

CHAPTER I

INTRODUCTION

A. Background

The international community which is comprised of states has variety of needs to improve the standard of living of their citizens. In their effort to accommodate their needs, the need of one state may confront to the others. Therefore, it can be said that in any international relations, there is always possibility for a dispute to occur. In other word, the occurrence of a dispute in any international relations is inevitable. Such a dispute may lead the disputants to a military tension and even a war.

A dispute may be defined as a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter-claim or denial by other.¹ In short, a dispute between states could occur when there is a conflict between the interests of states. If the states did not settle the dispute, the relation of the states could be in serious condition and in the worst case a war could occur. To prevent the war, United Nation Charter Article 33 stated:

“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”

¹ J G Merrills, 2005, *International Dispute Settlement*, New York: Cambridge University Press, p. 1.

According to the article, the parties should seek a peaceful settlement for their dispute. Judicial settlement is one alternative to settle a dispute. There is various international judicial body to settle a dispute between states which are International Court of Justice (ICJ), International Tribunal for the Law of the Sea, and several Ad Hoc Tribunals.²

International Court of Justice is a well-known international judicial body established under Charter of United Nation Article 92. Only states may be the parties before the court.³ As stated on Article 36 (2) of the statute, jurisdiction of ICJ is in all legal dispute concerning interpretation of treaty, question of international law, existence of any fact that could constitute a breach of an international obligation, and nature or extent of reparation to be made for the breach of international obligation.

Based on its competence and jurisdiction, International Court of Justice has settled many cases, for example is a dispute between Malaysia and Indonesia over sovereignty of Sipadan Island and Ligitan Island. This dispute was submitted to ICJ in 1998 based on the special agreement that was made by both states.

Indonesia claimed the sovereignty primarily based on the convention which Great Britain and Netherland concluded on June 20th 1891. Malaysia also claimed the sovereignty based on that convention but their interpretation was different than Indonesia. The convention explained the territory border of

² Sefriani, 2009, *Hukum Internasional Suatu Pengantar*, Jakarta: Rajawali Pers, p. 342.

³ See Statute of International Court of Justice Article 34 (1).

Great Britain and Netherland who were former ruler of Malaysian and Indonesian territory now. The court then concluded the decision by state succession and effective occupation principle. Based on state succession, the court could not find the inheritor of the islands since there was no any agreement that provide explanation on the possession of the islands. Based on effective occupation principle, the court concluded that Malaysia had title to Sipadan and Ligitan since they did several acts in both islands and could be considered as acts of effective occupation. The court made its decision in 2002 and decided Malaysia had sovereignty over Sipadan Island and Ligitan Island.⁴

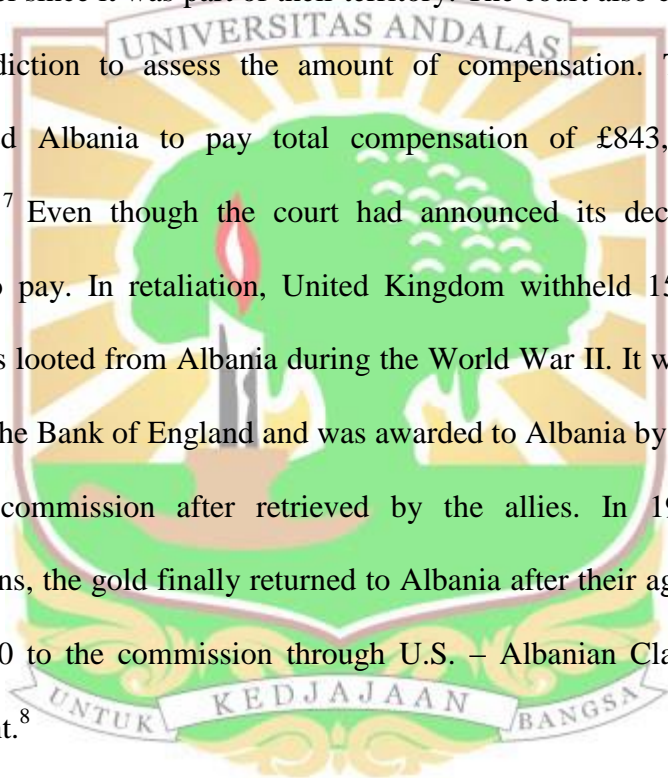
Sipadan Island and Ligitan Island case shows us if dispute between states occurs, the states can settle their dispute in ICJ as one alternative dispute settlement through international judicial body. But there is an issue concerning the settlement through ICJ. In some cases, the parties of a dispute are unable to comply with the decision of ICJ. *Corfu Channel* case is an example where one of the parties in dispute did not comply with the decisions of ICJ.

On October 22nd 1946, United Kingdom ordered its warship to through the Corfu Channel with purpose to test the Albanian reaction to their right of innocent passage.⁵ They ordered two cruisers and two destroyers. The

⁴ Sipadan Island and Ligitan Island (*Malaysia v Indonesia*) (Summary of the Judgment) [2002] ICJ Rep

⁵ Martin Dixon and Robert McCorquodale, 2003, *Cases and Material on International Law*, Oxford: Oxford University Pres, p. 357.

channel was regarded as safe. Then one of the destroyers, the Saumarez, struck a mine and was heavily damaged near the Saranda Bay. Another destroyer, the Volage, was ordered to assist the damaged destroyer. While towing, the Volage also struck a mine and sustained heavy damage. Forty five officers died and forty two others were wounded in the incident.⁶ In 1949, the court concluded that it was Albania's duty to notify the ships passing through the channel since it was part of their territory. The court also concluded that it had jurisdiction to assess the amount of compensation. The court then condemned Albania to pay total compensation of £843,947 to United Kingdom.⁷ Even though the court had announced its decisions, Albania refused to pay. In retaliation, United Kingdom withheld 1547 kg of gold which was looted from Albania during the World War II. It was stored in the vaults of the Bank of England and was awarded to Albania by US-UK-France tripartite commission after retrieved by the allies. In 1996 after long negotiations, the gold finally returned to Albania after their agreed to pay US \$2,000,000 to the commission through U.S. – Albanian Claims Settlement Agreement.⁸



Another case is Military and Paramilitary Activities in and against Nicaragua which parties are Nicaragua and United States of America. In 1909, President of United States of America, William Howard Taft ordered the

⁶ Mochtar Kusumaatmadja and Etty R. Agoes, 2003, *Pengantar Hukum International Cases and Material dan Lampiran-lampiran*, Bandung: P.T. Allumni, p. 4.

⁷ Corfu Channel Case (*UK v Albania*) (Merits) [1949] ICJ Rep 4.

⁸ See Article 2 and 3 of the U.S.- Albanian Claims Settlement Agreement (Agreement between the Government of United States of America and the Government of the Republic of Albania on the Settlement of Certain Outstanding Claims)

overthrow of Nicaraguan President. U.S. Marine landed in 1912 at the Corinto Port and occupied Leon, a city in Nicaragua. Several incidents occurred since then but in 1979 a revolution brought by Sandinista National Liberation Front (FSLN) overthrew the President of Nicaragua at that time, Anastasio Somoza Gracia. The US opposed this socialist group and supported the Anti-Sandinista Group. In 1984, Nicaragua brought this case before the ICJ against United States of America on the grounds, “The United States of America is using military force against Nicaragua and intervening in Nicaragua’s internal affairs, in violation of Nicaragua’s sovereignty, territorial integrity and political independence, and of the most fundamental and the most universally-accepted principle of international law”.⁹ Both of the states accepted the jurisdiction of ICJ as stated in the application of the case. During the trial, United States claimed that the court had no jurisdiction because the court concerned in irrelevant treaty, a multilateral treaty which its matters was excluded from the court jurisdiction. The United States had entered a reservation to the jurisdiction of the ICJ excluding a matter from the Court if the dispute concerned the application of multilateral treaty. Nicaragua argued that the court had jurisdiction based on rules of customary law.¹⁰ The rule of customary law mentioned is the principle of non-use of force as regulated under the UN charter Article 2 (4). In 1986, the ICJ made a judgment stated that United States breached several customary international law and treaty between the parties. The court therefore decided the United

⁹ Military and Paramilitary Activities in and against Nicaragua case (*Nicaragua v United States of America*) (Application Instituting Proceedings) [1984] ICJ Rep 1.

¹⁰ Martin Dixon, *op. cit.*, p. 30.

States is under duty to cease and to refrain from all such acts and in the other hand the ICJ decided United States is under an obligation to make reparation to Nicaragua for all injuries caused.¹¹ The United States refused to comply with it. In the end, this case was removed from the court in 1991 by the Nicaragua through its case removal submission despite its unfulfilled claims to the reparations.

Beside of two cases above (*Corfu Channel* case and *Military and Paramilitary Activities in and against Nicaragua* case), another case that shows states in dispute are unable to comply with the decisions of ICJ is *Land and Maritime Boundary between Cameroon and Nigeria* case.¹² The Sovereignty over the Bakassi peninsula resulted several armed conflict between the two states. The two states also had tried several means to resolve their dispute but still did not give any outcome. On March 29th 1994, Cameroon submitted a dispute before the ICJ concerning the sovereignty over the Bakassi Peninsula. In order to give its decisions, the court relied on the treaties that were made by the former rulers there and declarations that were made by the parties following their independence. There were Anglo-German Correspondence 1885, Treaty of Protection 1884, Anglo-German Treaty 1913, Yaounde II Declaration 1971, and Maroua Declaration 1975. On October 2002, the court finally made its decision heavily based on the Anglo-German Treaty 1913 and decided Cameroon has sovereignty over Bakassi Peninsula.

¹¹ *Military and Paramilitary Activities in and against Nicaragua case (Nicaragua v United States of America)* (Judgment of the Court) [1986] ICJ Rep 1.

¹² *Land and Maritime Boundary between Cameroon and Nigeria case (Cameroon v Nigeria)* (Application Instituting Proceeding) [1994]

The court ordered Nigeria to withdraw their troops.¹³ The decisions received critics and caused controversy in Nigeria. Nigeria then refused to comply with the decisions of the court. In 2006 Meeting was held by the United Nations for the two states in New York in order to assist them to resolve the dispute, the president from both states were invited. The meeting gave an outcome, Nigeria agreed to withdraw their troops in 60 days and leave the control of Bakassi peninsula into Cameroon completely in two years. However, the capability of Nigeria to refuse the decisions of the court leaves a question on integrity of the court.

Corfu Channel case, Military and Paramilitary Activities in and against Nicaragua case, and Land and Maritime Boundary between Cameroon and Nigeria case are example where a party of a dispute is unable to comply with the decisions of ICJ. These Cases also proved that ICJ has no power to execute its decisions whereas its main function is to settle legal disputes that are submitted to it. Even a research that was done by Errick A. Posner, a professor of law in University of Chicago, shows that compliance with the decision of ICJ is around 60 percent.¹⁴

The percentage shows there is issue regarding the compliance with ICJ decisions, whereas the parties of dispute brought the case before the court by agreement from its parties. It means the parties have will to settle the

¹³ Land and Maritime Boundary between Cameroon and Nigeria case (*Cameroon v Nigeria*) (Merits) [2002] ICJ Rep 225.

¹⁴ Erick A Posner and Miguel F P De Figueredo, 2005, Is the International Court of Justice Biased?, *Journal of Legal Studies the University of Chicago* (Volume 34), p. 625.

dispute before the court. Based on this notion, parties should comply with the decisions of ICJ since they are willing to settle the dispute before the court and referring to Article 94 of the United Nation Charter, members of United Nations have to comply with the court decisions. But cases above show that the parties do not comply with its decisions. Since parties have capacity to not comply with the decisions, question rises, is there any method on enforcing it?

Since questions appear about what is the issue concerning the compliance with the decisions of ICJ and how is the possible methods on enforcing the decisions of ICJ as stipulated under Article 94 of the United Nation Charter that members of United Nations have to comply with the decision of ICJ¹⁵ and stipulated under Article 59 of ICJ statute that the decision has no binding force except for the parties in respect of that particular case.¹⁶Writer is interested to do scientific research entitled **“Legal Issues Concerning the Enforcement of the Decisions of the International Court of Justice (ICJ)”**

B. Identification of the Issues

Based on the abovementioned background, the issues of the research are identified as follows:

1. What is the issue concerning the compliance with the decisions of ICJ?
2. What is the possible method on enforcing the decisions of ICJ?

¹⁵ See Charter of United Nation Article 94.

¹⁶ See Statute of International Court of Justice Article 59.

C. Objective of the Research

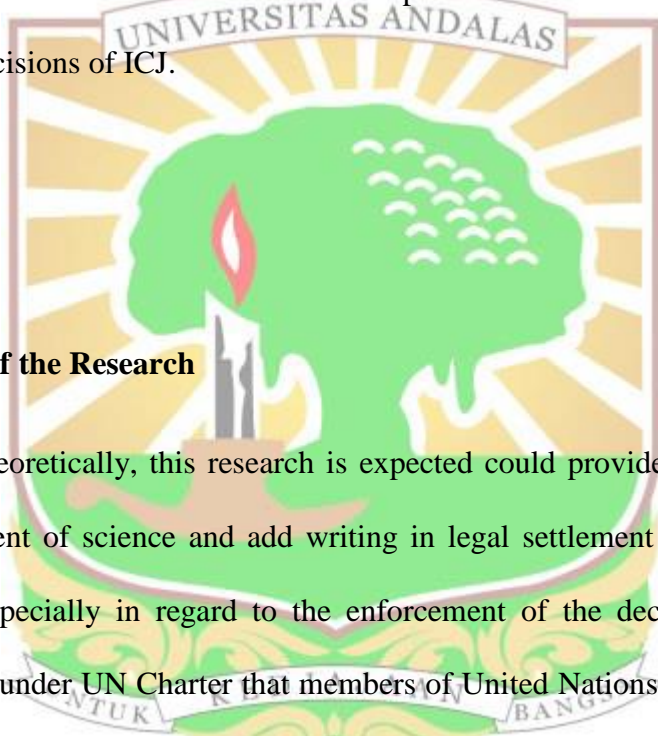
The purposes of the research based on the identification of the issue are:

1. To know and to understand the issue concerning the compliance with the decisions of ICJ.
2. To know and to understand the possible methods on enforcing the decisions of ICJ.

D. Benefits of the Research

Theoretically, this research is expected could provide benefits to the development of science and add writing in legal settlement of international dispute especially in regard to the enforcement of the decision of ICJ as stipulated under UN Charter that members of United Nations have to comply with the decision of ICJ and as stipulated under ICJ statute that the decision of ICJ has binding force for the parties in respect to that particular case.

Practically, this research could sharpen the ability of the writer in doing scientific research and having the result of the research into this thesis. Therefore the writer can share information with the readers who are interested in this research.



E. Theoretical Framework

1. Territorial Sovereignty

Territorial Sovereignty is the right of state to exercise its power over its own territory. Martin Dixon stated a state has absolute and exclusive power of enforcement within its own territory over all matters arising therein, unless that power is curtailed by some rule of international law, either general or specific no other state or international legal person may trespass into the “domestic jurisdiction” of territorial sovereign.¹⁷

A commission in the United States of America during the World War II in its mission arranging the establishment of international peace organizations had reported its research as follows:¹⁸

“A sovereign state at the present time claims the power to judge its own controversies, to enforce its own conception of its rights, to increase its armaments without limit, to treat its own national as it sees fit, and to regulate its economic life without regard to the effect of such regulations upon its neighbors. These attribute of sovereignty must be limited.”

Territory is main requirements for an entity to be recognized as a state in international relation. As stated in Article 1 Montevideo Convention on Rights and Duties of State 1933:

“The state as a person of international law should possess the following qualifications:

¹⁷ Martin Dixon, 1996, *International Law 3rd Edition*, London: Blackstone Press Limited, p. 127.

¹⁸ Yudha Bhakti Ardhiwisastra, 1999, *Imunitas Kedaulatan Negara di Forum Pengadilan Asing*, Bandung: PT. Alumni, p. 40.

- a. A permanent population
- b. A defined territory
- c. Government
- d. And capacity to enter into relations with other states”

Sovereignty confers powers and rights such as follows:¹⁹

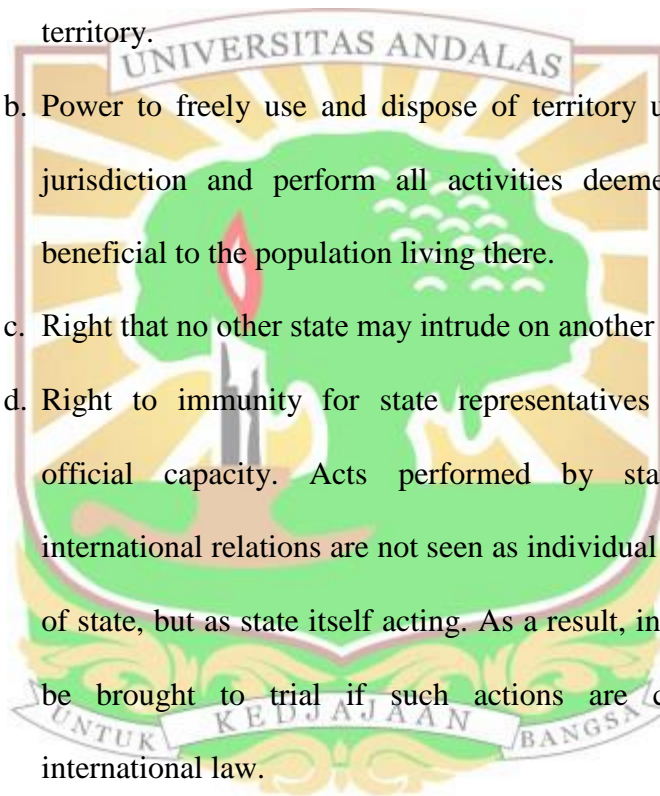
a. Power to wield authority over all the individuals living in the territory.

b. Power to freely use and dispose of territory under the state’s jurisdiction and perform all activities deemed necessary or beneficial to the population living there.

c. Right that no other state may intrude on another state’s territory.

d. Right to immunity for state representatives acting in their official capacity. Acts performed by state officials in international relations are not seen as individual acting on behalf of state, but as state itself acting. As a result, individuals cannot be brought to trial if such actions are contrary to the international law.

e. Right to immunity from jurisdiction of foreign courts for acts or actions performed by state in its sovereign capacity and immunity for execution measures taken against the use or planned use of public property or assets for the discharge of public functions.



¹⁹ Antonio Cassese, 2001, *International Law*, Oxford: Oxford University Press, p. 25.

- f. Right to respect for life and property of state's nationals and state official abroad.

In the opinion of Jean Bodin, there is no other superior power that might curtail state's power. He added the nature of sovereignty is as follows:²⁰

- a. Real, do not obtain from any other power
- b. Highest, there is no other superior power which might limit its power
- c. Everlasting
- d. Cannot be distributed because there is only one power
- e. Cannot be distributed or granted to another body

According to Steinberger, exclusivity of jurisdiction of states over their respective territories is a central attribute to sovereignty.²¹ A state has jurisdiction only in its territory. As long as it's in its territory, then it has sovereignty on it.

2. State Responsibility

Antonio Cassese defined state responsibility as the legal consequences of the international wrongful act of a state, namely the

²⁰ *Ibid.*, p. 41.

²¹ Miyoshi Masahiro, *Sovereignty and International Law*, p. 8.

obligations of the wrongdoer (on the one hand) and the rights and powers of any state affected by the wrong (on the other).²²

The principle of state responsibility conducts the qualifications on when and how a state is responsible for a breach of international obligations. The state responsibility rises when meet several conditions:²³

- a. Existence of international legal obligations in force as between two particular states
- b. There has occurred an act or omission which violates that obligation
- c. That act or omission results loss or damage

When a state meet the conditions to be responsible of its act or omission, that state has to make reparation of any loss and damage caused.

National legal systems often distinguish types or degrees of liability according to the source of obligation breached for example: crime, contract, tort, or delict. In international law systems there is no general distinction of this kind. As the arbitral tribunal stated in the *Rainbow Warrior* case:²⁴

“The general principles of International law concerning state responsibility are equally applicable in the case of breach of treaty obligation, since in the international law field there is no distinction between contractual and tortious responsibility, so that any violation of a state of any obligation, of whatever origin gives rise to state responsibility.”

²² Antonio Cassese, *op. cit.*, p. 50.

²³ Malcolm N Shaw, 2008, *International Law*, Cambridge: Cambridge Press, p. 781.

²⁴ Malcolm D Evans, 2003, *International Law*, Oxford: Oxford University Press, p. 451.

Ian Brownlie stated the nature of state responsibility is not based upon delict in the municipal sense, and “international responsibility” relates both breaches of treaty and to other breach of a legal duty. There is no harm in using the term “international tort” to describe the breach of duty which results in loss to another state, but the term “tort” could mislead the common lawyer. The compendious term “international responsibility” is used by tribunals and is least confusing.²⁵

3. Peaceful Co-existence

The appearance of principles of peaceful co-existence was based on the difference of system and ideology that is practiced by states. The concept of these principles is various. The first appearance of the term peaceful co-existence in international scene was in the Indian-Chinese Declaration and Treaty 1954. It concerns on mutual respect on sovereignty and territorial integrity, mutual non-aggression, non-interference in each other’s internal affairs, equality and mutual benefit, and peaceful co-existence.²⁶ It is also developed in Bandung Conference 1955 in its final communique which is emphasized in its Declaration of on the Promotion of World and Peace and Co-operation. The phrase “live together in peace” was used in it. International lawyers widely discussed the principles of peaceful co-existence at the International Lawyer

²⁵ Ian Brownlie, 1979, *Principles of Public International Law 3rd Edition*, Oxford: Oxford University Press, p. 110.

²⁶ Wen Jiabao, 2004, Carrying forward the Five Principles of Peaceful Coexistence in the Promotion of Peace and Development, *Chinese Journal of International Law*, p. 1.

Association Conference in 1956, 1958, 1960, 1962, and 1964 but the result is general statement on settlement of disputes by peaceful means in such manner that international peace, security, and justice are not endangered.²⁷

4. Peaceful Settlement of Dispute

The principle of peaceful settlement of dispute imposes the states to refrain in their international relation from the threat or the use of force against the territorial integrity or political independence of any state. This principle requires the states to settle their disputes by peaceful means. Therefore they will not endanger international peace and security. This principle is linked with other principles. It can be found in Manila Declaration. Some of those principles are principle of non-use of force in international relations, principle of non-intervention in the internal or external affairs of states, and principle of equal rights and self-determination of people.

F. Conceptual Framework

1. International Law

International law is law conducting obligations, rights, and relationships between its subjects.

2. Dispute

²⁷ Louis Kos-Rabcewicz-Zubkowsk, 1964, International Justice and Peaceful Coexistence, p. 202.

According to J.G. Merrills, a dispute may be defined as a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met refusal, counter-claim or denial by other.²⁸

3. International Dispute

International dispute is disputes that are not exclusively an affair of a country. Moreover, international dispute not only exclusively concern in the relationships of the countries, considering the subjects of international law are now having such expansion involves non-state actors.²⁹

4. Legal Dispute

Friedmann explained that the characteristics of legal disputes are as follows:³⁰

- 1) Capable of being settled by the application of certain principles and rules of international law.
- 2) Influence vital interest of state such territorial integrity.
- 3) Implementation of existing international law enough to raise a just decision and support to progressive international relation.
- 4) The dispute related with legal rights by claims to change the existing rule.

G. Method of the Research

²⁸ J G Merrills, *op. cit.*, p. 1.

²⁹ Sefriani, *op. cit.*, p. 322.

³⁰ Dedi Supriyadi, *op. cit.*, p. 323.

1. Types of Research

Generally the type of this research is juridical normative.³¹ It is heavily based on the secondary data.

Based on the research purpose, the type of this research is problem-identification which will be continued to problem-solution. It is focus on the identification of current issue and research on the solution of the issue.³²

2. Nature of Research

The nature of this research is descriptive analytical study. It explains the law and theory which are related to the case.³³

3. Research Methodology

Research methodology of this research is academic legal research (normative research). The object of this instruction is study of literature and documents.³⁴ This research will not need any empirical and social study. Therefore this research is limited on the study of literature and documents only.

4. Types of Data

The type of data required is secondary data. Secondary data is data obtained from literature research.³⁵ Beside of that secondary data also

³¹ Zainudin Ali, 2011, *Metode Penelitian Hukum*, Jakarta: Sinar Grafika, p. 105.

³² Soerjono Soekanto, 2012, *Pengantar Penelitian Hukum*, Jakarta: Universitas Indonesia, p. 10.

³³ Zainudin Ali, *Ibid.*, p. 106.

³⁴ Curry-Summer, Ian, Francois Kristen, Tina van der Linden-Smith, and Jet Tigchelaar, 2010, *Research Skills Instruction for Lawyers*, Nijmegen: School of Law Utrecht University, p. 23.

³⁵ Soerjono Soekanto, *Ibid.*, p. 194.

include censuses, organizational records and data collected through qualitative research by another researcher.

5. Sources of Data

Sources of data were taken from the literature research that is conducted on the books, scientific paper, laws, and other related regulations.

6. Method of Data Collecting

To obtain secondary data, authors studied various legal materials, both primary legal materials, secondary legal materials, and tertiary legal materials, with reading activities, quote, analyze, and conclude.

Primary legal materials are legal materials which nature is authoritative, such as law and jurisprudence.

Secondary legal materials are every publication on law which is not unofficial documents. Such publication could be books, thesis, journals, or comments on court judgments.

7. Method of Data Analyzing

Based on the nature of this research method which is descriptive analytical study, the data collected will be analyzed and presented qualitatively, through a descriptive explanation that can answer the question on this study.

