THE IMPLICATION OF THE UNITED NATIONS SECURITY COUNCIL RESOLUTION 1267 TOWARDS INTERNATIONAL LAW AND INDONESIA

A THESIS RESEARCH

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2020

THE IMPLICATION OF THE UNITED NATIONS SECURITY COUNCIL RESOLUTION 1267 TOWARDS INTERNATIONAL LAW AND INDONESIA

THESIS

Submitted to be examined in the front of the board of examiners at thesis examination.

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YOGYAKARTA

2020

ENDORSEMENT PAGE

THE IMPLICATION OF THE UNITED NATIONS SECURITY COUNCIL RESOLUTION 1267 TOWARDS INTERNATIONAL LAW AND INDONESIA

THESIS

This thesis has been proven and approved by thesis supervisor to be examined in the front board of examiners at thesis examination.

Yogyakarta, 31 July 2020

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ENDORSEMENT PAGE

THE IMPLICATION OF THE UNITED NATIONS

SECURITY COUNCIL RESOLUTION 1267 TOWARDS

INTERNATIONAL LAW AND INDONESIA

THESIS

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Yogyakarta, 06 August 2020

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Department : International Law
Period : April 2020 – September 2020
Semester : Even Semester Academic Year 2019/2020

Final thesis is approved by supervisor for examination dated:

Notes: Please write down the date and consultation topic in the table below.
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Yogyakarta, 8 June 2020

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FINAL THESIS APPROVAL

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THE IMPLICATION OF THE UNITED NATIONS SECURITY COUNCIL RESOLUTION 1267 TOWARDS INTERNATIONAL LAW AND INDONESIA

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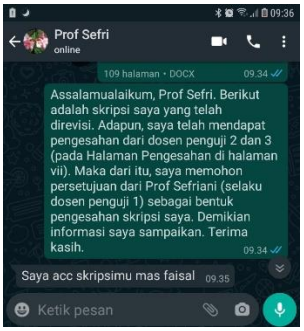

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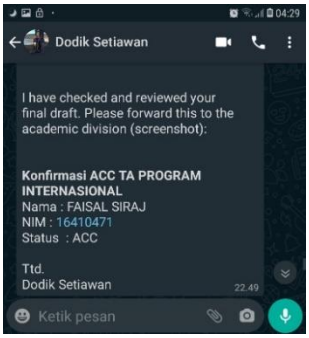

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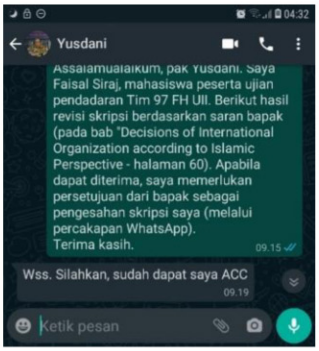

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MOTTO

"Every soul will taste death, and you will only be given your (full) compensation on the Day of Resurrection. So, He who is drawn away from the Fire and admitted to Paradise has attained (His desire). And what is the life of this world except the enjoyment of delusion."

(Quran 3:185)

"I have felt all the bitterness in life and the most bitter is to hope in humans."

(Ali ibn Abi Thalib)

DEDICATION

This thesis is dedicated to:

My parents, Mashudi and Astuti

My thesis advisor, Professor Sefriani

and the Faculty of Law Universitas Islam Indonesia

PREFACE

This thesis research is focusing the normative conflict between two international treaties. The author is studying the normative conflict in The United Nations Security Council Resolution 1267. Under the resolution provisions is contrary to provisions on the human rights treaties. This raising question about State's international obligation to two treaties giving exclusive obligations. Moreover, if Member States of the United Nations is protecting such provisions, and thus raising a problem if resolutions wants domestic legal effect. For this reason, this thesis is suited to those approaching this subject.

The Author

Table of Contents

ABSTRACT

The thesis is study about the hierarchy between Resolution 1267 and human rights treaties (Article 12 of International Covenant on Civil and Political Rights and Article 17 of Universal Declaration of Human Rights), Resolution 1267 and Indonesian Constitutional law; and the implication toward Indonesian legal order. These are purposes to analyze and deeply discover the normative hierarchy between Resolution 1267 and human rights treaties, Resolution 1267 and Indonesian Constitutional law; and the implication of Resolution 1267 toward Indonesian legal order. The author is using the methodology of qualitative data to analyze the normative value hierarchy and the recognition of the Security Council resolutions under Indonesian legal order. The normative value of Resolution 1267 is inferior than human rights treaties following the impact of violation the right of fair trial. On the other hand, the normative value of Resolution 1267 also inferior than Indonesian Constitutional law following the government system is rule of law based that uphold the supremacy of law. This reaffirmed under Indonesian statutory law that the Constitution is the highest law. The implication of Resolution 1267 to have domestic legal effect require Indonesia to incorporate the resolution accordingly domestic legal order through statutory law (*undang-undang*). Therefore, when the two norms, either the same or different legal system, comes into a normative conflict, and thus determining the normative value is a good way to justify which norm should be prioritized.

Keywords: *Resolution 1267*, *hierarchy of international law*, *human rights*

CHAPTER I – INTRODUCTION

A. Background of Study

The sources of international law gradually change becoming concrete and simplistic. The International Court of Justice (ICJ) had contributed as the most authorities of the sources of international law,[1] under Article 38 (1) as follows:

> "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> 1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting parties;
> 2. International custom, as evidence, of a general practice accepted as law;
> 3. The general principle of law recognized by civilized nations;
> 4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."[2]

It should be noted that the drafters of Article 38(1) to the ICJ Statute did not intend to create any hierarchy between different sources, whereas the order mentioned simply represented the logical order in which these sources would occur to the mind of the judge.[3] Conversely, before the ICJ formed, there were various sources of international law according to scholars. According to Smith, rules of international law are writers of text-books; treaties; opinion of experts; decisions of tribunals and arbitrations; and Stat's instruction to its envoy and the military.[4] On the other side, Stockton argued that sources of international law ascertained from

[1] Malcolm Shaw, *International Law* sixth edition, (Cambridge: Cambridge University Press, 2008), 70.

[2] United Nations, "Statute of the International Court of Justice", Article 38 (1), 18 April 1946, available at https://www.icj-cij.org/en/statute.

[3] Procès-Verbaux of the Proceedings of the Committee, Permanent Court of International Justice, 1920, 333.

[4] F. E. Smith, *International Law*, (London: JM Dent & Co, 1900), 21.

treatises of high publicists writing; treaties and agreements; decisions of national and international tribunals; the unilateral act of State; and opinion of official legal counsel.[5]

Another source that possibly becomes part of the sources of international law is the decision of an international organization.[6] It is referred to a unilateral act of international organization,[7] whether it is binding or not.[8] A decision of international organization may be becoming the source of international law because it has the character to purport to enact or affect the general of international law.[9] The Security Council is a good example that has the power to issue a decision, commonly known for 'resolution'.[10] The Council as one of the principal organs of the United Nations[11] has primary responsibility for maintaining international peace and security.[12]

After the incident of September 11, 2001, the Council has taken important measures against terrorism.[13] The Security Council had issued their first resolution

[5] Charles H. Stockton, Outlines of International Law, (London: George Allen & Unwin, 1914), 15-18.

[6] Shaw, *Op.cit.*, 114-115.

[7] C.F. Amerasinghe, *Principles of Institutional Law of International Organization*, (Cambridge: Cambridge University Press, 2005), 161.

[8] Filippo M. Zerilli, 'The Rule of Soft Law: An Introduction', *Journal of Global and Historical Anthropology* 56, (2010): 5, 10.

[9] Hugh Thirlway, *The Sources of International Law*, (Oxford: Oxford University Press, 2014), 8-9.

[10] According to Charter of the United Nations, Security Council has power to issue a decision about international peace and security. The word of resolution, actually, did not found under the Charter. *See* "Charter of the United Nations", Article 48 (1, 2), 24 October 1945, 1 UNTS XVI, available at https://www.un.org/en/sections/un-charter/un-charter-full-text/,; *https://www.un.org/securitycouncil/content/resolutions-0*

[11] "Charter of the United Nations", Article 7 (1), 24 October 1945, 1 UNTS XVI, available at https://www.un.org/en/sections/un-charter/un-charter-full-text/.

[12] "Charter of the United Nations", Article 24 (1), 24 October 1945, 1 UNTS XVI, available at https://www.un.org/en/sections/un-charter/un-charter-full-text/.

[13] Jane E. Stromseth, 'The Security Council's Counter-Terrorism Role: Continuity and Innovation', *Proceedings of the Annual Meeting (American Society of International Law)* Vol. 97, (2003): 41. Heriyanto, D.S.N, 'Solusi Intervensi Kemanusiaan Sebagai Penyelesaian Konflik yang Terjadi Pasca Kudeta Presiden Mursi di Mesir', 35 (78) *Jurnal UNISIA* 71, (2015).

concerning terrorism, Resolution 286 of 1970 purpose to call on States to prevent further hijackings.[14] Indeed, international terrorism became part of the scope of the Council, since international terrorism could harm international peace and security. In this present thesis, the author would like to discuss Resolution 1267 of 1999 concerning the situation in Afghanistan. Under the resolution illustrated the current situation in Afghanistan had an occurring violation of human rights and humanitarian caused Al-Qaida and/or the Taliban.[15] Thus, the Council, under the resolution, declared Al-Qaida, Usama bin Laden, and/or the Taliban as a terrorist.[16] It imposed the Member States towards individuals or entities associated with Al-Qaida and/or the Taliban to freeze the funds and travel ban.[17] Criticism at the human rights dimension, particularly clarity of suspected 1267 listing and deprive fundamental rights (*i.e.* the right to property, freedom of movement).[18] Those imposed corresponding freeze funds to the respect of property and travel ban to right to movement are guarantee by international human rights law, particularly

[14] (William C. Banks, Renee de Nevers, Mitchel B. Wallerstein, *Combating Terrorism*, (Washington, D.C.: CQ Press, 2008), 243.

[15] United Nations Security Council, Security Council resolution 1267 (1999) [Afghanistan], 15 October 1999, S/RES/1267 (1999), available at https://undocs.org/S/RES/1267(1999) <accessed 4 March 2020>

[16] United Nations Security Council, Security Council resolution 1267 (1999) [Afghanistan], 15 October 1999, S/RES/1267 (1999), available at https://undocs.org/S/RES/1267(1999) <accessed 4 March 2020>

[17] United Nations Security Council, Security Council resolution 1267 (1999) [Afghanistan], 15 October 1999, S/RES/1267 (1999), para. 4 (a, b), available at https://undocs.org/S/RES/1267(1999) <accessed 4 March 2020>

[18] Jae-myong Koh, *Suppressing Terrorist Financing and Money Laundering*, (Berlin: Springer, 2006), 104; Machiko Kanetake, "Enhancing Community Accountability of the Security Council through Pluralistic Structure: The Case of the 1267 Committee", *Max Planck Yearbook of United Nations Law* Vol. 12, (2008): 118.

under Article 17 of the Universal Declaration of Human Rights (UDHR) and Article 12 of the International Covenant on Civil and Political Right (ICCPR).[19]

The Member States shall designate the resolution into their domestic laws. Member States also face difficulty when they bound to an international agreement that guaranteed such rights along with implementing the resolution. A situation where a State gives obligation from two international agreement that is contrary called, 'norm conflict'.[20] In international law, a norm conflict is a situation of interaction between normative rules of international law.[21] In this context, when State bound to, for instance, International Covenant on Civil and Political Rights guarantees those rights against Resolution 1267, where both are legally binding. Furthermore, the rights under UDHR is crystalized as customary international law shall State respect those rights. It should be understood that Security Council resolutions have the character is binding force affirmed under Article 25 of Charter of the United Nations as followed:

> "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."[22]

Subsequently, Article 103 of the Charter states:

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any

[19] International human rights law guarantees right to own property and freedom of movement according to the Universal Declaration of Human Rights in Article 17 and the International Covenant on Civil and Political Rights in Article 12. *See* United Nations General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, Vol. 999, p. 171, available at https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx <accessed 4 March 2020>; https://www.un.org/en/universal-declaration-human-rights/.

[20] Erich Vranes, "The Definition of 'Norm Conflict' in International Law and Legal Theory", *The European Journal of International Law* Vol. 17, No. 2 (2006): 395.

[21] *Ibid.*

[22] "Charter of the United Nations", Article 25, 24 October 1945, 1 UNTS XVI, available at https://www.un.org/en/sections/un-charter/un-charter-full-text/.

other international agreement, their obligations under the present Charter shall prevail."[23]

The Council resolutions as the obligation derived from the Charter implicate obligations of Member States to other international agreements shall prioritize their obligations under the Charter. Despite Article 103 said so, a technique needed to solve this conflict identifies the characteristics of the substantial norm.[24]

A study of implementing Resolution 1267 in *Kadi Case* concerning freeze funds. Shaykh Kadi Abdullah was included terrorist-listing. Once the European Union implemented Council Regulation No. 881/2002, Kadi's wealth was suspended. He pleaded that such sanction had deprived of his fundamental rights, including the right to property referring to European Union law.[25] Unfortunately, The European Union Court of First Instance rejected to adjudicate Kadi's argument. This also happened to Abdelrazik had deprived his freedom of movement. He arrested in Sudan at that time his name was added to the 1267 List in July 2006. He had neither charged for criminal offense nor involvement in terrorists. In early 2008, he entitled to an emergency travel document and otherwise blocked his return to Canada.[26]

Another study of Member States implementing Resolution 1267 into domestic law by Canada. Under Canadian law, the decision of the international organization,

[23] "Charter of the United Nations", Article 103, 24 October 1945, 1 UNTS XVI, available at https://www.un.org/en/sections/un-charter/un-charter-full-text/.

[24] Theo Berggren, "Norm Conflicts in Public International Law The Relationship between Obligations under the ECHR and under the UN Charter", *Master's Thesis in European Law*, Uppsala Universitet, (2017): 26.

[25] T-315/01, Kadi v Council and Commission, 2005, C.F.I. II-3679

[26] Carmen K. Cheung, "The UN Security Council's Regime and the Rule of Law in Canada", BC Civil Liberties Association, (2010): 41-42.

including the Council resolutions shall be implemented by domestic law.[27] The legislative of Canada well-prepared in implementing the resolution ensuring that would not harm fundamental rights.[28] Those cases aforementioned made the author interesting to study Resolution 1267 from the aspect of human rights enforcement.

Thus, the author would like to present a thesis about the implication of Resolution 1267 at the international and Indonesia; and the hierarchy between Resolution 1267 towards human rights treaties and Indonesian law. Indonesia registered as the member of the United Nations, and thus Indonesia has obligation to carry out the council decisions. Furthermore, the rights under UDHR and ICCPR had crystalized under Indonesian constitutional law along with subsidiary regulation Law 39/1999, shall be careful in implementing Resolution 1267. This study is organized as follows. Chapter I will address the introduction of the thesis and theory literature. Chapter II will discuss the first problem formulation. Chapter III will discuss the second problem formulation. Lastly is the conclusion and recommendation.

B. Problem Formulation

This thesis questions will formulate as follows:

1. What is the hierarchy between Resolution 1267 towards human rights treaties and Indonesian law?

[27] Cheung, *Op.cit.*, 37.
[28] Cheung, *Op.cit.*, 38.

2. What are the consequences of the implementation of Resolution 1267 towards Indonesia?

C. The Objective of Research

The result of this thesis will achieve including:

1. To analyze and deeply discover the normative hierarchy between Resolution 1267 towards human rights treaties and Indonesian law; and
2. To analyze and deeply discover the implication of the implementation Resolution 1267 to Indonesia.

D. The Originality of Research

This section is a comparison between this thesis and other academic writing. The following academic writings added are Ricky Suhendar title "Penerapan Keputusan Perserikatan Bangsa-Bangsa di Tingkat Nasional";[29] Samantha Miko title "Norm Conflict, Fragmentation, and the European Court of Human Rights";[30] Marko Milanovic title "Norm Conflict in International Law: Whither Human Rights";[31] and Marko Divac Oberg title "The Legal Effect of Resolution of the UN Security Council and General Assembly in the Jurisprudence of the ICJ".[32]

[29] Ricky Suhendar, "Penerapan Keputusan Dewan Keamanan Perserikatan Bangsa-Bangsa di Tingkat Nasional" [Application the Security Council resolution in the National level], Director of Law and Political Security Agreements, Ministry of Foreign Affairs Republic of Indonesia, 2019.

[30] Samantha A. Miko, "Norm Conflict, Fragmentation, and the European Court of Human Rights", Boston College Law Review Rev. 1351 (2013).

[31] Marko Milanovic, "Norm Conflict in International Law: Whither Human Rights?", Duke Journal of Comparative & International Law (2009).

[32] Marko Divac Oberg, "The Legal Effect of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ", The European Journal of International Law volume 16, no. 5 (2006).

The idea inspired by Suhendar in “Penerapan Keputusan Dewan Keamanan Perserikatan Bangsa-Bangsa di Tingkat Nasional”. Suhendar explained about the comparison State procedural in implementation of the decision of an international organization into domestic law, specifically resolutions of the Security Council. He compares the practice between Indonesia, Singapore, and the Netherland. He concludes that the urgency to have legal instruments regarding the incorporation of a decision of international organizations to avoid the gap between international law and Indonesia law.

Miko wrote about a petition by Al-Jedda, a British-Iraqi citizen, who detained by the United Kingdom on basis of United Nations Security Council authorization. He pleaded that such an act was deprived of his fundamental right, particularly fair remedy. In this context, a conflict arose between obligation derived from the Charter of the United Nations and obligations derived from the European Convention on Human Rights. The Court adjudicated assert that Article 103 of the Charter disapply obligations of other international agreements.

Milanovic wrote about the practicalities of the normative conflict between human rights and the resolutions of the Security Council. Article 103 of Charter of the United Nations as conflict resolution rule in testing to some hypothesis, according to the European Court of Human Rights. Milanovic tries to show the practical European court examine human rights norms which are conflicting with resolutions of the Council.

Oberg wrote about the effects of the United Nations General Assembly and Security Council resolutions in the jurisprudence of the International Court of Justice. Both the Assembly and the Council resolutions have character purport to affect the general of international law. This made the ICJ in adjudicate international cases usually rely on the resolutions that have contributed to international cases.

No.	**Author(s)**	**Title**	**Research Focus**	**The distinction in the presently Proposed Research**
1.	Ricky Suhendar	'*Penerapan Keputusan Dewan Keamanan Perserikatan Bangsa-Bangsa di Tingkat Nasional*'	Comparison of the rule on enforcement a decision of international organization between Singapore, the Netherland, and Indonesia.	Analysis of the enforcement of the Security Council resolution 1267 of 1999 in Indonesian laws.
2.	Samantha Miko	'Norm Conflict, Fragmentation, and the	Analysis and study *The Al-Jedda case* from	Analysis and study the causes of norm conflict

		European Court of Human Rights'	the human rights aspect.	in international law and national law.
3.	Marko Milanovic	'Norm Conflict in International Law: Whiter Human Rights?'	Examine how norm conflicts test some of the basic assumptions about what exactly constitutes an autonomous legal order.	Examine the norm conflict between Article 103 of Charter of the United Nations and provisions of ICCPR and ICESCR.
4.	Marko Divac Oberg	'The Legal Effect of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ'	Extract from the jurisprudence of the International Court of Justice a basic theory of legal effects of unilateral instruments of international organizations in	Analysis and study the Security Council resolution generate as part of the sources of international law.

			public international law.	

Table 1: Distinguishing thesis focus

E. Literature Review

This section is briefly explaining the theoretical basis of this thesis. The following theories are the subject of international law, the legal personality of an international organization, the United Nations Security Council, the sources of international law, human rights, and the hierarchy in international law.

1. The subjects of international law

Dixon defines the subject of international law are those who capable to exercise their rights and duties following international law.[33] Same with Crawford states the subject of international law as an entity that enjoys the international rights and obligations also can maintain its rights for international claims and entail the responsibility of breaches of obligations through such claims.[34] While, Starke argues the subject of international law means the incumbent rights and duties under international law, having the right to prosecute a claim before an international tribunal, possessor of interest for which provision is made by international law.[35] Therefore, to be the subject of international law shall have the rights and duties under international law and can claim their rights for international claims.

[33] Martin Dixon, *Textbook on International Law*, (Oxford: Oxford University Press, 2013), 116.
[34] James Crawford, *Brownlie's Principle of Public International Law* ninth edition, (Oxford: Oxford University Press, 2019), 105.
[35] J.G. Starke, *An Introduction to International Law*, (London: Butterworth & Co., 1977), 66.

The types of the subject of international law vary. According to Lung-chu Chen, the subject of international law are nation-states;[36] international government organizations;[37] non-governmental organizations and associations;[38] and the individual.[39] According to Cassese, the subject of international law are State;[40] insurgent;[41] *sui generis* entities;[42] international organizations;[43] national liberation movement;[44] and the individual.[45] According to Sefriani, the subject of international law are States;[46] international organizations (public and private);[47] international non-government organization;[48] the individual;[49] transnational entities;[50] International Committee on the Red Cross (ICRC);[51] national liberation organizations;[52] and belligerent.[53]

[36] Lu-chu Chen, *An Introduction to Contemporary International Law*, (New Haven: Yale University Press, 1989), 25.

[37] *Ibid*, 50.

[38] *Ibid*, 63.

[39] *Ibid*, 76.

[40] Antionio Cassese, *International Law* second edition, (Oxford: Oxford University Press, 2005), 71.

[41] *Ibid*, 124.

[42] *Ibid*, 131.

[43] *Ibid*, 135.

[44] *Ibid*, 140.

[45] *Ibid*, 142.

[46] Sefriani, *Hukum Internasional edisi kedua* [International Law 2nd Ed.], (Depok: Rajawali Press, 2018), 94.

[47] International public organization is an international person constitute by a convention by multilateral State-parties along with its structures, function, and goal; *Ibid*, 123.

[48] International non-government organization known as private international organization has the legal personality of non-profit aim of international utility, established by international law as the instrument, carry their activities at least two effects, and have their statutory office in the territory of a party and the central management and control in the territory of that party or another party. The examples are Greenpeace, Amnesty International, and Human Rights Watch; *Ibid*, 126.

[49] *Ibid*, 127.

[50] *Ibid*, 130.

[51] International Committee on the Red Cross is non-governmental organization headquartered in Geneva, Switzerland. Its fields about humanitarian concern along with the members of ICRC are come from national red cross committee. It was constituted in respond to World War II for the purpose of humanitarian assistance; *Ibid*, 149

[52] *Ibid*, 149

[53] Belligerent known as the rebels of a State must meet the criteria following: structurally organized, having clear identification, effectively occupy a defined-territory, and supported by the

It is apparent, these subjects mentioned above are those who have the rights and duties under international law and have the rights for international claims.

2. Legal personality of an international organization

According to the 1986 Vienna Convention on the Law of Treaties between States and International Organizations, an international organization is an intergovernmental organization.[54] Another definition of the international organization is an association of States established by and based upon a treaty, which pursues common aims and which has its special organs to fulfill particular functions within the organization.[55] The core of the international legal personality of international organizations is that it can enter into treaties with other subjects of international law,[56] which made international organizations a subject of international law along with its duties and rights.[57] This means international legal personality is necessary for an international organization to perform their duties at the international level. The constitution of international organizations usually stated the status of its legal personality.[58] An international

society of a State. The presence of belligerent may attract recognition of insurgency by foreign State, but practically it is difficult to regard recognition which might lead to diplomatic relation. In fact, neither host State nor foreign State recognize the existence of belligerent, except if this group involve extraordinary conflict with the host State; *Ibid*, 150.

[54] "The 1986 Vienna Convention on the Law of Treaties", open for signature on March 21th, 1986, Doc. A/CONF.129/15, Article 2 (1i), available https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-3&chapter=23&clang=_en.

[55] Bindschedler, R.L., "International Organizations, General Aspects", in Bernhardt, R., ed., *Encyclopedia of Public International Law*, (Amsterdam: North Holland Publishing, 1983), 120.

[56] Anthony Aust, *Handbook of International Law*, 2nd Ed., (Cambridge: Cambridge University Press, 2010), 180.

[57] Martin Dixon, *Textbook on International Law* sixth edition, (Oxford: Oxford University Press, 2007), 111.

[58] H.G Schermers, N.M. Blokker, *International Institutional Law*, (London: Martinus Nijhoff Publishers, 2003), 988.

organization has characteristics following:[59] establishment by treaty, membership limited exclusively or primarily to States, international legal personality separates from its members, and financed by the members.

a. Criteria of international legal personality

There are three approaches to determine whether an international organization possess international legal personality. Even if an international organization does not meet these criteria, thus is treated as a mere organ common to these States and acting on their behalf.[60] First, the subjective approach asserts the legal personality of international organizations derives from the will of State explicitly attributed to it in a constitutive treaty.[61]

Second, the objective approach which associates the international legal personality of international organizations with certain criteria, the existence of which endows the organization with personality based on general international law. Once these criteria are met, an international organization possesses an international personality.[62]

Third, the functional approach is a combination of subjective and objective approaches. It asserts that "personality derives indirectly from the functions of the organization appropriately exercised through its organs especially when that

[59] Aust, *Op.cit.*, 178-179.

[60] Finn Seryested "Objective International Personality of Intergovernmental Organizations", *The Netherland Journal of International Law* Vol. 4 (1964): 57.

[61] Esa Paasivirta, "The European Union: from an aggregate of States to a Legal Person?", *Hofstra Law & Policy Symposium* Vol. 2, Issue 1, (1997): 37.

[62] Seryested, *Op.cit.*, 3.

exercise demonstrates a will separate from its members".[63] The ICJ used the implied powers approach in the *Reparations case*; "it referred to some of the criteria necessary to establish objective personalities such as organs and distinct purposes and at the same time referred to the implied intention of the founders as manifest in according to the organization certain rights and privileges".[64]

Besides, Brownlie sum up the criteria is a permanent association of State; distinction in terms of legal powers and purposes between the organization and its member States; and the existence of legal powers exercisable on the international level, not merely within the national level of States.[65] Consequently, an international organization possessed international legal personality to enable these functions[66] to the treaty-making power; make communication with other legal persons; enjoy privileges and immunities in member States, and capacity to initiate international claims and to be subject to such claims.

3. United Nations Security Council

The security Council is one of the principal organs of the United Nations[67] consisted of fifteen members,[68] where five are the permanent enjoyed veto

[63] Paasivirta, *Op.cit.*, 43.
[64] Nigel D. White, *The Law of International Organizations*, (Manchester: Manchester University Press, 2005), 44.
[65] Catherine Brölmann, *The Institutional Veil in Public International Law: International Organizations and the Law of Treaties*, (London: Bloomsbury Publishing, 2007), 75.
[66] Rachel Frid, *The Relations Between the EC and International Organizations: Legal Theory and Practice*, (The Hague: Kluwer Law International, 1995), 27.
[67] "Charter of the United Nations", Article 7 (1), 24 October 1945, 1 UNTS XVI, available at https://www.un.org/en/sections/un-charter/un-charter-full-text/.
[68] "Charter of the United Nations", Article 23 (1), 24 October 1945, 1 UNTS XVI, available at https://www.un.org/en/sections/un-charter/un-charter-full-text/.

rights.[69] The Council authorized by the Charter to issue decisions in the matter of international peace and security which is legally binding.[70]

a. Mandates and responsibilities

According to the Charter of the United Nations, Security Council the purposes as follows:[71]

1. To maintain international peace and security;
2. To develop friendly relations among nations;
3. To cooperate in solving international problems and in promoting respect for human rights; and
4. To be a center for harmonizing the actions of nations.

b. Limitations of Security Council powers

In exercise the functions, the Security Council has limited the Charter. According to Article 24 (2) stating:

> "In discharging these duties, the Security Council shall act following the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII."[72]

[69] "Charter of the United Nations", Article 23 (1), 24 October 1945, 1 UNTS XVI, available at https://www.un.org/en/sections/un-charter/un-charter-full-text/.

[70] "Charter of the United Nations", Article 25, Article 48, 24 October 1945, 1 UNTS XVI, available at https://www.un.org/en/sections/un-charter/un-charter-full-text/.

[71] "Charter of the United Nations", Article 24 (2), 24 October 1945, 1 UNTS XVI, available at https://www.un.org/en/sections/un-charter/un-charter-full-text/.

[72] "Charter of the United Nations", Article 24 (2), 24 October 1945, 1 UNTS XVI, available at https://www.un.org/en/sections/un-charter/un-charter-full-text/.

This Article clearly can understand that resolutions adopted Security Council shall reflect the principles and purposes of the United Nations. Subsequently, under Article 1 (1) stated:

> "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."[73]

The Council shall not exercise the functions beyond the provisions above and if it is exceeding the functions, thus the Council had *ultra vires*.

4. The sources of international law

The word of sources defines as a juridical way to constitute the rule of law and recognition of the rule of law and the specific rights or duties stipulated.[74] The source of law defines how new rules are made, while the existing rule is repealed. This is the distinction between material law – the elements aspect as the foundation of the formal sources and formal law – the sources constitute the form of law.

Sir F. Pollock has made the following observations on the nature of international rules:

> "We are not called upon to consider here whether they are more nearly analogous to the law administered by courts of justice within a state, or to purely moral riles, or to these customs and observances in an imperfectly

[73] "Charter of the United Nations", Article 1 (1), 24 October 1945, 1 UNTS XVI, available at https://www.un.org/en/sections/un-charter/un-charter-full-text/.

[74] Martin Dixon, Robert McCorquodale, Sarah Williams, *Cases and Materials on International Law* fifth edition, (Oxford: Oxford University Press, 2011), 18.

organized society, which has not fully acquired the character of law, but is on the way to becoming law."[75]

a. History of Article 38 (1) of the ICJ Statute

Article 38 (1) of the ICJ statute was integral from the Permanent Court of Justice statute, precisely under Article 35. This was discussed in the meeting of the Council of the League of Nations. The draft of Article 38 was proposed by Baron Descampes and read as follows:

"The following rules are to be applied by the judge in the solution of international disputes, they will be considered by him in the undermentioned order:

1. Conventional international law, whether general or special, being rules expressly adopted by the States;
2. International custom, being practice between nations accepted by them as law;
3. The rules of international law as recognized by the legal conscience of civilized nations;
4. International jurisprudence as a means for application and development of law."[76]

The final of the meetings, the Advisory Committee of Jurists submitted to the Council of the League of Nations the following text of Article 38 (then Article 35 of the PCIJ statute):

"The Court shall, within the limits of its jurisdiction as defined in Article 34, apply in the order the following:

1. International conventions, whether general or particular, establishing rules expressly recognized by the Contracting States;
2. International custom, as evidence of general practice, which is accepted as law;
3. The general principles of law recognized by civilized nations;

[75] F. E. Smith, *Op. cit.*, 12.

[76] Article 38 was initially numbered as Article 35. That change was affected by the Council of the League of Nations. Procès –verbaux of the proceedings of the Committee, June 16th – July 24th, 1920, with Annexes, Advisory Committee of Jurists Annex No. 3, Proposal by Baron Descampes, (van Langenhuysen Brothers, 1920), p.306. There were several drafts of Article 38: that the President (Baron Descampes); Root/Phillimore; President/ Ricci- Busatti.

4. Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rule of law."[77]

Therefore, the existing sources of international law are international conventions; international custom; the general principle of law; and judicial decisions and the teachings of the most highly qualified publicists. However, this provision is the formal rule for the ICJ to adjudicate international cases.

5. Human rights

Generally speaking, human rights are understood as fundamental rights belong to the human being.[78] The human rights issue has its own story either at the international or national level. The history of human rights at the international level when the United Nations proclaimed the Universal Declaration of Human Rights in 1948.[79] While in Indonesia was introduced in the 1950s under their constitution.[80] The rules of human rights are important to ensure the individual rights are protected from any form of human depredation.

In the domestic context, protection of human rights is enacted under the principle of rule of law concept – a State behaves according to law.[81] The index

[77] "Statute of the Permanent Court of International Justice", Article 35.

[78] Brian Orend, *Human Rights: Concept and Context*, (Mississauga: Broadview Press, 2002), 21.

[79] https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html <accessed 13 March 2020>

[80] Majdad El Muhtaj, *Hak Asasi Manusia dalam Konstitusi Indonesia Dari UUD 1945 sampai dengan Perubahan UUD 1945 Tahun 2002* edisi kedua [Human Rights under Indonesia Constitution from UUD 1945 until the amendment of UUD 1945 in 2002], (Jakarta: Kencana, 2005), 55-59.

[81] Yumna Sabila, Kamaruzaman Bustamam, "Landasan Teori Hak Asasi Manusia dan Pelanggaran Hak Asasi Manusia" [Fundamental Theory of Human Rights and Human Rights Violation], *Jurnal Justisia: Jurnal Ilmu Hukum, Perundang-undangan dan Pranata Sosial* Vol. 3, (2019): 206, available at https://www.researchgate.net/publication/339358889_LANDASAN_TEORI_HAK_ASASI_MANUSIA_DAN_PELANGGARAN_HAK_ASASI_MANUSIA.

is based on measures relating to the degree of compliance with the following principles:[82]

1. The degree to which government and their officials are accountable under the law;
2. The laws are clear, publicized, stable and fair, and protect fundamental rights;
3. The process for the enactment, administration, and enforcement of laws is accessible, fair and efficient; and
4. Access to justice is provided by competent, ethical, and independent lawyers and judges who are sufficient in number, have adequate resources and are representative of the society they serve.

The following characteristics of human rights:

1. Human rights are to be respected for the dignity and worth of each person;
2. Human rights are universal and inalienable, meaning that humankind is entitled to them and cannot be removed;
3. Human rights are indivisible, interrelated, and interdependent, meaning that each element is contributing to the realization of human dignity through the satisfaction of their developmental, physical, psychological, and spiritual needs.

a. International human rights law

Universal Declaration of Human Rights was the foundation of international human rights adopted by the United Nations General Assembly

[82] Anthony Valcke, "The Rule of Law: Its Origins and Meanings (A Short Guide for Practitioners)", (2012): 12, available at http://ssrn.com/abstract=2042336.

through Resolution 217 (III) in 1948.[83] The following year, two covenant, International Covenant on Civil and Political Rights and International Covenant on Economic, Social, and Cultural Rights were adopted in 1966.[84] These three international agreements referred to as *the International Bill of Human Rights*.[85] Interestingly, between ICCPR and ICESCR represented the needs of two great powers of the Cold War, which resulted in separation into two category human rights along with their supervisory body, which is to large extent result of the prevailing East-West rivalry.[86] The ICCPR addresses the State's traditional responsibilities for administering justice and maintaining the rule of law.

The ICCPR rights defined in the Covenant, inter alia, the right to self-determination; the right to life, liberty, and security; freedom of movement, including the freedom to choose a place of residence and the right to leave the country; freedom of thought, conscience, religion, peaceful assembly and association; freedom from torture and other cruel and degrading treatment or punishment; freedom from slavery, forced labor, and arbitrary arrest or

[83] Walter Kälin, Jörg Künzli, *The Law of International Human Rights Protection*, (Oxford: Oxford University Press, 2009), 4; UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at https://undocs.org/en/a/res/217(III).

[84] Nico Schjiver, "Fifty Years International Human Rights Covenants: Improving the Global Protection of Human Rights by Bridging the Gap between the two Covenants", reworked version of the speech held at the conference '50 years of ICCPR and ICESCR: impact, interplay, and the way forward' held at Leiden University on 19 May 2016, NTM-NJCMBull, (2016): 458, https://www.geneva-academy.ch/joomlatools-files/docman-files/Nico%20Schijver%20-%20Fifty%20Years%20International%20Human%20Rights%20Covenants.pdf.

[85] Daniel Moeckli, Sangeeta Shah, David Harris, Sandesh Sivakumaran, *International Human Rights Law*, (Oxford: Oxford University Press, 2014), 78.

[86] Nico Schjiver, *Op. cit.*, 457.

detention; the right to the affair and prompt trial; and the right to privacy.[87] The ICCPR has two optional protocols. The first establishes the procedure for dealing with communications (or complaints) from individuals claiming to be victims of violations of any of the rights set out in the Covenant. The second envisages the abolition of the death penalty.[88] Human Rights Committee is responsible for State parties implementing the Covenant.[89]

b. Indonesia human rights law

As the consequence follows the rule of law,[90] Indonesia shall enact fundamental human rights under their legal system.[91] Now it is available under the Constitution, *Undang-Undang Dasar Negara Republik Indonesia 1945*, and the primary human rights statutory, UU 39/1999 on Human Rights. Historically, the first version of the constitution was not defined human rights norms, but the next amendment to *Undang-Undang Dasar Negara Republik Indonesia Serikat 1949*, *Undang-Undang Dasar Sementara 1950*, until *Undang-Undang Dasar Negara Republik Indonesia 1945* had already defined human rights norms.[92]

[87] UN General Assembly, "*International Covenant on Civil and Political Rights*", Article 8, 7, 8, 10, 17, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

[88] Makau Mutua, *Human Rights Standards: Hegemony, Law, and Politics*, (New York: SUNY Press, 2016), 135.

[89] https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx.

[90] "Undang-Undang Dasar Negara Republik Indonesia 1945", Article 1 (3).

[91] A State who follow rule of law concept shall comply with its principle is guarantee fundamental human rights under their laws.

[92] Muhtaj, *Loc.cit*.

Under the constitution embodies provision on human rights norms in Chapter XI, Article 28 A-J including, the rights of life and maintain their fundamental rights; the right to have family and inherent; right of development; the right of fair remedy, right of compensation, and the right of equal opportunity in the government; the right to have a belief, education, and job; the right to communication and obtain information; the right of protection form their wealth, safety, and dignity; the right of freedom from slavery and cruel; the right to obtain health facility and social welfare; and the right to respect other human rights.[93] While at Law 39/1999 Chapter III regulated fundamental rights in rights to life; rights to descent; right to development; rights to obtain equity; rights of individual freedom; rights of secure; rights to welfare; rights to participate in the government; rights for women; and rights for children.[94] the National Commission on Human Rights is responsible to protect and enforce the human rights norm under the constitution, philosophical theory of Indonesia (Pancasila), Charter of the United Nations, and Universal Declaration of Human Rights.[95]

6. The hierarchy in international law

There are debates among scholars concerning the hierarchy of international law. Sefriani argues there are versions of the hierarchy of international law: First, the hierarchy under the common sources of international law, Article 38 (1) of

[93] "Undang-Undang Dasar Negara Republik Indonesia 1945", Chapter IX.
[94] Law 39/1999, Chapter III, Article 9-66.
[95] Law 39/1999, Article 75.

the ICJ Statute; Second, the hierarchy according to Article 103 of the UN Charter; and Third, the hierarchy under Article 30 of the 1969 Vienna Convention on the Law of Treaties.[96] However, the rest scholars disagree with the statement, "all substantive rules of international law are important, but some are more important than others."[97] A good example would be the statement from the International Law Commission:

> "A rule of international law may also be superior to other rules under a treaty provision. This is the case of Article 103 of the United Nations Charter under which 'In the event of a conflict between the obligations of the Members of the United Nations under the … Charter and their obligations under any other international agreement, their obligations under the … The charter shall prevail."[98]

According to Conforti insist customary law ranked at the top of the hierarchy of international law following international conventions are the second in the ranking. Treaties obligatory character rests on a customary rule (*i.e.*: *pacta sunt servanda*).[99] Contrary to Bernhardt asserts customary law is often superseded by conventions. Due to the practice of State concludes by treaty, which departs from customary law, and thereby change the applicable norm.[100] However, to justify between treaty and customary had examined in *Nicaragua Case*.

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[96] Sefriani, *Op.cit.*, 56-58.

[97] William R. Slomanson, *Fundamental Perspective on International Law* sixth edition, (Boston: Wadsworth, 2010), 27.

[98] ILC: Report on the work of its fifty-eighth session (2006), Gen. Assembly Off. Records, Sixty-first Session, Supplement No. 10 (A/61/10), §XII.D.II.6, p. 420 (Fragmentation of International Law). Commentator: F. Martin, Delineating a Hierarchical Outline of International Law Sources and Norms, 65 Saskatchewan L.R. 333, 359 (2002).

[99] B. Conforti, *International Law and the Role of Domestic Legal System* (Dordrecht: Martinus Nijhoff, 1993), 115-116.

[100] R. Bernhardt, "Hierarchy Among the Sources of International Law", in D. Constantopoulos (ed.), *Sources of International Law*, (Thessaloniki: Inst. Pub. Int'l Law, 1992), 97.

F. Operational Definition

1. Normative hierarchy

"A hierarchical order sort by the degree of normative value."[101]

2. Human rights treaties

"International agreement concluded between States in written form and governed by international law."[102] (the name of treaty refer to Universal Declaration of Human Rights and International Covenant on Civil and Political Rights).

G. Research Methodology

The function of research methods is explaining the writing structure which is used to identify, process, and analyze the information. It would understandable and helpful for readers. These below are things the author will explain:

1. Type of research

The thesis research is normative-legal. It can be identified from the problem formulations which is endeavor the enforcement of the Security Council resolution; and the hierarchy between the Security Council resolution and human rights treaties. These two are studied from the normative-legal aspect.

2. Research approach

[101] Vranes, *Loc.cit*.

[102] "*The 1969 Vienna Convention on the Law of Treaties*", May 23th, 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 2 (1a), available at https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en.

Qualitative approach used to describe this thesis research.[103] Qualitative research is an approach for exploring and understanding the meaning of individuals or groups ascribe to a social or human problem. The process of research involves emerging questions and procedures, data typically collected in the participant's setting, data analysis inductively building from particulars to general themes, and the researcher making interpretations of the meaning of the data.

3. Object of research

Based on the problem's formulation, the Security Council resolution 1267, human rights treaties, Indonesian laws relating to human rights are the object of the thesis research. These are what will study in this thesis research, specifically will discuss in the next Chapters II and III.

4. Sources of research data

Sources of research data comprise primary, secondary, and tertiary. First, primary data obtained from statutory of laws, conventions, and judicial decisions. Second, secondary data obtained from books, journals, and miscellaneous documents. Third, tertiary data obtain from dictionaries, encyclopedias, and the holy Quran.

5. Data analysis

Qualitative method is used to analyze and process any information. The result will describe the study.

[103] John W. Creswell, J. David Creswell, *Research Design Qualitative, Quantitative, and Mixed Methods Approaches*, (Thousand Oaks: SAGE Publications, 2017), 4.

CHAPTER II – DECISIONS OF INTERNATIONAL ORGANIZATION AND HUMAN RIGHTS TREATIES UNDER INTERNATIONAL LAW

A. Sources of International Law

The most authorities and agreed by scholars about the sources of international law, according to Article 38 (1) of the ICJ Statute following:

> "*The Court, whose function is to decide following international law such disputes as are submitted to it, shall apply:*
>
> 1. *International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*
> 2. *International custom, as evidence of a general practice accepted as law;*
> 3. *The general principles of law recognized by civilized nations;*
> 4. *Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono if the parties agree thereto*."[104]

1. International conventions

The terminology of convention can be a treaty, declaration, international agreement, *etc*.[105] According to the 1969 Vienna Convention on the Law of Treaties, the definition of the treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and

[104] "The International Court of Justice Statute", open for signature June 26th 1945, Article 38 (1).

[105] Diane Marie Amann ed., *Benchbook on International Law*, (American Society of International Law, 2014), I.B-3.

whatever its particular designation.[106] A treaty must fulfill the elements of the international agreement, conclude between States, and governs by international law. However, the definition is inadequate, because the subject of international law is not the only State.

The steps by which a treaty comes into being include negotiation; adoption signature; ratification; and entry into force.[107] The first step is negotiation. In this step, each State can negotiate a treaty. This is the deliberation session to determine the provisions will be regulated. Once the negotiation is completed, states adopt a treaty by an agreed-upon voting process. After the adoption of a final text, treaties typically are opened for signature; that is, states are invited to sign the treaty within a specified period, as a preliminary step toward full membership in the treaty. A state that has attached its signature has not consented to be bound to the terms of the treaty, and thus cannot be sanctioned for violating the treaty's terms. A state typically consents to be bound to the terms of a treaty by depositing a certain document – known as the instrument of ratification or accession – with a designated entity. Each state follows its domestic law to determine whether it will consent to be bound to a treaty. Treaty texts typically make explicit the number of states that must consent to be bound for the treaty to take effect – that is, to enter into force. Even after this entry into force, states may continue to join the treaty; typically, a treaty provision specifies that the treaty will enter into force

[106] "The 1969 Vienna Convention on the Law of Treaties", Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331, Article 2 (a).

[107] Diane Marie Amann ed., *Loc.Cit.*

for such a state a few months after that State deposits its instrument of ratification or accession.

There is a classification of conventions. The most common are distinction general nature of treaties: bilateral versus multilateral; and lawmaking versus contractual.[108] First, the bilateral and multilateral convention is different from the number of contracting parties. A bilateral treaty establishes mutual rights and obligations between the two States. It normally affects only them, but not others. The other States typically derive no benefits or duties from such a treaty. The States entering into this type of treaty do not intend to establish rules that contribute to the progressive development of International Law. While, a multilateral treaty, on the other hand, is an international agreement among three or more States. Most of the military, political, and economic organizations discussed in this book were created by multilateral treaties. They expressed the rights and duties of the member States and the competence of the particular organization created by their treaty.

Second, lawmaking and contractual convention are classified based on its legal effect. A lawmaking convention creates a new rule of International Law designed to modify existing State practice. The 1982 UN Law of the Sea Treaty contains several new rules governing jurisdiction over the oceans. Although it codifies (restates) some previously existing rules that States applied in their mutual relations, this multilateral treaty also contains some novel lawmaking

[108] Slomanson, *Op.cit.*, 575-576.

provisions. On the other hand, some treaties are merely "contractual." An import-export treaty sets forth the terms of a contract, which the State parties agree to for a specified period.

2. International custom

International custom regard as the source of international law. It manifests in the diplomatic correspondence of State; the practice of international organizations; judgment of State's tribunals; and unilateral acts of State.[109] Customary law defines as the regular practice imperceptibly acquire a status of inexorability.[110]

The binding power of customary law must fulfill the elements of an established, widespread, and consistent of the practice of State; and psychological or opinion as to law – *opinion Juris necessitates*.[111] According to Brownlie, conveniently assembles the four recognized elements for resolving whether a claimed practice falls within this domain: 1. Duration or passage of time; 2. Substantial uniformity or consistency of usage by the affected nations; 3. The generality of the practice, or degree of abstention; and 4. *Opinio juris et necessitates*— an international consensus about, and recognition of, the particular custom as binding.[112]

[109] Rama Rao, "Public International Law", lecturer materials, 10.
[110] Hugh Thirlway, "The Sources of International Law", in Malcolm D. Evans ed., *International Law* 3rd Ed. (Oxford: Oxford University Press, 2010), 101.
[111] *Ibid.* 103.
[112] Slomanson, *Op.cit.*, 29.

The first element of physical denotes there must, in general, be a recurrence of the acts which give birth to the customary rule. There must be a practice, whether of positive acts or omissions, whether in time of peace or war. The second element of psychological recurrence of the usage tends to develop an expectation that, in similar future situations, the same conduct or the abstention therefrom will be repeated. Despite the element of psychological is unnecessary, it would help in the present to different customary from a course of action followed as a matter of arbitrary choice or for other reasons.[113]

Custom law is man-made law. Customs can lead to norms of or general international law. Custom can create new norms or change or abolish existing norms. Customary principle *pacta sunt servanda* is the reason for the validity of all international law created by the treaty procedure.

3. The general principle of law

The general principle of law refers to a principle that is recognized in all kinds of legal relations, regardless of the legal system it belongs to.[114] In the context of international law, it refers to a principle that gives rise to international legal obligations. The phrase of general denote its principles apply generally in all cases of the same kind which arise in international law.

The functions of a general principle: a source of interpretation for conventional and customary international law; a means for developing new norms

[113] Shaw, *Op.cit.*, 76-84.

[114] Sam Stuart, *Encyclopedia of Public International Law*, (Amsterdam: Elsevier, 2014), 89-90.

of conventional and customary international law; a supplemental source to conventional and customary international law; and a modifier of convention and customary international rule.[115]

4. Judicial decisions

The decisions of the ICJ, the PCIJ, the international arbitration tribunals, and the national Supreme Courts are not only as of the sources of international law but also as the best evidence available to show the existence of rules of international law referred to in those decisions *i.e. The Fisheries case* declaring the drawing of straight baseline to determine the territorial waters, *the Reparation case* declaring the UN as the successor to the League of Nations & that UN is an International Person have laid down new principles of International law.[116]

5. The teachings of the most highly qualified publicists

Juristic writings had influenced the development of international law. The classical works such as Gentili, Grotius, Pufendorf, Vattel, and Bynkershoek were the supreme authorities of the sixteenth to eighteenth centuries and determined the scope, form, and content of international law.[117]

B. Decisions of the International Organization

Acts of an international organization meaning a process to issue a decision, by single-author acts, intended to be obeyed by the members of an international organization.[118] From a legal standpoint, such acts refer to law-enacting and law-

[115] Slomanson, *Op.cit.*, 31-32.
[116] Rao, *Op.cit*, 12.
[117] Shaw, *Op.cit*., 112.
[118] Thomas Sommerer, Jonas Tailberg, "Decision-Making in International Organizations:

executing rules.[119] It is illustrated the unilateral decision of an international organization. Broadly speaking, an instrument of decision contained binding and voluntary tool; policy and technical standard; and normative and guidance documents.[120]

1. Typology of international organizational acts

In general, the scope of acts of international organization cover the making of administrative rules such as rules of procedure for organs, rules creating subsidiary organs (including such organs as the UNEF and the ONUC) and the rules governing their operation, staff regulations and rules, rules and decisions relating to financial and budgetary arrangements (e.g., under Article 17 of the Charter of the UN, Article IV of the FAO constitution and Article 56 of the WHO constitution), acts connected with the management of assets and investments, external administrative rules (e.g., UN regulations on the registration of treaties, regulations on non-governmental organizations, ICAO regulations on publication and information and language regulations) and administrative arrangements and implementing regulations (e.g., headquarters agreements and implementing rules, agreements on collaboration), establishment of administrative tribunals (which are not 'subsidiary' organs, but are established under the general power to regulate

Actors, Preferences, and Institutions", conference paper at the Annual Convention of the International Studies Association, (2016): 4; Mohammed Bedjaoui, *International Law: Achievements and Prospects*

Democracy and Power, (The Hague: Martinus Nijhoff Publishers, 1991), 241.

[119] Renata Sonnenfeld, *Resolutions of the United Nations Security Council*, (Warszawa: Polish Scientific Publishers, 1988), 1.

[120] OECD, The Contribution of International Organizations to A Rule-based International System, *OECD Publishing*, (2019): 6, available at http://www.oecd.org/gov/regulatory-policy/a-partnership-for-effective-international-rule-making.htm.

and deal with relations with staff, if not specifically established under the constitution), the making of contractual and other arrangements to support the institutional aspects of the organization's operation (e.g., contracts for supplies and services connected with offices, building construction contracts and contracts for security services) and the creation of special organs.[121] In a particular degree, the following instruments-form used by an international organization:[122]

i. Treaties, a legally binding international agreement concluded between States and international organization;

ii. Regulations, a legally binding decision for the members of an international organization adopt by an international organization through the principal organ aim to take necessary measures at the domestic level, in order complying with their international obligations (*i.e.*: decision, regulation, directive);

iii. Recommendations/incentive instruments, a non-binding legal instrument purports to encourage the members of an international organization to conduct in a specific way (*i.e.*: recommendation, guideline, and code of practice);

iv. Declarations/policy, a high level aspirational and non-legally binding statements adopted by political organ (*i.e.*: policies, policy statements, declarations, and communiqués);

v. Model treaties/prescriptive instruments, an international agreement ready-to-use frames adopted by IO for its members. This usually somewhat has similarities with recommendations;

vi. Technical standard, a voluntary instrument design for the needs in a particular area expressed by stakeholders i.e.: the WTO SPS and TBT

[121] C.F. Amerasinghe, *Principles of the Institutional Law of International Organization* second edition, (Cambridge: Cambridge University Press, 2005), 165.

[122] OECD, *Op.cit.*, 58-59; Sonnenfeld, *Op.cit*, 7-8.

Agreements require WTO members to base their domestic regulations on international standards; and

vii. Supporting instruments, a non-legally binding instrument intended to facilitate the implementation of other normative instruments adopted by IOs i.e.: action plans, blueprints, explanatory notes, guides for the applications.

2. Voting rule

The voting rule aims to pass the instruments of an international organization.[123] It constructs for State control over the organization, attraction for the membership, international organization responsiveness to policy concerns, and State compliance with the international organization rules.[124] Commonly practice of voting rules is the one-nation-one-vote framework, in respect of total sovereign fairness,[125] unless the constitution of an international organization rules different frameworks.[126] There are some factors in the assurance of voting rules from decision costs, heterogeneity, and discount factors.[127] These are the common types of voting rules in the most international organization:[128]

i. Unanimity or consensus;
ii. Majority voting;
iii. Weighted voting;
iv. Multiple vetoes; and
v. Fast-track procedures.

[123] Sommerer, Tailberg, *Op.cit*., 12.
[124] *Ibid.*
[125] Shotaro Hamamoto, Hironobu Sakai, Akiho Shibata, *'L'être situé', Effectiveness and Purposes of International Law: Essays in Honour of Professor Ryuichi Ida*, (Leiden: Brill Nijhoff, 2015), 25.
[126] Amerasinghe, *Op.cit.*, 148-149.
[127] Eric A. Posner, Alan O. Sykes, "Voting Rules in International Organizations", *Coase-Sandor Institute for Law and Economics Working Paper No. 673*, (2014): 6, available at http://www.law.uchicago.edu/Lawecon/index.html.
[128] Sommer, Tailberg, *Loc.cit.*

3. United Nations Security Council Resolutions

The word of resolutions is no found according to the Charter of the United Nations. The history was from the practice of the United States and describe resolutions as an official expression of opinion of a parliamentary assembly.[129] The Security Council resolutions meaning a formal expression of its determinations by the President and it represents the Council's acts.[130] Thus, the council resolutions reflect the Council's acts. The special of the Council can issue resolutions because it possesses quasi-legislative character.[131] There are many ways to tackle the Council resolutions if its powers are *ultra vires*. This because the Council works alone in issuing resolutions. First, the Council has voting rules that are a check on the restriction of the exercise of those powers.[132] Second, the General Assembly could challenge the Council's actions through a censure resolution, an advisory opinion by the ICJ, or curtail them through its control of the United Nations budgets.[133] Third, the Council resolutions can be brought over national and international courts as advisory opinions or contentious cases[134] *i.e.*: in the *Lockerbie* case before the ICJ, *Tadic* case before the International Tribunal for Former Yugoslavia, and the cases concerning targeted financial sanctions

[129] Justin S. Gruenberg, "An Analysis of United Nations Security Council Resolutions: Are An Analysis of United Nations Security Council Resolutions: Are All Countries Treated Equally", *Case Western Reserve Journal of International Law* Vol. 41, Issue 2, Article 12, (2009): 481, available at https://scholarlycommons.law.case.edu/jil/vol41/iss2/12.

[130] Linn Edvartsen, "UN Security Council Resolutions as Authorization for the Use of Force: Collective Security under Chapter VII of the UN Charter", *Master's Thesis from University of Oslo*, 2003, 15, available at http://urn.nb.no/URN:NBN:no-36365.

[131] Simon Chesterman, "The United Nations Security Council and the Rule of Law", *Public Law and Legal Theory Research Paper Series No. 08-57*, New York School of Law, (2008): 12, available at http://ssrn.com/abstract=1279849.

[132] *Ibid.*, 10.

[133] *Ibid.*, 10.

[134] Edavrsten, *Op.cit.*, 23.

before the European Court of First Instance and the European Court of Justice.[135] Last, a State can disobey the Council's resolutions, if it is beyond the credibility of the Council's powers.[136]

The two basic binding effect – extrinsic and intrinsic – can determine where such effects of the Security Council resolutions is originated.[137] An intrinsic effect is based on a treaty or the customary law internal authorizing the adoption of resolutions (*i.e.*: the UN Charter). An extrinsic effect is directly based on international customary law.[138] The legal effect of causative, substantive, and modal utilized to which binding effect is fit with the Security Council resolutions.[139] According to Oberg, the Security Council resolutions is fit with intrinsic effect due to operational powers enshrined in the Charter of the United Nations.[140] The following reasons legal effect fulfilled by the Security Council.[141] Substantive effect, the Security Council resolutions can make obligation to their addressee under its resolutions.[142] Causative effect is adopted from factual event or legal situations, which resulting substantive effect. Modal effect, the procedural of substantive effect.[143]

a. Typology of the Council resolutions wording

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[135] *Ibid.*, 10.
[136] *Ibid.*, 11.
[137] Marko Divac Öberg, "The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ", *The European Journal of International Law* Vol. 16 no.5, (2006): 881.
[138] *Ibid.*
[139] *Ibid.*
[140] *Ibid.*, 895.
[141] *Ibid.*, 906.
[142] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 25, Chapter VII, available at https://www.un.org/en/sections/un-charter/un-charter-full-text/
[143] Öberg, *Op.cit.*, 882.

i. Emotive wording

Emotive wording is used by the council to express an opinion based on an incidental event.[144] These are the emotive words sort by weakest to strongest are concerned, grieved, deplored, condemned, alarmed, shocked, indignant, censured.[145] For instance, concerning the Iran-Iraq War, the Council "Deplored … the bombing of purely civilian population centers, attacks on neutral shipping or civilian aircraft, the violation of international humanitarian law and other laws of armed conflict, and, in particular, the use of chemical weapons contrary to obligations under the 1925 Geneva Protocol." Deplore signifies disapprove of.[146]

ii. Instructive wording

Instructive wording indicates to address the target of the council resolutions.[147] These words indicate the amount of authority the Security Council intends to convey to the Entity of each resolution to make the Entity recognize the severity of the Subject. These words such as decide, call upon, recommend, request, urge, warn, demand.[148] For example, the council has "recommended that the United Kingdom and Albanian Governments should immediately refer the dispute to the International Court of Justice following the provisions of the Statute of the Court."[149] Recommends signifying to urge or suggest as appropriate.

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[144] Gruenberg, *Op.cit.*, 483.
[145] *Ibid.*
[146] *Ibid.*, 484.
[147] *Ibid.*, 487.
[148] *Ibid.*
[149] *Ibid.*, 488.

b. Voting rule

Voting rule of Security Council, according to the Charter following:

> "1. Each member of the Security Council shall have one vote.
> 2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.
>
> 3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and paragraph 3 of Article 52, a party to a dispute shall abstain from voting."

The five permanent members, including the United States, the United Kingdom, the Russian Federation, France, and China have veto-rights.[150] This special voting power to prevent a decision by whatever means they may require.[151]

C. Normative Conflict in International Law

The value represents the interests of individuals or groups manifest being a norm to establish distinct rights and obligations that are legally binding.[152] A conflict describes *stricto sensu* as two norms causing a State cannot simultaneously comply with both treaties' obligations.[153] Conflicting norms may happen and with the solution of these conflicts being the foremost importance of any legal systems. In the domestic legal system, a conflicting norm can be solved by applying intra-

[150] https://www.un.org/securitycouncil/content/voting-system <accessed 7 April 2020>

[151] Bob Reinalda, "Decision Making within International Organization: An Overview of Approaches and Cases Studies", *Paper for delivery at the European Consortium for Political Research (ECPR), 29th Joint Sessions of Workshops*, (2001): 15.

[152] Ahmad Ali Ghouri, "Determining Hierarchy Between Conflicting Treaties: Are There Vertical Rules in the Horizontal System?", *Asian Journal of International Law*, (2012): 4; Miko, *Op.cit.*, 5.

[153] Vranes, *Loc.cit*.

systemic rules *i.e.*: *lex speciali, lex posterior*, *lex superior*.[154] Meanwhile, in the international legal system, those rules cannot be solving conflicting norms. The reasons intra-systemic rules are insufficient. Firstly, various branches of international law increasing various norms made their mechanism (*i.e.*: international trade, human rights, environment).[155] Secondly, each branch of international law has its mechanism dealing with conflicts and these often differ.[156]

The nature of norm conflict comprised of appearance conflict and genuine conflict.[157] Thus, a technique for solving these can be done by conflict avoidance and conflict resolution.[158] for apparent conflict, conflict avoidance can be solved through interpretative means.[159] When conflict avoidance fails, conflict resolution applies one conflicting norm to prevail over the other.[160]

1. Types of conflicts

According to Akhavi, four types of causes of conflicts are: First, the same act is subject to a different type of norms, where a norm conflict arises due to the same act regulated by different types of norms;[161] Second, a norm requires an act, another norm in contrast. This instance caused by unable to perform any

[154] Uta Bindreiter, *Why Grundnorm? A Treatise on the Implications of Kelsen's Doctrine*, (The Hague: Kluwer Law International, 2002), 151.

[155] Ralf Michaels, Joost Pauwelyn, "Conflict of Norms or Conflict of Laws: Different Techniques in the Fragmentation of Public International Law", *Duke Journal of Comparative and International Law*, (2011): 368.

[156] *Ibid.*

[157] Milanovic, *Op,cit.*, 3.

[158] *Ibid.*, 9.

[159] *Ibid.*

[160] *Ibid.*

[161] Ali Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties*, (Leiden: Brill Academic Publishers, 2003), 7.

obligation at the same time, but it can be avoided;[162] Third, a norm prohibits a necessary precondition of another norm asserts that if a norm requires an act, while another norm prohibits a necessary precondition of that act;[163] Fourth, a norm prohibits a necessary consequence of another norm. Conflict of norms can be since one norm requires or permits an act, while another norm prohibits a necessary consequence of that act.[164]

2. Causes of conflicts

According to Michael and Pauwelyn, a norm conflict can happen within one branch of international law and between branches of international law.[165] A conflict within one branch of international law applies to the same subject matter. For example, the Marrakesh Agreement establishing the WTO, thus this agreement prevail over all agreements within the WTO.[166] While conflict between branches of international law arises from different matters. For example, a conflict between the sub-functional system *i.e.:* human rights and finance, trade, and environment.[167]

According to Wright, a norm conflict of international law: with treaties affecting non-signatories; with treaties affecting only signatories; and conflicts between two treaties.[168] Wright concludes these conflicts have different

[162] *Ibid.*, 8.
[163] *Ibid*., 9.
[164] *Ibid*., 10.
[165] Michaels, Pauwelyn, *Op.cit*., 366-367.
[166] *Ibid.*, 366.
[167] *Ibid.*, 367.
[168] Quincy Wright, "Conflict between International Law and Treaties" *The American Journal of International Law* Vol 11, No. 3 (1917): 568, 575, 576.

treatments to solve the conflict. For the first matter apply: treaties are of legal validity only as between signatories and are superseded by customary international law in determining the rights of non-signatories when no statutory rules exist.[169] For the second matter apply: treaties ordinarily take precedence of customary international law in determining the rights of signatories, but when derogating from rights of non-signatories under customary international law, or from rights of signatories recognized by that law since the conclusion of the treaty, they will generally be interpreted in harmony way.[170] For the third matter apply: where two treaties conflict, courts will generally give precedence to the earlier if the signatories are different; to them later if they are the same.[171]

D. Legal Status of Security Council Resolutions

The reason for the binding nature of certain Security Council resolutions lies in the special nature of chapter VII of the Charter.[172] Under Chapter VII, the Security Council can take enforcement measures to maintain or restore international peace and security.[173] article 25 of the Charter states that:

> "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."[174]

Moreover, article 48 states that:

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[169] *Ibid*., 578.
[170] *Ibid*., 579.
[171] *Ibid*., 579.
[172] "Charter of the United Nations", Chapter VII, 24 October 1945, 1 UNTS XVI, available at https://www.un.org/en/sections/un-charter/un-charter-full-text/.
[173] "Charter of the United Nations", Article 39, 24 October 1945, 1 UNTS XVI, available at https://www.un.org/en/sections/un-charter/un-charter-full-text/.
[174] "Charter of the United Nations", Article 25, 24 October 1945, 1 UNTS XVI, available at https://www.un.org/en/sections/un-charter/un-charter-full-text/.

> "1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine;
>
> 2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members."[175]

Based on these articles of the Charter, Member States are bound by international law to give effect to decisions of the Security Council, even where such provisions otherwise would be in conflict with domestic law.

As mentioned above, Security Council resolutions based on chapter VII can contain both soft and hard law elements. Whether a particular element is binding on all Member States or not can be determined by looking at the language it uses.[176] Binding on States are provisions that begin with the phrase that the Security Council "decides that States shall …", while in non-binding provisions the Security Council uses formulations such as "calls upon", "urges", "encourages", "notes" etc.[177]

E. Human Rights and International Law

Before the United Nations introduced the concept of international human rights law, there was earlier development of international human rights in specific issues. First, religious liberty marked by the Westphalia Treaty as the foremost nation-state system and the modern of international law. Under the treaty regulated amnesty for all offenses committed during the troubles and freedom of contract.[178] Second, the

[175] "Charter of the United Nations", Article 48 (1, 2), 24 October 1945, 1 UNTS XVI, available at https://www.un.org/en/sections/un-charter/un-charter-full-text/.

[176] Vesselin Popovski, Trudy Fraser, *The Security Council as Global* Legislator, (Oxon: Routledge, 2014), 53.

[177] *Ibid.*

[178] Dinah Shelton, "An Introduction to the History of International Human Rights Law", lecturer material at the International Institute of Human Rights, Strasbourg, (2003): 5-6.

abolition of slavery and the slave trade that incurred the emergence of ideologies of racism, apartheid, and segregation.[179] Third, the emergence of international humanitarian law for caring wounded and prisoners of war. Following the increasing armies-size and wars led to the growing concern with the conditions of war, the treatment of wounded and sick, and the protection of civilians. The result was establishment Geneva-based private international organization, the International Committee of the Red Cross.[180] Last, the protection of citizens abroad. The incident of robbery, murder, the enslavement of diplomats, merchants, and others traveling abroad made international travel always been hazardous. The role of the government of the country entailed for the responsibility of individual inflicted the injury.[181]

A key characteristic of international human rights law is the relationship between State and individual.[182] The United Nations endorsed a list of human rights in numbers of human rights treaties. This marked as the achievement the United Nations lie in the standard-setting in guidelines State in treating individuals. The foremost the UN-rule making, Universal Declaration of Human Rights, specific in Article 1 (3), 55, and 56 introduced peremptory of international norms.[183] Between human rights and international law interplay distinctive roles: provides a common language, reinforces the universality of human rights, legitimizes claims of rights,

[179] *Ibid.*, 6-7.
[180] *Ibid.*, 8.
[181] *Ibid.*, 9.
[182] Hashemi, *Religious Legal Traditions, International Human Rights Law and Muslim States Studies in Religion, Secular Beliefs and Human Rights*, (Leiden: Martinus Nijhoff Publisher: 2008), 8.
[183] Sarah Joseph, Joanna Kyriakakis, "The United Nations and Human Rights", in Joseph, McBeth, *Op.cit*., 2.

signals the perceived will of the international community, provides juridical precision, creates increased expectations of compliance, encourages domestic judicial enforcement, encourages enforcement by international courts or agencies, creates additional stigma, and avoids moral relativism.[184] Therefore, international human rights law must be regarded as an international obligation to which effective protection of human rights is consequently also an essential precondition for peace and justice at the international level.[185]

1. Linkage to other branches of international law

International criminal law

International criminal law (ICL) is body international law aimed both to proscribe international crimes – *i.e.*: war crimes, crimes against humanity, genocide, and aggression – and entail criminal liability for those who engage in international crimes.[186] The following criteria an omission can be categorized as international crimes:[187]

1. Violate a rule of international law that entails individual criminal liability;
2. Committed by officials or private persons;

[184] Douglass Cassel, "Does International Human Rights Law Make a Difference?", *Chichago Journal of International Law* Vol. 2, No. 1, (2001): 126-130, available at https://scholarship.law.nd.edu/law_faculty_scholarship/671.

[185] *Ibid.*, 135; Office of the High Commissioner for Human Rights, International Bar Association, "Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers", *Professional Training Series No. 9*, (2003): 5, available at https://www.ohchr.org/documents/publications/training9chapter1en.pdf.

[186] Antonio Cassese, *Cassese's International Criminal Law*, (Oxford: Oxford University Publishing, 2013), 3.

[187] Douglas Guilfoyle, *International Criminal Law*, (Oxford: Oxford University Press, 2016) 185.

3. Crimes according to treaties, which usually implemented by national legal orders, or ought to 'core crimes', where it is independently from national laws and can be prosecuted in international courts.[188]

ICL comes from various discipline fields of international human rights, international law, criminal law, and comparative criminal law.[189] It aims to the prevention and suppression of international criminality, enhancement of accountability, and reduction of impunity, and the establishment of international criminal justice.[190] ICL has interplay with human rights,[191] however in any occasion, these are always overlapping, the former attributing blame to individuals mainly to impose punishment and the latter blaming the state and seeking some form of redress or compensation.[192] Simply, not all human rights violations subject to crimes, and ICL intended to redress human rights violations.[193]

International humanitarian law

International humanitarian law or law of armed conflict characterize the conduct and responsibilities of belligerent States, neutral States, armed groups, and individuals engaged in warfare, with each other and protected persons, namely combatants *hors de combat* and civilians. These four characteristics IHL

[188] William A. Schabas, *The Cambridge Companion to International Criminal Law*, (Cambridge: Cambridge University Press, 2016), 11.

[189] Guilfolye, *Loc.cit.*

[190] Cherif Bassiouni, "The Discipline of International Criminal Law", in M. Cherif Bassiouni, *International Criminal Law* 3rd Ed., (Leiden: Martinus Nijhoff, 2008), 3.

[191] Antonion Cassece, 6.

[192] William A. Schabas, "International criminal law", *Encyclopædia Britannica*, 2020, available at https://www.britannica.com/topic/international-criminal-law.

[193] https://www.ejiltalk.org/esil-international-human-rights-law-symposium-international-criminal-law-and-international-human-rights-law/

identified.[194] First, IHL applies only during situations of armed conflicts. Second, IHL prime objective to protects the life and dignity of persons who are perceived as the enemies of one of the parties to the armed conflict. Third, State behaves not to respect the prohibition of the use of force under international law will incur international armed conflicts. Fourth, as one of the branches of international law, IHL has mainly self-administered a horizontal legal system that lacks a centralized system of adjudication and enforcement for most of its rules.

Between IHL and international human rights correlates, as the ICJ considered under Advisory Opinion on the Wall constructed in the Occupied Palestinian Territory that the following possible inter-relations between the two bodies of law exist in situations where both apply:[195]

1. Rights that are only matters of IHL;
2. Rights that are only matters of IHRL; and
3. Rights that are matters of both bodies of law and should be examined under both IHRL and, as *lex specialis* IHL.

Therefore, during an armed conflict, each action needs to be examined under IHL, IHRL, or both, depending on the circumstances. Distinguishing between IHL and IHRL that IHL to use lethal force against legitimate targets and to intern certain persons without trial and sometimes even without any individual procedure, in other side IHRL appears to be more protective than IHL, but its rules may not be realistic in armed conflict.[196]

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[194] Marco Sassoli, *International Humanitarian* Law, (Cheltenham: Edwar Elgar Publishing, 2019), 1.01.

[195] Diakonia, *An Easy Guide to International Humanitarian Law*, Diakonia IHL Resource Center, 2017, 13-14, available at www.diakonia.se/ihl.

[196] Marco Sassoli, Op. Cit., 9.04

F. Hierarchy in International Law

The importance of the hierarchy of law denoted from the notion of law and hierarchy. A law essentially purposes to assist in maintaining the supremacy of force and the hierarchies established based on power and to give such an overriding system the responsibility and sanctity of law.[197] The concept of hierarchy, according to Meron:

> "one cannot deny that quality labels are a useful indication of the importance attached to particular rights. They strengthen the case against violation of such rights. Hierarchical terms constitute a warning sign that the international community will not accept any breach of those rights."[198]

Hierarchy under a legal system is designed to labeling a legal-normative sort by degree among other legal-normative.[199] The hierarchy of law is used in the event of a normative conflict, which only fits in the domestic context. This because the character of domestic law is the vertical hierarchy, rather than international law is horizontal rules of international law. Katians deny the concept of hierarchy under international society due to there is not a hierarchy in rational authority.[200] The same with Hegelians will not adopt the hierarchy in international law because States are assumed to dialectically compete and fight against each other.[201] According to

[197] J. H. H. Weiler, Andreas L. Paulus, "The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law", *European Journal of International Law* Volume 8, Issue 4, (1997): 560.

[198] Meron, "On a Hierarchy of International Human Rights", *American Journal of International Law* Vol.1 (1986): 80.

[199] Erika de Wet, Jure Vidmar, *Hierarchy in International Law: The Place of Human Rights*, (Oxford: Oxford University Published, 2012), 40.

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[201] Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal*, (Cambridge: Cambridge University Press, 2010), 98.

Kelsen in legal theory that international legal hierarchy will fail when it loses its effectiveness.[202]

Although international law does not recognize contextually hierarchy of law, jus *cogens norms* and obligation *erga omens* specify has special treatment and generally accepted under the normative hierarchy in international law.[203] the following reasons both normative enjoy such hierarchy. First, they must be central importance, because we regard the violation of them as particularly evil.[204] Second, the universal recognition which these rights enjoy.[205] Third, their purports for treating non-derogate rights as privileged is functional and deductive, which other rights are dependent on them.[206]

The following elements of hierarchy under international law:[207]

1. The object of hierarchy comprises a hierarchy of sources, the hierarchy of norms, the hierarchy of obligations, or hierarchy among conflicting norms procedures.
2. The formal extent of hierarchy comprises a hierarchy within a single treaty, the hierarchy among treaties governing the same topics or hierarchy among treaty regimes.

The following norms refer to the normative hierarchy in international law:

1. *Jus cogens* norms

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[202] *Ibid.*, 240.
[203] Tom Farer, "The Hierarchy of Human Rights", *American University International Law Review* Vol. 8, no. 1 (1992): 115.
[204] *Ibid.*
[205] *Ibid.*, 116.
[206] *Ibid.*
[207] Isabelle Buffard, Gerhard Hafner, *International Law Between Universalism and Fragmentation*, (Leiden: Martinus Nijhoff Publishing, 2008), 51-52.

Siderman, specify illustrate *jus cogens* alike to the constitution:

> "*Jus cogens* is not simply a device relevant to the law of treaties, but that is also governed and limits the formation of customary international law and the expression of unilateral or collective State behavior."[208]

Jus cogens refer to double acceptance by accepting of the norm content and its special character *i.e.*: peremptory. This norm had introduced in Roman law as the concept of *jus strictum*, as opposed to *jus dispositivum*. Jus cogens norm – compelling law – remarks about to those particular rules and principles whose application cannot be compromised by the will of parties to a contract.[209]

Jus cogens norms have two primary functions: on its being as a norm from which no States can derogate by mutual agreement and imposes a duty on all State to respect such norms and as a consequence, any unilateral action in violation of *jus cogens* norm would be null and void, but also for accountability (hold accountable individuals or states for the commission of unilateral acts allegedly in violation of peremptory norms), resolving priorities between conflicting norms (give superiority to other norms), and declaring fundamental values.[210]

Jus cogens norms initiated of the presence of an international lex superior, which is that jus cogens have an authority that exceeds that of ordinary

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[208] Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law*, (Cambridge: Cambridge University Press, 2003), 9.

[209] Thomas Watherall, *Jus Cogens International Law and Social* Contract, (Cambridge: Cambridge University Press, 2015), 3.

[210] Dinah Shelton, "Sherlock Holmes and the Mystery of Jus Cogens", in Maarten der Heijer, Harmen van der Wilt, *Netherlands Yearbook of International Law*, (The Hague: Spinger, 2016), 34-35.

international law. for example, a jus cogens status is endowed to the prohibition of torture, according to the 1975 Declarations on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, where it applies to the subjects of international law in eventually.[211]

Identify whether a norm is categorized as jus cogens norms:[212]

i. *Jus cogens* are a norm of general international law;[213]
ii. Accepted and recognized by the international community as a whole without derogation measure and can be modified with the subsequent norm of general international law that is the same character;[214]
iii. *Jus cogens* purport to protect fundamental values of community, are hierarchically superior to other rules of international law and universally applicable;[215]
iv. *Jus cogens* norms are to be identified based on their importance to international public order;
v. The judicial framework of national and international public order rests on it and it permeates the whole judicial system;
vi. All obligations established by *jus cogens* norms have the character of *erga omnes* obligations;
vii. *Jus cogens* norms are invariably norms of customary international law;
viii. Jus cogens norms are invariably prohibitions;

[211] Ulf Linderfalk, *Understanding Jus Cogens in International Law and International Legal* Discourse, (Cletenham: Edward Elgar Publishing, 2020), 1.1.
[212] Ibid, 1.2.2
[213] Chapter V Peremptory Norms of General International Law (*jus cogens*), A/74/10, 142, available at https://legal.un.org/ilc/reports/2019/english/chp5.pdf.
[214] *Ibid.*
[215] Aniel Caro de Beer, *Peremptory Norms of General International Law*, (Leiden: Martinus Nijhoff, 2019), 78.

ix. Jus cogens obligations arise from the notion of peremptory rules, which appears to State, peoples, and the most basic human values;

x. The substantial of jus cogens are accepted by a large number of States, be found necessary to an international life, and deeply rooted in the international conscience;

xi. The essential values and rights of the international community are harmed to breach;

xii. The non-derogate quality of jus cogens norms distinguishes them from other norms of international law.

2. Obligation *erga omnes*

A well-known *obiter dictum* in *the Barcelona Traction Case*, the ICJ described obligation *erga omnes* as:

> "certain obligations are the concern of all States. Given the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes."

Obligation *erga omnes* are obligations of a State towards the international community as a whole that protect the legal interest.[216] And to the extent, they have been recognized as customary international law.[217] erga omnes can result in the invocation of international responsibility.[218] Thus, obligation *erga omnes* is

[216] Marco Longobardo, "Genocide, Obligation *Erga Omnes*, and the Responsibility to protect: Remarks on a Complex Covergence", *The International Journal of Human Rights*, 19 (8), (2015): 1205, available at http://www.tandfonline.com/eprint/qS5CUGgpdRCJZrKU6wye/full.

[217] Erika de Wet, "Invoking Obligation *Erga Omnes* in the Twenty-first Century: Progressive Developments since Barcelona Traction", *South African Yearbook of International Law* 38, (2013): 4, available at https://ssrn.com/abstract=2629560.

[218] Wet, *Op.cit.*, 9.

breached, when it affecting the international community of States as a whole that is injured, where it arises from non-bilateral treaties. This is similar to the statement cited from the Report of the Study Group of the International Law Commission on Fragmentation of International Law:

> "If a State is responsible for torturing its citizens, no single State suffers any direct harm. Apart from the individual or individuals directly concerned, any harm attributed to anyone else is purely notional, that is, constructed based on the assumption that such action violates some values or interests of all, or … of the international community as a whole."

The following elements of obligation *erga omnes*:[219] Those obligations of a State owed to the international community as a whole and obligations *erga omnes partes*.

The Institute of International Law speaks of erga omnes partes in the following terms, as:

> "An obligation under a multilateral treaty that a State party to the treaty owes in any given case to all the other States parties to the same treaty, because of their common values and concern for compliance, so that a breach of that obligation enables all these States to take action."[220]

The following conditions *erga omnes partes* actively involved:[221] first, that the invocation of responsibility must be owned to the State Parties of the Treaty in question; and Second, that the obligation must have been established for the protection of collective interest. Besides, collective interest-only concerning about

[219] Jean Allain, "Slavery and its Obligations Erga Omnes", *Australian Yearbook of International Law* Vol. 36, (2019): 14, available at https://www.researchgate.net/publication/330452854.

[220] Institut de Droit International (Fifth Commission), 'Obligations and rights erga omnes in international law' (Krakow Session—2005), art 1 (b).

[221] Allain, *Op.cit*., 15.

environment, security, and human rights. *Erga omnes partes* are owned by a group of State and established for the protection of a collective interest of the group.[222]

3. Article 103 of Charter of the United Nations

Article 103 of the UN Charter speaking about the UN Member's obligation, which reads as follows:

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

This provision intended applies to obligations derived by the Charter and the decisions in conformity with it by the competent organs.[223] Some points from the provision highlighted. Firstly, the phrase of 'obligations … under the present Charter', meaning that the obligations are both stem directly from the Charter and the precise content of which is determined by an organ of the UN.[224] For example, the duty to settle disputes peacefully (Article 2 [3]) and the obligation to refrain from the use of force (Article 2 [4]). While the obligation from the UN principal organ such as the obligation to carry out the Security Council's decision (Article 25).

[222] Longobardo, *Op.cit.*, 1206.

[223] Pierre-Marie Dupuy, "The Constitutional Dimension of the Charter of the United Nations Revisited", *Max Planck Yearbook of United Nations Law*, (2008): 12, available at https://www.mpil.de/files/pdf1/mpunyb_dupuy_12.pdf

[224] Rain Livoja, "The Scope of the Supremacy Clause of the United Nations Charter", *International and Comparative Law* Quarterly, (2008): 585.

Secondly, the phrase of 'in the event of a conflict …', meaning that normative conflict between the Charter and other international agreement, typically conflicts are from:[225] with another member contracted before the entry into force of the Charter; with another member contracted after the entry into force of the Charter; and with a non-member state, whether (contracted) before or after the entry into force of the Charter. In the first situation, the Charter overrules *ipso facto* any other irrelevant international agreements.[226] In the second situation, a treaty concluded between the UN members after the Charter entry into force, lead to conflict. A conflict may be resolved by the principle of the law of treaty if it deals with intrinsic inconsistencies.[227] In the third situation, a non-member of the organizational institution cannot be bound by the principle of *pacta tertiis nec nocent*.[228] The question about the status of non-members *vis-à-vis* the UN enacted under Article 2 (6) of the Charter, stated:

> "The organization shall ensure that states which are not members of the united nations act following the principles of the un so far as may be necessary for the maintenance of international peace and security."

Besides, logical reasoning the non-members of the UN shall obey the UN following the special character of the UN as an organization concerned primarily

[225] *Ibid*., 593.
[226] *Ibid.*, 594.
[227] *Ibid.*
[228] *Ibid.*, 595.

with the maintenance of peace and security in the world and because of its extensive membership, the Charter is an exception.[229]

Thirdly, the phrase '… their obligations under the present Charter shall prevail', meaning that in the event of a conflict of obligation, the charter-based obligation is the one to be performed. This provision intended to apply to incidental inconsistencies, where conflict with an existing agreement to be null and void temporarily.[230]

Article 103 creates a formal hierarchy in treaty law of both primary and secondary UN law, which cannot be altered by maxims *lex specialis derogate legi general* and *lex posterior derogate legi inferior*.[231]

This consequently made Security Council resolutions can set aside rules of treaty law with which they conflict. Resolution 748 of 1992[232] is among the examples of the security council setting aside a treaty provision, where the security council demanded that Libyan nationals be turned over the US and the UK, thereby overriding provisions of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. The ICJ concluded that:

> "*prima facie* this obligation extends to the decision contained in resolution 748 (1992) [and] ... following Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations

[229] *Ibid*.
[230] *Ibid.*, 597.
[231] Guido den Dekker, "Absolute Validity, Absolute Immunity: Is There Something Wrong with Article 103 of the UN Charter?", in Cedric Ryngaert, Erik J. Molenaar, Sarah M. H. Nouwen, *What's Wrong with International Law*, (Leiden: Brill Nijhoff, 2015), 249.
[232] *Ibid*, 250.

under any other international agreement, including the Montreal Convention."[233]

This provision has thus elevated the un charter to the status of a superior international treaty. By reference to 'any other agreement,' it implies to supersede State obligation to other treaty law and customary international law.[234] The report of the study group of the international law commission on the fragmentation of international law has called article 103, "a means for securing that charter obligations can be performed effectively and not (a means for) abolishing other treaty regimes."[235] However, in case any obligations arising from the UN and breach *jus cogens* norms, thus it is declared *void*.[236] This article only dealing with treaty obligation seemly contrary to the object and purpose of the UN Charter.[237] However, it is not intended to elevate any particular norm to a hierarchically superior status and suspend the duty of a state to fulfill such an obligation.[238]

G. Decision of the International Organization according to Islamic Perspective

This section will focus discussing the features of ijtihad in the context of ijma' and the relation with the Security Council Resolutions. From Sharia law standpoint, the Security Council Resolutions is equal to *ijma'*. It define consensus of the jurist (mujtahid) from among the community of Muhammad PBUH, after his death in a

[233] Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v UK, Libya v US) (Provisional Measures) [1992] ICJ Reps 3 and 114, paras 39 and 42, respectively.
[234] Jure Vidmar 8
[235] A/CN.4/L.682 (n 8), para 335.
[236] Wet, Vidmar, *Op.cit.*, 48.
[237] *Ibid.*, 19.
[238] *Ibid*.

certain period of time upon a rule of Sharia law.[239] This signify that the practice of *ijma'* is conducted by varies of the jurist, where the role of them on *ijtihad* having impact on decisions of *ijma'*. *Ijma'* is utilized when Quran and hadith are silent on particular issue.[240] Thus, any decisions on ijma' cannot override a statement from Quran and hadith.[241] The binding force of *ijma'* in accordance to the hadith of the Prophet Muhammad, "My community will never agree on an error."[242]

The following conditions of *ijma'*:[243]

1. The agreement must take place among the jurist;
2. The agreement must be unanimous;
3. The jurist must belong to the Islamic community;
4. The agreement must conduct after the death of Muhammad PBUH;
5. The agreement should be held on a rule of Sharia law; and
6. The jurist must rely on hujjah as their basis of argumentation.

Typology of ijma' in the context of ijtihad:[244]

1. *Ijma' sarih* (explicit *ijma'*), where each of the jurist is express their argumentation explicitly. They usually express the same opinion and eventually they express a unanimous opinion.

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[239] Maimun, "Rekrontrkusi Konsep Ijma dalam Berijtihad di Era Modern" ["Reconstruction the Concept of Ijma on Ijtihad in Modern Age"], *Asas Jurnal Hukum Ekonomi Syari'a* Vol. 10 No.1, (2018): 7, 8, available on http://ejournal.radenintan.ac.id/index.php/asas/article/view/en

[240] John L. Esposito, "Ijma in The Oxford Dictionary of Islam", *Oxford Islamic Studies Online*, available on http://www.oxfordislamicstudies.com/article/opr/t125/e989

[241] *Ibid.*

[242] *Ibid.*

[243] Rosidin, *Pendidikan Agama Islam: Referensi Perkuliahan Terlengkap* [*Islamic Education: The Complete College References*], (Malang: Media Surya Atiga, 2020), 69.

[244] Maimun, *Op.Cit.*, 9-10.

2. *Ijma' sukuti* (silent *ijma'*), where some of the jurist are silent, neither challenge an argument of a jurist nor acknowledge it.

Ijma' is recognized in the following Quran verses:

يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولِي الْأَمْرِ مِنكُمْ ۖ فَإِن تَنَازَعْتُمْ فِي شَيْءٍ فَرُدُّوهُ إِلَى اللَّهِ وَالرَّسُولِ إِن كُنتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ۚ ذَٰلِكَ خَيْرٌ وَأَحْسَنُ تَأْوِيلًا - 4:59

"O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best (way) and best in result."[245]

فَلَمَّا ذَهَبُوا بِهِ وَأَجْمَعُوا أَن يَجْعَلُوهُ فِي غَيَابَتِ الْجُبِّ ۚ وَأَوْحَيْنَا إِلَيْهِ لَتُنَبِّئَنَّهُم بِأَمْرِهِمْ هَٰذَا وَهُمْ لَا يَشْعُرُونَ - 12:15

"So, when they took him (out) and agreed to put him into the bottom of the well... But We inspired to him, "You will surely inform them (someday) about this affair of theirs while they do not perceive (your identity)."[246]

In conducting ijtihad, there are three major instruments are qiyas, probability without presence of any effective course, deduction from nass of Quran and hadith in accordance with the purpose of Sharia.[247] Firstly, qiyas denotes as legal method

[245] https://quran.com/4/59
[246] https://quran.com/12/15
[247] Abdulrahman M.A. Albelahi, A. Ali, Metwally Ali, "The Theory of Interpretation in Solving Contemporary Legal Issues: With the Focus on the Instrument of Ijtihad", paper presentation on MATEC Web Conferences 150, (2018): 4-6.

of analogic reasoning on matters not precisely provided on Quran or Sunnah without relying on unsystematic opinion. A good example is the operative cause for the prohibition against alcohol is that it intoxicates in mind.[248]

The second method would be manifested in customary which generally speaking as a way of behaving that has been established for a long time. Despite it is not recognize as the sole source of Sharia law, scholars agree that custom as usage authority in interpretative means and its application rules concerning worldly affairs. The validity of custom must be sound and reasonable.[249]

The third method is referring to mashlahah and istihsan. Firstly, mashlahah asserts to preventing from harm and incurring of benefits in accordance with the objective of Sharia.[250] The scope of mashlahah divided into: mashlahah dharuriyat, mashlahah hajjiyat, and mashlahah tahsiniyah.[251] Secondly, istihsan is utilized in case of the jurist found that law is too broad or too specific and rigid. This method purport to avoiding distress and solution that is compatible with the objective of Sharia.[252]

In the context of Resolution 1267 case, the needs to protect international society interest[253] – international peace and security – also serves by *ijma'* on *mashlahah*

[248] Hasan, Ahmad. "The Definition of Qiyas in Islamic Jurisprudence", Islamic Studies Vol. 19 No. 1 (1980): 2, available on http://www.jstor.org/stable/20847125.

[249] Abdulrahman ed., *Op.cit.*, 5.

[250] Adinugraha, H., & Mashudi, M., "Al-Maslahah Al-Mursalah dalam Penentuan Hukum Islam" ["Al-Mashlahah in Determination of Islamic Law"], *Jurnal Ilmiah Ekonomi Islam* Vol. 4 No. 01, (2018): 65.

[251] *Ibid.*, 66.

[252] Abdulrahman, ed., *Op.cit.*, 5-6.

[253] The normative value of the Charter of the United Nations represent the needs of international society represent by the States as stated in the preamble of the charter. This strongly assert in the purposes of the UN to maintaining international peace and security which is the functions of the

dhauriyat. The objective of *mashlahah dhauriyat* one of them is protecting the soul asserting to keep the human soul from the bloodshed.[254] Moreover, *mashalhah* must applying in the context of *muamalah*. Thus, according to *mashlahah* instrument, the role of the Security Council in relation with public interest is relevant with the function to maintaining international peace and security. The following Quran verses supporting this position:

مِنْ أَجْلِ ذَٰلِكَ كَتَبْنَا عَلَىٰ بَنِي إِسْرَائِيلَ أَنَّهُ مَن قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ أَوْ فَسَادٍ فِي الْأَرْضِ فَكَأَنَّمَا قَتَلَ النَّاسَ جَمِيعًا وَمَنْ أَحْيَاهَا فَكَأَنَّمَا أَحْيَا النَّاسَ جَمِيعًا ۚ وَلَقَدْ جَاءَتْهُمْ رُسُلُنَا بِالْبَيِّنَاتِ ثُمَّ إِنَّ كَثِيرًا مِّنْهُم بَعْدَ ذَٰلِكَ فِي الْأَرْضِ لَمُسْرِفُونَ - 5:32

"Because of that, We decreed upon the Children of Israel that whoever kills a soul unless for a soul or for corruption (done) in the land - it is as if he had slain mankind entirely. And whoever saves one - it is as if he had saved mankind entirely. And our messengers had certainly come to them with clear proofs. Then indeed many of them, (even) after that, throughout the land, were transgressors."[255]

يَا أَيُّهَا الَّذِينَ آمَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلَى ۖ الْحُرُّ بِالْحُرِّ وَالْعَبْدُ بِالْعَبْدِ وَالْأُنثَىٰ بِالْأُنثَىٰ ۚ فَمَنْ عُفِيَ لَهُ مِنْ أَخِيهِ شَيْءٌ فَاتِّبَاعٌ بِالْمَعْرُوفِ وَأَدَاءٌ إِلَيْهِ بِإِحْسَانٍ ۗ ذَٰلِكَ تَخْفِيفٌ مِّن رَّبِّكُمْ وَرَحْمَةٌ ۗ فَمَنِ اعْتَدَىٰ بَعْدَ ذَٰلِكَ فَلَهُ عَذَابٌ أَلِيمٌ - 2:178

Security Council. United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 24 (2), Article 1 (1), available at https://www.un.org/en/sections/un-charter/un-charter-full-text/.

[254] Adinugraha, Mashudi, *Op.cit.*, 67-68.

[255] https://quran.com/5/32

“O you who have believed, prescribed for you is legal retribution for those murdered - the free for the free, the slave for the slave, and the female for the female. But whoever overlooks from his brother anything, then there should be a suitable follow-up and payment to him with good conduct. This is an alleviation from your Lord and a mercy. But whoever transgresses after that will have a painful punishment.”[256]

وَلَكُمْ فِي الْقِصَاصِ حَيَاةٌ يَا أُولِي الْأَلْبَابِ لَعَلَّكُمْ تَتَّقُونَ - 2:179

“And there is for you in legal retribution (saving of) life, O you (people) of understanding, that you may become righteous.”[257]

[256] https://quran.com/2/178
[257] https://quran.com/2/179

CHAPTER III – THE POSITION OF RESOLUTION 1267 UNDER INTERNATIONAL LAW AND ITS IMPLICATION TO INDONESIA

A. The hierarchy of Security Council Resolution 1267 towards Human Right Treaties and Indonesian law

1. The hierarchy between Resolution 1267 and Human Rights treaties

Norms themselves being known for legally binding rules establishing certain rights and obligations between the subject of international law.[258] A norm containing a value, where such value represent an interest in terms of benefits from that norm grant to an individual or a community.[259] In international law, norms can only interact with each other in two ways: they either accumulate or conflict.[260] A conflict of norm also a conflict of value.[261] An examination of a conflict of norm situation will usually proceed in two steps:[262] First, inquiry whether a conflict of norm can be solved through interpretation means (conflict avoidance technique). Second, if there is a genuine conflict, thus the conflict might be solved through conflict resolution technique priority to one norm over the other norms.

Determination of a hierarchical of norms depends upon the legal system. In international law, has developed as a system of horizontal rules which are binding only the consent of the subject of international law. The contemporary international law has transformed a structural legal system from horizontalization to verticalization. This resulting a paradigmatic and ideological change from law of

[258] André Nollkaemper, Janne Elisabeth Nijman, New Perspectives on the Divide Between National and International Law, (Oxford: Oxford University Press, 2007), 101.
[259] Ghouri, *Op.cit*., 5.
[260] Berggren, *Op.cit.*, 16.
[261] Ghouri, *Loc.cit.*
[262] Berggren, *Op.cit*., 29.

rules to law of values. The recognized peremptory norms, *jus cogens* norms and obligation *erga omnes* are exemplary reflections of the international value system. Thus, the existence of international value system made an international normative hierarchical order, which would justify the existence of superior norms.[263]

Determining hierarchy between Resolution 1267 and Article 17 of UDHR & Article 12 of ICCPR will examined in two stages: first, inquiry a conflict of norm. second, justify the value between the conflicting norms. The conflict of norm between Resolution 1267 and human rights treaties can be draw as a norm required to do something, while another norm is breached of it.[264] Under Resolution 1267 required Member States to freeze assets' and travel ban.[265] On the other hand, those sanction measures are corresponding with the right of property and freedom of movement, which guarantee under human rights treaties.[266] In solving it need to inquiry whether there is an apparent conflict or a genuine conflict.

A good example of examination of conflict of norm found in *Nada*,[267] the case concerning travel ban imposed to a dual citizen Italian-Egyptian, Youssef Mustafa

[263] Ricardo Pisilo Mazzeschi, "Global Public Goods, Global Commons and Fundamental Values: The Responses of International Law", Conference Paper No. 112017 presented at European Society of International Law, (2017): 5.

[264] Akhavi, *Op.cit.*, 7.

[265] UN Security Council, Security Council resolution 1267 (1999) [Afghanistan], 15 October 1999, S/RES/1267 (1999), para. 4, available at https://undocs.org/S/RES/1267 (1999) <date accessed 13 July 2020>

[266] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 17, available at https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html <accessed 14 July 2020>; UN General Assembly, *International Covenant on Civil and Political* Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 12 (1) available at https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx <accessed 14 July 2020>

[267] *Nada v. Switzerland*, Application no. 10593/08, European Court of the Human Rights, 12 September 2012.

Nada.[268] He was unable to traveling across Switzerland territory following his name added on the Swiss Taliban Ordinance list. The sanction imposed on him according to The Security Council Resolution 1390 of 2002, which was the national implementation of Resolution 1267 (1999), 1333 (2000) and 1390 (2002).

The Court examined in Resolution 1267 that its language is clear and explicit.[269] It signifies that the addressee must disregard any existing international agreement prior the resolution entry into force. This shall applies to human rights treaties. However, such provision was *ultra vires*, due to beyond from the purpose and objective of the United Nations. As practiced in *Al-Jedda*, the Court inspect the language of Resolution 1546 in accordance to where the resolution is adopted.[270] Referring to Article 24 (2) of the Charter, the functions of the Council shall accordingly to the purposes of the United Nations is respect human rights.[271]

In determining between the conflicting treaties, thus it must be identified the normative value behind it as set out in *Soering*,[272] the US, pursuant to the UK-US Extradition Treaty, sought the extradition of Jens Soering, a German citizen detained in a UK prison, for offences carrying the death penalty.[273] In accordance with the Article 4 of the Treaty, the UK had secured a waiver from the US of the

[268] *Nada v. Switzerland* Application no. 10593/08, p. 1, European Court of the Human Rights 12 September 2012.
[269] *Nada v. Switzerland* Application no. 10593/08, para. 172, European Court of the Human Rights 12 September 2012.
[270] *Al-Jedda v. The United Kingdom* Application no. 27021/08, para. 102, European Court of Human Rights 7 July 2011.
[271] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at https://www.un.org/en/sections/un-charter/un-charter-full-text/
[272] *Soering v. The United Kingdom*, Application no. 14038/88, European Court of Justice, 07 July 1989.
[273] *Soering v. The United Kingdom*, Application no. 14038/88, para. 15, European Court of Justice, 07 July 1989.

death penalty if extradition was approved. Unsatisfied with the US assurances on this matter, Soering unsuccessfully petitioned the English Courts for judicial review, which led to his application to the European Court of Human Rights that extradition would lead to a serious likelihood of his execution in the US. In addition to the death penalty itself, he also claimed that the circumstances surrounding this punishment, like the likelihood of an extended period on death row, would constitute inhuman or degrading punishment contrary to ECHR Article 3, which binds the UK but not the US.[274]

The conflict of norms between Article 3 of the ECHR and Article 4 of the Treaty provided obligations for which there were corresponding rights, and thus can only be resolved by establishing a hierarchy between the conflicting treaty norms in terms of their represented value and protected interests. The Court declared that the obligation of the ECHR prevail over the obligation of the Treaty. The Court contended Article 3 of the ECHR implicitly contains a non-refoulement obligation that forbids the UK from transferring a person to the US, if a real risk of that person being subjected to inhuman treatment in the US was established. The non-refoulement was prioritized over the obligation of extradition, because non-refoulement norm represented an interest that was superior than extradition norm.[275]

The ambiguous regulation under Resolution 1267 was criticized, because it did not respecting the right of targeting individual on fair trial. In the context of counter-terrorism, such rights also stress one of fundamental rules of criminal justice,

[274] *Soering v. The United Kingdom*, Application no. 14038/88, para. 35, European Court of Justice, 07 July 1989.
[275] Ghouri, *Op.cit*., 26-27.

presumption of innocence.[276] Under Article 10 of UDHR assert, that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in determination of his rights and obligations and of any criminal charge against him."[277] This signify in relating to the legal burden of proof is thus on the prosecution, which must present compelling evidence to the trier of fact. The prosecution must in most cases prove that the accused is guilty beyond reasonable doubt. If reasonable doubt remains, the accused must be acquitted.[278]

Regardless sanction measures under Resolution 1267 might effective means for tracking, and even preventing, terrorist activity, but targeted sanctions which result in freezing assets, imposing travel ban may also have serious consequences for the ability of the affected individuals and their families to enjoy economic and social rights, as their access to education and employment may be severely restricted.[279] By considering the impact might pose to targeted sanctions, therefore the value norms of Article 17 of UDHR and Article 12 (1) of ICCPR is higher than Resolution 1267.

2. The hierarchy between Resolution 1267 and Indonesian law

The theory of normative hierarchy introduced by Kelsen that norms is sort by the superior to inferior.[280] Furthermore, Nawiasky characterize the legal norms

[276] Azizur Rahman Chowdhury, Md. Jahid Hossain Bhuiyan, *An Introduction to International Human Rights Law*, Leiden: Koninklijke Brill NV, 2010, 42.

[277] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 10, available at https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html <accessed 14 July 2020>

[278] Chowdhury, Bhuiyan, *Loc.cit.*

[279] OCHCR, *Op.cit.*, 47.

[280] Darji Darmodiharjo, Shidarta, *Pokok-pokok filsafat hukum: apa dan bagaimana filsafat hukum Indonesia* [Principles of philosophy of law: what and how philosophy of Indonesia law], Jakarta: Gramedia Pustaka Utama, 2006, 116.

following basic norm of a legal system (*grundnorm*), formal or informal system of primary principles and laws (*grundgesetz*), and subsidiary law (*verodnungen*).[281] These norms are interrelated, where grundnorm as the prime source inspiring grundgesetz and verodnungen.[282] In the context of Indonesian legal system, the basic norm is Pancasila. It is the prime source to the latter norms, which hierarchically:[283]

1. Undang-Undang Dasar Negara Republik Indonesia 1945
2. Ketetapan Majelis Permusyawaratan Rakyat
3. Undang-Undang/Peraturan Pemerintah Pengganti Undang-Undang
4. Peraturan Pemerintah
5. Peraturan Presiden
6. Peraturan Daerah Provinsi; and
7. Peraturan Daerah Kabupaten/Kota.

Undang-Undang Dasar Negara Republik Indonesia 1945 as the constitutional law of Indonesia, which is the formal system of primary laws. Along with the latter as the subsidiary law. This imply that the Constitution as the highest law in the hierarchy of Indonesian law. In the event of conflict, the Constitution can trumping the law below it,[284] meaning the legal maxim *lex superior derogate legi inferior* applied.[285]

[281] *Ibid.*
[282] *Ibid.*, 117.
[283] Law 12/2011 on Formation of Statutory Law, Article 7 (1).
[284] Law 12/2011 on Formation of Statutory of Law, Article 7 (2).
[285] Masszechi, *Loc.cit.*, 5.

Indonesia as the member of the United Nations is bind to its obligation under Charter of the United Nations. This apply to resolutions of the Security Council that bind upon the Member States, including Indonesia:

> "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."[286]

This provision affirms that the Security Council resolution must be executed by Member States, and thus it is not self-executing.[287] When the government of Indonesia is carrying out the Council resolutions required domestic legislation through *undang-undang*.[288] The following substantial requirement of *undang-undang*:[289]

1. Subsidiary regulation from the Constitution;
2. Imperative of *undang-undang* to be set out under *undang-undang*;
3. Ratification of an international agreement;
4. Following up from the Constitutional Court judgement; and/or
5. The fulfilment of needs of the society.

The yield of legislation of Resolution 1267 in form of *undang-undang* shall fulfil the substantial requirement aforementioned. This mean that Resolution 1267

[286] Article 25

[287] Johannes Reich, "Due Process and Sanctions Targeted Against Individuals Pursuant to U.N. Resolution 1267 (1999)", *The Yale Journal of International Law* Vol. 33, No. 49, (2008): 505; See https://www.law.ox.ac.uk/events/distinction-between-self-executing-and-non-self-executing-treaties-international-law <accessed 24 July 2020>

[288] Marida Farida Indrati Soeprapto, *Ilmu Perundang-Undangan: Dasar-dasar dan Pembentukannya* [Legislative of statutory: basics and formation], Yogyakarta: Kanisius, 1998, 151.

[289] Law 12/2011 on The Formation of Statutory of Law, Article 10 (1)

convert into *undang-undang* must not violate rules of the Constitution. Therefore, hierarchically, Resolution 1267 is inferior than the Constitution.

A similar event found in *Kadi II*.[290] The case concerning assets' freeze involving Youssef Kadi and his company Al-Barakaat International Foundation, began when the European Union was implementing the Security Council Resolution 1267 in form of EU Regulation 881/2002.[291] Under the regulation contains a list of persons associated with Al-Qaida and the Taliban, including Kadi and Al-Barakaat. Kadi and his company challenged the regulation before the European General Court argued that the regulation had infringed their rights, particularly right to a fair hearing, their right of property, and their right to fair trial.[292] The court findings that the rights of the applicants on fair hearing and fair trial had violated and annulled the regulation.[293]

On appeal, the United Kingdom of Great Britain and Northern Ireland and European Commission challenged the judgement of the EGC. The approach took by the ECJ followed by the EGC expressed, that the constitutional principle that EU acts must respect fundamental rights that respect constituting a condition of their lawfulness which it is for the ECJ to review in the framework of the complete system of legal remedies established by the Treaty of the European Union.[294]

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[290] *Kadi and Al-Barakaat International Foundation v European Commission and United Kingdom of Great Britain and Northern Ireland*, C-584/10 P, C-593/10 P and C-595/10 P, European Court of Justice, 18 July 2013.

[291] *Kadi and Al-Barakaat International Foundation v Council and Comission*, C-402/05 P and C-415/05 P, para. 31, European General Court, 3 September 2008.

[292] *Kadi and Al-Barakaat International Foundation v Council and Commission*, C-402/05 P and C-415/05 P, para. 49-50, European General Court, 3 September 2008.

[293] *Kadi and Al-Barakaat International Foundation v Council and Commission*, C-402/05 P and C-415/05 P, p. 6512, European General Court, 3 September 2008.

[294] Koen Lenaerts, "The Kadi Saga and the Rule of Law within the EU", *SMU Law Review*, (2014): 709, available at https://scholar.smu.edu/smulr/vol67/iss4/4.

Accordingly, the ECJ annulled Regulation No. 881/2002 in so far as it concerned the appellants, since their rights of the defense, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected.[295]

Some perspective highlighted from the judgement of the ECJ can endeavored from the aspect of constitutional, international law, and fundamental rights. First, on constitutional level, the *Kadi I* judgement stresses the fact that EU law is an autonomous legal order and that the EU judiciary plays a fundamental role in protection that autonomy. However, EU law upholding the rule of law within the EU that is enshrined under the Charter of Fundamental Rights of the European Union. Thus, when the Charter rights are at stake, the incorporation of international law into EU law is not automatic. Second, it is true that the *Kadi I* judgment demonstrates that international obligations entered into by the EU are not absolute, as they may not prevail over the basic constitutional tenets of the EU legal order. The ECJ attempt to balancing between the EU principle of effective judicial protection and international law. Third, the *Kadi I* judgment shows that the ECJ is seriously committed to the protection of fundamental rights. In so doing, it has shown that the EU Courts must operate as the guarantors of individual rights and that the EU's international obligations may not deprive fundamental rights of their substance.[296]

[295] *Ibid.*

[296] *Ibid.*, 711-712; Juliane Kokott, Christoph Sobotta, "The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?", *The European Journal of International Law Vol. 23 no. 4*, (2012): 1017-1018.

The similar between *Kadi* and the present case that both European Union and Indonesia upholding the principle of rule of law. The purpose of the rule of law is to limit the conduct of the government to avoid arbitrary and accountable to laws.[297] One of principles of the rule of law is human rights protection.[298] When a government harms a person without following the exact course of the law, this constitutes a due process violation, which offends the rule of law.[299] Therefore, Resolution 1267 cannot trump the Constitution, and thus the Constitution prioritized.

B. The implication of Implementation the Security Council Resolution 1267 to Indonesia

Under Resolution 1267, the sanction measures impose the Member States to assets' freeze and travel ban toward individuals and entities associated with Al-Qaida or/and the Taliban.[300] The notion of assets' freeze is freezing the funds, other financial assets, or economic resources, including funds derived from the property owned or controlled directly or indirectly controlled by.[301] This measure aims to reject the suspected means to support terrorism action.[302] On the other side, the

[297] Jimly Asshiddiqie, "Gagasan Negara Hukum Indonesia" [Foundation of rule of law of Indonesia], paper presented in Forum Dialog Perencanaan Pembangunan Hukum Nasional yang Diselenggarakan oleh Badan Pembinaan Hukum Nasional Kementerian Hukum dan Hak Asasi Manusia RI, (2011): 4.

[298] *Ibid.*, 8.

[299] OHCHR, *Op. cit.*, 33.

[300] United Nations Security Council, Security Council resolution 1267 (1999) [Afghanistan], 15 October 1999, S/RES/1267 (1999), para. 4, available at https://undocs.org/S/RES/1267(1999) <accessed 4 March 2020>

[301] Assets Freeze: Explanation of Terms, para. 1, available at https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/eot_assets_freeze_-_english.pdf <accessed 11 May 2020>

[302] *Ibid.*, para. 2.

notion of the travel ban prevents landing, take off, or transit through the territories of suspected.[303] This measure aims to restrict the mobility of suspected.[304]

From the legal standpoint, the character of Security Council resolutions is legally binding:

> "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."[305]

Member States are obliged to carry out the Security Council resolutions. In case of conflict of obligations against other international agreement, Member States shall prevail their obligation under the Charter:

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[306]

Criticisms to Resolution 1267 due to lack of due process and fair remedy, also the clarity to determine the subject to sanction measures is severely secret by the Security Council.[307] Then, the Security Council established a committee, 'The Security Council Committee.' The Security Council Committee established in order

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[303] Travel Ban: Explanation of Terms, para. 1, available at https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/eot_travel_ban_english.pdf <accessed 11 May 2020>

[304] *Ibid.*, para. 2.

[305] "Charter of the United Nations", Article 25, 24 October 1945, 1 UNTS XVI, available at https://www.un.org/en/sections/un-charter/un-charter-full-text/.

[306] "Charter of the United Nations", Article 103, 24 October 1945, 1 UNTS XVI, available at https://www.un.org/en/sections/un-charter/un-charter-full-text/.

[307] Kanetake, *Op.cit.*, 146.

overseeing Member States' implementation of Resolution 1267 sanctions. The Committee is authorized to:[308]

1. Oversee the implementation of the sanction's measures;
2. Determine individuals and entities who fulfilled the listing criteria accordingly the relevant resolutions;
3. Judge and determine upon notifications and requests for exemptions from the sanction's measures;
4. Judge and determine upon requests to remove a name from the ISIL & Al-Qaida Sanctions List;
5. Conduct periodic and specialized reviews of the entries on the ISL & Al-Qaida Sanctions List;
6. Examine the reports presented by the Monitoring Team;
7. Report annually to the Security Council on the implementation of the sanction's measures; and
8. Conduct outreach activities.

The target of sanction measures is the name added in the ISIL & Al-Qaida Sanctions Lists following the criteria:[309]

1. Participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;
2. Supplying, selling, or transferring arms and related materiel to;
3. Recruiting for; or otherwise supporting acts or activities of ISIL, Al-Qaida, or any cell, affiliate, splinter group or derivative thereof.

Despite the committee has their procedural rule of clarity the suspect targeted by Resolution 1267; the author disagrees with their role to adjudicate of those who

[308] https://www.un.org/securitycouncil/sanctions/1267 <accessed 19 May 2020>

[309] United Nations Security Council, *Security Council resolution 2368 (2017) [Terrorism]*, 18 September 2017, S/RES/2368 (2017), para 2, 4, available at https://www.undocs.org/S/RES/2368%20(2017).

are qualified as the target of Resolution 1267. This because the action of the Security Council is breach principle of *nemo iudex in cause sua* where listing is based on classified intelligence, listed persons may never know the reason for their listing, and all decisions ultimately rest the listing committee.[310]

1. The implication of The Implementation of Resolution 1267 in Indonesia

As becoming the member of the United Nations, Indonesia is binding their obligation under Charter of the United Nations. In this context, Indonesia has obligation to exercise the Security Council resolutions following Article 25:

> "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."[311]

It may be interpreted to mean Member States are obliged to carry out all resolutions of the Security Council which the Council is authorized by the Charter to issue with the intention to bind Member States at whom they are directed.[312] This also reaffirm under Article 48 (1).[313] When resolutions come to a normative conflict – for instance Resolution 1267 has lack of procedural of due process – with domestic legal order shall be examined as set out in *Nada case*.[314] This would be an obstacle for Indonesia which guarantee human rights.

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[310] Atli stannard, "Approaches to Resolving Growing Conflicts Between Human Rights and International Law Norms in British and European Courts", 17, http://ssrn.com/abstract=1539215

[311] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 25, available at https://www.un.org/en/sections/un-charter/un-charter-full-text/

[312] Hans Kelsen, *The Law of the United Nations*, New Jersey: The Lawbook Exchange, 2000, 95.

[313] David Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter*, The Hague: Kluwer Law International, 2001, 40.

[314] *Nada v. Switzerland*, Application no. 10593/08, para. 172, European Court of the Human Rights 12 September 2012.

According to *Indonesian* 1945 Constitution, the constitution guarantee human rights norms, including the right to property and freedom of movement.[315] Further, Law 39/1999 as the subsidiary regulation from the constitution also guarantee the right to property and freedom of movement.[316] Under the law, those human rights under Law 39/1999 may be restricted for the sake of public order:

> "Rights and freedoms set out under this law can restricted solely by law, for the purpose to respect of other's rights, causality, public order, and State order."[317]

If the government of Indonesia wants to implementing Resolution 1267, they must designate legal framework for Resolution 1267 in order restriction the right to property and freedom of movement. While countering terrorism, the government shall respect human rights aspect:

> "In the prevention of terrorism action, the government shall conduct anticipation continuously accordingly principles of human rights protection and precautionary."[318]

a. Assets freeze

The legal basis to freezing the assets of accused terrorist are Law 9/2013 on Eradication and Prevention of Terrorism Funding Criminal Acts along with subordinate legislation Circular Rule OJK No. 38/SEOJK.01/2017. The scope of Law 9/2013 applies for those who are involve into terrorism activity and any assets is used for terrorism activity.[319] According to Law 9/2013 made concrete the object to freeze named, "*dana*". It states:

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[315] *Undang-Undang Dasar Negara Republik Indonesia 1945*, Chapter XV, Article 28
[316] Law 39/1999, Article 19 (1), Article 27.
[317] Law 39/1999, Article 73.
[318] Law 5/2018, Article 43A (2).
[319] Law 9/2013, Article 1 (6).

> "The whole assets, movable or immovable, tangible or intangible, obtain in any way and in any form, including electronic, letter of ownership, or tied with those assets, which not limited to credit bank, letter of bank, letter of voyage, stocks, bank debt letter, and bond"[320]

Thus, the word of the asset means any asset in form of electronic format, credit card, stocks, bonds, debenture, cheque, etc. movable, immovable, tangible, or intangible obtained in any way. To freeze those assets, the sanctioning measure taken is blocking the sources of assets by financial service provider authorized by Regulator Inspector Institute (*Lembaga Pengawas dan Pengatur*) consisted of Bank of Indonesia, Financial Services Authority (*Otoritas Jasa Keuangan*), and Center for Reporting and Analysis of Financial Transactions (*Pusat Pelaporan dan Analisis Transaksi Keuangan*).

The target of blocking assets is those who are added in listing (*Daftar Terduga Teroris dan Organisasi Teroris yang dikeluarkan Pemerintah*).[321] To block the assets of terrorist-listing, the Police shall submit, containing the identity of the subject along with the basis, supporting documents, and endorsed by the ministry of foreign affairs (for documents relating to the international subject), to District Court of Central Jakarta to adjudicate the following name of individual and entities.[322]

A mechanism complaint about the objection of the decision relating terrorist-listing, a person or entity accused as a terrorist can propose objection to the head of police Indonesia submitting the reason of objection and supporting data about the source of assets.[323] The name of individual or entities

[320] Law 9/2013, Article 1 (7).
[321] Law 9/2013, Chapter VII.
[322] Law 9/2013, Article 27, 28.
[323] Law 9/2013, Article 29 (1, 2)

added in terrorist-listing can be erased because exceeds period, the decision from the District Court and/or the High Court, and for the sake of the law.[324]

Law 9/2013 also respecting from human rights aspect. The following conditions for exemptions the assets cannot be blocked:[325]

i. Daily needs;
ii. Health costs;
iii. Children's' education tuition;
iv. House rent;
v. Insurance;
vi. Taxation;
vii. Public services;
viii. Relating to legal aid;
ix. Any expenses relating to 3rd party; and
x. Administration expenses of assets blocked.

b. Travel ban

As the author observed, the provision relating to travel ban for individuals and entities associated with Al-Qaida or/and the Taliban no found under Law 1/2009 on Aviation along with subordinate legislation the Ministry of Transportation Rule 127/2015. There is, only a provision relating to safe navigation and prevention from terrorism action. Indonesian National Counterterrorism Agency (*Badan Nasional Penanggulangan Terorisme*) is charged in this field.[326]

While counter-terrorism, human rights are one of the aspects shall be respected. The importance of human rights in this context can be avoiding the arbitrary action

[324] Law 9/2013, Article 30.
[325] Law 9/2013, Article 34.
[326] The Ministry of Transportation Rule 127/2015, Article 64.

of the government in counter-terrorism and protect the rights of an accused terrorist. The following risks pose human rights while counter-terrorism:[327]

1. Due process and the right to a fair trial

   The human rights protection for all persons charged with criminal offenses including terrorism-related crimes, the right to be presumed innocent, the right to be heard, independent and impartial tribunal, and the right to have a conviction and sentence reviewed by a higher tribunal satisfying the same standard.[328]

2. The principle of legality and the definition of terrorism

   The principle of legality is enshrined in Article 15 of the International Covenant on Civil and Political Rights following:

   > "No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offense was committed. If after the commission of the offense, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
   >
   > Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the same time when it was committed, was criminal according to the general principle of law recognized by the community of nations."[329]

[327] UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 32, *Human Rights, Terrorism and Counter-terrorism*, July 2008, No. 32, 38-39, 46, available at http://www.ohchr.org/documents/publications/factsheet32En.pdf.

[328] *Ibid.*, 38.

[329] UN General Assembly, "International Covenant on Civil and Political Rights", Article 15 (1, 2), 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

This provision is important to provide legal certainty. Primarily, when State is focusing on counter-terrorism, thus the definition of terrorism must be constituted.

3. Violation aspects of economic, social, and cultural rights

   Counter-terrorism may have a serious impact on the enjoyment of the economic, social, and cultural rights of individuals affected.[330] The sanctions measure according to Resolution 1267 might potentially be affecting individuals' and their families enjoying economic and social rights, such as their access to education and employment may be severely restricted.[331] The humanitarian exemption may be applied in this context.[332]

Based on the practice of Indonesia, the author offering a solution on complying with their obligation to the United Nations in carry out the Security Council resolutions. Firstly, there is a technique in deciding practical compliance with human rights while counter-terrorism. Firstly, the prescription of law meaning legal action that is prescribed. Definite the legal action in countering terrorism can avoid human rights violations. Prescription by law can limit the scope of counter-terrorism. Two requirements of prescription by law: that the law must be adequately accessible and that the law must be formulated with sufficient precision.[333] Secondly, respecting the principle of non-discrimination. Similar to the previous

[330] OHCHR, *Op.cit.*, 46.
[331] *Ibid.*
[332] *Ibid.*
[333] Alex Conte, "Counter-terrorism and Human Rights", in Sarah Joseph, Adam McBeth, *Research Handbook on International Human Rights Law*, (Cheltenham: Edward Elgar, 2010), 537.

compliance, the law must be ensuring that human rights are enforced without discrimination.[334] Thirdly, conferring restricted discretion meaning restricting counter-terrorism measure is established by the law prescribe the authority conferred of discretion, and such measure applied only in the context of counter-terrorism.[335] Lastly, limited to countering terrorism meaning that the context of counter-terrorism is only about terrorism and terrorist acts.[336] The United Nations Global Counter-Terrorism Strategy reaffirms the inextricable links between human rights and security, and places respect for the rule of law and human rights at the core of national and international counter-terrorism efforts.[337]

Secondly, Indonesia did not have a general law about the incorporation of decisions of the Security Council. The absence of such general law cannot made Indonesia – in manner of carrying out decision of the Security Council – to carry out the Council resolutions under domestic legal framework. This raised question about the compliance of Indonesia in their international obligation to the Charter of the United Nations in respect of Article 25. Defining compliance, in the context of Article 25, means to all conduct by actors that conform to the requirement of behavioral prescriptions addressed to them.[338] Thus, the Security Council wants to address to comply with their prescription set out under their resolutions.

[334] *Ibid*., 537-538.
[335] *Ibid*., 538-539.
[336] *Ibid.*, 539.
[337] OHCHR, *Op.cit.*, 21.
[338] Christoph Mikulaschek, "Understanding Compliance with UN Security Council resolutions in Civil Wars", *International Peace Institute*, (2009): 5.

Measurement of compliance Member States in carry out decisions of the Security Council identified from the following aspects:[339]

1. Completeness, refers to the extent to which the conduct under the Council resolutions conform to the requirements of the resolutions demand addressed to them;
2. Timeliness, refers to the question whether compliance occurred at the time when a demand addresses was expected to undertake certain conduct or whether it was delayed;
3. Continuity, refers to the question whether the demand addresses discontinued compliance at any point during the period when compliance is recorded;
4. Universality refers to addresses had complied with all or some of the resolutions' demand.

The Security Council resolutions may require implementation within the domestic legal orders of the Member States, depending on their regulatory context: resolutions that authorize the use of force do not entail the need for such implementation, since they are only meant to have a legal effect on the international level. Other resolutions explicitly aim at evoking legal effects within the domestic legal orders: the Council resolutions explicitly demanded domestic measures of the Member States – in the context of Resolution 1267 – to assets' freeze and travel ban against individual associated with Al-Qaida and the Taliban.[340] The

[339] *Ibid.*, 9.

[340] Erika de Wet, Holger Hestermeyer, Rudiger Wolfrum, *The implementation of international law in Germany and South Africa*, Pretoria: Pretoria University Law Press, 2015, 68.

implementation in the domestic legal order purports to give effect to the resolutions through which the Council imposes sanction on States or individuals. Thus, such resolutions which required domestic implementation is necessary carry out through legislative or administrative measures before domestic bodies *i.e.*: administrative agencies or Courts, can apply them.[341]

The Security Council resolutions are not self-executing,[342] since Member States have not transferred sovereign rights to the Council in manner that would enable the Council to pass the resolutions with such a direct effect.[343] The following reasons the Council resolutions is indirect applicability. Firstly, the Council resolutions are generally addressed to State only, thereby excluding their direct application with regard to individuals and private entities. If the resolutions are targeting individuals, thus required effective implementation ordering private entities to comply with resolutions, for instance, private banks to freeze the accounts of alleged terrorist, or private companies to respect the terms of a trade embargo. Secondly, numerous the Council resolutions explicitly require their domestic implementation through legislative or administrative measures, for example, in the case with regard to the obligations established under Resolution 1267. Thirdly, the Council resolutions that are intended to have an effect within domestic legal order will regularly restrict the rights of individuals or private entities.[344]

[341] *Ibid.*
[342] Reich, *Loc.cit.*
[343] *Ibid*, 68-69.
[344] *Ibid*, 69-70.

In the context of Indonesian legal order, statutory law or *undang-undang* is the right to incorporate resolutions of the Security Council that apply generally.[345] Thus, when Indonesia intend to carry out the Security Council resolutions into Indonesian legal order, it required to be deliberate in legislation process by House of Representative. Moreover, Indonesia is a rule of law based which means legal system of the government.[346] According to Jimly, the principles of Indonesian rule of law as follows:[347]

1. Supremacy of law refers to recognition of normative and empirical towards law as the guidance to solving problem. In this perspective place the constitution as the highest source of law;
2. Legality, refers to any conduct of State apparatus solely on statutory law and recognized prior such conduct decided;
3. Human rights protection refers to constitutional guarantee of human rights by secure to upholding through due process. Violations and omissions are not reflecting the value of rule of law based.

Therefore, the importance of designation of general law on incorporation of the Security Council resolutions is to be recognized under Indonesian legal order. In consequence of Indonesia statutory of law did not explicitly recognized the place of international law, thus a general law can bring the Council resolutions to be recognized under Indonesian legal order in form of *undang-undang*. Hence, the

[345] The House of Representative is authorized to legislating of *undang-undang* according to Law 17/2014 on House of Representative, People's Consultative Assembly, Regional Representative Council, and Regional House of Representative, Article 72; *See* Soeprapto, *Loc.cit.*

[346] *Undang-Undang Dasar Negara Republik Indonesia 1945*, Article 1 (3); Asshidiqie, *Loc.cit.*

[347] Asshiddiqie, *Ibid.*, 8-9, 13.

House of Representative have authority to legislating the Council resolutions and the government is complied with their international obligation under the Charter without abrogate their domestic law.

CHAPTER IV – CONCLUSION

A. The hierarchy of Resolution 1267 towards Human Rights treaties and Indonesian law

Determining the hierarchy of norm in order to solve a normative conflict. If such conflict has the corresponding norms, thus it required to examine value of norm. The conflict of norms between Resolution 1267 towards Article 17 of UDHR & Article 12 of ICCPR and Indonesian law have the corresponding rights. The conflict occurred when Resolution 1267 obliged to assets' freeze and travel ban. On the other hand, those measures are protected under UDHR, ICCPR, and Indonesian law (including the Constitution and Law No. 39 of 1999).

The result is, in the context of international law, the value of Resolution 1267 was weak. Because the measures targeting individual associated with Al-Qaida and the Taliban to assets' freeze and travel ban was not provide an effective remedy. In criminal justice, a person with criminal charged shall obtain presumption of innocence, a legal right of fair trial. The impact of Resolution 1267 might affect the targeting individual in other aspect of economic and social right. Thus, the norms under Article 17 of UDHR and Article 12 of ICCPR prevailed over Resolution 1267.

While in the context of Indonesia legal order, international law entered into by Indonesia is not absolute, as they cannot override the basic constitutional tenets of Indonesian legal order. The consequence of Indonesian holds the rule of law is legal certainty and supremacy of law. Any rules of international law wants to have domestic legal effect must be converting in accordance with domestic legal context.

When the norm of Resolution 1267 will incorporate into Indonesian legal order, it must be prescribed by the legislative. However, when such norm is conflicting with Indonesian laws, it cannot prevail the laws, specifically the Constitution. In relating with aforementioned, supremacy of law placed the Constitution as the highest law in Indonesia, and thus applied intra-systemic *lex superior* in case of conflict. Hence, the normative of the constitution is higher than Resolution 1267 norm.

B. The implication of the implementation of Resolution 1267 to Indonesia

The consequence of Indonesia becoming as the member of the United Nations is agreed to fulfil their obligations under Charter of the United Nations. Article 25 of the Charter obliged Member States to carry out the Security Council resolutions, and thus Indonesia must execute the Council resolutions. This signify that Article 25 is not self-executing. In the context of Resolution 1267, which explicitly require Member States to give domestic legal effect under paragraph 6. The recognition of Resolution 1267 in Indonesia will effectively enforced through domestic legislation. The mere fact that Indonesia had only fulfil one sanction measures is assets' freeze, where the resolution requested to implementing sanction measures of asset freeze and travel ban. In this case, the author suggest a recommendation: Firstly, the need of prescriptive by law, meaning to define legal action to countering terrorism as Resolution 1267 ordered. It is to conformity the government system as rule of law. Secondly, establishing a general law of incorporation of the Security Council resolutions. The available of this general law can granting authorization to the House of Representative to implementing Resolution 1267 under Indonesian legal order, and thus the resolution is recognized.

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