostar, *Mengurai Kompleksitas Hak Asasi Manusia (Kajian Multi Perspektif)*, (Yogyakarta: PUSHAM UII, 2007), pg. 281.

The term human rights can't be found in the 1945 Constitution. Human Rights in the 1945 Constitution arranged short and simple. Human rights set out in The 1945 Constitution is more oriented to the right as a citizen who just affirmed in Article 5, Article 27, Article 28, Article 29, Article 31, Article 34. In The 1949 RIS Constitution, human rights arrangements contained in Part V, entitled "The Rights and Freedoms of Basic Human". In that section there are 27 chapters of the start of Article 7 through Article 33.

The 1950 Provisional Constitution contains provisions on human rights is relatively more complete. Human rights provisions stipulated in Part V (The rights and fundamental freedoms of man) from Article 7 to Article 33. Interestingly, the government also has a basic constitutional obligations set out in such a way, as stipulated in Section VI (basic principles) as Article 8, of Article 35 through Article 43.

In The 1945 Constitution's history, amendment of the Constitution is a new history for the future of the Indonesian constitution. Settings human rights affirmed in The 1945 Amendment Constitution far exceeds the provisions ever organized in 1945. The basic law of human rights set out in a chapter, Chapter XA on Human Rights, which consists of 10 chapters, ranging from 28A to 28J.

2) The Prospect Of Human Rights in Indonesia

Constitution of a country is part of the basic law of the State. Constitution is the basic law of the countries listed. In addition to the basic laws of the countries listed, also known as the basic law is not written, namely the basic rules that arise and maintained in the practice of statecraft.

Constitution of various countries in the world is essentially the culmination of conceptualization ideas, ideals and objectives of the nations concerned, equipped with the ideal foundations, structural, and operational basis for the management of the life of a broad lines.

In addition, the Constitution provides the legal basis for making all the rules and for the enactment of the regulation. In terms of policies and objectives of the state, the Constitution is also a source of rulemaking, both in governance as well as the basic law that guarantees the rights and interests as well as the duty of every citizen.

The Republic of Indonesia, which proclaimed on August 17th 1945, based on a recognition that independence is the right as contained in the first paragraph of the opening of The 1945 Constitution which states that real freedom is the right of every nation and therefore, the occupation over the world should be abolished because it does not comply with humanity and justice.

The statement is the starting point of enforcement of human rights and constitutional conceptually.

a) The 1945 Constitution

Incorporate human rights norms into the Indonesian constitution is a long struggle. At the beginning of this country was formed, has no conflict between the founder and designer of the constitution of the state whether or not human rights incorporated into the Constitution of Indonesia. The disagreement symbolized between M.Yamin, on the one hand, Soepomo and Soekarno on the other. In view of Soepomo,⁹ is synonymous with the ideology of human rights, human rights is synonymous with individual-liberal ideology, and thus is not suitable to the nature of Indonesian society. Yamin reject this view. According to him, there is no basis whatsoever that can be used as a reason to reject incorporate human rights in the Constitution that they drafted.¹⁰

Opposition in the form of dissent was eventually gave birth to a compromise as a meeting point to include some human rights norms into the Constitution which they are

⁹ Rejection of Soepomo include human rights norms into the constitution in 1945 does not mean he is anti-human rights. Soepomo changes in attitudes towards human rights can be seen with the inclusion of the fundamental rights of citizens under the Constitution RIS 1949 and 1950, where Soepomo directly involved in the preparation of the Constitution. Ibid., pg. 318.

¹⁰ Ibid., pg. 319.

designed. The realization of such a compromise, there are several articles in the 1945 constitution, human rights, among others:

1. The right to justice, as stipulated in Article 27 (1) of The 1945 Constitution: all citizens are equal before the law and government and shall abide the law and government, without exception.
2. The right of the welfare, set in Article 27 (2): Every citizen has the right to employment and decent living for humanity.
3. The right of privacy, enshrined in article 28: freedom of association, of assembly, and of verbal or in writing and set forth by Law. In addition to the article 28, also article 29, paragraph (2) stipulates that the state guarantees the freedom of every citizen to choose his religion and to worship according to their religion or belief.
4. The right of education, stipulated in article 31, paragraph (1) that every citizen is entitled to teaching.
5. The right to life is also stipulated in the constitution of 1945, which in article 34 that the poor and neglected children who are maintained by the state.

b) The 1949 RIS Constitution and 1950 Provisional Constitution

Constitutionally, the recognition and enforcement of human rights have a better and more widely in the 1949 Constitution and the 1950 Provisional Constitution. The 1950 RIS Constitution Section V establishes the Rights and Freedoms of Human Basis of 27 chapters, the Chapter 7 to Chapter 34. Provisions it gives a better feel of human rights, especially in human rights.

There are some provisions that need to be known in The 1950 Provisional Constitution that deals with human rights, namely: Article 7 paragraph (1) that every person is recognized as an individual human being against the law. Paragraph (2) all persons entitled to demand equal treatment and protection by the law.

In addition to these provisions, there are also some similar provisions in the 1949 Constitution RIS and the 1950 Provisional Constitution, namely:

1. Article 10 that no person shall be enslaved, stalled¹¹ or enslaved. Slavery, the slave trade and thrall and all acts that aim to be anything that is prohibited.

¹¹ In KBBI explain stalled basic word is "stalling" which means people who are free and half slave (for committing a crime, such as murder, stealing, and do not give compensation, then gave himself).

2. Article 11 dwelling is that no one will be tortured or treated or punished in a cruel, not about humanity or insulting. This provision relates to Article 14 paragraph (2) that no person can be prosecuted for dwelling is convicted or sentenced, except for a rule of law that already exist and apply to it.

One more thing should be observed that the recognition of the right to demonstrate and strike as stated in Article 21 of The 1950 Provisional Constitution that the rights demonstrations and strikes are recognized and regulated by law. This provision is a new thing that is not recognized by the 1945 Constitution and the 1949 RIS Constitution, even in the Universal Declaration of Human Rights did not find the right to demonstrate and right to strike.

Some of the constitution which was formed after World War II includes the right to demonstrate and the right to strikes, such as the Constitution of the USSR (Russia), which was passed on March 19th in 1946, in Article 125 which provides that in accordance with the interests of (law) so that the workers and socialist regime strengthened, it is guaranteed to citizens of the USSR independence held marches and demonstrations.

In explaining the draft 1950 Provisional Constitution stated that before the law that will govern the rights marches are held the right to strike, the right shall be treated, as already recognized by the Constitution.

c) The 1945 Amendment Constitutional

For the first time the Assembly to use its authority in accordance with Article 37 of The 1945 Constitution, which is to make changes through the 1945 Amendments Constitutional as much as four times, each of the first amendment in 1999, the second amendment in 2000, the third amendment in 2001 and the fourth amendment in 2002.

The 1945 Amendment Constitution that relate to human rights is the enactment of human rights norms in the second amendment in 2000 by adding a special chapter on human rights, which is chapter entitled Chapter XA of Human Rights consists of 10 chapters. The amendment results indicate the existence of a real effort to uphold human rights by incorporating human rights norms in the Constitution. The rights set forth in Chapter XA, especially article 28G (2) that regulate the right to freedom from torture or degrading treatment of human dignity; and the right to political asylum in another country.

In addition to the provisions governing the rights relating to human rights, in paragraph 28I also determined that the protection, promotion, enforcement and fulfilment of human rights is the responsibility of the state, especially the government. To uphold human rights in accordance to the principles of a democratic constitutional state, the implementation of human rights are guaranteed, regulated and set forth in the legislation.

In defending human rights, everyone is obliged to respect the rights of others in an orderly society, nation, and state. To exercise their rights and freedoms, everyone shall be subject to the restrictions set by law. It is intended to ensure the recognition and respect for the rights and freedoms of others and to meet the demands of a fair according to considerations of morality, religious values, security, and public order in a democratic society.

It's very different from the founders of the state, particularly the planners who must argue the Constitution and proposes a philosophical foundation to incorporate norms or principles of human rights in the draft constitution, then the planners of Act No.39 of 1999 and The 1945 Amendment Constitution's Commission include norms or human rights principles into the legal product

flow without much hindrance. Norms or principles of human rights produced various declarations, conventions, as well as by the Rome Statute entered unhindered into the articles of the 1945 amendments, as well as in Act No. 39 of 1999 on Human Rights.

3) The Enforcement of Human Rights

National goals set forth in the preamble of the 1945 Constitution is to protect the people of Indonesia and the entire country of Indonesia, promote the general welfare, the intellectual life of the nation, as well as participate in the establishment of a world order based on freedom, lasting peace and social justice. The objectives contained in the vision of Indonesia in the field of human rights who want to create a society that is fair and prosperous Indonesia with the enforcement of fundamental rights. To realize this vision, the mission carried out development in all fields, including human development in Indonesia that led to the enforcement of human rights.

Enforcement of human rights based on the principle of indivisibility, equality and recognition of national conditions. The principle of indivisibility means that the civil rights of political, economic, social, cultural, and the right to development is a unity that can't be separated. While the

principle of equilibrium implies that in the individual and collective human rights and individual responsibility towards the community and the nation requires balance and harmony.

Balance and harmony is consistent with human nature as individuals and social beings. Balance and harmony between freedom and responsibility is an important factor in human rights.

In human rights, the Indonesian government has to realize its commitment to the establishment of institutional and manufacture of legislation relating to human rights.

In institutional terms, established the National Commission on Human Rights (Komnas HAM) by Presidential Decree No. 50 of 1993 which then confirmed by Act No. 39 of 1999 on Human Rights. Establishment of a Commission on Violence against Women by Presidential Decree No. 181 of 1998, Formation of the State Ministry of Human Rights in 1999, which later merged with the Ministry of Law and Legislation, which later became the Ministry of Justice and Human Rights, and the latter is called the Department of Justice and Human Rights. Human Rights in the Department of Legal Affairs and Human Rights were managed by the Directorate General of Human Rights Protection and Human Rights Research and Development Agency.

In the sector of legislation, in addition to laws and regulations of the foregoing has been assigned the legislation with the perspective of human rights and the ratification of international human rights instruments, namely:

1. Act No. 7 of 1984 on the Convention on the Elimination of all forms of discrimination against women;
 2. Presidential Decree No.129 of 1998 on a national action plan on human rights Indonesia which was later revised by Presidential Decree number 61 of 2003;
 3. The Presidential Instruction No. 26 of 1998 concerning discontinue use of the term indigenous and non-indigenous people in the formulation and implementation of the program, or the implementation of governance;
 4. Act No. 5 of 1998 concerning the ratification of the convention against torture and other acts of cruel, inhuman, or degrading treatment;
 5. Act No. 9 of 1998 on freedom of expression in public, and others
- 4) Human Rights' Material in the Constitution of Indonesia

As known in the constitutional history of the Republic of Indonesia, in Indonesia was happened three basic laws (constitution) in 4 (four) implementation period as follows:

1. The 1945 Constitution, which applies between August 17th 1945 until December 27th 1949;
2. The 1949 RIS Constitution, which is valid between December 27, 1949 to 17 August 1950
3. The 1950 Provisional Constitution, which applies between August 17th 1950 to July 5th 1959
4. The 1945 Constitution, which applies back since issued Presidential Decree July 5th 1959.

All provisions on human rights are normative instruments, which still need other instruments to enforce human rights namely the institutional instruments of human rights, one of its was the National Commission on Human Rights (Komnas HAM).

National Human Rights Commission was established on the basis of the recommendations from the first academic workshop which organized by the Ministry of Foreign Affairs, with the sponsorship of the United Nations (UN). Then in 1993 was born one institution authorized to carry out the enforcement of human rights, namely the National Commission on Human Rights (Komnas HAM) under Presidential Decree No. 50 of 1993 dated June 7, 1993.¹²

¹² Ibid., pg. 264.

The realization of human rights enforcement assigned to the National Human Rights Commission is to assist the development of conditions conducive to the implementation of human rights in accordance with Pancasila, improve the protection of human rights in order to support the realization of national development, namely the integral human development and the development community as a whole. Then Presidential Decree 50 of 1993 is integrated into the Act No.39 of 1999 which in Article 89 sub (3) states that the duties and authority of the Commission are as follows:¹³

1. The observation of human rights implementation and reporting the results of these observations;
2. The investigation and examination of the events that arise in a society that is based on the nature or scope are reasonably suspected of human rights violations;
3. Invitation to the complainant or victim and the defendants to be asked and heard testimony;
4. The calling of witnesses to be called and heard testimony, and to witness the complainant requested to submit the necessary evidence;
5. Review on the scene and other places deemed necessary;

¹³ Ibid., pg. 265.

6. The invitation to the relevant parties to provide written information or submit the necessary documents in the original with the approval of the chairman of the court;

7. Examination as houses, yards, buildings, and other places occupied or owned by certain parties with the approval of the chairman of the court; and

8. Giving an opinion based on the approval of the Chief Judge of the particular case which is in the process of justice, in the case where there are human rights violations in public affairs and the examination by the court that the arguments of the Commission shall be notified by the judge to the parties.

Then in performing mediation functions as specified in Article 76 of Act No.39 of 1999, the Commission assigned and authorized to do the following:¹⁴

1. Peace of both parties;
2. Completion of the case by way of consultation, negotiation, mediation, reconciliation, and expert assessment;
3. Provision of advice to the parties to resolve disputes through the courts;

¹⁴ Ibid., pg. 266.

4. Submission of recommendations on a case of human rights violations to the government to follow up its completion; and

5. Submission of recommendations on a case of human rights violations to the House of Representatives to follow up.

The classification of human rights cases is intended to distinguish between cases of human rights and human rights is not the case because, in reality, not all cases are reported to the National Human Rights Commission is a human rights case. Therefore, in the process of dealing with complaints of human rights cases, the Commission will continue to provide recommendations for resolution by the agency designated and authorized to complete and file closed; then if it is a case of complaints of human rights, the Commission will continue through the following procedure:¹⁵

1. For cases of human rights that can't be proven, the Commission will terminate the investigation and the file is closed;

¹⁵ Sri Hastuti PS, *Perlindungan HAM dalam Empat Konstitusi di Indonesia*, dalam *Jurnal Magister Hukum*, Vol.1 No.1, (Yogyakarta, Magister Ilmu Hukum FH-UII, 2005), pg. 24-25.

2. In the case of human rights that can't be proven Commission will follow up with a full investigation, if necessary also via a written investigation. If there is no response from the respondents as many as 3 (three) times, then the Commission will make the call. If the response received by respondents, the Commission does not need to call. After that will be analyzed and if the analysis has been completed, the Commission will undertake alternative measures: the file is closed, recommendation (referrals), and mediation.

3. For cases of human rights that can be verified, the Commission will make recommendations (referral) and can further mediation efforts.

Whereas in Article 18 of Act No.26 of 2000 about Human Rights Court in the fourth section, investigations, paragraph (1) states that an investigation into serious human rights violations carried out by the National Human Rights Commission, paragraph (2) the Commission in carrying out the investigations referred to in paragraph (1) can form an ad hoc team comprising the Commission and the public.

3. Sudan

a. Sudan legal system

The legal system in Sudan is based on Islamic law which Christians and followers of traditional indigenous beliefs are exempt from and have special courts. The legal system is also based on English common law.¹⁶

Although the Muslim influence on Sudanese law remained important, the long years of British colonial rule left the country with a legal system derived from a variety of sources. Personal law pertaining to such matters as marriage, divorce, inheritance, adoption, and family disputes was adjudicated in the Sharia courts in the predominantly Muslim areas. Customary law, modified in varying degrees by the impact of the Sharia and the concepts introduced by the British, governed matters of personal law in other areas of the country. Laymen, generally a chief or group of elders, presided over local courts. In addition to personal law, these courts, which numbered more than 1,000, heard cases involving land titles, grazing rights, and other disputes between clans and tribes. The civil courts considered all criminal and most civil cases.

The interesting thing is there is a Constitutional Court in Sudan that proceeds the case of human rights violation or fundamental freedoms. The Constitutional Court won't process the case that already

¹⁶ Sudan Embassy and Mission, "Sudan legal system" http://www.sudanembassy-mission.ch/legal_system.html, downloaded on 12 January 2015

been a constitutional complaint. A constitutional complaint is a legal remedy by which a constitutional complainant in proceedings before the Constitutional Court claims a violation of human rights or fundamental freedoms. A constitutional complaint cannot be lodged due to the erroneous application of substantive or procedural law or due to an erroneously established state of the facts in proceedings before courts

b. Human Rights in Sudan

1) Constitution of the Republic of Sudan

On July 1, 1998, a new constitution entered into force for Sudan. This constitution was marred by controversy from its inception because it was negotiated during the civil war and without the participation of any opposition representatives. Nevertheless, it appeared to offer a ray of hope in the midst of deteriorating living standards and increasingly uncontrolled security operations.¹⁷

The drafting process began with the formation of a National Constitutional Committee in 1997. Originally, the task of this committee was to submit a draft constitution on behalf of the government to the National Assembly, which would then vote

¹⁷ Ghazi Suleiman and Curtis Francis Doebbler, "Human Rights in Sudan in the Wake of the New Constitution" <http://www.wcl.american.edu/hrbrief/fall98/ghazi.html>, downloaded on 12 January 2015

on a final version of the constitution before sending it to the electorate for a referendum. The committee, however, never had a quorum and only submitted a "suggested draft" to President al-Bashir.

Nevertheless, this draft contained a solid collection of human rights provisions and granted increased authority to the president, which the drafters thought would create a more optimum balance of powers. Surprisingly, this draft was even acceptable to some opposition figures, who praised it as a positive step forward. As expected, however, the president's office weakened the provisions on individual human rights.

Less expected was the fact that the president's office also watered down its own newly proposed additional powers. This led observers to suggest that it was not the president, but others around him who made the changes. Many people assumed that Hassan al-Turabi, the speaker of the National Assembly, played a major role. Al-Turabi is an influential figure who helped install the current government after the 1989 coup. As a result of these changes, the draft constitution that the president's office passed to the National Assembly contained fewer human rights protections than the earlier draft.

These developments further aroused the suspicions of many people who already did not trust the government. In addition, it

annoyed the former chief justice and the former deputy chief justice, who chaired the National Constitutional Committee and were largely responsible for the pro-human rights initial draft.

At approximately 10 a.m. on March 28, 1998, the day that the president submitted his draft to the National Assembly, the two former justices made speeches describing the strengths and weaknesses of the new constitution. These addresses were televised and replayed during the afternoon and evening news.

The speeches concerned provisions contained in the initial draft, with its strong human rights protections. In contrast, when the speaker of the National Assembly unveiled and circulated the official draft later in the day, many of the provisions discussed in the morning's speeches disappeared from the text. As a result of the changes to the draft text, the two leading figures in the National Constitutional Committee appeared to support a document that was much less favorable to human rights than the one that they actually discussed in their speeches earlier in the day.

The discrepancies between the initial and final draft of the constitution became known in due course and sparked heated debates both in the National Assembly and among public observers. Although hardly a day went by without critical commentary in the national newspapers, the government

censored only a few stories and detained relatively few people for their views.

This situation of relative tolerance changed, for unknown reasons, after the National Assembly accepted the constitution on March 28, 1998, and the national referendum began on April 1, 1998. During this period, nearly 100 lawyers, trade union activists, and other protestors were detained by security forces for voicing their opposition. At least one individual was charged with the crime of causing "danger" to the constitutional state. Referendum procedures were also subject to questionable practices. As an example, voting attendants allegedly went from house to house offering bribes and using threats in an attempt to convince people to vote. Such practices called into question the integrity of the voting results.

Perhaps the most important problem with the referendum was the possibility of low voter turnout. Throughout the referendum period, it seemed very unlikely that more than 50% of the population would actually vote. This was partially due to the fact that the referendum was held without the participation of large parts of southern Sudan that are not under government control. In addition, several groups advised people to either vote against the constitution or not to vote at all. For example, the Umma party of the former Prime Minister Sadiq El-Mahdi

instructed its followers not to vote at all. In this Constitution there was part II which regulated about Freedoms Rights and Responsibilities.

2) Human Rights in the 2005 Interim National Constitution (INC) of the Republic of the Sudan

The first permanent Constitution of Sudan was drafted in 1973. It incorporated the Addis Ababa Agreement (1972) ending the first Sudanese civil war. On 1 July 1998, a new constitution entered into force after being approved in the constitutional referendum. The current Interim National Constitution of the Republic of Sudan, 2005 (INC) was adopted on 6 July 2005.¹⁸

3) The Advisory Council for Human Rights in Sudan

The Advisory Council for Human Rights, created by presidential decree in 1994, is advisory in nature but nevertheless responsible for all human rights activities in the country, according to its rapporteur, Dr. Ahmed el Mufti. The work of the Advisory Council for Human Rights was previously part of the foreign ministry until 1992, when a small

¹⁸ World Intellectual Property Organization, "The Interim National Constitution of the Republic of the Sudan" <http://www.wipo.int/wipolex/en/details.jsp?id=10720>, downloaded on 12 January 2015

coordination committee was established to coordinate all activities pertaining to human rights in Sudan.

In 1994 President Omar El Bashir issued a presidential decree replacing the coordination committee with the Advisory Council for Human Rights. The presidential decree states that the Advisory Council for Human Rights, in coordination with the competent state agencies, shall have the following functions and powers:

177. Provide advice and consultancy on human rights to the State;
178. Conduct the necessary human rights research and studies and reply to such queries as may be addressed to the State;
179. Require the necessary information and data from any State or other agency; participate in relevant local, regional, and international conferences and committees;
180. Organize and prepare for visits by individuals and organizations related to human rights in Sudan; and
181. Make international regulations necessary to regulate the business of the Advisory Council for Human Rights.

The Advisory Council for Human Rights in 1998 saw its role as follows: To insure that the government meets its regional and international reporting requirements and to participate in the drafting of the country reports; to respond when allegations against the government are raised and to provide information to the international community about human rights concerns; and to follow up with cases of persons detained by the security forces to press for release or for charges to be brought.²The Advisory Council for Human

Rights is divided into eight thematic subcommittees: (1) detention; (2) women's rights; (3) children's rights; (4) religious tolerance; (5) slavery/disappearances; (6) peaceful assembly; (7) judicial review; and (8) freedom of speech.

Meetings are called at the discretion of the chair of each subcommittee and they are all to report back to the full council when it meets, theoretically once a month. There are said to be twenty-six affiliated human rights committees in the twenty-six states of the county. There is one representative for about three states.

4. The Universal Declaration of Human Rights (UDHR)

The United Nation Charter contains a number of references to 'human rights', though no elaboration is provided to the meaning of the concept within the Charter itself. It also been noted that efforts by certain States, notably Panama, to have 'Bill of Rights' included within the United Nations Charter proved unsuccessful. After the coming into operation of the United Nations Charter, there was a move to spell out the meaning of the concept of 'human rights' in greater detail.

In 1945, the preparatory commission recommended that ECOSOC should establish a Commission on Human Rights which would then prepare a Bill of Rights. The recommendation was approved by the General Assembly and a Human Rights Commission was established

in 1946. The first regular sessions of the Human Rights Commission began on 27 January 1947. The Human Rights Commission immediately go down to its first task, i.e. that of drafting the International Bill of Rights.¹⁹

A consideration of the proceedings of the Human Rights Commission (amongst a specifically established Drafting Committee) represents divisions as to the form that the International Bill of Rights shall take. The primary divisions were amongst those who wanted a declaration and those who were in favor of a binding convention or treaty. In the second session of the Human Rights Commission late in 1947, it was decided that the International Bill of Human Rights should have three parts: a declaration; a Convention; and 'measure of implementation', i.e. a system of international supervision. It was subsequently decided to split the Covenant into two separate Covenants.²⁰

The Declaration was adopted on 10 December 1948 with 48 votes in favor, none against and eight abstentions. The UDHR was adopted by Resolution 217 (III) which consisted of five parts. The Declaration has 30 articles covering the most important fundamental human rights.

The General Assembly adopted the Declaration as a 'common standard of achievement for all peoples and all nations'. The catalogue of the

¹⁹ Javaid, Op.cit., pg. 75.

²⁰ Ibid., 76.

rights contained within the Declaration, provides for both civil and political rights as well as economic, social and cultural rights.

The Declaration condemns torture and slavery and prohibits arbitrary interference with privacy, family, home or correspondence.

The Declaration also contains certain civil and political rights which have retained a controversial standing. One example is the right to property. The right to property, although included in Article 17 of the UDHR, could not be provided for either in the ICCPR (1966) or in the ICESCR (1966).

5. International Covenant on Civil and Political Rights (ICCPR)

After the adoption of the Universal Declaration of Human Rights (UDHR), the next stage was to establish legally binding principles on international human rights. In its Resolution 217B and E(III) of 10 December 1948 the General Assembly, through the ECOSOC, requested the Human Right Commission to continue too accord priority to the drafting of the International Covenant and measures of implementation.²¹

Originally it had been intended to draft a single Covenant covering all the fundamental rights. However, with the emergence of the Cold War and the rise of new nation States (with their own priorities) it became impossible to incorporate all the rights within one document.

²¹ Ibid., 84.

The western States put the emphasis on civil and political rights whereas the focus of the socialist and newly independent States was upon economic, social, and cultural rights and the right to self-determination. There were divisions as regards having civil and political rights, alongside the economic, social and cultural rights within the text of a single treaty.

Those in favor of a single Covenant argued that human rights could not be clearly divided into different categories, nor could they be so classified as to represent a hierarchy of values. All rights should be promoted and protected at the same time. Without economic, social and cultural rights, civil and political rights might be purely nominal in character; without civil and political rights, economic, social and cultural rights could not be long ensured.

However the opposing camp prioritized civil and political rights as more significant. They also pointed to the progressive nature of the social and economic rights, some even doubting that they were rights in the real sense. A critical issue related to the implementation mechanism. While it was possible to install a scheme of implementing civil and political rights (through legislation), the same was not thought to be feasible for social and economic rights.

It was ultimately decided to have two different treaties, one covering primarily civil and political rights (i.e. ICCPR) and the other economic, social and cultural rights (i.e. ICESCR). Although some

rights contained within these treaties overlap, there are, nevertheless, substantial differences in the content, nature of obligations and the implementation mechanisms. The ICCPR and ICESCR were approved by the Third Committee of the General Assembly in December, 1966. Each Covenant required 35 ratifications and both came into force in 1976. The Optional Protocol was approved in 1966 and required 10 ratifications.²²

As of 8 April 2009, there are 163 States parties to the ICCPR. In addition, 112 States have made declarations pursuant to the First Optional Protocol to the ICCPR. The Second Optional Protocol aimed at the Abolition of Death Penalty was adopted and opened for signature, accession or ratification on 15 December 1989. It came into operation on 11 July 1991. There are currently 71 States parties to this Protocol. The ICCPR consists of a preamble and 53 articles, which are divided into eight parts.

The ICCPR has many rights which are covered by UDHR or other international and regional human rights treaties. However, unlike the UDHR, the ICCPR does not accord protection to the right to property (covered by Article 17 UDHR and ECHR first protocol). For the most part the ICCPR grants rights to all individuals who are within State parties' territories and are subject to their jurisdiction, regardless of their constitutional or political status. Thus, the protection covers

²² Ibid., 85.

nationals, aliens, refugees and illegal immigrants. The reference in the ICCPR to ‘everyone’ or ‘all person’ in relation to a majority of rights confirms this view. In order to ensure the rights within the Covenant, States parties undertake to provide for an effective remedy, by competent and judicial authorities, and to ensure the enforcement of these remedies by competent authorities.

6. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)

a. Definition of Torture

The most widely accepted definition of torture internationally is that set out by Article 1 of the United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT):²³

“... 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

²³ IRCT, “Definition of torture” <http://www.irct.org/what-is-torture/defining-torture.aspx>, downloaded on 9 January 2015.

From this definition, it can be said that torture is the intentional infliction of severe mental or physical pain or suffering by or with the consent of the state authorities for a specific purpose.

Torture is often used to punish, to obtain information or a confession, to take revenge on a person or persons or create terror and fear within a population.

Some of the most common methods of physical torture include beating, electric shocks, stretching, submersion, suffocation, burns, rape and sexual assault.

Psychological forms of torture and ill-treatment, which very often have the most long-lasting consequences for victims, commonly include: isolation, threats, humiliation, mock executions, mock amputations, and witnessing the torture of others.

b. Introduction of UNCAT

The existence of a statement of the universal Declaration of Human Rights:

"No one shall be subjected to torture or to cruel, Inhuman or degrading treatment or punishment".²⁴

Furthermore, the International Covenant On Civil and Political Rights states:

"No one shall be subjected to torture or to cruel, Inhuman or degrading treatment or punishment. In particular, no one shall be

²⁴ Universal Declaration of Human rights, UDHR 1948, Art.5.

subjected without his free consent to medical or scientific experimentation".²⁵

Then, based on the resolution of the UN General Assembly designated December 10, 1984 Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment. Currently 149 countries have become parties.

The principle of the UN Charter, the recognition of equal rights and rights that can't be separated from the human family is the foundation of freedom, justice and peace in the world. Those rights inherent in every peoples. The obligation of states was promote universal respect for and observance of, human rights and basic human freedom.

No one shall be subjected to torture or other acts of cruel, inhuman, or degrading; To make more effective the struggle against torture and other acts of cruel, inhuman or degrading worldwide.

1) Obligation of State Parties

State Parties shall take all appropriate legislative, administrative, judicial or other measures to prevent torture legal territory. No exceptional circumstances whatsoever, whether a state of war or threat of war, or political instability, or other emergencies can be used an excuse to justify torture.

²⁵ International Covenant on Civil and Political Rights, ICCPR 1966, Art.7.

Orders from superiors or the authorities should not be a reason for torture.

No State Party shall expel, return or extradite a person to another country when there is reason to believe the person will be subjected to torture. If there are such reasons, there should be consideration of all matters relating to, if there is a consistent pattern of violations may be big, flashy, or the bulk of the gross human rights violations.

States Parties shall ensure every act of torture is a crime, including torture experiments, by anyone who helped and participated. It is also required to arrange that the offense was punished commensurate with the nature of his crime. If there are acts of torture, should commit against offenders and other legal acts, conduct a preliminary investigation and initiate proceedings to ensure a fair trial in each process. States parties should provide assistance to all the evidence to the proceedings, and mutual legal assistance that may be.

State Parties shall ensure the education and information regarding the prohibition against torture are fully included in the training of law enforcement officers civilian/military, and other relevant parties. Beside, State Parties shall lists the prohibition of torture in the rules or instructions issued in regard to the duties and functions of the people / law

enforcement and other relevant authorities, oversee systemic review interrogation rules, methods, practices and regulations detention and treatment of persons arrested, detained, imprisoned to prevent torture.

2) Committee Against Torture (CAT)

The Committee Against Torture (CAT) oversees implementation of the UNCAT through its consideration of State reports, individual complaints, inter-State complaints, and inquiry requests, and its preparation of General Comments, statements and reprisal letters, and general discussions. As of January 2014, 154 States are party to the Convention against Torture.²⁶

The CAT consists of 10 independent experts who are elected for a term of four years by States parties to the Convention. Each member must be a national of a State party, of high moral character, and have recognized competence in the field of international human rights.

The CAT generally holds two sessions per year in Geneva, Switzerland, once in May and once in November, each generally lasting four weeks and examining approximately eight to nine State reports.

²⁶ International Justice Resource Center, "Committee against Torture" <http://www.ijrcenter.org/un-treaty-bodies/committee-against-torture/>, downloaded on 9 January 2015

3) Optional Protocol to the UNCAT

The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) is a treaty that supplements to the 1984 United Nations Convention against Torture. It establishes an international inspection system for places of detention modeled on the system that has existed in Europe since 1987 (the Committee for the Prevention of Torture).

The OPCAT was adopted by the United Nations General Assembly in New York on 18 December 2002, and it entered into force on 22 June 2006. As of November 2014, the Protocol has 75 signatories and 76 parties.

7. Rome Statute of the International Criminal Court (ICC Statute)

The Rome Statute of the International Criminal Court (often referred to as the International Criminal Court Statute or the Rome Statute) is the treaty that established the International Criminal Court (ICC). It was adopted at a diplomatic conference in Rome on 17 July 1998 and it entered into force on 1 July 2002²⁷. As of 6 January 2015, 123 states are party to the statute. Among other things, the statute establishes the court's functions, jurisdiction and structure.

²⁷ Codification Division Office of Legal Affairs, "Rome Statute of the International Criminal Court" <http://legal.un.org/icc/index.html>, downloaded on 10 January 2015

The Rome Statute established four core international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. Those crimes "shall not be subject to any statute of limitations". Under the Rome Statute, the ICC can only investigate and prosecute the four core international crimes in situations where states are "unable" or "unwilling" to do so themselves. The court has jurisdiction over crimes only if they are committed in the territory of a state party or if they are committed by a national of a state party; an exception to this rule is that the ICC may also have jurisdiction over crimes if its jurisdiction is authorized by the United Nations Security Council.

8. International Criminal Court (ICC)

The International Criminal Court (ICC), governed by the Rome Statute, is the first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community.²⁸

The ICC is an independent international organization, and is not part of the United Nations system. Its seat is at The Hague in the Netherlands. Although the Court's expenses are funded primarily by States Parties, it also receives voluntary contributions from

²⁸ International Criminal Court, "About the Court" [http://www.icc-cpi.int/en_menus/icc/about the court/Pages/about the court.aspx](http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx), downloaded on 10 January 2015

governments, international organizations, individuals, corporations and other entities.

The ICC has four principal organs: the Presidency, the Judicial Divisions, the Office of the Prosecutor, and the Registry. The President is the most senior judge chosen by his or her peers in the Judicial Division, which hears cases before the Court. The Office of the Prosecutor is headed by the Prosecutor who investigates crimes and initiates proceedings before the Judicial Division. The Registry is headed by the Registrar and is charged with managing all the administrative functions of the ICC, including the headquarters, detention union, and public defense office.

9. Dispute Resolution Under International Law

a. Definition of Dispute Resolution

International dispute is a dispute that is not exclusively an internal affair of a country. International disputes is also not exclusively involve interstate relations only remember the subjects of international law are now widely experienced expansion involves many actors such non-members.²⁹

In Article 36 paragraph (2) the statute the court asserted that the legal dispute can be brought to the Court regarding the following matters:

²⁹ Sefriani, *Hukum Internasional: Suatu Pengantar*, Edisi 1, (Jakarta: Rajawali Pers, 2011), pg. 322.

1. Interpretation of a treaty
2. Any question of international law
3. The existence of any fact which, if established, would constitute a breach of an international obligation
4. The nature or extent of the reparation to be made for the breach of an international obligation.

b. Methods of the Dispute Resolution under International Law

1) Peaceful Resolution of Dispute

Peaceful resolution of dispute is divided by politics or diplomatic and by law.

Resolution by politics or diplomatic, such as:

a) Negotiation

Generally, the negotiation is how the first and most widely used disputing parties in their international dispute resolution. This is because this method is recognized as the most convenient way compared to other methods. There are no special procedures for negotiation, may be bilateral or multilateral, formal and informal. However, it would be difficult to negotiate if the dispute between the parties that do not have diplomatic relations or do not recognize the

existence of each individual as a subject of international law.³⁰

b) Good offices

When negotiation can't resolve the dispute, the disputes will generally use the services or the involvement of a third party. The involved of a third party in good offices not seek a meeting over the disputing parties to negotiate, without getting involved in the negotiations themselves. Third parties here often referred to as an additional channel of communication.³¹

c) Mediation

If compared with the good offices, the involvement of third parties in the mediation has been greater. In mediation, the mediator plays an active role to reconcile the parties to the dispute, has certain powers leading the negotiations, it also distributes the proposals of each party dispute. Mediators are also expected to provide a proposal to resolve the dispute. In short it can be said that the mediation function is as follows:³²

1. Establish communication between disputing parties

³⁰ Ibid., pg. 228.

³¹ Ibid., pg. 229.

³² Ibid., pg. 330.

2. Removing or reducing the tension between the disputing parties so that they can be created the atmosphere that is conducive to negotiations
3. Can be an effective information channel for disputing parties
4. Apply satisfactory settlement efforts disputing parties.

d) Fact Finding/Inquiry

The function of the inquiry is to facilitate the settlement of disputes by seeking truth facts, unbiased, through investigation continuously until the facts presented one of the parties can be accepted by the other party.

Countries and organizations often use the inquiry.³³

Inquiry can be carried out by a permanent commission. Individuals and organizations are chosen to give their expert opinions. The task of the fact-finding commission is limited only to provide a statement regarding the truth of the facts, is not authorized to make a decision.

Just as negotiation, good offices and mediation, inquiry also requires the agreement of the parties to use the inquiry. In the practice of fact-finding commission often have trouble when the territorial state will place an investigation or an investigation does not cooperate or less

³³ Ibid., pg. 331.

cooperative. However, the UN Security Council has the authority to send a fact-finding commission on behalf of the United Nations without the consent of the territorial state when according to the Security Council dispute that has been categorized as threatened or violated international peace or security is also an act of aggression. Inquiry is often also formed through international agreements.

e) Conciliation

Conciliation is a political dispute resolution method that combines methods of inquiry with mediation. In conciliation third party to investigate the dispute in question the parties and then give a formal proposal series of dispute settlement. This settlement proposal is not binding however disputing parties. Conciliation can be done by the agency or commission a permanent or ad hoc.³⁴

f) Settlement through the United Nation

Settlement by politics that use the services of the United Nations can be carried out by the UN Secretary General, the General Assembly and Security Council.³⁵ UN Chief often asked to mediate or provide services either by the parties to the dispute. This is because in general the UN Secretary General is considered neutral, and has the

³⁴ Ibid., pg 333.

³⁵ Ibid.

competence to help resolve the dispute by the Parties in dispute. Need the consent of both parties to use the mechanism through the UN Secretary General's settlement.

The completion of the use of the general assembly can only be done when the Security Council has been unable or fail to carry out their duties maintaining international security peace. Then, through the completion of the Security Council is the only international legal dispute settlement money does not require prior consent of the parties.

g) Settlement through Regional Organizations

Settlement through regional organizations should be done in advance by the parties to the dispute before bringing the dispute to a wider forum (international) or in this case the UN Security Council.³⁶

Peaceful resolution by law, such as:

a) Settlement through Arbitration

Settlement of disputes through arbitration in accordance with international law commission is a procedure for the settlement of disputes between states by a

³⁶ Ibid., 335.

binding award on the basis of law and as a result of an undertaking voluntarily accepted.³⁷

As well as the peaceful settlement of disputes others, also underlies the principle of voluntary dispute resolution through this institution. The agreement of the parties to bring the dispute to arbitration must be met before arbitration implements its jurisdiction.

Arbitration is focus on problem of rights and obligations of Parties' dispute based on international law.

Dispute resolution is achieved by applying the law to the facts of a case is not appropriate to state that economic factors are not relevant to be the basis for decision making. Just as the ICJ, the main focus of arbitration is on issues of international law.

General provisions are arbitration decision that legally binding. Once a country is committed to arbitration then he has a legal obligation to implement all the results of the arbitration decision. Although it does not have the tools to ensure law enforcement, but the majority of the arbitration decision complied with and implemented by the parties to the dispute.³⁸

³⁷ Martin Dixon, *Textbook on International Law*, Fourth Edition (London: Blackstone Press Limited, 2009), pg. 268.

³⁸ *Ibid.*, pg 340.

In the process of arbitration the parties may choose the arbitrators. Unlike in the ICJ, the parties can directly control the composition of the panel and procedures. This ensures that the panel gained the full confidence of the parties and to increase the power of final decision. In general, the panel consists of equal amounts of both sides coupled with a neutral judge or arbitrator agreed by both parties to the dispute to sit as leaders.

b) Settlement through International Court

There are several international courts, among others, the international Court of Justice (ICJ), the Permanent Court of International of Justice (PCIJ), the international tribunal for the law of the sea, various ad hoc tribunals, also international criminal court (ICC).

ICJ also is the successor PCIJ was court adjudicate disputes between countries in the field of international law.

The ICJ is often regarded as the main means of interstate legal dispute resolution. Practice only about 4-5 cases submitted to this institution per year. Court jurisdiction is dependent on the willingness of the parties to bring the case to court.

Based on the results of the study, members of the international community rarely finish the case before the ICJ because of several factors:³⁹

1. Process through the ICJ is only taken as a last resort, when all other avenues congested;
2. Process through the ICJ take a long time and the cost is quite high, because usually only major cases are usually brought to the ICJ;
3. The ICJ does not have compulsory jurisdiction.

2) Resolution Using Violation

Resolution of disputes using violation is often referred to as the not peaceful resolution, consist of:

a) Retorting

Retorting is unfriendly act committed by one country against another country that had previously hostile action.

Retorting an act of retaliation against other countries that have committed immoral or unjust action. Usually in the form of action retorting same or similar to the actions taken by the state are subjected to retorting.

³⁹ Ibid., pg. 343-344.

Retorting is a legitimate action intended to harm the country who has committed an offense. Retorting is also an act of self help. Retorting forms include:

1. The severance of diplomatic relations;
2. The revocation of diplomatic privileges;
3. The withdrawal of tax concessions or tariffs;
4. Cessation of economic aid.

b) Reprisal

Reprisal is one of the terms that have been known for a long time, though scholars of international law when it has not obtained an agreement on the meaning to be given to reprisal. Initially reprisal is retaliation to secure the compensation. Reprisal when it is limited to detention of persons or property. Thus, very prevalent at the time the state issue a batters of the marque to one of its citizens, who do not obtain a court channels in other countries, which gave him the power to take its own damages suffered, if necessary by force. So did the confiscation of property belonging to the people of the state is at fault.

Further progress, reprisal interpreted as coercive efforts undertaken by a state against another, with the intent to resolve disputes arising out of the country has been subjected to reprisal illegal acts or acts that can't be

justified. Thus, reprisal is actually a hostile acts committed by a state against another in an attempt resistance to force other countries to stop the illegal act. A form of reprisal actions, among others:⁴⁰

1. Goods boycott
2. Embargo
3. Naval demonstration
4. Bombing

c) Peaceful Blockade (Pacific Blockade)

Peaceful blockade is a blockade in peacetime to force blockaded country to fulfill demand compensation that suffered by the country which blockade blockaded country. Peaceful blockade was more of reprisal, but still below the war. The unilateral actions of peaceful blockade's validity were still questionable in UN Charter.⁴¹

d) Embargo

Embargo is another procedure to obtain compensation from other countries. Embargo is a ban on the export of goods to countries subject to embargo. Other than that the embargo can be applied as a sanction for a country that many violations of international law.

⁴⁰ Ibid., 350.

⁴¹ Ibid., 352.

Compared with reprisal or peaceful blockades, embargoes are less effective, but less risk to increase to war.⁴²

e) War

War aims to conquer the opponent states that the losing country has no alternative but to accept the terms of the settlement are determined by the state of war winner.⁴³

B. Theoretical Framework

1. State Responsibility Theory

In international law recognized the existence of two kinds of rules, primary rules and secondary rules. Primary rules is a set of rules that define the rights and obligations set out in the Treaty form, common law or other instrument. As for the secondary rule is a set of rules that define how and what the legal consequences if it violated primary rules by state. Secondary rule is called the law of the state responsibility.⁴⁴

Generally, international legal experts argued characteristic of responsibility of the state, such as:⁴⁵

- a. The existence of international legal obligations that apply between two specific countries

⁴² Ibid., pg. 353.

⁴³ Ibid.

⁴⁴ Ibid., pg. 267.

⁴⁵ Shaw, M.N, *International Law*, Third Edition (Cambridge: Grotius Publication, 1991), pg. 482.

- b. The existence of an act or omission that violates the international legal obligations that the state bore responsibility
- c. Any damage or loss as a result of an unlawful act or omission.

There are two kinds of state liability theory in international law, i.e.:⁴⁶

- a. Objective theory/theory of risk: absolute state responsibility, that if any officer or agent of the state to harm other people responsible for the country no matter right or wrong
- b. The theory of subjective/error theory: state responsibility is determined by the element of fault (*dolus*) or negligence (*culpa*) to an officer or agent of the state

2. Legal Protection Theory / *Rechtsbescherming* Theory

According to Satjipto Rahardjo, the presence of legal in the community is to conduct the integration and coordination of interests which could conflict with each other. Therefore, the coordination must be done by law is to restrict and protect these interests. The protection of these interests can only be done by limiting the interest on the other. The law protects the interests of a person by means of allocating a power to a person for acting in the interests of the person.⁴⁷

⁴⁶ Huala Adolf, *Aspek-aspek negara dalam hukum internasional*, Edisi Revisi, (Jakarta : P.T Raja Grafindo Persada, 2002) pg. 15.

⁴⁷ Satjipto Rahardjo, *Ilmu Hukum*, (Bandung: Citra Aditya Bakti, 2000), pg. 53.

Means of legal protection (*rechtsbescherming*) by Philip Hadjon can be viewed from two (2) things such as:⁴⁸

a. Legal protection can be taken preventively with two (2) means that:

- 1) Protection of preventive law by means of legislation.
- 2) The legal protection through preventive means agreement.

b. Protection of repressive laws which obtain legal protection by seeking the General Court.

⁴⁸ Philipus Hadjon, *Perlindungan Hukum Bagi Rakyat di Indonesia*, Cetakan I, Edisi Khusus, (Surabaya: Peradaban, 2007), pg. 3-5.