

**INTERNATIONAL HUMAN RIGHTS REVIEW TOWARDS
FREEDOM OF RELIGION (THE HOUSE OF WORSHIP
ESTABLISHMENT CASE IN CILEGON CITY)**



**ANDI RIFA AADILAH
B011191149**



**UNDERGRADUATE LEGAL STUDIES PROGRAM
FACULTY OF LAW
HASANUDDIN UNIVERSITY
MAKASSAR
2024**

THESIS

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By:

ANDI RIFA AADILAH
NIM. B011191149

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TITLE PAGE

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Submitted As One Of The Requirements For Achieving A Bachelor's
Degree In The Undergraduate Legal Studies Program

Prepared and submitted by:

ANDI RIFA AADILAH
NIM. B011191149

**UNDERGRADUATE LEGAL STUDIES PROGRAM
DEPARTMENT OF INTERNATIONAL LAW
FACULTY OF LAW HASANUDDIN UNIVERSITY
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SUPERVISOR APPROVAL

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Prepared and Submitted by:

ANDI RIFA AADILAH
NIM. B011191149

For Thesis Seminar
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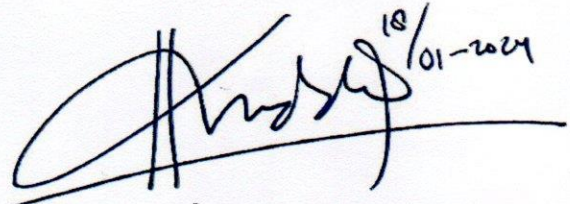
Supervisors Commission

Main Supervisor,



Prof. Dr. Iin Karita Sakharina, S.H., M.A.
NIP. 1977120 200112 2 001

Co-Supervisor,



Dr. Kadarudin, S.H., M.H., CLA.
NIP. 19880514 201904 3 001

THESIS LEGITIMATION

INTERNATIONAL HUMAN RIGHTS REVIEW TOWARDS FREEDOM OF RELIGION (THE HOUSE OF WORSHIP ESTABLISHMENT CASE IN CILEGON CITY)

Prepared and submitted by:

ANDI RIFA AADILAH

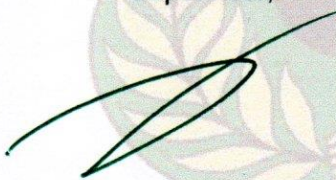
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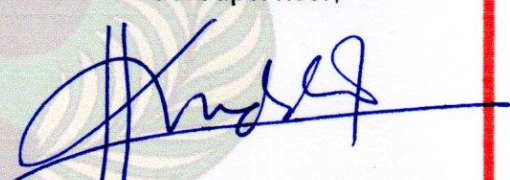
It has been defended before the Thesis Examination Committee which was formed in connection with the Completion of Undergraduate Studies in the Department of International Law, Legal Studies Program Faculty of Law, Hasanuddin University On Thursday, 14th March 2024 and declared to have fulfilled the graduation requirements.

Approve:

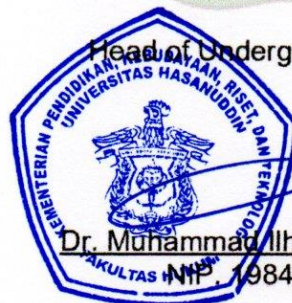
Supervisor,

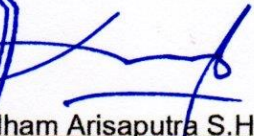
Co-Supervisor,


Prof. Dr. Iin Karita Sakharina, S.H., M.A.
NIP. 197701202001122001


Dr. Kadarudin, S.H., M.H., CLA.
NIP. 198805142019043001

Head of Undergraduate Study Program,




Dr. Muhammad Ilham Arisaputra S.H., M.Kn
NIP. 198408182010121005

STATEMENT OF THE AUTHENTICITY

Name : Andi Rifa Aadilah
NIM : B011191149
Courses : Legal Studies Program

Stating truthfully that the author of the thesis entitled **INTERNATIONAL HUMAN RIGHTS REVIEW TOWARDS FREEDOM OF RELIGION (THE HOUSE OF WORSHIP ESTABLISHMENT CASE IN CILEGON CITY)** is really my own work. Things that are not my work in writing this thesis are marked *citations* and shown in the bibliography.

If in the future it is proven that my statement is not true, then I am willing to accept sanctions in accordance with the regulation of the Minister of National Education of the Republic of Indonesia No. 17 of 2010 and applicable laws and regulations.

Makassar, 14th March 2024

Who makes the statement,



Andi Rifa Aadilah
NIM. B011191149

APPRECIATION LETTER

Bismillahirrahmanirrahim,

Assalamu'alaikum Warahmatullahi Wabarakatuh.

All praise and gratitude are always offered by the author for the presence of Allah SWT, God Almighty, for all the abundance of His mercy, pleasure, help, and affection for the author. As well as greetings and prayers to the Prophet Muhammad SAW who has given light guidance for his people in faith. Thanks to the permission of Allah SWT, the author was able to complete writing a thesis entitled "International Human Rights Review Towards Freedom of Religion (The House of Worship Establishment Case in Cilegon City)" as a final project in order to complete his Bachelor studies at the Department of International Law, Law Study Program, Faculty of Law, Hasanuddin University.

With all humility, the author dedicates this thesis to author's father namely Andi Dorhan and author's mother Andi Hartaty who with love, sincerity and patience have given birth to and educated the writer to be a useful person. To the author's brother and sister, Andi Muhammad Raditya Fahrezi and Andi Syaza Naura who have been generous and have expressed their prayers and support for the writer. And all the big family that the writer cannot mention one by one. The author is grateful for all the support and prayers.

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As well as all parties involved in the making and completion of the author's thesis directly or indirectly but cannot be mentioned one by one, the author expresses many thanks for the services and all forms of support that have been given to the author so that this thesis can be completed.

The author realizes that this work is still very far from perfection, for that with all humility the author expects constructive criticism for the improvement and refinement of this thesis.

Best regards,
Andi Rifa Aadilah

ABSTRACT

ANDI RIFA AADILAH (B011191149), with title "*International Human Rights Review Towards Freedom Of Religion (The House Of Worship Establishment Case In Cilegon City)*". Under the guidance of **lin Karita Sakharina** and **Kadarudin**.

This study aims to determine the regulation of freedom of religion in international human rights law and the role of the Cilegon City government in ensuring the enjoyment of freedom of religion for individuals in Cilegon City.

- This research uses empirical legal research types, uses primary data and secondary data, and uses primary legal materials and secondary legal materials. The method used by the author is the interview method, then analyzed prescriptively using the primary and secondary legal materials obtained.

As the results of this study are: (1) Freedom of religion is part of human rights whose enjoyment and restrictions are accommodated through international and national sources of human rights law, such as the UDHR, the ICCPR, Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion, UN Human Rights Council Resolution No. 16/18, the 1945 Constitution, the Human Rights Law, and the Law on the Ratification of the International Covenant on Civil and Political Rights. (2) The Cilegon City Government as a representative of the state fails to carry out its obligations in protecting, fulfilling and respecting the freedom of religion of the HKBP Maranatha Cilegon group to be able to carry out its worship ceremonies perfectly, safely and peacefully.

Keywords: Cilegon City; Human Rights; Freedom of Religion.

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CHAPTER I

INTRODUCTION

A. Background

The plurality of religious people or beliefs in Indonesia is a necessity by looking at the geographical conditions of Indonesian territory which is separated by islands and historically has a different cultural background from one another. Based on data from the Ministry of Culture and Education in 2017, in addition to 6 religions recognized by the Indonesian government through the explanation of article 1 of Presidential Decree No. 1 of 1965 concerning the Prevention of Abuse and/or Blasphemy of Religion (namely Islam, Christianity, Catholicism, Hinduism, Buddhism, Confucianism) there are around 187 local beliefs in Indonesia,¹ while based on data dated December 31, 2021, there are 126,515 people who adhere to local beliefs in Indonesia.²

This diversity of religions or beliefs in Indonesia must be seen positively and optimistically as an advantage that is not owned by other countries and not a barrier in the life of the nation and state, because the guarantee of freedom of religion and belief has been contained in the

¹ Hyugo Simbolon. "Mengenal 6 Aliran Kepercayaan yang Tersebar di Indonesia". Liputan6.com. October 1, 2022. <https://www.liputan6.com/amp/5084852/mengenal-6-aliran-kepercayaan-yang-tersebar-di-indonesia>

² M Ivan Mahdi. "Mayoritas Penganut Aliran Kepercayaan Indonesia Berada di NTT". DataIndonesia.id. April 22, 2022. <https://dataindonesia.id/varia/detail/mayoritas-penganut-aliran-kepercayaan-indonesia-berada-di-ntt>

Constitution of the Republic of Indonesia Year 1945 as the constitution of the unitary state of the Republic of Indonesia in article 28E paragraph (1). The formulation of article 28E paragraph (1) clearly guarantees freedom of religion and belief for all Indonesian citizens and in addition to the freedom to choose which religion or belief to follow, the concept of freedom of religion and belief as a human right also guarantees to followers of religion or belief to be able to express their beliefs through worship and cultural expressions related to religion or belief aforementioned.

Not only within the scope of the constitution, in the dimension of international law there are also norms that protect and recognize freedom of religion as a form of human rights. The norm is regulated in article 18 of the International Covenant on Civil and Political Rights which accommodates the protection and respect for freedom of thought, belief and religion, as well as the recognition and legitimacy of protection of the manifestation of these beliefs and religions in the form of worship procedures, to education.³ No one can be persecuted for his or her freedom of religion, and restrictions on freedom of religion can only be enshrined in the form of laws to safeguard public safety, public benefit, morals or fundamental values and freedoms of others.⁴

³ Winner Agustinus Siregar and Iin Kartika Sakharina, 2019, *Human Rights Protection Policy in Freedom Violations of Religion and Belief*, Research on Humanities and Social Sciences, Volume 9, Number 4, p. 70.

⁴ Zainal Abidin Bagir, *et.al.* 2019. *Membatasi Tanpa Melanggar: Hak Kebebasan Beragama atau Berkeyakinan*. Yogyakarta: Center for Religious and Cross-cultural Studies (CRCS), p. 3.

Unlike it should be, the problem that often arises in society is friction between groups on behalf of certain religious groups or beliefs, in many cases minority groups of certain religions or beliefs often face persecution or discrimination based on their religion or belief.⁵ This makes the paradigm related to religion in Indonesia a sensitive matter, the problem of persecution or discrimination occurs in almost all aspects, ranging from things that are paradigmatic in the level of ideas such as the dominance of discourse on a religious teaching or belief in other religions or beliefs, to practical things such as the inability to enjoy guarantees of carrying out worship procedures and the absence of religious facilities or trust.

Referring back to General Comment No. 22 of the ICCPR, it further points out that the fact that a religious state, or a state declaring official religions, or the religion of a majority of the population in a country, cannot be grounds for degrading the right to religion against other religions, as guaranteed protection in the ICCPR and leading to discrimination against those minor religions.⁶

Persecution and discrimination against religious or religious minorities such as the prohibition of carrying out certain worship as well as the prohibition of the construction of religious facilities are no longer a new

⁵ Abdul Maasba Magassing, *et.al.* 2014. *Kompilasi Hasil Penelitian Putusan Pengadilan dan Kebijakan Daerah Terkait Hak-Hak Atas Kebebasan Beragama/Berkeyakinan*. ILRC, p. 192.

⁶ Kadarudin, 2015, *Legal Guarantees and Inconsistency of State Recognition to the Right of Religion/Belief in Indonesia*, Hasanuddin Law Review, Volume 1 Number 1, Faculty of Law, Hasanuddin University, Makassar, p. 13.

problem in Indonesia. Every year, there are almost often statutes related to this issue, for example, such as the polemic banning the construction of the Huria Kristen Batak Protestan (HKBP) Maranatha house of worship (church) which occurred in Cilegon City, West Java Province in September 2022.⁷

For 15 years, the congregation of HKBP Maranatha Cilegon, took care of permits regarding the establishment of churches, but until now it has not been realized. Thousands of Christians in Cilegon City even have to cross the city to Serang City to ride to worship. The challenges they face to be able to enjoy the right to religion and practice their worship arise from community rejection, to the passive attitude of the local government which seems reluctant to issue permits for the construction of the church, even though the permit file has been submitted.⁸

There are interesting facts related to the city of Cilegon, namely that there are no other house of worship facilities besides Mosques and Musallas for residents who are Muslims while in Cilegon City itself there are 6,740 Christians, 1,743 Catholics, 215 Hindus, 215 Buddhists, and 7 Confucians who⁹ also need house of worship facilities so that they can carry

⁷ Maria Flora. "Ephorus HKBP: Penolakan Pembangunan Gereja di Cilegon Melukai Hati, Harap IMB Segera Keluar" Liputan6.com. September 16, 2022. <https://www.liputan6.com/news/read/5071828/ephorus-hkbp-penolakan-pembangunan-gereja-di-cilegon-melukai-hati-harap-imb-segera-keluar>

⁸ BBC News Indonesia. "Pendirian Gereja Ditolak: Penantian 15 Tahun Jemaat, Warganet Pertanyakan Langkah Wali Kota, 'Inikah Namanya Toleransi?'. [bbc.com](https://www.bbc.com/indonesia/indonesia-62836957). September 8, 2022. <https://www.bbc.com/indonesia/indonesia-62836957>

⁹ Ministry of Religious Affairs of the Republic of Indonesia. "Mengurai Polemik Penolakan Pendirian Gereja di Cilegon". [kemenag.co.id](https://kemenag.go.id/read/mengurai-polemik-penolakan-pendirian-gereja-di-cilegon-doyyq). September 9, 2022. <https://kemenag.go.id/read/mengurai-polemik-penolakan-pendirian-gereja-di-cilegon-doyyq>

out their respective worship safely and comfortably without interference and discomfort when worshipping.

State guarantees for freedom of religion or belief as well as guarantees for the implementation of worship systems and the willingness of worship facilities as a form of fulfillment of human rights are not at all reflected in the polemical case of prohibiting the construction of houses of worship in Cilegon City, because the state through its legal instruments has provided rights and freedoms for every citizen for matters related to religion or belief. Under ideal conditions, citizens are free to choose the religion or belief they believe privately and citizens also have the right to express those religious practices or beliefs.

In the context of human rights law, the presence of the state should be seen as an entity bearing obligations in all kinds of efforts to uphold human rights. This is known as a *duty bearer*. Efforts in the fulfillment, protection, and respect of human rights, shall be the responsibility of the state towards all individuals residing in its territory, without selective cutting or discrimination based on certain circumstances, including regarding religious minorities in a domestic territory in the country.¹⁰

Given the position of the state represented by the local government of Cilegon City as a stakeholder of obligations, the state should be able to guarantee that citizens of religious minorities or beliefs in Cilegon City get fulfillment of freedom of religion or belief, get protection to be able to

¹⁰ Rhona K.M. Smith, *et al.* 2008. *Hukum dan HAM*. Yogyakarta: PUSHAM UII, p.35.

exercise freedom of religion or belief, and get respect for citizens' choices about freedom of religion or belief. Because the obligations of the country are contained in various legal instruments such as Article 28E of the 1945 Constitution, Article 18 of the Law of the Republic of Indonesia Number 39 of 1999 concerning Human Rights, and Article 18 of the International Covenant on Civil and Political Rights, as ratified through Law of the Republic of Indonesia Number 12 of 2005 concerning the Ratification of the International Covenant on Civil and Political Rights.

Reflecting on the event, the state is urged to be present in response to this incident. The polemical context of banning the construction of the HKBP Maranatha house of worship (church) in Cilegon City was exacerbated by the action of the Deputy Mayor of Cilegon who co-signed the petition against the construction of the church. Therefore, by looking at *the gap between das sollen and das sein* through the polemic event of church construction in Cilegon City, the author is interested in designing a research entitled **International Human Rights Review Towards Freedom of Religion (the House of Worship Establishment Case in Cilegon City)**.

B. Research Questions

1. How is the freedom of religion protect by the international of human rights law?
2. How is the role of the state in Cilegon City regarding the guarantee of Freedom of Religion for individual?

C. Research Purpose

1. To find out the freedom of religion protection by the international of human rights law.
2. To find out the role of the Cilegon City government in guaranteeing freedom of religion for individuals.

D. Research Benefit

1. This research is expected to act as a reference for students and universities, to review issues surrounding freedom of religion in the lens of international human rights law.
2. For the author himself, this research is expected to increase the understanding and knowledge that the author has about freedom of religion in international human rights law, as well as be a guide for the author to apply studies about human rights.
3. For the general public, this research is also expected to be a reference to discuss freedom of religion in international human rights law, especially to the people of Cilegon City who are still fighting for their right to religion and carry out their worship ceremonies.

E. Research Originality

The research raised by the author this time is original research and does not contain similarities with previous studies. As a comparison, the author first describes previous studies which include the following:

1. Thesis by Dio mandala Putra, 2019, Faculty of Law, University of Riau with the title " *Perlindungan Hak Kebebasan Beragama dan*

Berkeyakinan di Indonesia Menurut Universal Declaration of Human Rights Tahun 1948". The problem formulation consists of: "(1) Bagaimana perlindungan hak kebebasan beragama dan berkeyakinan di Indonesia menurut *Universal Declaration of Human Rights* tahun 1948? (2) Bagaimana peran The National Commission on Human Rights dalam perlindungan hak kebebasan beragama dan berkeyakinan di Indonesia menurut *Universal Declaration of Human Rights* tahun 1948?". The difference between this study and the research that will be raised by the author is that this study focuses on aspects of freedom of religion and belief narrowly on the norms contained in the 1948 Universal Declaration of Human Rights and the role of The National Commission on Human Rights on freedom of religion and belief as stipulated in the 1948 Universal Declaration of Human Rights. While the research that will be raised by the author will discuss freedom of belief and religion through the dimensions of international human rights law as a whole, the role of the state in freedom of belief and religion in international human rights law, and the application of these norms in the case of refusal to build houses of worship in Cilegon City.

2. Thesis by Sigit Riono, 2015, Faculty of Law, Semarang University with the title "*Hak Kebebasan Beragama di Indonesia (Studi Socio-Legal Dalam Kasus Ahmadiyah)*". The Problem Statement consists of: "(1) Bagaimana pengaturan hak kebebasan beragama di Indonesia dalam peraturan hak asasi manusia secara hukum pada kelompok aliran

agama Ahmadiyah? (2) Bagaimanakah implementasi Undang-Undang Nomor 39 Tahun 1999 tentang Hak Asasi Manusia dalam mengatasi konflik horizontal yang ada di masyarakat terhadap kelompok Ahmadiyah?". In this study, there are also differences with the research that will be raised by the author, namely this study only focuses on aspects of freedom of religion accommodated by positive law in Indonesia, the application of human rights laws in overcoming conflicts between communities, and this research focuses on the case of Ahmadiyah. Meanwhile, the author's research focuses on freedom of religion on the dimensions of international human rights law and the role of the state in international human rights law in cases of refusal to build houses of worship in Cilegon City.

3. Thesis by Iwan Alfitra, 2020, Faculty of Sharia and Law, AR-Raniry Darussalam Islamic University Banda Aceh with the title "*Protection of Religious Rights for Children (Comparative Study of Islamic Law and Laws and Regulations in Indonesia)*". The formulation of the problem consists of: "(1) Bagaimana kebebasan hak beragama bagi anak menurut hukum Islam dan peraturan perundang-undangan di Indonesia? (2) Apa saja bentuk-bentuk perlindungan hak beragama bagi anak menurut hukum Islam dan peraturan perundang-undangan di Indonesia?" In this study, there are also differences with the research that will be raised by the author, namely this study only focuses on discussing freedom of religion for children which is accommodated by Islamic law

and positive law in Indonesia, as well as forms of protection of religious rights for children according to Islamic law and positive law in Indonesia. Meanwhile, the research that will be raised by the author does not limit the subject of these rights stakeholders only to children, and the legal basis used is international human rights law and discusses the role of the state in international human rights law against the rejection of the construction of houses of worship in Cilegon City.

4. Thesis by Ulfatun Ni'mah, 2022, Faculty of Ushuluddin, Adab and Humanities, Islamic University KH. Ahmad Siddiq Jember with the title "*Kebebasan beragama Dalam Perspektif Sayyid Quthb (Studi QS. Al Baqarah: 256)*". The formulation of the problem consists of: "(1) Bagaimana Sayyid Quthb memaknai kebebasan beragama dalam penafsiran QS. Al-Baqarah: 256? (2) Bagaimana metode yang digunakan oleh Sayyid Quthb dalam memahami penafsiran kebebasan beragama?" In this study, there are differences with the research that will be raised by the author, namely this study focuses on discussing freedom of religion through the perspective of Sayyid Quthb through QS. Al-Baqarah: 256 and the interpretation method used by Sayyid Quthb in understanding freedom of religion. While the research that will be raised by the author does not only focus on using the interpretation of freedom of religion by one figure and source of religious law, but uses international human rights law norms and discusses the role of the state in

international human rights law against the rejection of the construction of houses of worship in Cilegon City.

5. Thesis by Rohana, 2017, Faculty of Sharia, Palopo Islamic Institute (IAIN) Palopo with the title "*Jaminan Kebebasan Beragama Menurut Undang-Undang Dasar Negara RI Tahun 1945 Di Desa Mantadulu Kecamatan Angkona Kabupaten Luwu Timur (Perspektif Hukum Islam)*".

The formulation of the problem consists of: "(1) Bagaimana jaminan kebebasan beragama menurut Undang-Undang Dasar Negara Republik Indonesia tahun 1945 di Desa Mantadulu Kec. Angkona Kab. Luwu Timur? (2) Bagaimana jaminan kebebasan beragama menurut hak asasi manusia (HAM) di Desa Mantadulu Kec. Angkona Kab. Luwu Timur? (3) Bagaimana jaminan kebebasan beragam perspektif Hukum Islam di Desa Mantadulu Kec. Angkona Kab. Luwu Timur?" In this research, there are differences with the research that will be raised by the author, namely this research only focuses on discussing freedom of religion within the scope of the Indonesian constitution, the concept of human rights in general, and also the perspective of Islamic law which was studied using a case study approach in a village in East Luwu, South Sulawesi. Although it contains a few similarities, namely discussing freedom of religion and there are also similarities in the use of universal human rights concepts contained in international human rights norms, the research that will be raised by the author will focus more on discussing freedom of religion using international human rights law and discussing the role of

the state in international human rights law against the event of refusal to build houses of worship in Cilegon City.

CHAPTER II

LITERATURE REVIEW

A. General Review of International Human Rights

1. Definition of Human Rights

Human Rights is a set of basic rights inherent in every human person simply because he is solely a human being.¹¹ The nature of inalienable human rights basically protects one's dignity because it can apply regardless of ethnicity, religion, race, and group can also apply anywhere and anytime. Based on its terminological development, human rights were only known after the Universal Declaration of Human Rights (UDHR) in 1948 but conceptually recognition of human rights had developed long before that. The concept of human rights can already be found in documents such as the Magna Charta in 1215 and the *bill of rights* in 1689 in England, then the recognition of the concept of human rights is also contained in *The American Declaration of Independence* and after the French revolution was born The French Declaration in 1789¹².

¹¹ Kadarudin. "Pembatasan Hak Kebebasan Beragama dan Berkeyakinan di Indonesia yang Kian Terlupaka", Jurnal Keadilan Sosial. Edisi III, 2013, p. 24.

¹² Serlika Aprita, Yonani Hasyim, 2020, *Hukum dan Hak Asasi Manusia*, Bogor: Mitra Wacana Media, pp. 9-10.

In modern international legal documents such as the UDHR, human rights are defined as a set of rights that guarantee human dignity, equality, the basis of freedom, justice and peace in the world.¹³

The definition of human rights can also be found in Article 1 number (1) of Law Number 39 of 1999 concerning Human Rights which reads:

"Human rights are a number of rights inherent in the essence and existence of man as a creature of God Almighty and are His gift that must be respected, upheld and protected by the state, law, government, and everyone for the honor and protection of human dignity and dignity".

2. Instruments of International Human Rights

International Human Rights Law which is a friction or fragment of international law also has similar sources to international law. Just as international law draws from international treaty law, *customary international law*, common law principles, judges' rulings and doctrines of international jurists, international human rights law also derives from these sources.¹⁴ However, if you look at legal instruments that can be identified as having the force of binding law (*hard law*), it can be argued that the source of International Human Rights Law will lead to 9 core International Human Rights Law instruments.¹⁵

¹³ The first paragraph of the Preamble to the Universal Declaration of Human Rights of 1948.

¹⁴ Harkristuti Harkrisnowo, Hadi R. Purnama. Module 1: *Pengantar Hak Asasi Manusia dan Humaniter*, pp. 1.10-1.12.

¹⁵ *Ibid.*

A more basic description of these human rights legal instruments can be referred to human rights law norms sourced from three international legal instruments, namely, 1) the UDHR of 1948; 2) the ICCPR of 1966 and; 3) The International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966.¹⁶

The three instruments above in its development have many derivatives that provide more specific guarantees for certain rights, there are at least 6 human rights law instruments born after the presence of the ICCPR and the ICESCR which discuss women's rights, the right to be free from torture, the right to be free from racial and ethnic-based discrimination, children's rights, migrant workers' rights, the right to protection from enforced disappearance, and the rights of persons with disabilities.¹⁷

In Indonesia itself, of the 9 main instruments of International Human Rights Law, from the 1990s to 2021 Indonesia was only absent from ratification of the International Convention for the Protection of All Persons from Enforced Disappearance, formed in 2007. So there have been 8 instruments of international human rights law ratified or accession into national legal norms through the following laws:

¹⁶ *Ibid.*

¹⁷ *Ibid.*

- a) Law Number 7 of 1984 concerning the Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women;
- b) Presidential Decree Number 36 of 1990 concerning the Ratification of the Convention on the Rights of the Child;
- c) Law Number 5 of 1998 concerning the Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- d) Law Number 29 of 1999 concerning the Ratification of the International Convention on the Elimination of All Forms of Racial Discrimination;
- e) Law Number 11 of 2005 concerning the Ratification of the International Covenant on Economic, Social and Cultural Rights;
- f) Law Number 12 of 2005 concerning the Ratification of the International Covenant on Civil and Political Rights;
- g) Law Number 6 of 2012 concerning the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;
- h) Law Number 6 of 2011 concerning the Ratification of the Convention On The Rights of Persons With Disabilities.

Each of the 8 main human rights instruments above provides a very rapid development of human rights law discourse in Indonesia, especially during the transition period between the New Order

government under the leadership of H. M. Soeharto as President to the government under the leadership of President B. J. Habibie who then ratified or formed many norms of Human Rights Law and even amended the constitution which in the second amendment added a special chapter in the constitution on Human Rights i.e. beginning in chapters 28 A - 28 J CHAPTER XA.

From the variety of human rights legal instruments as described above, the research that will be raised by the author this time will only use international human rights law instruments as a legal basis in answering the problems studied, namely the UDHR and the ICCPR.

3. Principles of International Human Rights

Principles in human rights are something very basic and are the touchstone of human rights norms or the implementation of human rights, there are at least four basic principles of human rights that can be found in Article 5 of the Vienna Declaration of 1990 concerning the Program of Action, namely, universal, indivisible, interdependence, and interrelated. The details are outlined as follows:¹⁸

a) The Universal Principle

The Universal principles are the basic framework of the enjoyment of human rights that are timeless in time and space, in addition to transcending these concepts, human rights can also

¹⁸ Rhona K.M. Smith, *et.al.*, *Op. Cit.*. p. 11

apply universally regardless of the concept of socio-political-based identity inherent in each individual human being.

b) The Indivisibility Principle

Human rights are constructed as a "set of rights" not without reason, but based on the consideration that all human rights exist as a unified component of guaranteeing human dignity, therefore it is not allowed to exclude or not consider certain rights as human rights. As in the division between the categories of Civil Political rights and Economic, Social, Cultural rights the fulfillment cannot be divided into only one part, but must be as a whole

c) The Principle of Interdependence

The principle of interdependence comes along with the realization that the enjoyment of certain rights will depend on the fulfillment of other rights as a prerequisite. If the enjoyment of a right is hampered, it will also affect the fulfillment of other rights.

d) Interrelated Principles

The relationship of one right with other rights in the framework of human rights is a necessity because all human rights are an inseparable package in order to achieve an ideal condition of human rights enjoyment.

B. Universalism and Cultural Relativism in Human Rights

1. Theory of Universalism of Human Rights

Human rights in many theoretical reviews are understood a set of rights that in their enjoyment have a universal moral basis, meaning that the enjoyment of human rights in any part of the world must behave similarly to one another based on these universal norms. However, the universal nature of human rights has become a topic of discussion that cannot be resolved because international legal norms that bring the concept of human rights across national borders that have diverse ideological concepts and moral codes cannot accept the enjoyment of human rights as a whole because they clash with local moral and cultural values or codes.

As mentioned above that human rights are based on universal morals that if they can apply in any part of the world and to anyone, universal morals themselves are understood as truths whose acceptance crosses human cultures and history because they are based on rationality.¹⁹ Before attaching universal morals to human rights, in the study of legal philosophy, especially those that discuss related schools of natural law, also emphasizes the universal and eternal nature of a law. The school of natural law can be separated into two derivative streams, namely the irrational flow of natural law and the flow of rational natural law which in the context of human rights,

¹⁹ *Ibid.* p. 19

universal moral values contained in international human rights law norms are in line with the flow of rational natural law that bases justice on human rationality.²⁰

The effort to base justice on rationality is what makes the theory of universalism can cross the boundaries of regions that have different cultures and even individual personalities of each human being, because rationality is free from such things. For example, the recognition of jus cogens or a preematory norm that civilized nations must adhere to as part of the general principles of international law, the acceptance of a basic concept of ²¹ jus cogens is evidence that apart from the diverse cultures and personalities of individual human beings, there is acceptance of universal morals.²²

2. Theory of Cultural Relativism of Human Rights

Cultural relativism as a counter-narrative to human rights universalism is a dialectical part of the development of human rights ideas born after the cold war and promoted by third world countries (former colonies). Cultural relativism carries the grand narrative that values in the idea of human rights must be related to diverse local cultural contexts and universal morals claimed by the doctrine of human

²⁰ Sukarno Aburaera, *et.al.*, 2013, *Filsafat Hukum: Teori dan Praktik*, Jakarta: Publisher Kencana, p. 94.

²¹ Eddy O.S. Hiariej, 2010, *Pengadilan Atas Beberapa Kejahatan Serius Terhadap Hak Asasi Manusia*, Jakarta: Erlangga Publishers, p. 2.

²² *Ibid.*

rights universalism are only part of the attempt to dominate one culture over another.²³

The doctrine of cultural relativism in the idea of human rights departs from the philosophical view that moral codes are something relative, therefore it needs an empirical context (cultural, economic, socio-political) in formulating laws containing the idea of human rights. This view, of course, is different from the doctrine of universalism of human rights which is more inclined to the theory of positivism and views the law as an instrument needed to regulate and create the empirical situation.²⁴

Cultural relativism can be classified by degree according to Jack Donnelly. At the lowest level there is "weak cultural relativism", at this level social groups that base their acceptance of human rights ideas on their culture tend to be able to accept human rights ideas and then integrate with local culture as long as they are considered to have positive values. Second, there is "strong cultural relativism" which regards their culture as a primary moral code and then complemented some values from outside their culture, such as in the context of how religion can coexist feminism in terms of eliminating discrimination against women. At the highest stage there is "radical cultural relativism", adherents of "radical cultural relativism" assume that culture is only the

²³ Rhona K.M. Smith, *et.al.*, *Op. Cit.* pp. 20-21.

²⁴ *Ibid.*

only source of morality and that assumption is absolute which means external values cannot be accepted because they are considered to damage the core values of the culture adhered to.²⁵

C. Freedom of Religion

1. Definition of Freedom of Religion

Religion can be simplified into a collection of certain rules or statutes to govern life. In a sociological context, religion becomes a form of recognition of a group that has beliefs and practices a certain system of worship. While belief can be interpreted as something that does not meet the elements contained in religion, which means there is a similarity of the two concepts, namely in "belief". Although in many forms it has to do with how to accept belief, how to exercise belief, and so on.²⁶

Through the above understanding, it can be concluded that freedom of religion or belief is a human rights idea that provides guarantees for humans to be able to choose, defend, and practice their beliefs. In addition, freedom of religion or belief is also set forth in legal norms both on an international and national scale, on an international scale there are guarantees in article 18 of the ICCPR along with the General Comment of the Commission for Civil and Political Rights number 22, while in the Indonesian national legal system the guarantee of freedom

²⁵ Al Khanif, 2016, *Diktat Mata Kuliah HAM*, Faculty of Law, Jember University, p. 41.

²⁶The Wahid Institute, 2015, *The Wahid Institute's 2014 Annual Report on Religious/Freedom of religion and Intolerance*, p. 3.

of religion or belief is contained in the constitution as the most basic legal norm, namely in article 28E The 1945 Constitution, also in article 18 of Law Number 39 of 1999 concerning Human Rights, and Law Number 12 of 2005 concerning the Ratification of the International Covenant on Civil and Political Rights.

Each legal norm that guarantees freedom of religion or belief recognizes the guarantee of freedom to choose, practice, and defend one's religion or belief free from pressure or coercion from others. At the normative level, this is in accordance with what was initiated in the concept of human rights, but in practice, especially in countries such as South Asia, the Middle East, and Southeast Asia, there are often many violations, one of the causes of which is related to the doctrine of cultural relativism in the previous discussion.²⁷

2. Freedom of Religion as a Human Rights

Freedom of religion or belief is theoretically a freedom that has a portion in the *internum forum* and also the *external forum*. The classification of which forms are included in the internal and external forums must be clear, because in the dimension of civil politic rights that recognize the concepts of derogable and non-derogable rights will have implications for the extent to which restrictions can be applied to freedom of religion / belief. *Forum internum* is a freedom that is within the internal scope of each individual as an individual is free to believe,

²⁷ Al Khanif. *Op.Cit.* p. 43.

adhere, religion or any belief because it is on a conscience that is not even known by others. While the *extremum forum* is in the opposite dimension, where individual freedom is manifested concretely in the form of acts of practice, teaching, worship and structuring.²⁸

In freedom of religion or belief, it has eight main elements consisting of:²⁹

- a) *Internum Forum*. Every individual has the right to think, believe, and be religious. This right includes the freedom of any individual to own, adhere, defend, or convert to religion or belief.
- b) *Externum Forum*. Each individual has the freedom, either individually or collectively, in public or in the private sphere, to realize his religion or belief in teaching, implementing the teachings of that religion, worship, and arrangement.
- c) No coercion. Each individual cannot be coerced which results in the interruption of the individual's freedom to profess or establish his religion or belief according to his choice.
- d) Non Discrimination. The State bears the obligation to respect and guarantee freedom of religion or belief to all individuals who are in the territory of their country and subject to their jurisdiction,

²⁸ The Wahid Institute. *Op.Cit.* pp. 7-9.

²⁹ The Indonesian Legal Resource Center (ILRC). 2010. "*Bukan Jalan Tengah*" *Eksaminasi Publik Putusan Mahkamah Konstitusi Perihal Pengujian Undang-Undang Nomor 1 PNPS Tahun 1965 Tentang Penyalahgunaan dan/atau Penodaan Agama*". The Indonesian Legal Resource (ILRC). Jakarta. p. 44.

without making any distinction of treatment based on ethnicity, color, sex, language, religion, or belief, etc.

- e) Rights of Parents and Guardians. States bear the obligation to respect the freedom of parents and legal guardians to provide religious and moral education to their children in accordance with their beliefs and in line with the obligation to protect the right of children to freedom of religion and enjoyment in accordance with the child's developmental capacity.
- f) Institutional Freedom and Legal Status of Children. Every individual has the right to form groups or associations just as a crucial aspect of religion is to form groups. Thus, religious unity has the freedom to practice religion / belief and in it also contains freedom in forming groups or associations, and has independence in
- g) Non-derogability. The state cannot reduce or suspend freedom of religion and freedom of belief under any circumstances.
- h) Permissible Restrictions. The freedom to establish the rules of one's religion or belief can only be limited through the product of law and is intended to protect public safety and order, public health or decency, or the fundamental rights of others.

3. Restrictions on Freedom of Religion and Expression

Freedom of religion or belief which is understood as a right that is divided into two parts, namely the *internum forum* and the *external*

forum also has a uniqueness in terms of restrictions, because restrictions on freedom of religion or belief can only be applied to the externum forum which is a form of manifestation of religious teachings / beliefs in the form of expression. Meanwhile, restrictions on the internal forum section of freedom of religion / belief cannot be carried out for any reason even in emergency conditions.³⁰

In order to clearly distinguish between the forms of forum internum and forum externum on freedom of religion/belief, the UN Human Rights Committee issued a further explanatory document related to article 18 of the ICCPR in the form of General Comment No. 22. It is defined in the document that the freedom to own or profess a religion or belief of one's own choice which also includes converting or leaving a religion or belief is part of the internal forum, and the freedom to practice the teachings of a religion or belief is part of the external forum.

The forms of embodiment of religious teachings in question consist of:³¹

- a) Carrying out religious teachings in the form of worship activities.
- b) Has a place of worship
- c) Using religious symbols
- d) Commemorating religious holidays
- e) Appoint or elect religious leaders
- f) Teaching and spreading religious teachings
- g) The right of parents to provide religious and moral education for their children
- h) Communicate with individuals and religious communities at local and international levels
- i) Establish and run a humanitarian institution and receive funding

³⁰ Zainal Abidin Bagir, *et.al.*, *Op.Cit.* p. 2

³¹ *Ibid.* p. 6

j) Raising conscientious objections

So in the case of restrictions on these forms can still be done but with conditions that have also been set. Based on the ICCPR there are four basic restrictions that are further explained in the Siracusa Principles, namely public safety, public morals, public health, and public order. The four bases of restrictions above can only be determined if they have fulfilled four conditions, namely that the restrictions must be determined through legal instruments, must be in a democratic society, must meet the necessary principles, and must not be discriminatory.³²

4. International and National Instruments on the Right to Freedom of Religion

Discussing freedom of religion, there are several main references to review legal protection related to freedom of religion as a human right, both internationally and nationally, namely as follows:

a) Universal Declaration of Human Rights

This declaration is a universal agreement of all nations of the world on human rights. In essence, this declaration provides provisions that human rights are the rights of all human beings regardless of certain backgrounds or circumstances. Regarding freedom of religion in this declaration, it is also accommodated which is more specifically stated in Article 18 which states:³³

³²*Ibid.* p. 12. See also: Paragraphs 8, 10, 15, 19 of the Siracusa Principles on the Limitation and the Derogation for the International Covenant on Civil and Political Rights.

³³ Pultoni, Siti Aminah, and Uli Parulian Sihombing. 2012. . *Panduan Pemantauan Tindakan Pidana Penodaan Agama dan Ujaran Kebencian atas Dasar Agama*, Jakarta: The Indonesia Legal Resources Center (ILRC), p. 6.

"Everyone has the right to freedom of thought, conscience and religion, in this case including freedom to change religion or belief, with the freedom to proclaim religion or belief by teaching it, doing it, worshipping and obeying it, either alone or together with others, publicly or alone".

b) International Covenant on Civil and Political Rights

This Covenant was later ratified by Indonesia through Law Number 12 of 2005 concerning the Ratification of the International Covenant on Civil and Political Rights. The content of this covenant also regulates freedom of belief/religion as stated in Article 18 which states as follows:³⁴

1. "Everyone has the right to freedom of thought, belief and religion. This right includes the freedom to establish a religion or belief of one's own choice, and the freedom either alone or in association with others, whether in public or private places, to practice one's religion and beliefs in worship, observance, practice, and teaching.
2. No one shall be compelled so as to be impaired with his freedom to profess or establish his religion or belief according to his choice.
3. The freedom to practice and determine one's religion or beliefs can only be limited by provisions under the law, and as necessary to protect the security, order, health, or morals of society, or the fundamental rights and freedoms of others.
4. States parties to the present Covenant undertake to respect the freedom of parents and, where recognized, legal guardians, to ensure that the religious and moral education of their children is consistent with their own beliefs.

Article 20 of the Covenant also provides for the prohibition of war propaganda and acts that lead to provocation in the expression of hatred, which is specified in detail as follows:

³⁴ *Ibid.*

1. "Any propaganda for war must be prohibited by law.
2. Any act advocating hatred on the basis of nationality, race or religion that constitutes incitement to discrimination, hostility or violence shall be prohibited by law".

c) Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion

Not only formulated in the UDHR and the ICCPR, freedom of religion is more detailed in this declaration. The Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion was formulated through the UN General Assembly in 1981, which included:³⁵

1. "To worship or assemble in connection with a religion or belief, and to establish and administer places for these purposes;
2. Establish and manage a range of appropriate charitable or humanitarian institutions;
3. Make, obtain, and use sufficient equipment and materials necessary in connection with the ceremonies or customs of a religion or belief;
4. Write, publish, and disseminate various publications relevant in these fields;
5. Teaching a religion or belief in places suitable for these purposes;
6. Collect and receive financial and other voluntary donations from individuals or institutions;
7. Training to appoint, elect or nominate through succession appropriate leaders is necessary under the requirements and standards of any religion or belief;
8. Respect days of rest, and celebrate holidays and ceremonies according to the teachings of one's religion or belief;
9. Establish and manage communications with persons and communities on matters of religion or belief at national and international levels".

³⁵ *Ibid.* p. 8.

d) UN Human Rights Council Resolution No.16/18

This resolution comes in order to fight intolerance, negative stereotypes and stigmatization, discrimination, and incitement aimed at violence based on religion or belief.³⁶

e) Other International Instruments

In addition to some of these international legal instruments, the guarantee of freedom of religion in international law can also be found in several other sources of international law, such as the Convention on the Rights of the Child, the Convention on the Elimination of Discrimination Against Women, the Convention Against Torture, and other conventions. Although the convention does not specifically or specifically regulate freedom of religion, some legal rules stipulate prohibitions against discrimination or violence based on one's religion.³⁷

f) The 1945 Constitution of the Republic of Indonesia

The 1945 Constitution is the constitution of the Republic of Indonesia which of course contains guarantees regarding the enjoyment of human rights for each individual, including freedom

³⁶ *Ibid.*

³⁷ *Ibid.*

of religion. The formulation regarding the guarantee of freedom of religion can be found in Article 29 paragraph (2) of the 1945 Constitution which states:³⁸

"The State guarantees the freedom of every citizen to profess his own religion and to worship according to his religion and belief".

Article 28 E, Article 28 I, and Article 28 J of the 1945 Constitution also affirm the guarantee of freedom of religion, which is as follows:³⁹

Article 28 E of the 1945 Constitution

1. "Everyone is free to profess his religion and worship according to his religion, to choose education and teaching, to choose employment, to choose citizenship, to choose residence in the territory of the country and to leave it, and to have the right to return.
2. Everyone has the right or freedom to believe in beliefs, express thoughts and attitudes, in accordance with his conscience".

Article 28 I of the 1945 Constitution

1. "The right to life, the right not to be tortured, the right to freedom of mind and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted on the basis of retroactive law, are human rights that cannot be diminished under any circumstances".

Article 28 J of the 1945 Constitution

1. "Everyone is obliged to respect the human rights of others in the orderly life of society, nation and state.
2. In exercising his rights and freedoms, everyone shall submit to the remedies established by law for the sole purpose of ensuring recognition and respect for the rights

³⁸ *Ibid.* p. 8.

³⁹ *Ibid.* p. 10.

and freedoms of others and to meet demands that are just and in accordance with considerations of morals, religious values, security, and public order in a democratic society".

- g) Law Number 39 of 1999 concerning Human Rights (Human Rights Law)

The presence of the Human Rights Law also strengthens the guarantee of freedom of religion in Indonesia which is more specifically formulated in Article 22 of this law, which is as follows:

"Everyone is free to profess his own religion and to worship according to his religion and belief. And the state guarantees the freedom of every person to profess his own religion and to worship according to his religion and belief".

D. Subjects of Human Rights Law

1. State Actors as Stakeholders of Obligations

Discussing the subject of human rights law, it is important to understand in advance what is meant by the subject of law itself. In the study of legal science, the subject of law is meant as everything that bears rights and obligations.⁴⁰ The state is identified as an entity that has at least 4 (four) elements, namely (1) the existence of a fixed

⁴⁰ Fence M. Wantu. 2015. *Buku Ajar Pengantar Ilmu Hukum*. Gorontalo: Reviva Scholar, p. 40.

population, (2) a fixed territory, (3) the existence of a sovereign government, and (4) the ability to establish relations with other states.⁴¹

As states are positioned as legal subjects in the dimension of international law, it can be understood that states are stakeholders of rights and obligations in international law, just as the previous understanding of the understanding of legal subjects is universal. However, in the human rights dimension, the state is positioned as a stakeholder of obligations. This is because the state is seen as a primary entity that bears the responsibility of protecting, enforcing, and promoting human rights, at least to its citizens.

Therefore, it is understood that the state has power relations with individuals or citizens in various policies made by the state, and the state has a position in establishing relations with other countries including in the activities of making or participating in an international agreement related to human rights.⁴²

2. Non-State Actors as Rights Stakeholders

In addition to actors who bear obligations, of course, the counter position of these actors is that they bear rights and in this case are individuals and groups of individuals, especially vulnerable groups. Individuals who from the previous discussion have been mentioned as

⁴¹ Rhona K.M. Smith, et al. *Op. Cit.* p. 53.

⁴² Rhona K.M. Smith, et al. *Op. Cit.* p. 53.

subjects of international law, including subjects of international human rights law, place individuals as stakeholders of rights and obligations.⁴³

The report of the Special Rapporteur at the fortieth session of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities shows that from a theoretical and practical point of view, individuals bear rights and obligations in the dimensions of international law, as well as in international human rights law.⁴⁴ It also found in several international human rights-themed treaties, giving individuals the opportunity to complain directly to international bodies, such as the Genocide Convention and the Convention on the Abolition and Punishment of the Crime of Apartheid. Thus, individuals are placed to have an equal position in the dimensions of international human rights law and in this case play a role as stakeholders.⁴⁵

E. The Indonesian National Commission on Human Rights Duties and Functions of the Commission on Human Rights

The Indonesian National Commission on Human Rights (INCHR) is an independent institution owned by Indonesia which was conceptually born because of the state's special attention to the protection and enforcement of each individual human rights by the state. Historically, the INCHR was born marked by the signing of Presidential Decree of the Republic of

⁴³ *Ibid.* p 55.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

Indonesia Number 50 of 1993 concerning the Indonesian National Human Rights Commission.⁴⁶ In the authentic interpretation of Article 1 point 7 of the Human Rights Law, the INCHR is defined as an independent institution whose position is at the same level as other state institutions that function to carry out human rights studies, research, counseling, monitoring, and mediation.⁴⁷

Through the mandate of Presidential Decree 50/1993, the INCHR institutions received assignments in the form of: 1) Tasks regarding the dissemination of human rights insights; 2) reviewing human rights instruments in order to provide inputs for the accession and/or ratification of international human rights instruments into national law; 3) monitor and investigate the implementation of human rights and provide opinions, considerations to the government, and the state; 4) Establish regional and international cooperation.⁴⁸

Based on Article 3 and Article 4 of Presidential Decree 50/1993, the INCHR is independent and has objectives that are detailed to to: 1) assist in the development of conditions conducive to the implementation of human rights in accordance with Pancasila, the 1945 Constitution, and the Charter of the United Nations, as well as the UDHR; 2) improve human rights protection to support the realization of national development goals, namely

⁴⁶ Presidential Decree of the Republic of Indonesia Number 50 of 1993 concerning the Indonesian National Human Rights Commission.

⁴⁷ Law of the Republic of Indonesia Number 39 of 1999 concerning Human Rights.

⁴⁸ Presidential Decree of the Republic of Indonesia Number 50 of 1993 concerning the National Commission on Human Rights.

the development of Indonesian people as a whole and the development of Indonesian society as a whole.⁴⁹

The objectives of the INCHR are further outlined in Article 75 of the Human Rights Law, namely: 1) developing conditions conducive to the implementation of human rights in accordance with Pancasila, the 1945 Constitution, and the Charter of the United Nations, as well as the UDHR; 2) improve the protection and enforcement of human rights for the development of the Indonesian human person as a whole and his ability to participate in various fields of life. Meanwhile, regarding the function of the INCHR, Article 76 paragraph (1) of the Human Rights Law states that, the INCHR has the function of studying, researching, counseling, monitoring, and mediating on human rights.⁵⁰

In relation to the duties and authorities of the INCHR, Article 89 of the Human Rights Law also provides modifications to it, namely: 1) assessment and research of various international human rights instruments with the aim of providing suggestions on the possibility of accession and / or ratification; 2) review and research of various laws and regulations to provide recommendations regarding the formation, amendment, and repeal of laws and regulations related to human rights; 3) publication of the results of studies and research; 4) literature studies, field studies and comparative studies in other countries on human rights; 5) discussion of various issues

⁴⁹ *Ibid.*

⁵⁰ Law of the Republic of Indonesia Number 39 of 1999 concerning Human Rights.

related to the protection, enforcement, and promotion of human rights; and 6) cooperation in assessment and research with organizations, institutions or other parties, both national, regional, and international levels in the field of human rights.⁵¹

In carrying out the INCHR's functions related to counseling, the INCHR is tasked and authorized to carry out: 1) dissemination of insights on human rights to the people of Indonesia; 2) efforts to increase public awareness about human rights through formal and non-formal educational institutions and various other groups; and 3) cooperation with organizations, institutions or other parties, both at the national, regional, and international levels in the field of human rights.⁵²

For the implementation of the INCHR's function in monitoring, the INCHR has the duty and authority to carry out: 1) observation of the implementation of human rights and preparation of reports on the results of these observations; 2) investigation and examination of events arising in society which by their nature or scope should be suspected of human rights violations; 3) summons to the complainant or victim or the party made to be questioned and heard; 4) the summoning of witnesses to be asked to be heard, and to the complaining witnesses to submit the necessary evidence; 5) review at the scene and the scene and other places deemed necessary; 6) summons to the relevant party to give a statement in writing or submit the

⁵¹ *Ibid.*

⁵² *Ibid.*

required documents in accordance with the original with the approval of the chief justice; 7) local inspection of houses, grounds, buildings, and other places occupied or owned by certain parties with the approval of the chief justice; and 8) giving an opinion based on the approval of the chief justice on a particular case that is in the judicial process, if in that case there is a violation of human rights in a public matter and an examination by the court which then the opinion of the INCHR must be notified by the judge to the parties.⁵³

Regarding the mediation function, the INCHR is tasked and authorized to carry out: 1) peace between both parties; 2) settlement of cases through consultation, negotiation, mediation, conciliation, and expert assessment; 3) providing advice to the parties to resolve the dispute through the courts; 4) submission of recommendations on a case of human rights violations to the government for follow-up resolution; and 5) submission of recommendations on a case of human rights violations to the House of Representatives of the Republic of Indonesia for follow-up.⁵⁴

It seems that there is a slight difference in the phrase of the function and purpose of The INCHR between Presidential Decree 50/1993 and the Human Rights Law, so that it is in accordance with the transitional provisions of the Human Rights Law which states that at the time of the enactment of this Law (Human Rights Law), the organizational structure,

⁵³ *Ibid.*

⁵⁴ *Ibid.*

membership, duties and authorities, and rules of The INCHR must be adjusted to this Law (Human Rights Law).⁵⁵

F. State Accountability in Human Rights

1. State Responsibility

State responsibility, in fact, is claimed through common law principles recognized by civilized nations. As it is known that the principles of common law recognized by civilized nations are one of the sources of international law contained in Article 38 paragraph (1) of the Statute of the International Court of Justice. Thus, just as the character of the source of law is to have a position where the law can be obtained, the responsibility of the state contained in one of the sources of international law has a position to be used as a guide for the international community.⁵⁶

In principle in international law, the responsibility of states is fundamental and is a further elaboration of a doctrine of state sovereignty. State responsibility is considered to be born when it violates an international obligation attached to it, either because it does something or does not do something.⁵⁷

⁵⁵ *Ibid.*

⁵⁶ Sefriani. 2014. *Hukum Internasional: Suatu Pengantar*. Jakarta: RajaGrafindo Persada, p. 48.

⁵⁷ Huala Adolf. 1991. *Aspek-aspek Negara dalam Hukum Internasional*. Jakarta: Rajawali, p. 174.

F. Sugeng Istanto elaborated his opinion on state responsibility as "the obligation to give answers which is a calculation of something that happened and an obligation to provide recovery for losses that may be caused".⁵⁸ Also through the Draft Articles on Responsibility of States for Internationally Wrongful Acts prepared by the International Law Commission in 2001, states that state responsibility arises when there is a violation that is categorized as internationally wrong and arises as a result of one or several acts or omissions, or a combination of the two acts.⁵⁹

The elements of the action can be either active actions or passive actions or neglect. Then, the act must be an act attributable to a state under an international obligation and it gives rise to an international obligation that applies to that state when it is committed.⁶⁰

In the study of state responsibility for human rights, it generally covers two aspects. *First*, the obligation to ensure that states do not take direct actions that violate human rights. *Second*, neither do they act passively or ignore human rights violations. From these two aspects, it is also known as the form of state responsibility in the human rights dimension in the form of obligations to respect, protect, and fulfill.⁶¹

⁵⁸ F. Sugeng Istanto. 1998. *Hukum Internasional*. Yogyakarta: Atma Jaya Yogyakarta, p. 77.

⁵⁹ Rhona K.M. Smith. *Op.Cit.* p. 72.

⁶⁰ *Ibid.*

⁶¹ Suparman Marzuki. 2017. *Hukum Hak Asasi Manusia*. Yogyakarta: PUSHAM UII, p. 25.

The obligation of respect means that the state must not take actions that may result in its citizens being unable or difficult to enjoy human rights. The obligation to protect is defined as the obligation of the state to take actions as much as possible through its state apparatus to respond when human rights violations occur. Then the obligation to fulfill is that the state is obliged to take effective measures to make its citizens able to enjoy their rights to the fullest.⁶²

From this formulation, it can be understood that the responsibility of the state in the dimension of human rights law is a responsibility born because of violations of international human rights law norms, both based on international treaties on human rights, as well as from international customs, especially for international customs which are seen as *Jus Cogens*.⁶³

2. Basis and Nature of State Responsibility

In international law, each state has sovereignty that grants it the authority mandated by its people. So that on the basis of this authority, the state has legitimacy in carrying out various actions.⁶⁴

The basis of state responsibility actually stems from the provisions contained in international treaties, such as Principle 21 of the Stockholm Declaration on the Human Environment 1972 which states that each state, in accordance with the United Nations and the principles of

⁶² *Ibid.* p. 25.

⁶³ Rhona K.M. Smith, *et.al.*, *Op. Cit.* p. 69.

⁶⁴ Suparman Marzuki. *Op. Cit.* p. 25.

international law, has the sovereign right to exploit its natural resources, but also bears the responsibility not to cause damage to the environment of other countries.⁶⁵

In other international human rights treaties, such as the ICCPR, each state is obliged to take responsibility for victims of human rights violations and is obliged to make effective remedies, even if the act is done officially by state authorities. This gives access to its citizens to take civil action to claim compensation for losses resulting from human rights violations.⁶⁶

3. Reparation Concept

The discussion around state responsibility is closely related to the issue of steps in realizing this responsibility. If state responsibility is born due to wrong actions by the state, then the form of implementation of that responsibility becomes a further discussion. In the law regarding state responsibility, it is called reparations.⁶⁷

Referring to Black's Law Dictionary, the meaning of the word reparation is "the act of indemnifying a fault or compensation for losses or wrongdoing arising from war or as a breach of an international obligation". Meanwhile, according to Ian Brownlie, reparations have a critique that correlates with the overall action in the form of payment of

⁶⁵ Rhona K.M. Smith, *et.al.*, *Op. Cit.* p. 75.

⁶⁶ Geoffrey Robertson Q.C. 2002. *Kejahatan terhadap Kemanusiaan Perjuangan untuk Mewujudkan Keadilan Global*. Komnas HAM. Jakarta. p. 308.

⁶⁷ Rhona K.M. Smith. *Op.Cit.* p. 79.

compensation or restitution, an apology, punishment of those responsible, measures to prevent the recurrence of violations of duty and other forms of immaterial liability.⁶⁸

Reparation can also be interpreted as an action or process in providing a means of remedy or even interpreted as a remedy itself. In the study of law, sometimes the term reparation tends to be interpreted as a procedure owned by the state to abdicate international responsibility. Often, the word reparation is also interpreted narrowly, as compensation for a sum of money and more generally, reparation is defined as the entire implementation of remedies owned by the state for a violation of international obligations.⁶⁹

From the various spectrum of discussions contained in the concept of reparation, in general, the forms of reparation include restitution, compensation, rehabilitation, and guarantees of satisfaction and non-recurrence. Restitution is given to restore as far as possible the situation for victims of human rights violations before the incident occurred. Compensation, defined as material or economic reimbursement for damage incurred and its value can be estimated, such as physical and mental damage, suffering, costs incurred, loss of livelihood, and so on. Rehabilitation itself is defined as legal services, psychological care, medical, and other treatments, as well as actions to

⁶⁸ *Ibid.*

⁶⁹ Dinah Shelton. 1999. *Remedies in International Human Rights Law*. New York: Oxford University Press, p. 4.

restore the dignity and dignity of victims. Then the guarantee of satisfaction and non-recurrence, is the existence of means provided by the state in terms of satisfaction and assurance that the events that happened to the victim will not be repeated.⁷⁰

G. Human Rights Violations

1. Definition of Human Rights Violations

Definitively, there is no final understanding of human rights violations. Each expert has a different opinion from each other. However, among the differences in interpretation of human rights violations, a substantial understanding can generally be drawn among these expert opinions, that human rights violations are defined as violations of the state of its obligations in the human rights dimension, whether it is actively or intentionally committed, or through negligence. The benchmark of the state's obligations stems from its obligations under international law.⁷¹

Cheriff Bassiouni explained that the act was qualified into three factors, namely his actions violated international interests significantly, acts that violated the common values of the world community, actions concerning more than one country or crossing territorial boundaries, both referring to his actions, victims, and the perpetrators themselves.⁷²

⁷⁰ Supriyadi Widodo Eddyono and Zainal Abidin. 2016. *Memastikan Pemenuhan Hak Atas Reparasi Korban Pelanggaran HAM Yang Berat*. Jakarta: Institute for Criminal Justice Reform, p. 8.

⁷¹ Rhona K.M. Smith, *et.al.*, *Op. Cit.* p. 69.

⁷² Eko Riyadi. 2012. *Membaca Perkembangan Wacana Hak Asasi Manusia Di Indonesia*. Yogyakarta: Pusham Ull, p. 107.

In a different formulation, human rights violations are defined as active or passive actions (negligence) from the state against a norm that has not been constructed as a criminal norm in national law but is categorized as an international human rights norm.⁷³ From the construction of the understanding of human rights violations, it can be interpreted that the subject who is held accountable for human rights violations is the state, not individuals.⁷⁴

In national law, the definition of human rights violations can be found in Article 1 number 6 of the Human Rights Law which reads:⁷⁵

"Human rights violation is any act of a person or group of persons including state apparatus whether intentional or unintentional or negligence, restricting, and or depriving a person or group of people of human rights guaranteed by this law, and not obtaining, or fearing that they will not obtain an existing and correct legal solution, based on the applicable legal mechanism".

2. Resolving Human Rights Violations

When human rights violations occur, the next aspect of discussion is how to resolve the events of human rights violations. This is worth discussing, because every human rights violation that occurs results in the responsibility of the state which is positioned as a duty bearer in the dimension of human rights law.

Every incident of human rights violations, regardless of the category of human rights violations, gives birth to the responsibility for

⁷³ Rhona K.M. Smith, *et.al.*, *Loc.Cit.*

⁷⁴ *Ibid.*

⁷⁵ Law of the Republic of Indonesia Number 39 of 1999 concerning Human Rights

the state to make all efforts in terms of resolving the provisions of these human rights violations. The settlement of human rights violations refers to the concept of reparation of victims of human rights violations, including guarantees of non-recurrence of these human rights violations in the future. Therefore, every effort to resolve human rights violations should be seen as part of efforts to promote human rights.⁷⁶

In Indonesia, there is a domestic institution that plays a role in upholding human rights, namely the INCHR. In the international scope, the presence of the INCHR is intended to be a partner of the UNHRC at the national level, so that the INCHR also has a position in the promotion and protection of human rights.⁷⁷

Functionally, there are 4 (four) main functions of the INCHR, namely monitoring, research/study, mediation, and education. From these functions, an organ of the INCHR was born, namely the Sub-Commission whose role is to carry out these functions.⁷⁸

The Sub-Commission has several duties. *First, the* Sub-Commission for Assessment and Research aims to conduct a study of international instruments related to human rights and various laws and regulations in addition to discussing issues related to the protection and promotion of human rights. *Second, the* Sub-Commission on Counseling which is tasked with disseminating human rights ideas and

⁷⁶ Rhona K.M. Smith, et.al., *Op.Cit.*, p. 70.

⁷⁷ *Ibid.* p. 283.

⁷⁸ *Ibid.*

carrying out activities aimed at increasing public awareness related to human rights. *Third*, the Monitoring Sub-Commission in charge of monitoring the implementation of human rights and investigating alleged human rights customer events. The Monitoring Sub-Commission is empowered to make subpoenas and take amicus curaei steps in courts containing aspects of human rights violations. And *Fourth*, the Mediation Sub-Commission in charge of peacemaking and resolving cases through consultation, negotiation, mediation, and conciliation.⁷⁹

⁷⁹ *Ibid.* p. 70.