ISSN: 2302-1217

JURIS GENTIUM LAW REVIEW

Volume 2, Number 1, September 2014

AN ANALYSIS ON THE LEGAL OBLIGATION OF SPACEFARING STATES FOR SPACE DEBRIS REMIDIATION AND MITIGATION
Vulkania Neysa Almandine

RETRACTED: AN ANALYSIS ON STRAIT OF MALACCA SEEN FROM THE PERSPECTIVES OF INTERNATIONAL LAW, REGIONAL REGULATIONS AND REPUBLIC OF INDONESIA
Vierna Tasya Wensatama

IMPLEMENTING THE WARSAW CONVENTION 1929 IN INDONESIA
Ghema Ramadan

INDONESIAN WORKERS PROTECTION ABROAD: INDONESIAN LAW POST-RATIFICATION OF INTERNATIONAL CONVENTION ON MIGRANT WORKERS
Achmad Zulfikar

JUSTIFICATION FOR INDIRECT EXPROPRIATION WITHIN A GOVERNMENT MEASURE
Pulkeria Proprieta

PARTICULARLY SENSITIVE SEA AREAS DESIGNATION; PURPOSES, PROTECTION, IMPLICATIONS, AND APPLICATION IN THE MALACCA STRAITS
Kartika Paramita

POSSIBLE DISPUTE SETTLEMENT FOR AMBALAT DISPUTE
Ni Made Nungki Suardhani Giri

THE INSTITUTIONAL AEGIS: INTERNATIONAL ORGANIZATIONS AS SHIELDS AGAINST MEMBER STATE RESPONSIBILITY
Ibrahim Hanif and Shita Pina Saphira

Faculty of Law
Universitas Gadjah Mada
Indonesia

Community of International Moot Court

JURIS GENTIUM LAW REVIEW

JOURNAL OF INTERNATIONAL LAW

Published by Community of International Moot Court

Volume 2, Number 1, September 2014

In cooperation with:

Faculty of Law Universitas Gadjah Mada

International Law Department of
Faculty of Law Universitas Gadjah Mada

Business Law Department of
Faculty of Law Universitas Gadjah Mada

JURIS GENTIUM LAW REVIEW is an expert-reviewed and peer-edited law journal dedicated as a place for undergraduate students from any major to contribute in scientific research and writing in regards to Business Law, Public International Law, Private International Law and Comparative Studies. The Editorial Board receives any research paper and conceptual article that has never been published in any other media. The writing requirement can be found at the inside back cover of this journal.

FOREWORD FROM THE DEAN
FACULTY OF LAW UNIVERSITAS GADJAH MADA

Good readers,

Since the last decade, a lot of improvement has been made in our Faculty of Law Universitas Gadjah Mada. It is very exciting to see how young generations of student in our campus have broadened their point of view and interest. Not so long ago, students are more focus on issues related to democracy, government and politics. The spirit of Reformation 1998 has driven idealistic atmosphere for law students to talk about constitution and justice. Students are expected to be vocal on term of expressing their arguments, which then created skillful generations in the art of public speaking and diplomacy. Debate, speech, moot court, and public oratory have set the obligatory image of law students in Indonesia: dare to say, dare to speak.

Nowadays, although the trend is still on, however we witness some changes. First, the topics that catch law student's interests are not merely related to what previous generations were so fond of. Students, shall we use the term, has been hatched from the shell of law exclusivity. More and more attention falls toward interdisciplinary learning, global issues and international business. The consequence of this phenomenon then leads to the necessity to conduct research with a lot of reading materials and observations. A new trend has arrived: the art of legal writing that required not just one side point of view, but also embodied different type of perspectives. This then lead to the second change, temptation to not just speak, but also write.

Juris Gentium was born to manage these needs. We expect that through Juris Gentium new ideas could be collected, research and papers could be documented and students are more and more challenged to sharpen their pencils in order to craft high quality of legal writings. Come back with new theme for this new academic year, I genuinely hope that every student could enrich their knowledge and share their thoughts to others with the newest issues.
We are looking forward to have your name as one of contributor in Juris Gentium!

Best Regards,

Dr. Drs. Paripurna, S.H., M.Hum., LL.M.
Dean
Faculty of Law
Universitas Gadjah Mada

FOREWORD FROM THE PRESIDENT
COMMUNITY OF INTERNATIONAL MOOT COURT
FACULTY OF LAW UNIVERSITAS GADJAH MADA

As an organization which is committed to consistently enhance legal skills and understandings within the scope of university students, the Community of International Moot Court ("CIMC") is proud to have Juris Gentium Law Review ("JGLR") as one of its product to serve the aforementioned purposes. JGLR itself aspires to accommodate the submissions of legal articles from students all over the world and publish it through online and/or printed versions.

In my humble view, JGLR has been a major breakthrough in the development of legal education because it answers today's legal challenges through the expressions of original and out of the box perspectives offered by young legal minds. In addition, JGLR also set a milestone in creating an academic writing culture to university students, thus, paving the way to the molding of future brilliant scholars.

This edition marks the third edition of JGLR and I am confident to say that the overall quality of JGLR is steadily getting higher from one edition to another. For current edition, we received a more vibrant articles ranging within various scope of international and comparative laws, we also managed to enhance the quality of expert reviewers to also include law professors from university outside Indonesia. These advancements are also furthered by the achievement of countless other progressive measures that affect to the betterment of this third JGLR edition.

However, these significant progresses would not have been achieved without the hard work of 5 dedicated and sincere individuals in contributing to the achievement of CIMC's noble purposes. To this end, I would like to deeply thank the Head of JGLR Editorial Board, Mr. Ibrahim Hanif, along with his staffs Mr. Azka Hanani, Ms. Laurensia Andrini, Ms. Pulkeria Proprieta Dewi Ekaristi and also Ms. Rachmi Dzikrina. Thank you for showing us that no obstacles are hard enough if we want to achieve honorable aims.

My appreciation also extends to Faculty of Law Universitas Gadjah Mada Deaneries for the endorsement to JGLR publication, and also expert reviewers for having spared their precious knowledge and time to ensure the maintenance of JGLR's articles high standard. Lastly, I would like to thank all the contributors for having conveyed their thoughts and presented it in exceptional legal articles.

Hence, on behalf of CIMC, I present to the readers, the third edition of JGLR, may it be beneficial for us and generations to come.

Billy Esratian
President of Community of International Moot Court
Faculty of Law Universitas Gadjah Mada

FOREWORD FROM THE EDITORIAL BOARD
JURIS GENTIUM LAW REVIEW

Of what use is knowledge unshared? Every walk I take through my campus grounds brings a wealth of knowledge from my peers. I see students always hard at work, learning all they could from the faculty and often pushing boundaries on their own accord; as it happens at al law faculties. It's quite amazing the work that us students could do, even as undergraduates. It's quite a shame that many of our voices loud heard across campus grounds and sometimes on the streets, are much more rarely found as written discourse.

Juris Gentium Law Review was first established with the vision of proliferating an international perspective of law and promoting academic writing at the undergraduate level. In our third edition, we are proud to receive submissions from all over Indonesia. As a student law review based in an archipelagic state, it is very fitting that this edition contains three submissions covering the law of the sea. Vierna Tasya Wensatama in *An Analysis on Strait of Malacca seen from the Perspective of International Law, Regional Regulations and Republic of Indonesia* seeks to address the current issue of global piracy in the Malacca strait. Ni Made Nungki Suardhani Giri explores the possibility of settling the current issues of the Ambalat area between Indonesia and Malaysia in *Possible Dispute Settlement for Ambalat Dispute*. Meanwhile, the International Maritime Organization's policy of designating Particularly Sensitive Sea Areas becomes the subject of Kartika Paramita's paper titled *Particularly Sensitive Sea Areas Designation; Purposes, Protection, Implications and Application in the Malacca Straits*.

On the subject of aviation law, Ghema Ramadan in *Implementing the Warsaw Convention 1929 in Indonesia* will explore how the international airline standard of responsibility towards passengers are applied in Indonesia. Pulkeria Proprieta Dewi Ekaristi presents a discussion on investment law's protection regime and the extent of government indirect expropriation in *Justification for Indirect Expropriation within A Government Measure*. Addressing public international law, Ibrahim Hanif and Shita Pina Saphira presents an insight into possible misuses of international organizations in *The Institutional Aegis: Intrnational Organizations as Shields against Member State Responsibility*. And finally looking forward into the future we have Vulkania Neysa Almandine with *An Analysis on the Legal Obligation of Spacefaring States for Space Debris Remidiation and Mitigation*. With these contributions the third edition covers a wide range of issues under public and private international law.

Finally, I would like to express my gratitude to all those who made this third edition possible. On behalf of the current Editorial Board, I would like to thank the Faculty of Law, Gadjah Mada University and our Executive Reviewers, our writers, the unsung heroes who helped during publication and of course, our readers. I hope this edition could further serve as a stepping towards getting more students to share and develop legal knowledge.

Ibrahim Hanif
Chief Editor of Juris Gentium Law Review
Faculty of Law Universitas Gadjah Mada

JURIS GENTIUM LAW REVIEW

Volume 2, Nomor 1, September 2014

Table of Contents

Foreword from the Dean Faculty of Law Universitas Gadjah Mada *Dr. Drs. Paripurna, S.H., M.Hum., LL.M.*	I
Foreword from the President of Community of International Moot Court Faculty of Law Universitas Gadjah Mada *Billy Esratian*	II
Foreword from the Editorial Board of Juris Gentium Law Review *Ibrahim Hanif*	III
An Analysis on the Legal Obligation of Spacefaring States for Space Debris Remidiation and Mitigation *Vulkania Neysa Almandine*	1 – 12
Retracted: An Analysis on Strait of Malacca seen from the Perspective of International Law, Regional Regulations and Republic of Indonesia *Vierna Tasya Wensatama*	13 – 21
Implementing the Warsaw Convention 1929 in Indonesia *Ghema Ramadan*	22 – 29
Indonesian Workers Protection Abroad: Indonesian Law Post-ratification of International Convention of Migrant Workers *Yordan Nugraha*	30 – 41
Justification for Indirect Expropriation within a Government Measure *Pulkeria Proprieta Dewi Ekaristi*	42 – 50
Particularly Sensitive Sea Areas Designation: Purposes, Protection, Implications, and Application in the Malacca Straits *Kartika Paramita*	51 – 59
Possible Dispute Settlement for Ambalat Dispute *Ni Made Nungki Suardhani Giri*	60 – 70
The Institutional Aegis: International Organizations as Shields against Member State Responsibility *Ibrahim Hanif and Shita Pina Saphira*	71 – 81

AN ANALYSIS ON THE LEGAL OBLIGATION OF SPACEFARING STATES FOR SPACE DEBRIS REMEDIATION AND MITIGATION*

Vulkania Neysa Almandine**

Abstract

Over the last few decades, mankind has constantly striven to understand and grasp the world around it. Some of the most profound breakthroughs in recent years are found in the course of the space exploration. Space venture is no longer only the domain of the most developed States. However, increased human activity in outer space has contributed to greater environmental threats. An increasing amount of space debris is being introduced into our cosmos. Varying in size yet deadly given its speed and possible radioactivity, debris contaminates the outer space environment and will eventual hamper further exploration.

This paper provides an analysis of the integral element of environmental law upon space law. Using elements of public space law and customary international law, it examines the *res communis* nature of outer space and the function of law in determining the extent of the obligation of space-faring states to preserve the spatial environment. An assessment of the present *corpus juris spatialis* highlights that definite implementation of such obligation remains wanting. The author concludes this paper by identifying the shortcomings of the present regulations on space debris, and provides recommendations to fill the legal void in space debris regulation.

Intisari

Beberapa dekade terakhir ini, umat manusia senantiasa berusaha untuk memahami dan menyelami dunia sekitarnya. Beberapa penemuan terbesar dalam beberapa tahun terakhir ditemukan dalam eksplorasi ruang angkasa. Penjelajahan ruang angkasa ini tidak lagi menjadi domein dari sebagian besar negara maju. Akan tetapi, peningkatan aktivitas manusia di luar angkasa telah mengakibatkan ancaman lingkungan yang lebih besar. Peningkatan jumlah puing-puing ruang sedang diperkenalkan ke kosmos kita. Benda tersebut memiliki berbagai ukuran namun mematikan, mengingat kecepatannya, dan mungkin radioaktivitas, puing-puingnya mencemarkan lingkungan luar angkasa dan pada akhirnya akan menghambat eksplorasi selanjutnya.

Makalah ini menjelaskan analisis unsur integral hukum lingkungan pada hukum ruang angkasa. Unsur-unsur hukum publik dan kebiasaan hukum internasional, digunakan untuk mengkaji res communis luar angkasa dan fungsi hukum dalam menentukan tingkat kewajiban negara berkapasitas antariksa dalam melestarikan lingkungan ruang angkasa. Penilaian corpus juris spatialis ini menyoroti kurangnya pelaksanaan yang pasti dari kewajiban tersebut. Penulis menyimpulkan makalah ini dengan mengindentifikasi kekurangan dari peraturan sekarang mengenai puing-puing ruang dan memberikan rekomendasi untuk mengisi kekosongan hukum dalam peraturan puing-puing ruang angkasa.

Keywords: Spacefaring States, Space Debris Remediation, Space Law.
Kata Kunci: Negara Berkapasitas Antariksa, Remidiasi Puing-puing Ruang Angkasa, Hukum Ruang Angkasa

---

* Preferred Citation Format: Almandine, V. N. (2014). An Analysis on the Legal Obligation of Spacefaring States for Space Debris Remediation and Mitigation. J.G.L.R., 2(1), 1-12.
** 2011;-; Faculty of Law, Universitas Gadjah Mada; Yogyakarta, Indonesia.

A. Introduction

It has been said that it is man's nature to explore, to seek out new frontiers to expand its world. It is then of little wonder, that since the beginning of civilization, space has been a constant fascination. Our ancestors revered the great unknown that is the cosmos, and intellects of old have always sought means to decipher the mysteries in our stars. The importance of space exploration extends beyond mere humane curiosity; it is a sign of development and national prowess. It holds such big importance that the space race—culminating in the sending of the first men to the moon—is one of the biggest hallmarks of the Cold War (Collins, 1999).

Satellites, the first objects launched into space, are employed to ease life on earth, voyages to distant planets are arranged, and scientists are enabled to be stationed at orbit to directly observe space. However, these achievements do not mean that the interest in space activities will wane anytime soon. To the contrary, states, which have started, early on the space race is preparing to undergo bolder and more ambitious missions. Small and temporary space structures have evolved into larger and more permanent space stations, and plans for space tourism are even drafted. The effort to explore space is not only *intensified,* but also expanded. States which were previously silent are beginning to play larger roles in exploring the universe. Indonesia, for example, has begun plans to test its nationally made RX-550 rocket with the range of 100-900 km in 2013 (AntaraNews.com, 2012).

B. The Environmental Element of Space Law

Environmental legal principles have been affirmed and have gained effect in the international context, as *inter alia* seen in the International Court of Justice *Fisheries Jurisdiction* case on how States arrange for the conservation of shared natural resources. To assess whether States have obligations towards preserving the spatial environment of the cosmos, determination must firstly be made as to whether the principles of environmental law can be applied to outer space. Such assessment shall be made with a three-tiered approach; by assessing space in itself, its relation to living environment on earth, and the future possibility of space in sustaining life.

First, environmental law, as defined by the United Nations Environment Program, encompasses the body of law, which seeks to protect the natural environment, which may be affected, impacted or endangered by human activities (United Nations Environment Programme). Natural environment encompasses all parts of the environment, living or otherwise, which came to be naturally (Johnson et al., 1997). Therefore, despite the heretofore-apparent absence in biotic life form, outer space is considered as forming this natural environment and worthy of protection under environmental law (Menezes).

Secondly, the need to identify the environmental element in space law is necessary given space's undeniable impact upon life on Earth. Space debris has constituted an environmental hazard as it increases the risk of collision and consequential damage, as further addressed *infra*.

Finally, aside from being a natural environment in itself, current, and present developments to mankind's exploration in space further render support to the protection of the space environment. With the launch of the Skylab in 1973—which has accommodated astronauts and researchers for 40 years—space stations have enabled

humans to live for prolonged periods of time in space. The increasingly intensive and permanent use of space structures are feared to eventually cause damage to the environment in which they are placed (Galloway, 1989).

Therefore, it can be concluded that it "would be wrong to consider the law of the space environment as something separate, distinct, and different from the concepts of terrestrial environmental law (Lyall & Larsen, 2009). It is evident that environmental space law is a specialized area of environmental law (Lyall and Larsen, 2009) hence development in this area should not be held separate from the technological development of space ventures.

C. Definition and Nature of Space Debris

There are numerous objects currently orbiting the Earth, yet not all are considered as space debris. Some space objects are naturally formed, such as meteorites, and other are man-made structures. Space debris merely forms a percentage of man-made structures in space. Although there is currently no formal agreement on the definition of space debris, it is the general consensus that it encompasses structures, which are no longer operational and are uncontrollable. The United Nation has further endorsed the definition of space debris as

> "all manmade objects, including their fragments and parts, whether their owners can be identified or not, in Earth orbit or re-entering the dense layers of the atmosphere that are non-functional with no reasonable expectation of their being able to assume or resume their intended functions or any other functions for which they are or can be authorized" (Technical Report on Space Debris, 1999).

Space debris can originate from a myriad of sources. A satellite may have exhausted its operational period and is no longer in use, payloads are deteriorated, and rocket thrusters are spent. Aside from intact structures, fragments also make up the number of space debris encircling our Earth.

Based upon their form, the scholar Howard Baker divides space debris into four classes; inactive payloads, operational debris, fragmentation debris, and micro-particulate matter. Inactive objects are primarily made up of satellites that have run out of fuel or have malfunctioned, and hence are no longer able to maneuver. Operational debris is an object, which have been released to space in normal operations, whether intact or in its component form. Parts of a space object, which have broken apart through explosion, collision, or deterioration, or any other means, are classified into the third group of fragmentation debris. Micro-particulate matters are the smallest form of debris. Made up of shed coatings or surfaces, this form of debris is released to space due to surface degradation (*inter alia* due to radiation, micrometeoroids, or atomic oxygen) (Senechal, 2007).

It is the realization of spacefaring states that, in the interest of ensuring spatial safety, space debris should be properly monitored. Although an international database is currently under discussion in the Inter-Agency Space Debris Coordination Committee (IADC), as of 2013 it has yet to exist. Reliance must then be made to national sources, as several States operate space debris catalogues of their own.

The two most prominent national catalogues are the United Sates Space Command catalogue and the space object catalogue of the Russian Federation. Other national catalogues rely on the data of

either one or both of these two catalogues; examples are the Database and Information System Characterizing Objects in Space (DISCOS) of ESA, and the National Space Development Agency (NASDA). Such institutions do not merely aim to identify space object, but also to monitor them to ensure safe space voyage, which can include analysis on the trajectory prediction analysis for re-entering objects and collision avoidance analysis.

Given the absence of a centralized database to track and monitor space debris, the number of tracked space debris may vary from catalogue to catalogue. However, it is generally estimated that by 2011, space debris comprise approximately 7,000 debris larger than ten centimeters, 17,500 between one and ten centimeters, and 3,500,000 under one centimeter (Roberts, 1992).

D. The Threat Posed by Space Debris upon the Environment and Mankind

1. The Dangerous Properties of Space Debris

Despite the vastness of space, space debris scattered above our atmosphere still poses an imminent danger upon the environment. This phenomenon is due to the fact that most human activity is concentrated in a specific area of space; namely the Low Earth Orbit (LEO) and the Geosynchronous Earth Orbit (GEO). Of the currently operational space structure, an estimated 45% are located in LEO and GEO (Bruenner & Soucek, 2011). This tendency to accumulate creates a problem of overcrowding in areas most used for exploration, which renders further human activities dangerous.

The three characteristics of debris render it a potential high-level risk to the environment. Firstly, space debris decay slowly, and can become a semi-permanent problem for future years and even centuries. When space debris collides with a functioning space structure, this would in turn produce more debris fragments; creating a so-called snowball effect (Bruenner & Soucek, 2011). In fact, the fragmentation of spacecraft constitute an approximately 43 percent of the current debris population—for debris larger than 5 cm, this number even rises to 85% ("Technical Report on Space Debris, 1999). Left unchecked over the years, where space launches becomes more frequent, this would slowly create a self-sustained polluted area dense with debris, which would eventually bar further commercial and exploration activities (Senechal, 2007).

Secondly, being defunct, the very nature of such objects renders it uncontrollable and difficult to track. Debris come in many sizes. Collision with a large debris piece, defined generally as objects larger than 10 cm in size, can severely damage equipment and even put lives at risk. The European Remote Sensing Satellite (ERS-1) had to perform collision-avoidance maneuvers to avoid large debris in 1997 and 1998, and the French SPOT-2 also had to do so in 1997.

Thirdly, it is not only sizeable debris, which can pose danger; high speeds provides for high-velocity impact. The current database is merely capable of tracking debris as small as 10-30 cm in diameter ("Technical Report on Space Debris", 1999). This means that there are countless of smaller debris, which is unaccounted for.

Smaller debris is not at all harmless. The velocity of the objects traveling in orbit—11,000 km per hour for debris in Geosynchronous Orbit (GSO) and 35,900 km per hour in LEO—would render even small objects dangerous (Roberts, 1992). Even object smaller than a few millimeters in diameter can cause damage to operational space systems, damaging shuttle windows or

antenna. Human space operations are also at risk, and measures must be taken to secure extravehicular activity (EVAs) crews to be shielded from debris by the orbiter. To illustrate, travelling at approximately 35 thousand km per hour, a 0.5 chip of paint could puncture a standard spacesuit, killing an astronaut or disabling an expensive satellite (Bruenner & Soucek, 2011).

2. Impact of Space Debris to the Environment

The damage caused by space debris to the environment can take on several forms. Even in the early days of space faring, the dangers of space debris did not entirely go unnoticed. Triggered with the launch of Sputnik 1 in 1957, the Scientific and Technical Sub-Committee of the UN Committee on the Peaceful Uses of Outer Space concluded that pollution in outer space can take form through "[changing] the space environment or adversely affect other experiments in space" (Diederiks-Verschoor & Kopal, 2008). This paper will first address the effects of space debris to the space environment, and then assess the effect this has upon man's activities in space. Additionally, assessment will also be made on how activities in space can affect the quality life on earth.

i. Damage to the Space Environment

The first identified issue arises with respect to changes to the space environment. Outer space is considered as a pristine environment, and it has become the consensus of States to not taint it with its byproducts (Ferguson & Wilson, 2010).

Contamination of outer space is caused by the introduction of harmful matter into outer space. Although there is no direct definition of the notion 'harmful contamination' of outer space, the general term 'pollution' enjoys common usage and is defined as 'a modification of the environment through human agency by the introduction on undesirable elements or by the undesirable use of elements' (Diederiks-Verschoor & Kopal, 2008). Scrap metal, fuel, structural components, and waste and garbage produced by manned satellites would contaminate space if they were allowed to be jettisoned to space. Nuclear, the testing of which for military purposes in outer space has been widely condemned, would also taint the existing environment (Jasani, 1987).

ii. Adverse effects to Space Exploration

The second tier of damage is the adverse effect to further space exploration. Space debris put other active structures at risk for a collision, or it can interfere with telecommunications and remote sensing, which will put human life and active payloads at risk. Danger is amplified by the fact that at high velocity even minuscule objects can be dangerous. An incident involving the Shuttle Challenger occurred as it was hit by a tiny piece of paint measuring only 0.2 mm in diameter.

iii. Impact on Earth

Not only outer space is subject to harmful contamination; space debris can also impose the risk of environmental pollution on Earth. Should debris fall down to Earth, the force of impact may create severe destruction where it lands. Given that most are nuclear charged, debris can also contaminate the area even when it comes down in an unpopulated area.

In January 1978, the Cosmos 954 satellite disintegrated and fell over North Canada. Although inflicting no direct loss of life, the debris was radioactive and contaminated an area of over 600 km. Two subsequent incidents further raised awareness on the environmental hazards of space debris, namely the reentry of COSMOS 1402 in 1983 and COSMOS 1960 in 1988 (Benkoe & Schrogl, 1993).

These incidents also underscore the fact that the primary pollutant in activities related to nuclear power sources in outer space is radioactivity caused by nuclear waste, which is released both in outer space and in Earth (Abeyratne, 1997).

E. The Need for an International Legal Regime Regulating Space Debris

1. Function of Law in Anticipating Further Developments

The current population of debris is growing, and that the probabilities of potentially damaging collisions are increasing ("Technical Report on Space Debris", 1999). Given the past and present development of space ventures and the plethora of environmental issues it presents, an immediate response in the form of a unifying regulatory standard of conduct is required (Williamson, 2006).

Even when one disagrees that the *status quo* merits the creation of a separate regime governing space debris—that the present danger is at minimum and such matters shall be shelved to a later date—law does not merely seek to resolve an issue, which is currently present. Law as useful a tool in resolving present conflicts *ex-post* as anticipating problems and regulating their possible occurrence *ex-ante* (Bruenner & Soucek, 2011).

The Brundland Report emphasizes that safeguarding future environmental conditions should not fall behind present developments; that development must "meets the needs of the present without compromising the ability of future generations to meet their own needs" ("Report of the World Commission on Environment and Development", 1987).

2. The Shared Responsibility of States

One of the unique aspects of laws governing space law is that it must inherently be of an international character. The contamination of space affects the interest of all states, and hence it must be treated through global measures and "cannot be resolved by any country independently" (Diederiks-Verschoor & Kopal, 2008). The chief reason thereto is that the legal status of outer space is that of *res communis*; a common property of mankind (Brownlie, 2003). No particular state or individual may subjugate space as its sovereignty, make claims with its regard, and most relevantly, refrain from any acts, which would adversely affect its use.

This would imply that despite the fact that although individual claims upon space cannot be made, the obligation to care for space is one burdened upon all states. It is a general rule in international customary law, as enshrined in Principle 21 of the Declaration of the United Nations Conference on Human Environment (1972) that States are obliged to abstain from causing damage to the environment outside of their national jurisdiction, even when *controlling* their own resources (Koneva, 2004). States should "avoid engaging in the harm-producing activity or weigh the benefits against the potential environmental damage and take appropriate steps to mitigate the anticipated environmental harm (Mirmina & Den Herder, 2005).

Under the General Assembly Resolution 61/36 on the Principles on the Allocation of Loss in the Case of Trans boundary Harm, 'damage' is interpreted to encompass loss of life or injury to persons, loss or damage to property, or loss of damage by impairment of the environment. Therefore, liability for damage would appear to arise irrespective of whether the damage occurred outside of the sending state's territory. This notion is affirmed further by the International Law Association in the Buenos Aires International Instrument on the Protection of the Environment from Damage Caused by Space Debris in 1994. Environmental damage encompasses "the

hostile changes in the environment within the territory under the jurisdiction of any state or any other place not under the jurisdiction of any new state" (Bockstiegel, 2000).

3. Current Legal Regime and Shortcomings

The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies (Vladimir, 1966) was conceived to balance the development of space exploration with a sense of obligation to ensure propriety. Although the Outer Space Treaty makes no direct reference to space debris, it generally regulates activities conducted in space.

Under the Treaty, each State Party which launches an object into outer space, or from which a launch is conducted, is held liable for damage for such objects *or its component parts* in outer space. Article 1 prescribes that the exploration and use of outer space shall be carried out in the interest of all countries. Space debris would evidently contradict such an aim, as they would render space exploration and use dangerous due to crowding.

Article 9 follows in the vein of Article 1 by mandating signatory states to "avoid harmful contamination" and to consult other States prior to conducting an activity, which can lead to "harmful interference." However, the Convention is unclear on whether the obligation of regulating impact or to control would encompass space debris, as one of its most distinguished identifier is the lack of ability to control it. Further questions are also raise on whether floating debris can be designated as a "national activity" or merely its unintentional by-product. The harmful contamination and adverse changes in the environment of the earth, resulting from the introduction of extra-territorial matter'; geared towards protection of human beings rather than the environment as an end in itself (Sands & Peel, 2012).

The 1972 Space Liability Convention furthers the obligation of states whose space object cause damage by mandating compensation. However, there are several caveats in this Convention, which do not render it fully suitable for the protection against space debris. Liability will only be invoked under the Convention in cases the existence of a physical damage, and not in cases where space debris 'merely' pollutes space.

Additionally, an ongoing debate still exists on whether the term 'space object' encompasses the broad spectrum of space debris, small fragments and all. There are two main veins of interpretation to such terms. It is argued on one hand that a reading of "component parts" shall be inclusive to fragments, notwithstanding their functionality, size, or origin (Bruenner & Soucek, 2011). In contrast, it can also be argued that practically, the definition of space objects, "does not include all space refuse." This unresolved issue is of utmost importance, as liability cannot be invoked for non-space object debris.

As compensation cannot be invoked without the identification of the State which to bear it, the 1974 Convention on Registration of Objects Launched into Outer Space also plays an important role in the space debris regime. However, the same impediment as found within the Space Liability Convention arises; registration obligations merely arise with respect to space objects, and if certain forms of debris were not covered under the definition of a space object, the Convention would not apply. Additionally, further uncertainties arise with respect to the method of registration. The issue on whether fragments of the main body of must be registered separately is an example of a practical

issue, which is yet clearly regulated (Diedericks-Verschoor & Kopal, 2008).

F. Recommendation

Through an assessment of the present body of space law—*corpus juris spatialis*—it is apparent that a comprehensive and specialized regime on space debris remains wanting. In terms of the interest of legal certainty, existing laws do not clearly enumerate on whether space debris mitigation qualifies as a legal obligation of spacefaring states. In a more technical sense, given that the laws were not specifically made with space debris in mind, with are of different characters than functional space structures, regulations in place may not accommodate the full need.

A more poignant case for the need of change is that present regulations were adopted before environmental considerations had become an important international legal issue, and do not reflect some of the legal innovations which have occurred in the past decade. Therefore, the introduction of a separate international scheme to tackle space debris is highly recommended.

Such scheme, if introduced, should provide clarity on both the issue of the extent of the obligation of states, as well as contain specific technical code of conduct on the remediation of the space debris problem. If, as the *status quo* allows, a State sending objects into orbit is allowed to do so without being subject to repercussions or control in their treatment of space debris, the problem of space debris would be perpetual one. Each state sending space objects must be held liable for its own debris, inventorize them and take measures to slowly remove it (Gordon, 1982).

Measures to mitigate and to remediate space debris are urgently needed. Debris mitigation and remediation are differing yet interrelated concepts. The former is concerned with the reduction of future space debris, while the latter are measures to actively lessen the impact and danger of current debris (Mineiro, 2011).

There are currently two main ways in which space debris is removed from orbit; either through entry to the Earth's atmosphere, or the maneuvering of controllable structures to a safe orbit prior to becoming defunct. However, these fixes are at best temporary, and still do not eliminate the risk of collision—both in space and on Earth. To truly reduce the amount of waste encircling the Earth, measures for manual removal of debris, a mechanism for space debris extraction, must be considered.

However, preventive measures would be and more practical and economical than remedying existing problems; not only must existing debris problem be dealt with, remediation measures must be taken to prevent said issue to recur or be amplified. Standards on better (essentially, ecofriendly) designing of spacecraft must be introduced to ensure that not only spacefaring State do not become overly eager in joining the space craze without taking sufficient measures to prevent environmental degradation (Leinberg, 1989).

Finally, it is recognized that there is currently very little information shared between States, which would aid a joint resolution to the space debris problem. The United Nations has made calls to Member States to provide information on practices that they have adopted and that proven effective in minimizing the creation of space debris, and the time is high that an international platform for this purpose is created. The Inter-Agency Space Debris Coordination Committee (IADC) attempts to achieve such and end since its establishment in 1993, but its membership is limited to several states. To date, only the European

Union, Japan, USA, Russia, China, British, France, India, Germany, and Italy are counted as members of the IADC, and to truly achieve its aim, the Committee should be opened to virtually all States.

G. Conclusion

It is to be concluded that the present need for an international regime regulating the remediation and mitigation of space debris is an urgent one. Not only do debris physically provide barriers to the inhabitance of the certain orbital area; their radioactivity would taint and adversely affect the space environment. Should spacefaring states fail to mitigate the present problem, the contamination of the environment by space debris would continue, endangering lives on Earth and also the environment as a whole.

There is an undeniable aspect of environmental law to space law. Even when space may not necessarily house living biotas of its own, environmental law includes all aspects of the natural world, both living and otherwise. The condition of the outer space is also inevitably interconnected with life on Earth; impacts and re-entry would pose serious harm to the biosphere, and it can also be foreseen that human activities in space would only intensify. Hence, despite the fact that environmental law was conceived generally and not necessarily with space law in mind, environmental conservation principles are to be applied to the issue of space debris.

However, these principles merely provide general guidance and reference. Present laws, although providing general principles on mankind's activities in space, have yet sufficed to fulfill the demand for adequate protection of the space environment. The problem with the *status quo* can be surmised to be threefold; certain areas are silent on the treatment of space debris, the existing law is too vague to be applied concretely, or that existing laws do not take into account the particular nature of space debris—barring effective resolution of the problem.

To truly resolve the issue of debris, the two major steps of remediation and mitigation must be undergone. Mitigation is necessary to reduce the impact of vessels from further contributing to the present problem, while remediation is called for to actively resolve existing problem. These measures must be undertaken through a global cooperation mechanism, as burdening such role to individual states would be unrealistic and contrary to the shared nature of outer space.

In utilizing outer space, it is imperative to note that every State is entitled to strive towards the stars, and explore it for its own interest. However, in doing so, it must be made clear that such rights do not come without restriction, and the right of humanity to still enjoy space from years to come should not be foiled by the carelessness of the present generation.

BIBLIOGRAPHY

A. Books

Baker, H. (1989). *Space Debris: Legal and Policy Implications (Utrecht Studies in Air and Space Law)*. New York, NY: Springer.

Benkoe, M., & Schrogl, K. (1993). *International Space Law in the Making: Current Issues in the UN Committee on the Peaceful Uses of Outer Space (Forum for Air and Space Law)*. United Kingdom: Editions Frontieres.

Brownlie, I. (2003). *Principles of Public International Law*. United Kingdom: Oxford University Press.

Bruenner, C., & Soucek, A. (Eds.). (2011). *Outer Space in Society, Politics and Law: Studies in Space Policy*. New York, NY: Springer.

Collins, Martin J. (1999). *Space Race: The U.S.-U.S.S.R. Competition to Reach the Moon*. California: Pomegranate.

Diederiks-Verschoor, Philepina, I.H., & Kopal, V. (2008). *An Introduction to Space Law*. United Kingdom: Kluwer Law International.

Ferguson, J.G., & Wilson, S. W. (2010). *Military Space Power: A Guide to the Issues*. Santa Barbara: Praeger.

Galloway, J.F. (1989). *Mission to the Atmosphere*. New York, NY: Springer.

Lyall, F., & Larsen, P.B. (2009). *Space Law: A Treatise*. Farnham, Surrey, United Kingdom: Ashgate.

Jasani, B. M. (1987). *Space Weapons and International Security*. United Kingdom: Oxford University Press.

Kiss, A., & Shelton, D. (2004). *International Environmental Law*. New York, NY: Transnational Pub.

Koneva, Aleksandra. (2004). The Issue of the Environmental Damage Caused by the Space Activities. Ardsley, NY: Transnational Publisher.

Sands, P., & Peel, J. (2012). *Principles of International Environmental Law*. United Kingdom: Cambridge University Press.

Senechal, Thierry. (2007). *Orbital Debris: Drafting, Negotiating, Implementing a Convention*. Cambridge, United States: Massachusetts Institute of Technology.

Vladimir, K. (1966). *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies*. Montreal: McGill University Press.

Williamson, M. (2006). *Space: The Fragile Frontier (Library of Flight)*. Reston, Virginia: American Institute of Aeronautics & Ast.

B. Journals & Articles

Abeyratne, R. I. R. (1997). The Use of Nuclear Power Sources in Outer Space and Its Effect on Environmental Protection. *Journal of Space Law*, 25, 17.

Bockstiegel, K.H. (2000). Buenos Aires International Instrument on the Protection of the Environment from Damage Caused by Space Debris Introduction. *Proceedings of the Workshop on Space Law in the Twenty-first Century*, 209.

Gordon, E. (1982). Toward International Control of the Problem of Space

Debris. *Proceedings of the 25th Colloquium on the Law of Outer Space*, 60-66.

Johnson, D. L., Ambrose, S.H., Bassett, T.J., Bowen, M.L., Crummey, D.E., Isaacson, J.S., … Winter-Nelson, A.E. (1997). Meanings of Environmental Terms. *Journal of Environmental Quality*, 26, 581-589.doi:10.2134/jeq1997.00472425002600030002x

Lyall, Francis. (2000). Protection of the Space Environment and Law. *Proceedings of the International Institute of Space Law,* 472-82.

Leinberg, Gunar. (1989). Orbital Space Debris. *The Journal of Law & Technology* (1989).

Menezes, J.J. Contamination of Outer Space: Liability under the Existing Corpus Juris Spatialis. *International Journal of Contemporary Laws*.

Mirmina, S.A., & Den Herder, D.J. (2005). Nuclear Power Sources and Future Space Exploration. *The Chinese Journal of International Law,* 149.

Roberts, L.D. (1992). Addressing the Problem of Orbital Space Debris: Combining International Regulatory and Liability Regimes. *Boston College International and Comparative law Review*, 15, 53. Retrieved from http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi? article=1531&context=iclr

Suryanto (Ed.). (2012, August 3). *Menristek: Indonesia Siap Luncurkan Roket RX-550*, *AntaraNews.com*. Retrieved from http://www.antaranews.com/berita/325494/indonesia-siap-luncurkan-roket-rx-550

C. Conventions & Legal Instruments

Convention on International Liability for Damage Caused by Space Objects. Retrieved from http://www.faa.gov/about/office_org/headquarters_offices/ast/media/Conv_International_Liab_Damage.pdf

Convention on Registration of Objects Launched into Outer Space. Retrieved from http://www.faa.gov/about/office_org/headquarters_offices/ast/media/Conv_Regi_Objects_Launched.pdf

Principles Relevant to the Use of Nuclear Power Sources in Outer Space. Retrieved from http://www.unoosa.org/oosa/ SpaceLaw/nps.html

D. Miscellaneous

Columbia Accident Investigation Board. (2003, August). *Report Volume I*. Retrieved from http://govinfo.library.unt.edu/caib/news/report/pdf/vol1/full/caib_report_volume1.pdf

General Assembly Resolution 61/36, *Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities,* A/RES/61/36 (2 June 2006), retrieved from http://cil.nus.edu.sg/rp/il/pdf/2006%20Draft%20Principles%20on%20the%20Allocation%20of%20Loss%20in%20the%20Case%20of%20Transboundary%20Harm%20Arising%20Out%20of%20Hazardous%20Activities-pdf.pdf.

Mineiro, M.C. (2011, November). *Space Debris Remediation: The Public International Legal Satus of Jurisdiction and Control of Space Objects*. Paper presented to the International Interdisciplinary Congress on Space Debris

Remediation Montreal, QC, Canada. Retrieved from SSRN: http://ssrn.com/abstract=1951562

United Nations, Declaration of the United Nations Conference on the Human Environment. (1972, June). Report of the United Nations Conference on the Human Environment (Report No. A/CONF.48/14/Rev. 1). Retrieved from http://www.un-documents.net/aconf48-14r1.pdf

United Nations, *The Scientific and Technical Subcommittee of the United Nations Committee on the Peaceful uses of Outer Space*. (New York: United Nations, 1999), retrieved from http://www.oosa.unvienna.org/pdf /reports/ac105/AC105_720E.pdf.

United Nations, United Nations Environment Programme. *Environmental Law and Multilateral Agreements.* Retrieved from http://www.unep .org/training/programmes/Instruct or%20Version/Part_2/Activities/In terest_Groups/DecisionMaking/Cor e/Environmental_Law_Definitions_r ev2.pdf

United Nations, United Nations General Assembly. (1987, December). Report of the World Commission on Environment and Development (Report No. A/RES/42/187). Retrieved from http://www.un .org/documents/ga/res/42/ares4 2-187.htm

RETRACTED: AN ANALYSIS ON STRAIT OF MALACCA SEEN FROM THE PERSPECTIVES OF INTERNATIONAL LAW, REGIONAL REGULATIONS, AND REPUBLIC OF INDONESIA

Vierna Tasya Wensatama

Retraction notice to "An Analysis on Strait of Malacca Seen from the Perspectives of International Law, Regional Regulations, and Republic of Indonesia"
[J.G.L.R., 2(1), 13-21]

This article has been retracted by the author due to ethical concerns.

IMPLEMENTING THE WARSAW CONVENTION 1929 IN INDONESIA*

Ghema Ramadan**

Abstract

This article will discuss how the Warsaw Convention 1929 regulates the responsibility of international airlines to passengers and luggage under civil law. It will also discuss how Indonesia has been bound under this convention, and will further discuss how Indonesian courts have implemented this convention to adjudicate "international carriage" cases relevant to the convention. The unfortunate conclusion is that many Indonesian judges are still unfamiliar with private international law in general, and the Warsaw Convention 1929 specifically.

Intisari

Artikel ini membahas beberapa ide pokok. Pertama, penulis akan menjelaskan bagaimana Konvensi Warsawa 1929 mengatur tanggung jawab maskapai penerbangan internasional terhadap penumpang dan bagasi mereka. Kedua, artikel ini akan mencermati bagaimana konvensi ini mengikat Indonesia serta implementasi konvensi ini oleh pengadilan –pengadilan Indonesia. Kesimpulan yang dapat ditarik adalah bahwa hakim-hakim Indonesia di beberapa kasus yang diangkat, masih kurang terbiasa memberikan adjudikasi berdasarkan hukum perdata internasional, khususnya Konvensi Warsawa 1929.

Keywords: Warsaw Convention 1929, International Airline, Luggage Claims, Indonesia.
Kata Kunci: Konvensi Warsawa 1929, Penerbangan Internasional, Klaim Bagasi, Indonesia.

* Preferred Citation Format: Ramadan, G. (2014). Implementing the Warsaw Convention 1929 in Indonesia. J.G.L.R., 2(1), 22-29.
** 2009, Transnational Law; Faculty of Law; Universitas Indonesia; Jakarta, Indonesia.

A. Introduction

In the past few decades, airplanes have become one of the most important modes of transportation due to its ability to rapidly carry passengers and goods. Airlines, being in charge of these fleets of airplanes, are regulated by comprehensive legal instruments enforcing their contractual legal relation with their passengers. These legal instruments differentiate between the obligations of airlines and passengers to one another.

In the 1920s, mulilateral meetings to discuss this matter eventually led to the creation of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed in Warsaw on 12 October 1929 (Warsaw Convention). Until today, this private international law convention has 154 contracting states around the world (ICAO, 2008). The Warsaw Convention –which consists of five chapters– determines the limitation of airline's responsibility, but not the exact amount of compensation. The latter shall be proven by the passenger as the injured party. Article 1 Paragraph (1) Warsaw Convention states that this convention applies to all international carriage of persons, luggage, or goods performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking. Furthermore, Article 1 Paragraph (2) of this convention also defines international carriage.[1]

B. Airline's Responsibility to Passengers

Article 3 Paragraph (1) of Warsaw Convention regulates that the carrier (airlines) must deliver a passenger ticket which shall contain the following particular information:

1. the place and date of issue;
2. the place of departure and of destination;
3. the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the carriage of its international character;
4. the name and address of the carrier or carriers; and
5. a statement that the carriage is subject to the rules relating to liability established by this Convention.

Beside the obligation to deliver a passanger ticket, the Warsaw Convention also renders carriers liable for its passenger based on a presumption of liability. Article 17 of Warsaw Convention regulates that the carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. Hence, the carrier will always be presumed to be responsible for their passenger's condition, such as death,

[1] Warsaw Convention, Article 1 Paragraph (2), "for the purposes of this Convention the expression "international carriage" means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention..."

wounds, or injury. The carrier is also liable for damage occasioned by delay in the carriage by air of passengers based on Article 19 of Warsaw Convention, also under a presumption of liability.

The Warsaw Convention determines that the nominal limitation of a carrier's liability to passengers is limited to the sum of 125.000 Francs. Nevertheless, the carrier and the passenger may agree to a higher limit of liability by a special contract made by themselves. The use of the Franc currency is somehow problematic because gold's price is fluctuative, for instance in 1933 forcing the USA to frezee gold's price at certain levels (Mankiewicz, 1972).

The above liability of carriers for passengers above can be exempted, under several reasons which have to be proven by the carrier itself or by the passengers. Facts to be proven by the carriers are that:

1. the carrier and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures (Warsaw Convention, Article 20(1)). Damages caused by a carrier's agents such as pilot or stewardess is considered as carrier's liability because they are acting as carrier's representative (Martono, 2002). This is in line with the concept of "vicarious liability" that was adopted by common law legal systems between an employer and his employee. In Indonesia, the concept of vicarous liability is regulated under Article 1367 of the Indonesian Civil Code.
2. The damage was caused or contributed by the negligence of the injured person. The Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability (Warsaw Convention, Article 21).
3. the claim is expired. The right to damages shall be extinguished if an action is not brought within two (2) years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped (Warsaw Convention, Article 29 Paragraph 1).
4. the accident which caused the damage so sustained did not take place on board the aircraft or in the course of any of the operations of embarking or disembarking. Thus, there is an element unfulfilled from Article 17;
5. the damages did not occur by delay in the carriage by air of passengers. Thus, there is an unfulfilled element from Article 19.

If the carrier can prove these conditions above, their liability to passengers can be wholly or partly exonerated. Meanwhile, the passanger who could prove:

1. that the carrier did not deliver passenger ticket (Warsaw Convention, Article 3 Paragraph 2); or
2. that the damage is caused by the carrier or its agent by their wilful misconduct or by such default on his part as, in accordance with the law of the Court seized of the case, is considered to be equivalent to wilful misconduct (Warsaw Convention, Article 25).

Could claim for an excess of the nominal liability of 125.000 Gold Francs (can be exceeded–depends on the amount of loss) by the court.

C. Airline's Responsibility to Passenger's Luggage

Although the Warsaw Convention does not specifically define "luggage", this convention obliges carriers to deliver a luggage ticket to passengers based on Article 4 Paragraph (1). That ticket shall contain the following particular information:

1. the place and date of issue;
2. the place of departure and of destination;
3. the name and address of the carrier or carriers;
4. the number of the passenger ticket;
5. a statement that delivery of the luggage will be made to the bearer of the luggage ticket;
6. the number and weight of the packages;
7. the amount of the value declared in accordance with Article 22 Paragraph (2);
8. a statement that the carriage is subject to the rules relating to liability established by this Convention.

Besides the obligation to deliver a luggage ticket, the Warsaw Convention also renders carriers liable to its passengers' luggage under presumption of liability. Article 18 Paragraph (2) of Warsaw Convention regulates that the carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air. The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever. In addition, the carrier is liable for damages occasioned by delay in the carriage by air of luggage. Thus, just like the carriage of passengers, the carriage of baggage is also based on presumed liability principle where the carrier will always be presumed liable to the damages of passenger's luggage.

If a passenger's luggage is damaged, the passengers themselves must complain to the carrier immediately after the discovery of the damage, and, at the latest, within three days from the date of receipt in the case of luggage. In the case of delay the complaint must be made at the latest within fourteen days from the date on which the luggage or goods have been placed at their disposal. The Warsaw Convention determines that the nominal limitation of carrier's liability to passenger's luggage is limited to the sum of 250 Gold Francs per kilogram based on Article 22 Paragraph (2).

Similar to the liability to passengers, the liability of carrier to passenger's luggage can be exempted by several reasons which have to be proven by the carrier itself or the passenger. If a carrier could prove that:

1. the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage (Warsaw Convention, Article 20 Paragraph 2).
2. the claim is expired. (Warsaw Convention, Article 29 Paragraph 1).
3. the damage did not happen during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever (Warsaw Convention, Article 18 Paragraph 2).
4. the damages did not occur by delay in the carriage by air of passengers.

So, there is an unfulfilled element from Article 19;

5. the passenger did not complain to the carrier forthwith after the discovery of the damage, and, at the latest, within three days from the date of receipt. In the case of delay the complaint must be made at the latest within fourteen days from the date on which the luggage have been placed at his disposal (Warsaw Convention, Article 26 Paragraph 2).

their liability can be wholly or partly exonerated. Meanwhile, facts which may be proven by passenger is:

1. whether the carrier did not deliver luggage ticket, or the ticket did not contain of the number of passenger ticket, number and weight of packages, or a statement that the carriage is subject to the rules relating to liability established by this Convention (Warsaw Convention, Article 4 paragraph 4); or
2. that the damage is caused by the carrier or its agent by their wilful misconduct or by such default on his part as, in accordance with the law of the Court seised of the case, is considered to be equivalent to wilful misconduct (Warsaw Convention, Article 25).

If a passenger can prove one of the above, the nominal liability of 250 Gold Francs per kilogram will not be applied (can be exceeded).

D. Airline's Responsibility to Hand Luggage

Besides liability for the passengers and their luggage, carrier is also liable to passenger's hand baggage -which is defined as objects which passengers takes charge themselves- under Article 22 Paragraph (3) Warsaw Convention. In this context, the limitation of carrier's liability is 5.000 Gold Francs per passanger. Different with the liability to passengers and their luggage, carrier is presumed not liable for passenger's hand baggage and therefore the damages shall be proven by the passengers in order to receive compensation. This idea was established because the hand bagagge is carried by the passengers themselves (under their own surveillance).

Carrier's liability to passenger's hand baggage can be exempted by several reasons which has to be proven by the carrier itself or the passenger. Matters that should be proven by carrier is whether the passenger's claim is expired (Warsaw Convention, Article 26). Meanwhile, matters which could be proven by the passengers is whether the damage is caused by the carrier or its agent by their wilful misconduct or by such default on his part as, in accordance with the law of the Court seised of the case, is considered to be equivalent to wilful misconduct (Warsaw Convention, Article 25).

E. Warsaw Convention's Implementation in Indonesia

Warsaw Convention is ratified by the Netherlands on July 1st 1933. According to the principle of concordance, this convention was also applied in the Dutch East Indies (Indonesia prior to independence) as their colonial territory under the *Staatsblad* No. 344 Year 1933. After independence, Indonesia bound itself to this convention by sending a written note to the International Civil Air Organization's (ICAO) secretariat. Further, Article 2 of the Transitional Provisions of the 1945 Constitution of the Republic of Indonesia also states that this convention is still relevant. It states that "all government bodies and rules which exist are still in force, as long as it has not been

replaced by this Constitution". The Warsaw Convention, which is still binding for Indonesia, needed to be updated through the Montreal Convention 1999 to better adapt to present circumstances (Martono & Pramono, 2013). The Warsaw Convention's currently holds the main functions for the unification of ticket regulation system, luggage, cargo, and loss claim by the passengers with certain limitations and its exception (Speciale, 2006).

F. Case Studies

1. Singapore Airlines v. Sigit Suciptoyono (2000)

Sigit bought a ticket for a Jakarta-Singapore-Taiwan-Los Angeles (USA) flight with Singapore Airlines. When his plane was about to depart from Taiwan to Los Angeles, it crashed, which injured Sigit and caused permanent damage to him. Sigit then filed a lawsuit via the California State Court, but the Court declared the case inadmissible based on *forum non conveniens*. When he later filed a lawsuit via Singaporean Court, he could not fly from Jakarta to Singapore due to his trauma. Hence, Singapore Court did not accept his claim. Finally, he filed a lawsuit via Indonesian court, at the South Jakarta District Court.

In *Sigit v. Singapore Airlines*, the judges from the South Jakarta District Court clearly expressed in their verdict that they have jurisdiction to adjudicate the case under Article 28 of Warsaw Convention because Indonesia is the country where the claimant first bought the ticket (Sigit Suciptoyono v. Singapore Airlines, 2000). This means that the judges have done the right thing according to the law. But even so, the judges did not discuss which law would apply, whereas this point is of critical importantance. According to Indonesian jurisprudence, Indonesian court uses *lex loci delicti commissi* to mend foreign-element-tort-cases. Moreover, Sudargo Gautama stated that whenever the claimant chooses a forum to file his lawsuit, it implies that he/she is also choosing the applicable law for their cases (Gautama, 2002). Therefore, Indonesian law should be the applicable law for this case. The judges were therefore supposed to analyze every element in Article 17 and 18 Paragraph (1) Warsaw Convention in order, an obligation which they did not undertake.

2. Emirates Airlines v. Dono Indarto (2008)

In *Emirates Airlines v. Dono Indarto*, the problem occured when Dono ordered a ticket from Istanbul (Turkey) to Jakarta (Indonesia) with a transit route in Dubai (United Arab Emirates). At Istanbul Airport, the airport's security staff asked him to give his walking stick to them. At first, Dono rejected, but eventually the staff forced him to do so then gave him a luggage ticket. When Dono transited in Dubai, he asked Emirates' staff about his walking sticks's condition. The staff replied that his walking stick was fine and can be picked when they arrived in Jakarta later. Unfortunately, he did not find his walking stick when he arrived in Jakarta. He chose to bring legal action via Indonesian courts, at the South Jakarta District Court (Dono Indarto v. Emirates Airline, 2008). The judges did not give a clear explanation why they have competency over the case, a crucial omission.

In reality, Indonesian courts would have had competence over this case as Indonesia is the final destination of the claimant's flight, in accordance to Article 28 Paragraph (1) Warsaw Convention. The court also did not state which law shall be used although this case contains foreign elements (subjects of private international law). The proper law, similar with the above explanation, should be Indonesian law.

Furthermore, the court also repeated the same mistake as the Sigit case, by failing to elaborate and discuss whether all elements required for fault are satisfied.

3. Eunike Mega v. Garuda Indonesia (1999)

This case began when Eunike arrived in Singapore from the USA by using Northwest Airlines. After that, she bought a ticket from Singapore to Jakarta by using Garuda Indonesia Airlines. Before she had boarded the plane, she gave her luggage to Garuda Indonesa by herself. By the time she arrived in Jakarta, she could not find her luggage. She sued Garuda Indonesia through Indonesian court, via the Surabaya District Court (Eunike Mega Apriliany v. PT (PERSERO) Perusahaan Penerbangan Garuda Indonesia, 1999).

The judges at the Surabaya District Court stated that they have jurisdiction over this case under Article 18 *Algemene Bepaling van Wetgeving voor Indonesie* (AB), which provides for *lex loci regit actum*. This means legal action will be adjudicated by the court where such legal action is brought. Unfortunately, the judges were not thorough because there is a specific law instrument which should have regulated (*lex specialis*) this international carriage case, being the Warsaw Convention.

According to Article 28 paragraph (1) Warsaw Convention, a plaintiff may bring an action before the court having jurisdiction where the carrier is ordinarily residing (Indonesia), or has his principal place of business (Indonesia), or has an establishment by which the contract has been made (Singapore) or before the Court having jurisdiction at the place of destination (Indonesia). Hence, the judges should have also relied on the Warsaw Convention instead of referring merely to the AB. They also did not state which substantive law shall be used although this case also contains foreign elements (subject of private international law). The proper law, similar with the above explanation, should be Indonesian law. Furthermore, the court also repeated the same mistake as the Sigit and Dono cases, by failing to elaborate and discuss whether all elements required for fault are satisfied.

G. Conclusion

Indonesian judges should be more aware of private international law aspects when it comes to adjudicating foreign element civil cases. For example tort cases involving foreign airlines relating to international flights which is comprehensively regulated under Warsaw Convention.

BIBLIOGRAPHY

A. Books

Gautama, Sudargo. (2002). Hukum Perdata Intenasional Indonesia. Bandung: Alumni.

Martono, K. (2002). Analisis dan Evaluasi Hukum tentang Status Hukum dan Tanggung Jawab Awak Pesawat Udara Sipil. Jakarta: Badan Pembinaan Hukum Nasional Departemen Kehakiman dan HAM.

Martono, K & Pramono, A. (2013). Hukum Udara Perdata Internasional dan Nasional. Jakarta: Raja Grafindo.

Speciale, Raymond. C. (2006). Fundamentals Aviation Law. New York: McGraw-Hill Companies, Inc.

B. Journals

Mankiewicz, Rene H. (1972). The Judicial Diversification of Uniform Private Law Conventions, the Warsaw Convention's Days in Court. The International Comparative Law Quarterly. Vol. 21, No. 4, 718-157.

C. Convention and Legal Instruments

Algemene Bepaling van Wetgeving voor Indonesie, (1847).

Convention for the Unification of Certain Rules Relating to International Carriage by Air, (1929).

Staatsblad No. 344. (1933)

The 1945 Constitution of the Republic of Indonesia, (1945).

D. Case Law

Dono Indarto v. Emirates Airlines, Indonesian Supreme Court Decision No. 2094 K/Pdt/2010

Dono Indarto v. Emirates Airlines, South Jakarta District Court Decision No. 639/Pdt.G/2008/PN.Jkt.Sel

Dono Indarto v. Emirates Airlines, Jakarta High Court Decision No. 397/PDT/2009/PT.DKI

Eunike Mega Apriliany v. PT (PERSERO) Perusahaan Penerbangan Garuda Indonesia, Surabaya District Court Decision No. 631/Pdt.G/1999/PN.Sby

PT (PERSERO) Perusahaan Penerbangan Garuda Indonesia v. Eunike Mega Apriliany, Surabaya High Court Decision No. 535/PDT/2000/PT.Sby

PT (PERSERO) Perusahaan Penerbangan Garuda Indonesia v. Eunike Mega Apriliany, Indonesian Supreme Court Decision No. 970K/Pdt/2002

Sigit Suciptoyono v. Singapore Airlines Limited, South Jakarta District Court Decision No. 908/Pdt.G/2007/PN.Jak.Sel

Sigit Suciptoyono v. Singapore Airlines Limited, Jakarta High Court Decision No. 611/PDT/2008/PT.DKI

Singapore Airlines Limited v. Sigit Suciptoyono, Indonesian Supreme Court Decision No. 1517 K/Pdt/2009

E. Others

International Civil Air Organization (ICAO). (2008). Contracting Parties to the Convention for the Unification of Certain Rules Relating To International Carriage by Air Signed at Warsaw on 12 October 1929 and the Protocol Modifying the Said Convention signed at the Hague on 28 September 1955. Retrieved from http://www.icao.int/secretariat/legal/List%20of%20Parties/WC-HP_EN.pdf

INDONESIAN WORKERS PROTECTION ABROAD: INDONESIAN LAW POST – RATIFICATION OF INTERNATIONAL CONVENTION ON MIGRANT WORKERS*

Achmad Zulfikar**

Abstract

United Nations Secretary-General Ban Ki-moon in the General Assembly on International Migration and Development, stated that since 1990-2010 the growth of international migration has increased significantly. It brings implications for the deployment of migrant workers that draw attention to the sending, transit, recipient countries, or a combination of the three catagories. Government should provide a clearer framework for migrant workers' rights to protect the migrant workers during pre-placement, placement, and post-placement. This article draws on the results of the literature study and interviews with respondents in the field of employment. This article found a positive relations between the revised of Law No. 39/2004 and Indonesian Migrant Workers Protection Bill as a follow-up of the ratification of the International Convention on the Protection of the Rights of Migrant Workers and their Families.

Abstrak

Sekretaris Jenderal PBB, Ban Ki Moon, dalam Rapat Majelis Umum mengenai Migrasi dan Perkembangan Internasional mengatakan bahwa dalam kurun waktu tahun 1990-2010, pertumbuhan migrasi internasional telah berkembang sangat pesat. Hal ini memberikan dampak kepada pengiriman buruh migran yang melibatkan negara pengirim, transit, serta penerima, ataupun kombinasi antara ketiga kategori tersebut. Pemerintah harus mengatur hak-hak buruh secara lebih jelas untuk melindungi buruh migran selama pra-penempatan, penempatan, dan setelah penempatan. Artikel ini ditulis berdasarkan studi pustaka dan wawancara dengan responden dalam ranah ketenagakerjaan. Penelitian ini juga menemukan relasi positif antara Undang-undang No. 39/2004 dan Undang-undang Perlindungan Buruh Migran Indonesia sebagai hasil ratifikasi dari International Convention on the Protection of the Rights of Migrant Workers and their Families.

Keywords: International Migration, International Law, Migrant Workers, Indonesian Workers.
Kata Kunci*: Migrasi Internasional, Hukum Internasional, Buruh Migran, Pekerja Indonesia*

* Preferred Citation Format: Zulfikar, A. (2014). Indonesian Workers Protection Abroad: Indonesian Law Post-Ratification of International Convention on Migrant Workers. J.G.L.R., 2(1), 30-41.
** 2010, International Relation; Faculty of Social and Political Science, Universitas Muhammadiyah; Yogyakarta, Indonesia.

A. Introduction

United Nations Secretary-General Ban Ki-moon in the middle of 2012 in the General Assembly on International Migration and Development stated that the growth of international migration during the period of 1990-2010 increased significantly. Ban Ki-moon said, "More people live outside their country of origin today than at any time in history. The global number of international migrants increased from 155 million in 1990 to 214 million in 2010. During that period, the number of international migrants in the more developed regions, or the North, grew by 46 million, or 56 per cent, while the immigrant population in the South increased by 13 million, or 18 per cent. By 2010, almost 60 per cent of all international migrants in the world were living in more developed countries, compared with 53 per cent in 1990". (United Nations, 2012)

The data above shows that there are 155 million people migrating internationally in 1990, whereas in 2010 this has increased to 214 million people. Significantly within the last 20 years there is an increase of 59 million people, and then if there is an increase in the international migration averaged up to 3 million people per year. The increase of international migration actors over the years certainly evokes the countries in the world to pay attention to it, either as sending countries, transit countries, recipient countries, as well as a combination of all three. These include the dual role of Indonesia as sending countries, but also as a recipient country.

In accordance with the migration of Indonesian citizens abroad, Chief of Diaspora Desk Ministry of Foreign Affairs of the Republic of Indonesia (Kemlu RI), Wahid Supriyadi, in an interview quoted by Antara stated that the current Indonesian people who are in diaspora (international migration) is estimated at 8-10 million worldwide. (Antara News, 2013) This estimation includes Indonesian people who works abroad (Indonesian migrant workers).

International Labor Organization (ILO) quotes from the National Agency for the Placement and Protection of Indonesian Workers (BNP2TKI) stated in its report for the period 2006-2012, the number of migrant workers reached approximately 4 million, while the number of migrant workers who are undocumented estimated two to four times greater (ILO, 2013).

Consider the high number of Indonesian people who involved as international migrants, as well as the high number of migrant workers abroad, the government should formulate an effective policy to better manage the issue. In reality, the government did not formulate sufficient policies and not took significant efforts to protect the migrant workers abroad resulted many workers remain unmanaged and tend to become victims of the uncertainty.

Data from the Ministry of Manpower and Transmigration (Menakertrans) cites cases of migrant workers during the year 2010 as 60,399 cases and in 2011 was 44,573 cases. While the NGO Migrant Care Data recorded 5,314 cases of violence experienced by migrant workers abroad during the period of 2009 to 2010, which in details 1,748 cases in Malaysia, 1,048 cases in Saudi Arabia, 1,004 cases in Jordan, 784 cases in Kuwait, 533 cases in Abu Dhabi, 103 cases in Taiwan 103, 78 cases in Hong Kong, and 16 cases in Singapore. (Antara Jatim, 2012)

The above data shows that the government was not serious in the handling of international migration, including the placement of Indonesian workers abroad. Even the government is constitutionally required to take a series of actions to

protect its citizens in seeking for job both within and outside the country without discriminative treatment and put forward comprehensive safeguards for Indonesian workers overseas. The reason of Indonesian people to fight for independency of their country, as mentioned in the preamble of the 1945 Constitution, is to have sovereignty to protect the territory and interest of all Indonesian citizens.

Further in the Universal Declaration of Human Right (UDHR) which adopted by all countries including Indonesia, one of its article recognize the right of any citizens to migrate anywhere to seek for job. In article 23 UDHR stated that everyone has the right to have a job, to choose a job, protection from unemployment, and good working environment in terms of fair wages, as well as life insurance (United Nations, 1948). Furthermore, in article 2 of UDHR declare that everyone is entitled to all the rights and freedoms set forth in this Declaration, with no exceptions whatsoever, such distinction as to race, color, sex, language, religion, political or other views, national origin or community, property, birth or other position.

On the basis of labor law, Indonesian law guarantees the right of every citizen of Indonesia (WNI) to get a job and freedom to choose jobs protected under Indonesian Constitution of 1945 as stipulated in the Article 27 Paragraph 2: "every citizen has the right to a decent livelihood for humanity". Further arrangements governed by Law No. 13 of Year 2003 regarding Manpower (demand and supply), and the Article 34 of Law No. 13/2003 states that Indonesian worked overseas is regulated through legislation. Regulation related to placement and protection of Indonesia migrant worker overseas is stipulated in Law No. 39/2004.

In addition, in 2012 the government of Indonesia has ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families which consist of basic guidelines on migrant workers protection. Following the ratification, Indonesian government has an obligation to harmonize the national law with the content of the International Convention. This will be great momentum for the fulfillment of Indonesian migrant workers right under the international law.

Realizing the urgency of the issue, the author is interested in reviewing efforts from the government to revitalize Indonesian workers protection through a comparison between Law No. 39/2004 (national law) with International Convention on Migrant Workers (ICMW) regarding the placement and protection of Indonesian workers abroad. Through the comparison of these two laws, the author expects to find common ground, as well as the issues that need to be focused on for the future improvement of the protection of migrant workers by the government.

B. Indonesian Workers in the Perspective of Law No. 39 of Year 2004 and the Respond from Politician and Civil Society

Definition of Indonesian Workers (TKI) and candidate of Indonesian Workers (CTKI) in Law No. 39/2004 has a different meaning. TKI is defined as any Indonesian citizens who are eligible to work in the overseas employment for a specified period of timeand been paid. While CTKI defined as every Indonesian citizen who qualifies as job seekers who will work abroad and registered by local government agencies/municipalities which responsible for labor dispatch.

Understanding the definition of TKI and CTKI is very important for further discussion because it is related to their rights and duties from the perspective of Law No. 39/2004. In Chapter III Article 8 regarding Rights and Duties of workers, states that

every prospective migrant workers have the same rights and opportunities to: (a) work abroad, (b) to obtain correct information about the labor market and overseas placement of workers based on procedures applied abroad, (c) obtain services and equal treatment in the placement country; (d) obtain freedom and faith adheres well as the opportunity to perform religious worship and belief espoused; (e) wages in accordance with the standards of wages applicable in the country of destination; (f) acquire the rights, opportunities, and equal treatment of foreign workers obtained in accordance with the laws and regulations in the destination country; (g) obtain legal protection in accordance with the legislation on measures that can be degrading dignity and violation of the rights established in accordance with the laws and regulations for foreign employment; (h) obtain assurance of safety and security protection workers returning to their homes, and (i) obtain the original manuscript agreement.

Later in article 9, each prospective migrants/migrant workers have an obligation to: (a) comply with laws and regulations both domestically, as well as in the country of destination; (b) comply with and carry out work in accordance with the employment agreement, (c) pay the service charge placement of workers abroad appropriate regulatory circuitry, and (d) notify or report the arrival of the existence and the return of migrant workers to the Representative of the Republic of Indonesia in destination countries.

The articles contained in Law No. 39/2004 mentioned above is still too general to provide comprehensive cover for the rights of Indonesian workers overseas. Many politicians, NGOs and migrant workers observers consider that the regulation was more economic oriented as trade system than efforts to protect Indonesian workers rights.

Rieke Diah Pitaloka, a parliament member in charge of the manpower affair, during an interview with the author on 27 of December 2013, stated that Law No. 39/2004 which is applied for protection of Indonesian migrant workers overseas, also admit the tendency of the law as economic instrument rather than protection on humanity as should be demonstrated by the government on its major responsibility as representative of the State in protecting the citizens. Rieke clearly sees an urgency to revise the existing Law No. 39/2004.

In line with Rieke's opinion, the Advocation Team for Migrant Worker which is consist of number of NGOs such as HRGW, National Commission for Women, ATKI, GPPBM, IWORK, KWI, LBH Apik Jakarta, LBH Jakarta, Migrant Workers Care, SBMI, and Women Solidarity Movement are united in their opinion that Law No. 39/2004 regarding Placement and Protection of Migrant Workers Overseas has a number of weakness in term of rights coverage which will be discussed further below.

The mindset behind Law No. 39/2004 is more focused on the issue of migrant worker placement mechanism. It was clearly shown on the title, which 'placement' stated before than 'protection'. It was logically interpreted that placement is more important than protection. Through exploration of the content, only 8 out of 109 articles regulate about protection. It reflects an attitude that responsibility of the government was sending the workers somewhere else as long as there is a need in foreign countries and some workers are willing to work abroad. Worker are not a commodity that can be easily traded just taking into account its economic aspect. In actuality, State has responsibility to provide job opportunity for the citizen.

Since the State is unable to provide sufficient job opportunities for its citizen, then the alternative is through international cooperation with other countries who lack of manpower in particular areas. The available job opportunity, of course, should be first assessed by Indonesian government comprehensively for the maximum security of the citizens who going to be dispatched later. It is also important to take into account the dignity or pride of our nation not to allow our people to be treated as slaves by other people in foreign countries for the sake of money.

By using the above perspective, the migrant workers who seek and find job abroad by themselves are discriminated because they are considered to be outside the framework of placement as defined by the government in the law. In particular the possibility that the same thing will happen to Indonesian workers independently. One serious principle was forgotten or intentionally omitted: whether the migrant workers are documented or undocumented they are still Indonesian citizens who are supposed to receive equal protection from the State.

In addition, Law No. 39/2004 does not put legal aid as one of the important points in the scheme for the protection of migrant workers. Until now, a Government Regulation on Legal Aid as mandated by the law, was never made by the government. Thus, the issue of legal assistance to migrant workers are limited to ad hoc measures (Gaussyah et. al., 2012: 30-3).

Based on the data and the response as has been described above, we can see that Law No. 39/2004 which regulates the placement and protection of migrant workers abroad urgently needs more attention from the government to be refined. When linked with the problems that afflict Indonesian workers abroad, it can be concluded that the root cause is the lack of force override placement and protection of migrant workers from the government, as well as the vague description of rights that must be met by the government for migrant workers. This results in the emergence of various problems that afflict both migrant workers in the pre- placement, placement, and post-placement phases.

From the explanation above, we can conclude the actions that can be undertaken by the government is to speed up the revision of Law No. 39/2004. Hopefully with these revisions, better clarity for the migrant workers status who are in a regular situation (have proper documents) as well as in situations of irregularity (incomplete documents) can be handled without discrimination as revealed by the Migrant Workers Advocacy Team. This is, of course, based on the State's obligation to protect all citizens as mandated by the preambule of Indonesia Constitution 1945.

C. The Process to Ratify the International Convention on Migrant Workers and the Standar Rights for Migrant Workers

Ratification of the International Convention on the Protection of the Rights of Migrant Workers by the Indonesian government required quite a long time. As from September 22, 2004, the Indonesian government under the President Megawati Soekarnoputri administration sent Minister of Foreign Affairs Hassan Wirajuda to attend the annual session of the UN agreement during the 59th of UN General Assembly and Hassan to sign the agreement as the Indonesia government representative. Eight years later, or 12 of April 2012 in the Plenary Session of the Indonesian Parliament the bill agreed to be ratified. Furthermore, the Convention was finally legalized by President Susilo Bambang Yudhoyono on May 2, 2012 into

Law No. 6 of Year 2012 on the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The Indonesian government then submitted the ratification to the UN Secretary-General before reporting to the United Nations Treaty Collection, which received the report of the ratification on May 31, 2012.

The series of events above shows that Indonesia took eight years (2004-2012) to complete ratification procedures for the Convention, which should have been done not long after the signature. In addition, the Convention was referred in the Action Plan on Human Rights (RANHAM) twice during the 2004-2009 and 2009-2011 periods. The length of time needed shows a lack of concern, interest or at least indicates circumspection of the Indonesian government toward adoption of international law. It can be also assumed that initially the government didn't see a significant link between migrant workers and the economic growth of this country until several lender states finally linked their willingness to invest in Indonesia with the availability of regulation protecting migrant workers. Since then, discourse regarding the importance of the International Convention on Migrant Workers started to be fine tuned with national interest, but mostly in economic point of view. Under the President Yoedhoyono administration, the Ministry of Manpower and Transmigration, Ministry of Law and Human Right, National Agency for the Placement and Protection of Indonesian Workers (BNP2TKI), sought for a way to fit the International Convention into Indonesian law and regulations.

The definition of migrant workers in Article 2 paragraph (1) of the Convention is someone who will be, is being or has been doing paid work in a country where he/she is not a citizen. Thereafter, the Convention also regulates the Family Members of Migrant Workers which is defined in Article 4 that the members of the family of migrant workers are people who are married to migrant workers or are having a relationship with him/her, which by law has the same result as marriage, and children as their young dependents and other people of their dependents who are recognized as members of the family by applicable law, or under bilateral or multilateral agreements between the States concerned.

Article 5 paragraph (a) and (b) defines two conditions of migrant workers and their family members, namely : (a) they are considered to have a document or in a regular situation if they are allowed to enter, reside and perform activities that are paid in country of employment, in accordance with the laws of that State and international treaties that the state is a party, and (b) are considered not to have a document or in a non- regular situation if they do not comply with the provisions set out in sub-paragraph (a) of this article.

If the understanding contained in the Convention is compared to Law No. 39/2004, we can easily see a significant difference. The Convention has a wide scope related to migrant workers, while Law No. 39/2004 only considers two categorization of migrant workers: those who are recognized by the government through compliance to a number of administrative documents and others which are not. The regulation states that only the migrant workers who hold complete administrative documents will be taken cared by the government and the rest are considered as illegals which means they will be abandoned by the government.

Unlike Law No. 39/2004, the Convention categorizes migrant workers into two category namely regulars, with

complete administrative documents, and irregulars, which do not. Instead of defining the treatment of each category The Convention rather emphasizes the standard of rights which should be possessed by all migrant workers in both regular and irregular conditions. The standard of rights according to the Convention are as follows: the right to life shall be protected by law (article 9); prohibition of degrading treatment or cruel, inhuman and degrading treatment (article 10); prohibition of slavery, forced labor or enslaved conduct (article 11); the right to freedom of thought, opinion and religion (article 12); the right to not be deprived of his possessions arbitrarily (article 15); right to legal assistance when on trial (article 18 paragraph 3d), the right not to be seized or destroyed identity documents, or document entry permit or residence permit or work permit (article 21); the right to consular protection and assistance from their home country or State that represents the interests of the State (Article 23); the right to recognition before the law (article 24); rights get treated the same as the country of destination (article 25 paragraph 1); the right to association and assembly in unions (article 26), the right to social security in accordance with the country of destination (article 27 paragraph 1); rights of health care (article 28); obligation of State parties to ensure respect for the cultural identity migrant workers (article 31); the right to transfer earnings and savings of migrant workers, as well as applicable laws in the countries concerned (article 32).

Another significant part of Convention is article 33 paragaraph 1 on the right to be told by the country of origin, country of work, or the transit State regarding: (a) their rights under this Convention; (b) provisions regarding admission, their rights and their obligations under the law and practice of the State concerned, and other similar things that enable them to comply with the administrative provisions and other provisions in the State. Such information shall be provided free of charge, and as far as possible in the language they understand (article 33, paragraph 3).

After the ratification of the Convention, governments should take appropriate measures so that the ratification of the Convention may used as a vital basis of national law which binds all stakeholders in order to provide migrant workers rights as an international standard that has been described above.

Further in Article 69 paragraph (2) of the Convention it is stated that "If the States Parties concerned consider the possibility of making regular situations such persons in accordance with national laws and bilateral or multilateral agreements in force, appropriate consideration should be taken regarding the condition their entry into the country, the length of their stay in the Country of work, and other considerations, in particular the situation of their families".

Ratification by the Indonesian government is expected to improve the bargaining position of the receiving countries of migrant workers. In addition, the government is carrying out its duty to provide the rights of migrant workers in the pre- placement and post-placement. So that the action taken by the government can be thorough and right on target.

D. Revitalization of National Law Post Ratification of International Convention on Migrant Workers to Protect Indonesian WorkersAbroad

After the ratification of the Convention a series of efforts have been undertaken by the government in order to harmonize Law No. 39/2004 which is a reference to the efforts of the placement and protection of migrant workers abroad

with the International Convention on the Protection of the Rights of Migrant Workers. One of the measures taken by the House of Representatives of Commission IX regarding the agenda to revize Law No. 39/2004.

Some important chronology of the plan to revise the Law 39/2004 is as follows: (1) November 2010 Law Revision includes No. 39/2004 on the agenda of the national legislation program (Prolegnas) of House of Representatives; (2) 12 April 2012 ratification of the International Convention on the Protection of the Rights of Migrant Workers; (3) May 23, 2012 harmonizing efforts, rounding, and stabilization bill PPILN (Protection of Indonesian Overseas Workers) conception; (4) Plenary Session held in July, 5 2012 until the House of Representatives passed a draft PPILN Law Revision bill into Parliament initiative; (5) August 2, 2012 issuance of presidential document (No. R.7/Pres/08/2012) that six Ministries are appointed to participate in the discussion of the PPILN bill; (6) 11 September 2012 PPILN drafting committee by the House of Representatives consisting of 30 people from Commission I, III, and IX; (7) October 9, 2012 Chairman of the committee chooses PPILN chairman of committee but experiences deadlocks; (8) October 24, 2012 Chairman of the committee of PPILN bill set Budi Supriyanto from the Golkar Party; (9) February 6, 2013 submission of DIM (Inventory of Problems) by the Government of Indonesia to the PPILN committee; (10) February 26, 2013 meeting conducted between PPILN committee and the agreement to establish a Working Committee of PPILN bill comprising 19 people; and (11) April 8, 2013 meeting of the Committee done the PPILN bill and government to discuss the bill title but no deal (NGO Migrant Care, 2013).

The draft PPILN bill seems unharmonized and gives no new vigor to the protection of migrant workers abroad. Definition of Indonesian workers (PI/IMW) has morphed into any Indonesian citizen who is eligible to work abroad in an employment relationship for a certain period of time with pay, while the candidate of Indonesian workers (CPI/CIMW) is every Indonesian worker who qualifies as job seekers who will work abroad and is registered in local government agencies/municipalities responsible for labor affairs. Definition of IMW when compared with Law No. 39/2004 did not change save only the editorial from TKI to IMW, while the definition of family additions is any person or individual who has a kinship due of blood or birth, appointment or recognition, as well as court decisions, as being part of a family..

As for the rights and obligations of IMW or CIMW, article 6 of the PPILN bill, provides IMWs with the following rights: (a) get a decent job abroad and choose the type of work, (b) obtain a better capacity of self improvement through formal and non-formal education; (c) obtaining correct information about the foreign labor market, workplace location, prospective users, PI placement procedures, working conditions as well as cultural, social security and insurance programs at home and abroad, as well as legislation on employment in the recipient country; (d) obtain professional and humane services, and equal treatment for pre-palcement, placement, and post-placement; (e) obtain freedom of religion and belief, as well as the opportunity to perform in accordance with religious worship and beliefs held; (f) obtain wages in accordance with the prevailing wage standards in the recipient country; (g) acquire the rights, opportunities, and equal treatment in accordance with the laws and

regulations in the recipient country; (h) obtaining guarantees of legal protection against degrading actions in accordance with legislation in Indonesia and in the recipient country; (i) obtain protection for the safety and security of pre-placement, placement, and post-placement; (j) determine the rights and obligations as set forth in the Employment Agreement; (k) obtain the original manuscript Employment Agreement, and can store personal documents; (l) to communicate with family, and (m) to socialize, organize and/or association with PI communities in the recipient country.

Then IMW obligations under Article 7 PPILN bill are as follows: (a) provide data and information that is correct in each document, (b) know and understand the entire content of the signed Employment Agreement and (c) comply with laws and regulations both domestically as well as in the recipient country; (d) comply with and carry out its work in accordance with the Employment Agreement, and (e) pay the cost of the placement of Indonesian workers in accordance with the provisions of the legislation.

Additionally contained in Article 8 rights inside PPILN bill include those for the family, among others: (a) have access to determine public policy related to IMW, (b) obtain information about the condition, issue and return of IMW (c) obtain a copy of the document and the Employment Agreement CIMW and/or IMW, (d) access to education and training; (e) receiving the rights obtained by the IMW who died during the work, and (f) acquire all property belonging to the IMW who died.

Significant changes is seen from some of the additions to the rights and obligations of Indonesian workers, as well as additional rights for IMW family in the PPILN bill. But this bill needs improvement to represent the strong commitment of government regarding the fulfillment of the rights of IMW. Substantially this bill is still in talks at the level of the House of Representatives and not the end result. However, we can only hope that the influence of the International Convention on the Protection of the Rights of Migrant Workers of national law may provide a positive impact on efforts to reduce the problems faced by the IMW with a stronger rule of law.

E. Conclusion

Based on the above discussion, it can be concluded that the ratification of the International Convention on the Protection of the Rights of Migrant Workers gives a positive effect to Indonesian national law, proven with planned revisions of Law No. 39/2004 not long after the ratification of the Convention, so as to produce a bill for Protection of Indonesian Migrant Workers (PPILN).

Some parts of Law 39/2004 and the PPILN bill which is a product of the ratification are adjusted to better suit the Convention. Starting from the definition of a family that adds an element of Indonesian workers as one of the subjects of law. In addition, some additional points on the rights and obligations of the Convention is also an adjustment. However, not all of the standard rights of migrant workers are accommodated in the section of rights and obligations in PPILN bill.

This effort is expected to be a new step to revitalize the protection of Indonesian workers abroad as a form of government's responsibility to protect all Indonesian citizens everywhere, both inside and outside the country without discrimination.

BIBLIOGRAPHY

A. Books

Gaussyah, M. dkk. (2012). Menagih Janji Ratifikasi: Analisis Terhadap Ratifikasi Empat Konvensi Internasional di Bidang HAM. Jakarta: Kemitraan Partnership.

Husni, Lalu. (2012). Pengantar Hukum Ketenagakerjaan Indonesia. Jakarta: Rajawali Pers.

Yuwono, Iswantoro Dwi. (2011). Hak dan Kewajiban Tenaga Kerja Indonesia di Luar Negeri. Yogyakarta: Penerbit Pustaka Yustisia.

Sitepu, P. Anthonius. (2011). Studi Hubungan Internasional. Yogyakarta: Graha Ilmu.

Burhan Tsani, Mohd. (1990). Hukum dan Hubungan Internasional. Yogyakarta: PAU- Studi Sosial UGM.

Syamsuddin, Aziz. (2013). Proses & Teknik Penyusunan Undang-Undang Edisi Kedua. Jakarta: Sinar Grafika.

B. Research

Badan Nasional Penempatan dan Perlindungan Tenaga Kerja Indonesia. (2008). Permasalahan Pelayanan dan Perlindungan Tenaga Kerja Indonesia di Luar Negeri.

Bank Indonesia. (2009).Laporan Survei Nasional Pola Remitansi TKI Tahun 2008. Jakarta: Bank Indonesia.

Bank Indonesia. (2010).Laporan Survei Nasional Tenaga Kerja Asing di Indonesia Tahun 2009. Jakarta: Bank Indonesia.

International Labour Organization. (2013).Laporan ILO: 10 Tahun Menangani Migrasi Kerja di Indonesia.

International Organization for Migration. (2010). Migrasi Tenaga Kerja dari Indonesia: Gambaran Umum Migrasi Tenaga Kerja Indonesia di Beberapa Negara Tujuan di Asia dan Timur Tengah. Jakarta: IOM.

Zulfikar, Achmad, Suleman, and Aan Febriadi. (2013). Penguatan Kapasitas Tenaga Kerja Internasional Indonesia dalam Aspek Etika dan Hukum di Kalangan Penyalur Jasa TKI di Yogyakarta. Program Kreativitas Mahasiswa Penelitian DIKTI 2013.

Zulfikar, Achmad. (2013). Alasan Pemerintah Indonesia Meratifikasi Konvensi Internasional Perlindungan Hak Pekerja Migran Tahun 2012. Skripsi Ilmu Hubungan Internasional Universitas Muhammadiyah Yogyakarta.

C. Report and Cases

Dewan Perwakilan Rakyat Republik Indonesia. 2012. Risalah Rapat Kerja Komisi IX pada Pembicaraan Tingkat I Pembahasan RUU tentang Pengesahan Konvensi Internasional mengenai Perlindungan Hak-Hak Seluruh Pekerja Migran dan Anggota Keluarganya.

Dewan Perwakilan Rakyat Republik Indonesia. 2012. Risalah Rapat Paripurna ke- 25 Tahun Sidang 2011-2012.

United Nations, (2012). Secretary-General's Report on International Migration and Development.

Antara Jatim. (2012). Kapan Kekerasan TKI akan Berakhir.

Antara News, (2013), Kemlu bentuk 11 Kelompok Kerja Kongres Diaspora.

Komnas Perempuan. (2006). Pentingnya Meratifikasi Konvensi Migran 1990.

Migrant Care. (2012). Wujudkan Payung Hukum bagi Perlindungan dan Pemenuhan Hak-Hak Buruh Migran Indonesia dan Anggota Keluarganya!-Selebaran Informasi.

The Jakarta Post. (2012). Indonesia Ratifies Migrant Worker Convention.

D. Conventions and Agreements

United Nations. (1948). The Universal Declaration of Human Rights.

Undang-Undang No. 24 Tahun 2000 tentang Perjanjian Internasional.

Undang-Undang No. 13 Tahun 2003 tentang Ketenagakerjaan.

Undang-Undang No. 39 Tahun 2004 tentang Penempatan dan Perlindungan Tenaga Kerja Indonesia di Luar Negeri.

Dewan Perwakilan Rakyat Republik Indonesia. (2012). *Undang-Undang No. 6 Tahun 2012*.

United Nations Treaty Collection. (2003). International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

JUSTIFICATION FOR INDIRECT EXPROPRIATION WITHIN A GOVERMENT MEASURE*

Pulkeria Proprieta Dewi Ekaristi**

Abstract

Customary International Law has granted a protection of foreign direct investment from being expropriated. Various investment treaties have also included the provisions of protection from expropriation. International law recognizes two basic concepts of expropriation, namely direct and indirect expropriation. Indirect expropriation is a measure, taken by a State, which deprives the foreign investor of its property or its benefits, although it does not affect the transfer of property. However, international law also recognizes lawful state measures or state police power, which does not raise the duty of compensation even if it, to some extent, has the similar effect to expropriation. The difficult conundrum is to distinguish between indirect expropriation and lawful state measures for which no compensation is due. Although there is no universal threshold to differentiate indirect expropriation and lawful state measures, international conventions, investment treaties practice, scholars and practices in arbitral tribunal have provided the consistent patterns in characterizing it. This article will observe and elaborate the characters of lawful state measures which do not amount to a bona fide expropriation.

Intisari

Hukum Internasional memberikan perlindungan bagi investor asing dari tindakan pengambilalihan properti. Perjanjian-perjanjian investasi juga kerap menuliskan ketentuan perlindungan dari pengambilalihan oleh pemerintah. Konsep pengambilalihan yang dikenal dalam hukum internasional meliputi pengambilalihan langsung dan tidak langsung. Pengambilalihan tidak langsung adalah tindakan (berupa kebijakan) yang diambil oleh pemerintah yang mencederai hak milik investor asing, tanpa perlu adanya pengalihan atau transfer hak milik. Namun hukum internasional juga mengenal konsep regulasi yang sah, yang mungkin memiliki efek merugikan bagi investor asing, namun tidak termasuk tindakan pengambilalihan. Pertanyaannya adalah bagaimana menentukan kondisi dimana sebuah kebijakan dianggap pengambilalihan secara tidak langsung, dan kapan hal tersebut dianggap kebijakan yang sah tanpa ada kewajiban membayar kompensasi atas kerugian investor asing. Meskipun tidak ada standar internasional yang mengikat untuk menentukan hal ini, namun berbagai perjanjian-perjanjian internasional, praktek perjanjian investasi asing, akademisi, dan praktek penyelesaian sengketa di arbitrase telah menunjukkan pola yang konsisten mengenai hal ini.

Keywords: Expropriation, Indirect Expropriation, State measure.
Kata Kunci: Pengambilalihan, Pengambilalihan tidak langsung, Tindakan Negara

* Preferred Citation Format: Ekaristi, P. P. D. (2014). Justification for Indirect Expropriation within a Government Measure. J.G.L.R., 2(1), 42-50.
** 2011;-; Faculty of Law, Universitas Gadjah Mada; Yogyakarta, Indonesia.

A. The Concept of Expropriation

In order to protect the property of foreign investor, various investment treaties have included the provisions of protecting the investment from being expropriated by the Host State. Expropriation itself is defined as the seizure of private property by government, involving the payment of compensation. (Vyuptakes, 2006) The concept of expropriation was once clear, which is the act of physical taking of foreign property. In the early period, takings involved the direct seizure of physical property belonging to foreign investor, thus no issue of identification arises. Later, we find another characteristic in the form of taking which does not affect the right of possession of physical property. A progressive expansion of the concept of expropriation has made it difficult to characterize whether an act by a State constitutes as an expropriation and rises the duty of compensation.

The formulations in investment treaties refer to three types of taking: direct, indirect, and anything tantamount to taking, or equivalent to taking. (Sornajanah, 1994) However, in practice, there also others terms such as creeping expropriation, de facto expropriation, regulatory expropriation, or partial expropriation. The developed concept of expropriation has raised certain issues like the type of expropriation, the issue of compensation, or even a more basic question whether the law grants its protection of the taking in certain scope.

Customary International law recognizes two forms of expropriation: (i) direct form of expropriation in which the state openly and deliberately seizes property, and/or transfer title to private property to itself or a state-mandated third party, and (ii) indirect expropriation in which a government measure, although not on its face effecting a transfer of property, results in the foreign investor being deprived of its property or its benefits. (Newcombe, 2009)

The form of direct expropriation has now become very rare and almost impossible in practice. Expropriation nowadays is in the form of indirect, through a government measure which in some extent inflicted adverse effects to property interest, also known as regulatory expropriation. These types of taking is not visibly recognizable as expropriation, the proof is very casuistic or case by case basis. There is no general and binding threshold in international law to establish the condition of when the indirect expropriation has occurred. However, there are many case laws, doctrines, and international treaties as guidance to determine the existence of expropriation within a government measure.

The question arises how does and should international law distinguish between expropriation and "legitimate" regulation for which no compensation is due. International law recognizes lawful state measures or also known as state police power, which do not raise the duty of compensation to the host State. Thus, the term of state measure and state police power will be interchangeable within this paper.

B. Indirect Expropriation and Government's Regulatory Power

Middle East Cement Shipping and Handling Co. v Egypt describes indirect expropriation as measures taken by a state the effect of which is to deprive the investor of the use and benefits of his investment even though he may retain nominal ownership of the respective rights. Furthermore, the tribunal in Lauder v. Czech Republic added that such taking does not involve an overt taking but effectively neutralizes the enjoyment of property. In conclusion, expropriation could also occur through interference by a state in the use of

that property or with the enjoyment of the benefits even when the property is not seized and the legal title to the property is not affected (OECD, 2004).

However, international law recognizes the government right to regulate as the basic attribute of sovereignty (Mann, 2002), thus not all state measures interfering with property is an expropriation. As Brownlie stated, "state measures, prima facie a lawful exercise of powers of governments, may affect foreign interest considerably without amounting to expropriation. Thus, foreign assets and their use may be subjected to taxation, trade, restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation." Furthermore, according to Sornarajah, non-discriminatory measures related to anti-trust, consumer protection, securities, environmental protection, land planning are non-compensable takings since they are regarded as essential to the efficient functioning of the state.

Practices within the Tribunal Suez Inter Agua v. Argentine Republic opines that in evaluating a claim of expropriation, it is important to recognize a State's legitimate right to regulate and to exercise its police power in the interest of public welfare and not to confuse of that nature with expropriation. UNCTAD Series on Issues in International Investment Agreement II supported this case finding police power measures as an act taken by States in the exercise of their right to regulate in the public interest that may lead to effects similar to indirect expropriation but at the same time are not classified as expropriation and do not give rise to the obligation to compensate those affected. Thus, measures adopted within the scope of any state's regulatory power in the interest of public welfare, even if to some extend may lead to effect similar to expropriation, does not constitute as an expropriation and does not rise the duty of expropriation.

C. Bona Fide Public Welfare Objectives Requirement

The requirement of public benefits may be a little tricky, as to some extent may justifies the government's regulatory expropriation, but also at the same time, it is one of the requirement of the legality of expropriation.

Various investment treaties have included the public purpose as one of the requirement for a legal expropriation. The term itself is quite vary, the most generally found is"public purpose"[2], but some are using "public benefit"[3], "public welfare objectives[4], "public interest"[5] or a "public necessity"[6]. Many of these formulations are equivalent in their scope and may be a result of different legal cultures and languages. (UNCTAD, 2012) However, as a general rule, mere public interest does not provide a sufficient reason for non-compensation. (Newcombe, 2005)

International law authorities reflected in international investment instruments such as The Energy Charter Treaty (Article 13), NAFTA 9(Article 1110), MIGA Convention (Article 11 (a) (ii)), US Third Restatement (§712 (g)), and the Harvard Draft (Article 10(5)), they have regularly concluded that no right to compensation arises for reasonably necessary regulations passed

[2] See Austria-Croatia BIT (1997), Mexico-United Kingdom BIT (2006), Japan-Lao People's Democratic Republic BIT (2008),Canada – Colombia FTA (2008), Canada-Slovakia BIT (2010)

[3] See Egypt-Germany BIT (2005), Germany – Pakistan (2009)

[4] See Colombia –India BIT (2009)

[5] See Netherlands – Oman BIT (2009), China – Peru FTA (2009)

[6]See Peru – Singapore FTA (2008)

for the "protection of public health, safety, morals or welfare". (Christie, 1962)

However, other practice such as tribunal within ADC Affiliate Ltd v. Hungary stipulates that even if a State has fulfilled the public benefit requirement, it does not affect the nature of the measure of the compensation to be paid for the taking. Furthermore, the tribunal in Santa Elena v. Costa Rica has asserted the statement above by stating that it does not alter the legal character of the taking for which adequate compensation must be paid. Tribunal in Santa Elena, Azurix, and ADC Affiliate Ltd all indicate that even if a regulation (environmental or otherwise) resulted in an expropriation is enacted for the genuine benefit of the public; this does not excuse the State from its obligation under customary international law to compensate the foreign investor for its losses.

As bona fide public purpose is an important element in determining a lawful state measure, thus we must first assess how the public purpose requirement can be classified as bona fide. Public purpose is a very significant factor in characterizing a government measure as falling within the expropriation sphere or not, is whether the measure refers to the State's right to promote a recognized "social purpose" or the "general welfare". The existence of generally recognized considerations of the public health, safety, morals or welfare will normally lead to a conclusion that there has been no "taking". There is no general and binding threshold in international law of how a public purpose is qualified as bona fide. Literally, bona fide defines as in or with good faith; honestly, openly, and sincerely; without deceit of fraud (Black's Law, 1990), or genuine, real, without intention to deceit. (Oxford, 2000) The case of Liberian Easter Timber Corporation (LETCO) v. Liberia is using the standard of bona fide public purpose, but it did not specify the meaning. The Tribunal held that the taking was not for a bona fide public purpose as it was granted to other foreign companies that were "good friends" of the Liberian authorities. Arbitral Tribunal in ADC v. Hungary stipulates that "public interest" requires a "genuine" interest of the public. In ADC v. Hungary, Tribunal concludes that there was no genuine public interest as Respondent has never articulated any public interest justification before (during or after the taking) and the financial purpose backing the expropriation reported in Hungarian press and attributed to officials of the Hungarian Government is not sufficient to be a public interest justification.

Those Tribunals do not explicitly establish the threshold of bona fide public purpose, however, seeing from the case above, it can be concluded that a public purpose must be purely and genuinely aim for the public, it must also be conducted in good faith and there must not be any private or individual intention. The taking of the property must be motivated by the pursuance of a legitimate welfare objective, as opposed to purely private gain or an illicit end. Even the slightest purpose of benefiting certain party can eliminate the whole public welfare objective.

D. Economic Impact of Government Action

The economic impact such as some diminishment in the value of the investment is another element to define whether governmental regulatory action is expropriatory. Under a state's police powers, the taking of property by a State is lawful even if the property owner may suffer significant losses without giving rise to state responsibility.

In addressing the issue of expropriation, there are quantitative requirements developed by arbitral

tribunal for indirect expropriation. In case of UNCITRAL Pope and Talbot and also Revere Copper and Bross Inc., the tribunal found that regulatory deprivation has occurred where government environmental regulation has totally wiped out the value of an investment. (Marlles, 2007)

Furthermore, Wälde and Kolo (2001) opines that an government regulation "which effectively or totally renders the investment/property [of a foreign investor] without an economically beneficial use or imposes on the owner a special sacrifice in favour of the community at large is compensable.

Practices in arbitral tribunal are a mix of both non-specific investment treaties related to expropriation provision and customary international law. They are faced with a dispute in which government regulations have deprived the foreign investor of less than the total value of its investment. Expropriation occurs only if the deprivation is total or substantial. In Pope & Talbot v. Canada, the Tribunal found that "under international law, expropriation requires a 'substantial deprivation. The tribunal in MS Gas Transmission Co. v. Argentina has asserted this statement by stating that expropriation has occurred if investor has suffered a substantial deprivation or the regulations has had a devastating effect on the investment.

Besides the requirement of substantial deprivation, the degree of interference with the property rights must be examined. The CMS Tribunal, referring to Metalclad Corporation v. Mexico explained that substantial deprivation relates to incidental interferences with the use of property which have the effect of depriving the owner, in whole or in significant part, of the use or reasonable to-be-expected economic benefit of property. Thus in summation, a total deprivation of value, like in Metalclad, appears to always fulfill the necessary requirement, while partial deprivations of value must be either "substantial" in nature, or of "devastating effect".

The conception of expropriation as applied in numerous cases involves the deprivation or impairment of all, or a very significant proportion of an investor's interest. It requires a complete or very substantial deprivation of owner's rights in the totality of the investment, the tribunal in Pope and Talbot Interim Award rejected expropriation claims where a claimant remained in possession of an ongoing business, as in this case, tribunal rejected a claim that the disputed measures interfered with the claimants' business sufficiently to constitute an expropriation where claimant continued to make profitable exports of logs.

In addition, tribunal in Feldman v. Mexico has strengthened the statement above by stipulating,

> *"[H]ere, as in Pope & Talbot, the regulatory action (enforcement of longstanding provisions of Mexican law) has not deprived the Claimant of control of the investment, CEMSA, interfered directly in the internal operations of CEMSA or displaced the Claimant as the controlling shareholder. The Claimant is free to pursue other continuing lines of export trading, such as exporting alcoholic beverages, photographic supplies, or other products ... although he is effectively precluded from exporting cigarettes. Thus, this Tribunal believes there has been no "taking" under this standard articulated in Pope & Talbot, in the present case."*

Furthermore, to similar effect, the tribunal in Glamis Gold found following,

> *"[A] panel's analysis should begin with determining whether the economic impact of the complained of measures is sufficient to potentially constitute a*

taking at all: "[I]t must first be determined if the Claimant was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto ... had ceased to exist." The Tribunal agrees with these statements and thus begins its analysis of whether a violation of Article 1110 of the NAFTA has occurred by determining whether the federal and California measures "substantially impair[ed] the investor's economic rights, i.e. ownership, use, enjoyment or management of the business, by rendering them useless. Mere restrictions on the property rights do not constitute takings."

Those NAFTA tribunals above are acting in accordance with Article 1110 of The NAFTA which stipulates "NAFTA Parties may not directly or indirectly nationalize or expropriate an investment of an investor of another party in its territory [...]". Thus it requires a complete or very substantial deprivation of owner's rights in the totality of the investment, and rejected expropriation claims where a claimant remain in possession of ongoing business.

Besides the NAFTA Tribunals, the ICSID tribunals have also rejected expropriation claims involving significant diminution of the value of a claimant's property where the claimant nevertheless retained ownership and control. Tribunal within CMS Gas Transmission Company v. Argentina rejected a claim of expropriation where the claimant retained full ownership and control of the investment, even though its value was reduced by more than ninety (90) percent. In addition, LG&E v. Argentine Republic similarly stated that interference with the investment's ability to carry on its business is not satisfied where the investment continues to operate, even if profits are diminished.

UNCITRAL tribunal within the case of Grand River v. USA is referring to those ICSID cases above and concludes that an act of expropriation must involve "the investment of the investor" as a whole. In circumstances involving an investment that remain under the investor's ownership and control, expropriation claim fails for failure to establish expropriation.

In summation, to suffice the claim of expropriation within the government measure, the economic impact caused must be total or substantial, and the investor must suffer loss of ownership or loss of control towards the investment. Arbitral tribunals have clearly established that those two conditions must be cumulatively fulfilled. The control argument indicates that it required the taking of the whole property for an expropriation to be occurred. The ability to continue to operate the business, although the profit is diminished, is one of the indications of retaining the control towards investment.

E. Non-Discriminatory Manner

The non-discriminatory requirement is a standard element both in customary international law and in most treaty provisions in addressing regulatory expropriation. Investment treaties such as MIGA Convention (1985), codification such as US Third Restatement (1987), and the Harvard draft have added the non-discriminatory clause as one of the condition of non-compensable regulatory measures. However, the non-discriminatory requirement cannot stand alone, this is asserted in The Pope and Talbot tribunal rejected Canada's argument that non-discriminatory regulation cannot be expropriatory, holding that a blanket exception for regulatory measures would create a "gaping loophole in international protections against expropriation". Thus, the non-discriminatory manner must be

examined overall by also considering all the conditions stated above. It may sounded that non-discriminatory manner is an additional requirement, but still it is very important to be assessed.

Pursuant to the case of GAMI Investments v. Mexico and ADC v. Hungary, a non-discriminatory action can be seen from the goal of the policy, whether it is applied in a discriminatory manner where there are different treatments to different parties or as a disguised barrier to equal opportunity.

Breach of non-discriminatory manner can be found in the case of Ethyl Corporation v. Canada (1998), the Canadian government passed legislation which banned the internal transport and the import of the manganese-based compound (MMT) due to health concerns. Ethyl Corporation was the only producer of gasoline containing MMT. The company alleged breach of the obligation not to discriminate on ground of nationality, breach of the obligation not to require performance requirement and expropriation of its property right and goodwill. The government of Canada then agreed to rescind the ban on the additive, to pay $19million of compensation to the company and issue a statement confirming that MMT does not affect health or environment.

With regards to the non-discriminatory requirement, in the case Chemtura v. Canada, the Tribunal had concluded that a measure taken by a State within its mandate, in non-discriminatory manner, does not constitute expropriation. Furthermore, the arbitral tribunal in Saluka v. Czech Republic states that,

> "States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare."

Thus, a legitimate measure within a State's regulatory authority when conducted in a non-discriminatory manner does not constitute as an expropriation and does not give the duty of compensation.

F. Conclusion

The concept of expropriation mostly in practice is in the form indirect expropriation within a government measure, also known as regulatory expropriation. However, international law recognizes lawful state measures, or state police power, which does not raise the duty of compensation.

International law recognizes the government right to regulate as basic attribute of international law. By that means not all state measures which have adverse effects toward foreign investment is classified as an expropriation. Customary international law stipulated that State has the legitimate rights to regulate and to exercise its police powers in the interest of public welfare, even if it may have the effect of expropriation, it does not constitute as expropriation and does not raise the duty of compensation.

After recognizing the State's right to regulate, then we must assess the public welfare objective requirement within a government measure. There is a controversy whether the interest of public itself can justify a government action as non-expropriatory. Although investment treaties and scholar tend to agree with it, practices in arbitral tribunal stated otherwise. By that means, the purpose of public interest is not the only requirement to define whether an expropriation has occurred or not. However, as important matter, it must be assessed how does a public purpose is bona fide. Based on practices in cases such as LETCO v. Liberia, ADC v. Hungary, it can be concluded that the public purpose must be

genuinely aim for the public, conducted in good faith and there must not be any individual or private intention.

Another conundrum in defining regulatory expropriation is the economic impact of government action. NAFTA jurisprudence and ICSID Tribunals have assessed that an expropriation occurred where a government measure has substantially or totally wiped out the value of the investment. In addition, the investor must also suffer loss of ownership and loss of control towards the investment. Those conditions are cumulative fulfilled in order to suffice the claim of expropriation. Practices within Grand River v. USA, LG&E v. Argentine, and CMS v. Argentina rejected claim of expropriation when the investor retain ownership and control, even if the investment value is substantially deprived.

The last but not least important, is the non-discriminatory manner. The existence of non-discriminatory manner itself does not automatically justify the expropriation within a government measure. It must be examined overall by considering other conditions stated above. This is supported by Pope and Talbot tribunal which rejected Canada's argument that non-discriminatory regulation cannot be expropriatory. Non-discriminatory manner is an additional clause; however, it is still important to be assessed.

BIBLIOGRAPHY

A. Books

Brownlie, I. (2003). Principles of Public International Law. Oxford: Oxford University Press.

Newcombe, A. Pradell, L. (2009). Law and Practice of Investment Treaties: Standard of Treatment.The Netherlands: Kluwer Law International.

Sharan, Vyuptakesh. (2006). International Bussiness Concepts, Environment, and Strategy.2nd Edition. Singapore: Pearson Education.

Sornarajah, M. (2010). The International Law of Foreign Investment. UK: Cambridge University Press.

B. Journals

G.C. Christie. (1962). What Constitutes a Taking of Property under International Law. British Yearbook International Law.

Mann, Howard. "The Right of States to Regulate and International Investment Law" (Expert Meeting on the Development Dimension of FDI: Policies to Enhance the Role of FDI in Support of the Competitiveness of the Enterprise Sector and the Economic Performance of Host Economies, Taking into Account the Trade/Investment Interface, in the National and International Context: 2002).

Marlles, Justin R. (2007). Public Purpose, Private Losses: Regulatory Expropriation and Environmental Regulation in International Investment Law.

Newcombe, Andre. (2005). The Boundaries of Regulatory Expropriation in International Law. ICSID Review. Page. 27.

Organization for Economic Cooperation and Development. (2004). "Indirect Expropriation" and The "Right to Regulate" In International Investment Law.

Phelps Dodge, 10 The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility. Rep.

Rubins, Noah. (2004). The Notion of 'Investment' in International Investment Arbitration" in Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects, N. Horn and S. Kröll (eds.). The Hague: Kluwer Law International.

Wälde, Thomas & Kollo, Abba. (2001). Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law, 50 INT'L & COMP. L.Q.

C. Cases

ADC Affiliate Ltd. V, Hungary, ICSID (W. Bank). ICSID Case No. ARB/03/16, Award, para 432. (2 October 2006).

CMS Gas Transmission Co., Inc. v. Argentina, ICSID Case No. ARB/01/8. Final Award (12 May 2005).

Ethyl Corporation v. The Government of Canada. UNCITRAL. Jurisdiction Award. (24 June 1998).

GAMI Investments v. Mexico, Award, 15 November 2004.

Grand River Enterprises Six Nations, LTD., et al. v. United States of America. UNCITRAL. Award. (12 January 2011).

Lauder v. Czech Republic. UNCITRAL Arbitration Proceedings. Final Award. (3 September 2001).

LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentina. ICSID Case No. ARB/02/1. Decision on Liability. (3 October 2006).

Liberian Eastern Timber Corporation (LETCO) v. Liberia. ICSID No ARB/83/2. Award. 31 March 1986.

Metalclad Corporation v. Mexico. ICSID Case No.ARB (AF)/97/1, IIC 161. 7 ICSID Reports 69. Award. (30 August 2000).

Middle East Cement Shipping and Handling v. Egypt. ICSID Case No. ARB/99/6. Award. (12 April 2002).

Pope & Talbot v. Canada, Interim Award, 26 June 2000,. Para 102.

Saluka Investments BV v. The Czech Republic, award of May 17, 2006, para. 255

Suez, Sociedad General de Aguas de Barcelna S.A., and InterAgua Servicios Integrales del Agua S.A., v. Argentine Republic. ICSID Case No. ARB/03/17. Decision on Liability (30 July 2010).

D. Others

North America Free Trade Agreement (NAFTA)

Restatement of the Law Third, the Foreign Relations of the United States," American Law Institute Volume I, 1987, Section 712, Comment g.

The Convention Establishing the Multilateral Investment Guarantee Agency 1985.

The Energy Charter Treaty

The Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens 1961.

PARTICULARLY SENSITIVE SEA AREAS DESIGNATION; PURPOSES, PROTECTION, IMPLICATIONS AND APPLICATION IN THE MALACCA STRAITS*

Kartika Paramita**

Abstract

This paper basically aims to analyze the designation of Particularly Sensitive Sea Areas (PSSA) by International Maritime Organization observed from three critical aspects: its purposes, scope of protection and implications. Further, this paper also addresses the possibility of PSSA to be applied in Indonesian sea areas especially in the area of Malacca straits, one of the busiest marine trade routes in the State. As a result of normative-legal research, this paper dissects secondary data which includes conventions, resolutions, various legal documents, researches, and other references relevant to the designation of PSSA in international level. Expected from this paper, layman could get more understanding regarding the concept of PSSA and Indonesian government could consider the possibility of Indonesian sea areas can be situated as one of PSSA in the world.

Intisari

Naskah ini akan menganalisis penentuan Daerah Sensitif Khusus (PSSA) oleh Organisasi Maritim Internasional (IMO), ditinjau dari tiga aspek kritis: tujuan, perlindungan dan implikasi. Naskah ini juga akan mengangkat kemungkinan diaplikasikannya PSSA in daerah laut Indonesia, khususnya di daerah Selat Malaka, salah satu dari rute maritime sibuk dunia. Berdasarkan studi hukum normative, naskah ini akan membivarakan sumber data sekunder, yakni dokumen-dokumen hukum, penelitian dan referensi-referensi lain yang relevan dengan PSSA di tingkat internasional. Harapannya, masyarakat awam dapat lebih memahami konsep PSSA, dan naskah ini dapat mendukung pemerintah Indonesia untuk mempertimbangkan kemungkinan daerah laut Indonesia untuk mendapat status PSSA.

Keywords: Particularly Sensitive Sea Areas Designation, Malacca Strait, Maritime Protection
Kata Kunci: Peruntukan Area Laut Sensitif, Selat Malaka, Perlindungan Maritim

* Preferred Citation Format: Paramita, K. (2014). Particularly Sensitive Sea Areas Designations; Purposes, Protection, Implications, and Application in Malacca the Straits. J.G.L.R., 2(1), 51-59.
** 2010; Business Law, Faculty of Law, Universitas Gadjah Mada; Yogyakarta, Indonesia.

A. Introduction

International trade has evolved to the point that almost no nation can fulfill its own needs by its natural resources. Every country is involved in the process of buying and selling in order to fulfill demand from the market. Shipping industry comes as a cost-effective method of bulk transport over great distance and supports import/export activities between states. In the course of routine operation nowadays, roughly 90% of international trade is carried by international shipping industry (Berstein, 2008). This industry has become the linchpin of the global economy; without shipping, intercontinental trade would simply not be possible (International Maritime Organization, 2012). As the most international industry of the world and one of the most dangerous, shipping is vital to the functioning of the global economy of countries in this world (International Chamber of Shipping, 2013).

Conversely, adverse effects and damage may occur to the marine environment and the living resources of the sea as a result of such shipping activities. Risk of accidents and even normal operations could constitute negative impacts on marine environment, ecologically sensitive areas, wildlife and habitats as well as the coral reefs.

In response, many international and regional instruments arose to protect biological diversity, the protection of which was also expected to cover other areas which have high ecological, cultural, historical/archaeological, socio-economic or scientific significance (Revised Guidelines, 2005). These instruments further call upon their Parties to protect such vulnerable areas from damage or degradation, including from shipping activities. It culminates with an international instrument concept called Particularly Sensitive Areas (PSSA) in order to reach such purposes.

The International Maritime Organization (IMO) Assembly in November-December 2005 at its 24th session adopted the Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas (PSSAs) in Resolution A.982(24). According to this guideline, Particularly Sensitive Sea Areas can be defined as areas which need special protection through action by IMO because of their significance for recognised ecological, socio-economic or scientific reasons and which may be vulnerable to damage by maritime activities (Revised Guidelines, 2005).

Currently, there are at least 14 areas that have been designated by IMO as PSSA. In 2012, The Saba Bank, located in the North-eastern Caribbean area of the Kingdom of the Netherlands was designated by IMO as the latest PSSA. Included into such guidelines, there are several criterias to allow areas to be designated a PSSA, such as: ecological criteria, such as unique or rare ecosystem, diversity of the ecosystem or vulnerability to degradation by natural events or human activities; social, cultural and economic criteria, such as significance of the area for recreation or tourism; and scientific and educational criteria, such as biological research or historical value.

Through PSSA, IMO developed rules which authorize coastal states to impose protective measures that restrict the freedom of navigation provided by UNCLOS in ecologically sensitive marine areas within its areas in order to protect their environment. In order to impose such measures however, the coastal state shall apply to the IMO whenever it believes that international standards are insufficient to protect a clearly defined area of particular ecological sensitivity within its EEZ (Van Dyke & Broeder, 2011). If the application is approved by IMO, thus, the requirements under UNCLOS can be excluded.

The Straits of Malacca is one of the most important shipping lanes that facilitate international trade in the world (George, 2008). As a golden heritage of the littoral states such as Malaysia, Indonesia and Singapore, it is not only rich in marine resources but serves as a primary conduit for the movement of cargo and human traffics between Indo-European region and the rest of Asia and Australia (Suppiah, 2009). In 2007, these waterways were traversed by more than 70.000 vessels (Mandryk, 2008) which is predicted to increase to approximately 150,000 vessels by 2020, a double of what they are burdened with now (Beckman, 2009).

East Asian Region economic development brings various environmental damages as a real threat to the area. Due to heavy shipping activities, it was recorded that coral reef development in the Strait of Malacca is amongst the lowest in this region (Emran, 2007). The Mangrove ecosystem along the Strait of Malacca, especially in the south-western corner of the Malaysian State of Johor is also being threatened by constant soil erosion as a result of high navigational density plying the waterway (Basiron, 2008). This condition is also compounded by the the possibility of oil spills due to shipping.

PSSA status in the Straits Malacca can be a useful management mechanism for protection. The designation of PSSA in Malacca Strait would enable Indonesia to protect valuable ecosystems in its marine area. With such a possibility, this paper seeks to analyze the designation of PSSA within a state's sea areas by IMO, examined by three aspects: purposes, scope of protection and implications. This paper would like also to analyze the likelihood of PSSA status to be applied in Indonesian sea areas especially in the area of Malacca Straits.

B. Particularly Sensitive Sea Areas Designation; Its Purposes, Scope of Protection and Implications

1. Historical Background of PSSA

The study towards the question of Particularly Sensitive Sea Areas (PSSAs) began in 1978 in response to a resolution of the International Conference on Tanker Safety and Pollution Prevention conducted by The Marine Environment Protection Committee (MEPC) of the International Maritime Organization (IMO). PSSA status began to be regulated by Assembly Resolution A.720(17) in 1992, followed by A.885(21) in 1999 and finally by Resolution A.927(22). Both the Special Areas and the PSSAs are regulated in the same guidelines. In 2002, this resolution was superseded by the resolution A.927 (22) to update and simplify the guidelines.

2. Purposes of PSSA

PSSA seeks to encourage the protection of areas important for the conservation of biological diversity as well as other areas with high ecological, cultural, historical/archaeological, socio-economic or scientific significance.

IMO also provides Revised Guidelines to provide guidance to IMO Member Governments in the formulation and submission of applications for designation of PSSAs. Second, the Guidelines also ensure that in that process all interests are thoroughly considered on the basis of relevant scientific, technical, economic, and environmental information regarding the area at risk of damage from international shipping activities and the Associated Protective Ceasures to prevent, reduce, or eliminate that risk. Finally, this Guideline is needed to provide for the assessment of PSSA applications by the IMO.

3. PSSA Scope of Protection

A PSSA is an area that needs special protection through action by the IMO (Revised Guidelines, 2005). IMO can design a PSSA in specific areas of the territorial sea or the EEZ which are vulnerable to damage from international shipping activities, to adopt protective measures (Beckman, 2007). However, a PSSA does not include any explicit prescribed protective mechanisms, but an application to the IMO for PSSA designation needs to be accompanied by specific proposed APM (Revised Guidelines, 2005).

APM can include a wide range of actions, but they are limited to actions within the purview of IMO, and must relate to international shipping activities. Specific APM can be used to control the maritime activities in that area, such as compulsory pilotage programs, separated shipping, traffic lanes, areas to be avoided, reporting requirements, no anchor zones, strict application of discharge and equipment requirements for ships, and installation of vessel traffic services (VTS) (Van Dyke, 2011).

The PSSA Guidelines explicitly states that APM may include any measure that is already available under an existing IMO instrument; or is to be adopted by the IMO; and measures beyond those already identified or approved (Revised Guidelines, 2005).

Basically, the effect of a PSSA is to impose measures to reduce ship-source pollution in the EEZ which a coastal State has no authority to impose unilaterally (Gerard, 1994).

In brief, such PSSA designation can bring three principal benefits to a coastal state; first, it provides global recognition of the special significance; second, coastal states have extra opportunities to adopt additional protective measures (Berstein, 2002).

4. Procedure of PSSA Designation

PSSA designation and the adoption of APM requires consideration of three integral components. First is the particular attributes of the proposed area, second is the vulnerability of such an area to damage by international shipping activities, and third is the availability of APM within the competence of IMO.

The designation of PSSA must be proposed by an IMO member. The proposal itself must meet three requirements. First, the proposal must include information and supporting documentation to show that the proposed area has recognized ecological, socio-economic, or scientific attributes. Second, the proposal must include information and supporting documentation to show that the area is vulnerable from shipping activities. Third, the proposal must state that "APM" within the competence of the IMO are available to prevent, reduce or eliminate the risk of pollution from shipping activities (Beckman, 2011).

If, two or more Governments have a common interest in a particular area, they can formulate a co-ordinated proposal (Revised Guidelines, 2005). Such a proposal however, should contain integrated measures and procedures for co-operation between the proposing Member Governments.

The application for a PSSA should clearly specify the category or categories of ships to which the proposed APM would apply, consistent with the provisions of UNCLOS, including provisions relating to vessels entitled to sovereign immunity in paragraph 7.5.2(5) (Revised Guidelines, 2005). The proposing state is also required to include details of actions to be taken pursuant to domestic law for the failure of a ship to comply with the requirements of the APM and to ensure that any action taken should be consistent with international law

as reflected in UNCLOS, as required in paragraph 7.9 (Revised Guidelines, 2005).

5. Features of PSSA

The Revised Guidelines (2005) issued by IMO addresses two different concepts for the protection of marine areas; one is called Special Areas which are regulated by MARPOL Convention, the other one is PSSA which is not regulated in any of the IMO Conventions. The PSSA provides a clearer framework, which explains why States push for PSSA status in spite of other measures.

The Revised Guidelines (2005) allow PSSAs to be designated anywhere in the sea area. It seems that any part of the sea area such as territorial waters, exclusive economic zones (EEZ) or even straits used for international navigation could be included in the PSSA.

In order to be identified as a PSSA, a sea area only requires one of the criteria established in the Revised Guidelines (2005). The criteria are defined as ecological; social, cultural and economic; or scientific and educational. In addition to meeting at least one of these criteria, the area should also be at risk from international shipping activities. As such, PSSAs prvide a less stringent framework than other mechanisms, which usually require cummulative criteria.

Under Special Areas, States only can take protective measures to prevent sea pollution under MARPOL 73/78. MARPOL Annex I (oil), II (Noxious Liquid substances), IV (sewage) and V(garbage) which set forth special discharge standards applicable. Under the PSSA, a state can propose APM which may include wide discretionary measures (Ünlü, n.d.).

6. PSSA and UNCLOS

UNCLOS limits coastal state environmental efforts to protect the freedom of navigation by providing coastal states with few options for imposing protective measures even in navigationally challenging or ecologically sensitive areas (Van Dyke, 2011). Article 211(6)(a) of UNCLOS provides that where an area in an EEZ is particularly navigationally challenging or ecologically sensitive, a coastal state may "direct a communication" to "a competent international organization" (which has been generally interpreted to refer to the IMO) to permit the adoption of coastal state regulations in that area that are more stringent than international ones. Thus, PSSA policy may still be in line with the values contained in UNCLOS.

C. The Application of PSSA in Indonesian Seas

1. PSSA Categories and Criteria

To be designed as a PSSA, the area must meet at least one of the criteria established in the Revised Guidelines (2005). The criteria are as follows (WWF & The Widlife Trusts, 2003):

Ecological Criteria include 1) *Uniqueness,* an ecosystem can be unique or rare. An area is unique if it is "the only one of its kind". Habitats of endangered species that occur in one area are an example. 2) Dependency, ecological processes of such areas area highly dependent on biologically structured systems. Dependency also embraces area representing the migratory routes of marine fish, reptiles, birds and mammals. 3) Representativeness, these areas have highly representative ecological processes, or community or habitat types or other natural characteristics. 4) Diversity, these areas have a high variety of species or include highly varied ecosystems, habitats, communities, and species. 5) Productivity, the area has high natural productivity. 6) Naturalness, the area has high naturalness, as a result of the lack of human-induced

disturbance or degradation. 7) Integrity, the area is a biologically functional unit, an effective, self-sustaining ecological entity. The more ecologically self-contained the area is, the more likely it is that its values can be more effectively protected. 8) Vulnerability, the area is susceptible to degradation by natural events or the activities of people. Communities associated with the coast may have a low tolerance to changes in environmental conditions, or they may exist close to the limits of their tolerance.

Social, cultural and economic criteria include: 1) Economic Benefit, the area is of particular importance to utilisation of living marine resources. 2) Recreation, the area has special significance for recreation and tourism. 3) Human Dependency, the area is of particular importance for the support of traditional subsistence and/or cultural needs of the local human population.

Scientific and education criteria include: 1) Research, the area has high scientific interest. 2) Baseline and Monitoring Studies, the area provides suitable baseline conditions with regard to biota or environmental characteristics. 3) Education, the area offers opportunity to demonstrate particular phenomena. 4) Historical Value, the area has historical and/or archaeological significance.

2. Application of Categories in the Malacca Strait

The application for PSSA designation and the adoption of APMs to IMO by members should be submitted based on certain criteria as laid down in the Revise Guidelines (2005). In designing a PSSA, consideration would also be given by IMO on vessel traffic characteristics which include vessel operational factors, vessel types, traffic characteristics and the harmful substances that the vessels are transporting; as well as natural factors which consist of hydrographical, meteorological and oceanographic factors.

In order for the proposal to be seriously considered, the proposing State(s) should provide evidence to show the vulnerability of the area to international shipping and to propose effective APMs to protect the area.

The Malacca Straits has long been known as route which is not entirely safe for navigation. Its waters are rather shallow and changes with the tide (Ibrahim, Husain & Sivaguru, 2008); and the seabed also shifts (Van Dyke, 2009). The probability of groundings will always exist.

Accidents and maritime collisions in the Straits of Malacca are exacerbated by heavy traffic, poor visibility during squalls, numerous shoals and banks that often change in location along the waterways, confusing crossing patterns by small domestic craft and several wrecks in certain localities along the Straits (Rusli, 2011).

Based PSSA criteria above, it would not be impossible for Malacca Straits to be qualified as a PSSA as they have significant ecological or socio-economic or scientific value which may be vulnerable to damage by international maritime activities such as shipping movements and discharges of harmful substances.

For example, from the point of social, cultural and economic criteria, these straits have fulfilled all requirements. They have economic benefits; as the Malacca Straits are included into one of the busiest trading routes in this world. They have special significance for recreation and tourism since they are located between three countries known as tourist destinations: Indonesia, Malaysia and Singapore. These straits are also of particular importance for the support of traditional subsistence and/or cultural needs of the local human population as the straits serve as the trading center in the area.

Several scholars however have expressed that the Strait of Malacca as a whole would not qualify for designation as a PSSA, but only a specifically defined areas within it (Beckman, 2004). However, Van Dyke (2009) stated that "the Malacca Strait might be a logical candidate to be designated by the IMO as a particularly sensitive sea area because of the human and economic dependency on this Strait. Its economic importance as a transport channel is unquestioned and the closure of the Strait because of an accident…would be disastrous to the region and the world, and would cause severe harm to other economic activities in the region including offshore fishing, tourism and mangrove harvesting".

3. Implication of PSSA Application in Indonesian Sea Areas

If PSSA status were to be requested, Indonesia together with Malaysia and Singapore as the coastal states can ask the IMO for permission to issue requirements for vessels and these requirements can and do impose restrictions on the freedom of the seas and passage in the PSSA. Indonesia will have authority to reduce ship-source pollution in its EEZ which it cannot freely do according to UNCLOS. Positive and negative impacts will certainly follow the designation. The environment of the area of course will be better protected with the existence PSSA status.

However, since the Malacca Straits are trading routes heavily laden with traffic, the restrictions towards shipping will significantly influence the trading activities in the area which later may lead to the decreasing of revenue suffered by the surrounding States; not to mention the possible disruption to global trade routes passing through the strait.

D. Conclusion and Recommendation

As stated in the Revised Guidelines (2005), the purpose of PSSA is to encourage the protection of areas important for the conservation of biological diversity as well as other areas with high ecological, cultural, historical/archaeological, socio-economic or scientific significance. PSSA is thus an instrument which calls upon Parties to protect such vulnerable areas from damage or degradation, including from shipping activities.

The scope of protection of PSSA covers areas that need special protection through action by the IMO due to their significance for recognized ecological, socio-economic, or scientific attributes where such attributes may be vulnerable to damage by international shipping activities. Once an area is designated as PSSA, the states protecting it may formulate its own restrictions to be approved by the IMO.

The author recommends the Government of Indonesia to consider the possibility of applying for the Malacca Strait to be designated as a PSSA. However, the negative impacts arising from the designation which particularly will affect trading activities on In the Malacca strait should be considered.

BIBLIOGRAPHY

A. Books

Amiruddin & Asikin, Z. (2004). Pengantar Metode Penelitian Hukum. Jakarta: Raja Grafindo Persada.

Beckman, R. (2009). The Establishment of Cooperative Mechanism for the Straits of Malacca and Singapore under Article 43 of the United Nations Convention on the Law of the Sea. In A. Chircop, T. L. McDorman & S. J. Rolston (Eds.), The Future of Ocean Regime-Building-Essays in Tribute to Douglas M. Johnston. Leiden: Martinus Nijhoff Publisher.

Basiron, M. N. (2008). Sea-Based Sources of Marine Pollution. In H. M. Ibrahim & H. A. Husin (Eds.), Profile of the Straits of Malacca: Malaysia's Perspective. Kuala Lumpur: Maritime Institute of Malaysia.

Dyke, J. M. V. (2009). Transit Passage Through International Straits. In A. Chircop, T. L. McDorman & S. J. Rolston (Eds.), The Future of Ocean Regime-Building: Essays in Tribute to Douglas M. Johnston. Leiden: Martinus Nijhoff Publishers.

Emran, A. (2007). The Regulation of Vessel-Source Pollution in the Straits of Malacca and Singapore. Wollongong: University of Wollongong

George, M. (2008). Legal Regime of the Straits of Malacca and Singapore. LexisNexis: Malaysia Sdn Bhd.

Ibrahim, H. M., Husin, H. A., & Sivaguru, D. (2008). Physical, Ecological and Demographic Characteristics. In H. M. Ibrahim & H. A. Husin (Eds.), Profile of the Straits of Malacca: Malaysia's Perspective. Kuala Lumpur: Maritime Institute of Malaysia

Marzuki, P.M. (2005). Penelitian Hukum. Jakarta: Kencana

B. Journals and Articles

Beckman, R. C. (2007). PSSAs and Transit Passage-Australia's Pilotage System in the Torres Strait Challenges the IMO and UNCLOS. 38 Ocean Devel & Int'l L 325, 327.

Berstein, B. (2002). Particularly Sensitive Sea Areas": Using a Comprehensive Planning Tool to Protect Habitats from Shipping. International News and Analysis on Marine Protected Areas, Vol. 3, No. 8, 1-6

Rusli, M. H. B. M. (2011). The Legal Feasibility of the Imposition of a Traffic Limitation Scheme in Straits Used for International Navigation: A Study of the Straits of Malacca and Singapore. International Journal of Humanities and Social Science, Vol. 1 No. 6, 122-130

Gerard, P. (1994). Particularly Sensitive Sea Areas-A Documentary History, 9 International Journal of Marine and Coastal Law, 9(4); 469-482

Van Dyke, J. M. & Broeder, S. P. (2011). Particularly Sensitive Sea Areas; Protecting the Marine Environment in the Territorial Seas and Exclusive Economic Zones. Denver Journal of International Law and Policy 2011-2012, Vol. 40, Issue 1-3, 472.

C. Conventions and Legal Documents

Revised Guidelines for The Identification and Designation of Particularly Sensitive Sea Area. International Maritime Organization Assembly Resolution A.982(24) (2005).

D. Others

Beckman, R., Bernard, L. (2011). The Use of PSSAs in the South China Sea. Cooperation for the Safety of Navigation in East Asia: "Legal Arrangements and Political Implications, Panel IV: Navigation in the South China Sea November 17-18, 2011, Haikou, China.

Beckman, R. (2004). Transit Passage Regime in the Straits of Malacca : Issues for Consideration. Paper presented at the Building A Comprehensive Security Environment in the Straits of Malacca, Kuala Lumpur.

International Chamber of Shipping. (2013) Shipping, World Trade and the Reduction of CO2 Emissions, United Nations Framework Convention on Climate Change, International Maritime Organization World Maritime Day. Retrieved from http://www.ics-shipping.org/docs/default-source/resources/environmental-protection/shipping-world-trade-and-the-reduction-of-co2-emissions.pdf?sfvrsn=10

International Maritime Organization. (2012). International Shipping Facts and Figures – Information Resources on Trade, Safety, Security, Environment, 6 March 2012. Retrieved from http://www.imo.org/KnowledgeCentre/ShipsAndShippingFactsAndFigures/TheRoleandImportanceofInternationalShipping/Documents/International%20Shipping%20-%20Facts%20and%20Figures.pdf

Mandryk, W. (2008). Lloyd's Marine Intelligence Unit : Strategic Importance of Trade & Shipping in the Straits of Malacca and Singapore. Paper presented at the Symposium on Safety and Protection of the Marine Environment in the Straits of Malacca and Singapore, Kuala Lumpur, Malaysia.

Nihan Ünlü. (n.d.). Particularly Sensitive Sea Areas: Past, Present and Future. International Maritime Organization. Retrieved from http://www.imo.org/blast/blastDataHelper.asp?data_id=17988&filename=Particularly.pdf

Suppiah, C. P. (2009). Designating the Straits of Malacca as a PSSA, EAS Congress 2009, 23-27 November, Manila, Phillipinnes.

WWF & The Wildlife Trusts. (2003). Joint Marine Programme, Particularly Sensitive Sea Areas (PSSAs) and Marine Environmentally High Risk Areas (MEHRAs), Annex 1, September 2003.

POSSIBLE DISPUTE SETTLEMENT FOR AMBALAT DISPUTE*

Ni Made Nungki Suardhani Giri**

Abstract

Ambalat dispute occurs in the area of Ambalat, located off the coast of the Indonesian province of East Kalimantan and southeast of the Malaysian State of Sabah. Many accidents have occurred in this area, and some of them involving navies from both of the state. Although this dispute has called for a need of serious settlement, none of this State has taken an effort to solve this long-term dispute that has become a problem to their harmony life as a neighboring State. Diplomatic protest, navy hot pursuit, and battle of natural resource exploitation are the dispute that be on the list of the effect of this Ambalat dispute, and if this dispute will not be solved in any time soon, the future generation of both state will still inherit and cannot use the natural resources contained in Ambalat area effectively. Seeing the urgency to solve this Ambalat dispute, the author would like to analyze the possible dispute settlement of this dispute, whether it is through ITLOS as it is provided in UNCLOS, or any other peaceful means. In writing this paper, the author is using the book research method.

Intisari

Sengketa kasus Ambalat terjadi di sekitar wilayah Ambalat, terletak di lepas pantai Indonesia bagian Kalimantan Timur dan sebelah tenggara dari Sabah, Malaysia. Banyak masalah yang terjadi di wilayah ini, dan sebagian besar melibatkan angkatan laut dari kedua negara. Walaupun sengketa ambalat harus diselesaikan dengan segera, kedua belah pihak tidak melakukan tindakan untuk mengakhirinya, yang menyebabkan terganggunya harmonisasi hubungan antara kedua negara bertetangga tersebut. Protes secara diplomatis, pengejaran oleh angkatan laut, eksploitasi sumber daya alam adalah contoh dampak dari sengketa kasus Ambalat ini, apabila tidak diselesaikan dengan segera, maka generasi Indonesia mendatang tidak bisa mengakses sumber daya alam yang tersedia di pulau itu secara efektif. Melihat urgensi dari sengketa ini, penulis akan menganalisis metode penyelesaian sengketa yang efektif diaplikasikan dalam kasus ini. Baik melalui ITLOS, UNCLOS, dan mekanisme damai lainnya.

Keywords: Ambalat dispute, Dispute Settlement, UNCLOS, Maritime Delimitation.
Kata Kunci: *Sengketa Ambalat, Penyelesaian Sengketa, UNCLOS, Batas Maritim.*

* Preferred Citation Format: Giri, N. M. N. S, (2014). Possible Dispute Settlement for Ambalat Dispute. J.G.L.R., 2(1), 60-70.
** 2010; International Law, Faculty of Law, Universitas Gadjah Mada; Yogyakarta, Indonesia.

A. History of Ambalat Case

The history of Ambalat case was influenced by the the history of Indonesian-Malaysian border from the colonialism era. when Malaysia was still colonialized by the Great Britain and Indonesia was still colonialized by the Netherland, these two colonial States made a convention over Borneo Island, which was called the 1891 Convention. This convention divided the Island into two parts the northern part belonged to The Great Britain and the southern part was the Netherlands. (Andi Arsana, 2005) This 1891 Convention is still used by Malaysia as the successor of Great Britain and Indonesia as the successor of Netherland to define their boundary, especially land boundary.

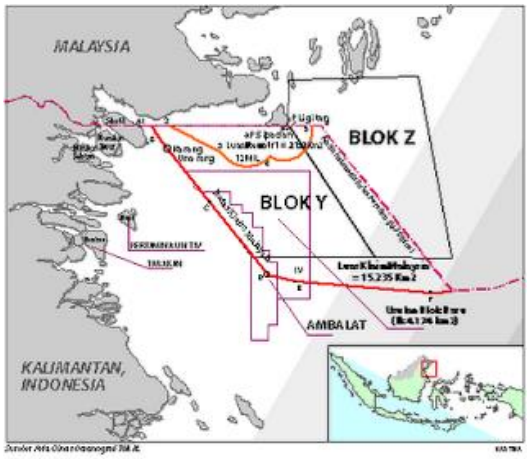
Pursuant to article 2 of 1891 Convention between Great Britain and Netherland, the Indonesia-Malaysia maritime boundary continued as a straight line along the 4° 10' North after it left the eastern land boundary terminus on the eastern shore of Sebatik Island. Therefor pursuant to this provision Ambalat is clearly in the area of Indonesia. Geographically, Ambalat is an area of sea block located off the coast of Indonesian Province of East Kalimantan and Southeast of Sabah which is the area of Malaysia.

This area is believed to be one of the richest natural resources spot, containing 62,000,000 barrels (9,900,000 m^3) of oil and 348 million cubic meters of natural gas. (Syarifuddin, 2009) The history of dispute between Indonesia and Malaysia over this area has begun in the 1979 when Malaysia published their map showing their territorial waters and continental shelf.

This publication of Malaysian National Map begun the territorial war between these two states, whereas Indonesia argued at that time that in *de jure* that Ambalat belonged to their territory, and they protested when Malaysia included it in their territory in their national map. This map of Malaysia was not recognized by fellow ASEAN States, and also In addition, the 1979 Malaysian Map that they used to assert Ambalat has not been submitted to the UN Secretary General pursuant to Article 47(9) of LOSC. Hence, the 1979 Malaysia's map regarding their territorial water is not legitimate. (Schofield and Storey, 2007)

After Indonesia lost to Malaysia on their claim of Sipadan and Ligitan Island ownership in 2002, the Indonesian Government had to revised their maritime territory configuration, since they cannot use the Sipadan and Ligitan as their baseline anymore. In 2008, Indonesia redrew baselines from the eastern shore of Sebatik Island to *Karang Unarang* and three other points to the southeast. This results in the Ambalat Block no longer being entirely inside Indonesian internal waters.

Even though the ICJ made no decision on whether the features should be able to claim maritime zones, nor on maritime boundaries. But Malaysia then used these features as base points to make further claims to territorial sea, EEZ and continental shelf. (Mark and Khalid, 2013)



B. The Most Suitable Settlement for this Dispute

Ambalat dispute is different from the dispute of Sipadan and Ligitan Island, thus it requires different approach for settlement. The difference lays lays on the right that is being disputed between the disputing parties. In the case of Sipadan and Ligitan case, this is a dispute of ownership of an island which involves the question of full sovereignty, on the other hand, in case of Ambalat, it is merely the question of limited sovereign right which involves the right of exploration and exploitation in the sea area. (Villanueva, 2013)

Since, both Malaysia and Indonesia are the member states of the UN, and then in this case The UN Charter will be applicable to both states. Pursuant to article 2(3) UN Charter which states that:

> "All member shall settle their international dispute by peaceful means in such a manner that international peace and security, and justice are not endangered"

Basically this provision demands that all member of UN settle their international dispute in a manner which does not endanger international peace and security, meaning that the means of dispute settlement shall not involve a provocation to the other disputing state or another state using of force that might end up as a war. (Shaw, 2008)

The Ambalat dispute fall under the category of marine delimitation dispute, since it involves an overlapping claim of a territory by 2 or more states, as it is regulated under UNCLOS article 83 concerning Delimitation of the Continental Shelf between State with Opposite or Adjacent Coasts. In order for UNCLOS to be applicable along with its dispute settlement mechanism, both of parties in dispute shall give their consent to be bound by that treaty as what it has been regulated under Article 11 Vienna Convention on the Law of Treaty year 1969 which states. (Aust, 2002)

> "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed"

Indonesia and Malaysia have fulfilled this requirement by ratifying the UNCLOS. Indonesia ratified UNCLOS under Law No. 17 Year 1985, (Kesumawardhani, 2008) on the other hand, Malaysia ratified on 14 October 1996 and came into force to Malaysia on 13 November 1966.

C. Maritime Delimitation Dispute

In this present case, Ambalat dispute is included as marine delimitation dispute. Marine Delimitation dispute is a dispute that arises when there is an overlapping claim of maritime zone from two or more States, and no agreement can be reach on the limit of each States maritime zone. (Alexander, 1986) Dispute of delimitation belongs to international dispute, where the parties are states and regulates by international law.

Maritime Delimitation is a complex subject, as it involves several types of issues regarding the real situations throughout the world and the delimitation process. The delimitation process itself involves several types of issues: the authority, the principal method to carry out delimitation process, and technical questions regarding the determination of the actual lines in space. (Rosenne, 2007)

Currently, maritime delimitation is ruled through agreement between parties, , meaning that if there is an overlapping claim of marine zone from 2 or more parties, these claiming states shall come together and negotiate to set the limit of their marine zone in the disputing territory. (Vukas, 2004)

The need of Marine Delimitation is crucial in determining limit of a state's marine zone. Especially considering the breadth of every marine zone that is claimable by a state (territorial sea, contiguous zone, ZEE, and Continental Shelf) depends on the distance from that state to its neighboring state. An ideal condition for the marine zone division set up in UNCLOS would be if a coastal state does not have a neighboring state located in less than 400 M from that state. (Sobar, 2006) The coastal state will then have an ideal and undisputed territorial sea, additional zone, ZEE and Continental Shelf.

However, this condition is somewhat impossible in reality. For example, Indonesia as the largest archipelagic state which has wide coastline. Its outer island is directly adjacent to not less than 10 neighboring countries that are Singapore, Thailand, Malaysia, Vietnam, East Timor, Papua New Guinea, Australia, and Palau.

In terms of Ambalat dispute, pursuant to Article 47 of UNCLOS which states that,

"An archipelagic state may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between one to one and nine to one"

Based on this provision, Indonesia as an archipelagic States has a right to draw a straight archipelagic baseline connecting the outermost points of outermost island of Indonesian territory, which also means that Ambalat region is located in Indonesian ZEE. (Agoes, 2006) However the overlapping claim occurs in Ambalat when Malaysia won the Sipadan and Ligitan Island from Indonesia, thus Indonesia can no longer use those Islands as their baseline, which resulted in not all part of Ambalat belongs to Indonesia, and oil concession, navy hot pursuit and sea patrol incident regularly occurs ever since.

D. Dispute Settlement Provided by UNCLOS for Delimitation State Boundary Dispute

As both Indonesia and Malaysia are contracting States of UNCLOS, thus dispute settlement mechanism contained in UNCLOS are relevant in this matter. United Nation on the Law of the Sea or UNCLOS provides sets of dispute settlement procedures in the part XV from article 279 to 296.

To abide to United Nation charter article 2 (3) which requires all member state of UN to settle their international dispute in any manner that do not threat international peace, security and justice, or in other hand this charter requires an amicable and peaceful settlement first among their member state. This article is also inline with article 279 UNCLOS concerning the obligation of member state to settle dispute by peaceful means. This article states that:

> "States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter".

In choosing the method of amicable settlement or peaceful settlement, the UNCLOS does not impairs the right of any member states to agree at any time to settle a dispute between them by any peaceful means of their own choice. This right of every member state is guaranteed under Article 280 UNCLOS, which states that:

> "Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or

> application of this Convention by any peaceful means of their own choice."

Here settlement for marine delimitation dispute is crucial because an undetermined boundary opens a possibility of clash and dispute between state, which can leads to threat to international peace, and security, and on the other hand delimitation enables neighboring States to properly exercise their rights, freedoms, jurisdiction and sovereignty in their respective zones. From the diplomatic standpoint, "good fences make good neighbors." (Frost, Wall, and Connery, 1979)

There are two ways in solving the undetermined marine boundary according to UNCLOS. (Atmaja, 1997) The first is determining the boundary directly by states, which involves negotiation between those disputing states. The second way is by the involvement of a third party, either it is international tribunal or third state party. The first way is the most common way out for this kind of dispute, negotiations have been the most efficient, speedy and inexpensive way of establishing maritime frontiers between States just like any other dispute settlement in International Law dispute in general.

Delimitation through diplomacy and negotiation is far more advantageous than adjudication, because there are no limits to the considerations, which States may take into account for the purpose of making sure that they apply equitable procedures. (North Sea Case, 1969) Furthermore, there is no legal rule, which guides negotiations on delimitation. (Oda, 2003) States are unrestrictedly free to choose any circumstances (political, geographical, strategic, environmental, defense, juridical, economic, etc.), irrespective of their legal relevance, which would not always be possible in international adjudication.

In fact since the entry of force of the UNCLOS, there has been at least approximately 71 maritime delimitation treaties have been negotiated by States and only six boundaries have been brought to international court.

The examination of the agreements concluded in the period under review demonstrates that the most preferred method of delimitation has been the drawing of a single maritime boundary, a solution created exclusively by State practice. (Qatar vs. Bahrain, 2001) Single maritime boundaries are not mentioned in the Convention, but they have broadly been used both by States and by the international courts.

Even though government to government diplomacy or negotiation is the most common way to solve a delimitation boundary dispute, but however this method only work if both of the disputing states have at least good relation to each other and can leave their ego behind which is rarely happened in the practice. (Rothwell and Stephens, 2010) Most of marine delimitation boundary dispute caused by the eagerness of states to fight over the natural resources contained in that area. (Oda, 1995)

If the all matter of amicable dispute settlement effort fails, Article 281(1) of UNCLOS will be applicable, which states that:

> "If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure".

Article 287 of UNCLOS has provide several procedure and international tribunal that can be chosen by member states to solve their dispute, which are: 1) ITLOS, 2) ICJ, 3) Arbitral Tribunals and 4) Special Arbitral Tribunals.

Member state can choose one of those listed international tribunal to solve their dispute in writing declaration when they are ratifying, acceding or at any time when they need. (Boyle, 2007) This third party involvement is considered as a deterrent or unilateral interpretation of the terms of the Convention that would lose the compromise achieved during negotiations. (Klein, 2004)

E. Indonesia and Malaysia Current Effort to Settle Ambalat Dispute

Indonesia and Malaysia has once discussed about their marine delimitation dispute and tried to figure out the solution. As a result, a treaty was even concluded to regulate the delimitation boundary between Indonesia and Malaysia, this treaty came into force in 1964. (Forbes, 2001)

However, the boundaries have not been fully accomplished until today. It is noted that there are three locations of maritime boundaries between Indonesia and Malaysia: Malacca Strait, South China Sea, and Celebes Sea, where Ambalat lays. (Prescot, 2004) Even though this negotiation resulted a convention that was aimed as a dispute settlement for marine delimitation boundary, it is still not useful since the fact that this dispute cannot solve the problem it was intended to solve. Due to this failure of negotiation, there are other efforts taken by Indonesian and Malaysian government to solve this dispute such as diplomatic way.

Indonesian government through the Ministry of Foreign Affairs has sent more than 36 Diplomatic notes protesting the action by Malaysian government. Not only in form of note, but also diplomatic spy war in the media though television or newspaper. (Bernard, 2011) It was improperly conducted and condemned as Malaysia ignored 36 diplomatic notes from the government of Indonesia. It shows that Malaysia has not good faith to settle this dispute in an amicable way by diplomatic means.

However, we cannot just look from Indonesian perspective, as maybe the government of Indonesia procrastinating this dispute. A big and emergency case like this cannot be just solved by sending diplomatic notes containing protest.

F. Most Suitable Dispute Settlement for Ambalat Dispute

The first suitable dispute settlement that author would like to suggest is the establishment of Joint Development Agreement. The delimitation of the maritime boundary is not necessarily a panacea for the dispute over offshore resources (a panacea for Disputes over offshore resources). Both demands on oil reserves and fish or marine mammals must respect national boundaries. Even success the limit may still require close cooperation level if countries are opposite or adjacent (opposite or adjacent states) is rationally to exploit the cross-border resources. Therefore, necessary arrangements through joint development. (Low and Churchill, 2012)

As it is known that the joint development agreement (the joint development agreement) covered in a particular segment of the UNCLOS, which concluded after or in agreement on the maritime boundary and is not intended by Article 74 (3) and 83 (3) of UNCLOS, 1982. In other words, the agreement negotiated in recognition of the resources are located between the two countries, and the need to avoid unilateralism in international resource development and management in general. Countries will also prove that the joint development can be negotiated without

force (compelling) factors that limit disputed or overlapping maritime boundary claims (disputed boundary or overlapping maritime boundary claims). Demands of coastal states over maritime areas adjacent to it along the continental shelf region, not only involves the region delimitation issues, but also issues concerning resource exploitation of natural resource such as mineral and hydrocarbon reserves. Also, delimitation of borders is a politically sensitive process. It has a direct effect not only on the rights and interests of those countries with respect to fisheries and marine resources, but also oil, gas and hydrocarbon resources, navigation and other uses over the sea. Therefore, the question of delimitation of the area is so complex, involving a variety of interests that helped determine the delimitation. (United Nations, 2008)

Second most suitable settlement is on the basis of equity principle. Equity principle is one of the principles of maritime boundary delimitation determination. Ideas or thoughts on a fair principle are at the heart of the delimitation of the Continental Shelf, which is based on the 1945 Truman Proclamation. Dundua mentions the following:

> "The notion of equity is at the heart of the delimitation of the CS and entered into the delimitation process with the 1945 proclamation of US President Truman, concerning the delimitation of the CS between the Unites States and adjacent States. President Truman proclaimed that: The United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United states, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another States, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles."

There are many cases of claims on the continental shelf in the future is decided based on the principle of a fair (equity / equitable), as decided by the ICJ. Aasen elaborate as follows: "In the Cameroon / Nigeria case it was held that there was no presumption for any one method to be used under Articles 74 (1) and 83 (1), putting, in theory, all thinkable methods of maritime delimitation on an equal footing.

Yet, in the Barbados/Trinidad and Tobago Award, it was held that the determination of the line of delimitation normally follows that of the corrective/equity approach. In the Nicaragua/ Honduras case it was held that the use of another method than that of the corrective/equity approach would require a well-founded justification (as indeed was the situation in this case). In the Guyana/Surinam Award it was held that there is presumption for the corrective/equity approach in situations with opposite as well as adjacent coasts. And finally in the Romania/Ukraine case it was held that there is presumption for the corrective/equity approach could be better unless compelling make this unfeasible in the particular case.

According to the ICJ, the rights of the coastal State with respect to the area of the continental shelf is the natural prolongation of the land territory into and under the sea exist ipso jure and ab initio based on its sovereignty over the land and the expansion of its sovereign rights for the purpose of exploring the seabed and the exploitation of resources nature.

ICJ decided that the continental shelf to be restricted in accordance with "the principles of fair, and considering all the

relevant circumstances (equitable principles and taking into account all the relevant circumstances) to rule out as much as possible from each party, all the parts of the continental shelf which is a natural extension to the mainland territory, in, and under the sea, without breaking a natural extension of the land territory of the other country (without encroaching on the natural prolongation of the land territory of the other). Based on these considerations as well, the continental shelf Ambalat can be settled.

G. Conclusion

Ambalat is a very crucial issue for both Indonesia and Malaysia. This is not a new dispute between these two neighboring states, as it has been started even before the independence of Indonesia and Malaysia. Ambalat is rich with natural resourches , mostly natural gas and crude oil.

Many incident and territorial dispute occurs in this area since 2005, especially when Malaysian navy ship shot Indonesian navy ship and refuse to leave the Indonesian territory.

There are dispute settlements that is available under UNCLOS to solve this dispute, but non of them is taken by both disputing states. Only negotiation which was failed and diplomatic way have been taken by the government of Indonesia and it is not enough to solve this dispute.

BIBLIOGRAPHY

A. Convention

1891 Convention between Great Britain and Netherland

The United Nation Charter

United Nations on the Law of the Sea (UNCLOS)

B. Books

Agoes. Etty R. (2006). Sengketa Ambalat Dilihat Dari Segi Hukum Internasional Dan Peraturan Perundang-Undangan Nasional. Bakorsurtanal.

Aust, Anthony. (2002). Modern Treaty Law and Practice. Cambridge University Press, Cambridge.

Budislav, Vukas. (2004). The Law of the Sea: Selected Writing. Publications on Ocean Development: Boston.

Chadrasekhara Rao and Ph. Gautier. (2006). The Rules of the International Tribunal for the Law of the sea: A commentary. Martinus Nijhoff Publisher: Lieden.

Devenport, Tara. (2012). Southeast Asian Approaches to Maritime Delimitation. Asian Society of International Law: Singapore.

Forbes, Louise. (2001). Conflict and Cooperation in Managing. Cambridge University Press: Cambridge.

M. Kusuma Atmadja. (1997). Sustainable Development and Preservation of the Oceans: The Challenges of UNCLOS and Agenda 2. Law of the Sea Institute Publisher: Honolulu.

Natalie Klein. (2004). Dispute Settlement in the UN Convention on the Law of the Sea. Cambridge University Press: Cambridge.

Prescot, Victor. (2004). Maritime Delimitation in Southeast Asia: The Case of Indonesia. Kluwer: Netherlands.

R. Frost, Mending Wall, and E. Connery Lathem. (1979). Poetry of Robert Frost: The Collected Poems, Complete and Unabridged. Holt, Rinehart & Winson, New York.

Rosenne, Shabtai. (2007). Essay on International Law and Practice. Martinus Nijhoff Publisher: Leiden.

Rothwell, Donald and Tim Stephens. (2010). The International Law of the Sea. Hart Publishing: Oxford and Portland.

Shaw, Malcom N. (2008). International Law. Cambridge University Press, Cambridge.

Sigeru Oda. (2003). Fifty Years of Dispute Settlement Prospects in the Law of the Sea, *Fifty Years of the Law of the Sea*. Kluwer: Netherland.

Sutisna Sobar (2006), Pandang Wilayah Perbatasan: Aspek Permasalahan Batas Maritim Indonesia. Pusat Pemetaan Batas Wilayah. BAKOSURTANAL.

Syarifuddin Usman Mhd. and Isnawati Din. (2009). Heboh Ambalat: Ternyata Malaysia ingin Merebut Sumber Minyak Indonesia. Narasi, Jakarta.

United Nation. (2008). United Nation Convention on the law of the Sea. Nova Science.

Vaughan Low and Robin Churchill. (2012). A series of study on the International, Legal, and

Institutional and Policy Aspects of Ocean Development. Publication on Ocean Development Publishing.

C. Journals

Alan E. Boyle. (2007). Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction. Cambridge University on behalf of the British Institute of International and Comparative Law.

Alexander L. M. (1986). The Delimitation of Maritime Boundaries. Political Geography Quarterly.

Dr Clive Schofield and Dr Ian Storey. (2007). Energy Security and Southeast Asia: The Impact on Maritime Boundary and Territorial Disputes. Harvard Asia Quarterly.

Leonard Bernard. (2011). Whose Side is it on-The Boundaries Dispute in the North Malacca Strait. Delivered at 2nd CILS International Conference 2011 at Universitas Gadjah Mada, Faculty of Law, 21-22 November 2011.

Resistensia Kesumawardhani. (2008). Dispute between Indonesia-Malaysia over Ambalat *Sydney University Law Journal*.

Riza Sukma, "Chapter 1: Indonesia: Security Outlook, Defense Policy, and Regional Cooperation retrieved from http://www.nids.go.jp/english/publication/joint_research/series6/pdf/01.pdf, accessed on Thursday 20 June 2013, at 1.15 AM

Shigeru Oda. (1995). Dispute Settlement Prospect in the Law of the Sea. *British Institute of International and Comparative Law* Vol. 44.

D. Cases

Arbitration Procedure of *Barbados/Trinidad and Tobago*

International Court of Justice. (February 1969). North Sea Continental Shelf Case. Judgment.

International Court of Justice. (March 2001). Maritime Delimitation and Territorial Question between Qatar and Bahrain (Qatar v. Bahrain). Judgment.

E. Others

I Made Andi Arsana. (April 2005). *Ambalat: A Spartial Perspective*. retrieved from http://geo-boundaries.blogspot.com/2005/04/ambalat-spatial-perspective1.html accessed on Wednesday 19 June 2013 at 5.06 PM

Mark J. Valencia and Nazery Khalid. (). *The Sulawesi Sea Situation: Stage for Tension or Storm in a Teacup*?", The Asia Pacific Journal: Japan Focus. retrieved from http://www.japanfocus.org/-Mark_J_-Valencia/3184>, accessed on Wednesday 19 June 2013, at 8.24 PM

Djanuarto, Bambang Dwi. (October 2009). *Indonesia to Fight Malaysia Ambalat Oil Claim,*" The Jakarta Post. retrieved from http://www.thejakartaglobe.com/archive/indonesia-to-fight-malaysias-ambalat-oil-claims/ accessed on Wednesday, 19 June 2013 at 8.41 PM

Wakasal. (Desember 2010). *Potensi Konflik Laut Terbesar di Ambalat*. Antara

News Agency, retrieved from http://www.portal.antaranews.com /news/238908/wakasal-potensi-konflik-laut-terbesar-di-ambalat, accessed on Thursday, 20 June 2013 at 1.03 AM

Villanueva, Klass Jan. (2005).*Suatu Pandangan: Sengketa di Wilayah Zee dan Wilayah Landas Kontinen Di Ambalat.*" retrieved from http://geoboundaries.blogspot.com /2005/04/ambalat-spatial-perspective1.html, accessed on Thursday 20 June 2013, at 5.38 AM.

THE INSTITUTIONAL AEGIS: INTERNATIONAL ORGANIZATIONS AS SHIELDS AGAINST MEMBER STATE RESPONSIBILITY*

Ibrahim Hanif and Shita Pina Saphira*****

Abstract

The development and proliferation of international organizations has endowed them with a legal personality separate from their member states, opening the possibility of international organizations as independent actors of internationally wrongful acts. While the ILC's Draft Articles on the Responsibility of International Organizations has attempted to codify the law on the matter, the obscurity of law persists with regards to the law of responsibility of those international organizations. Behind this obscurity, there is a concern that the powers of an international organizations may be misused to shield member states against responsibility. The separate legal personality of international organizations has been invoked in past cases to shield member states from alleged misconduct of their troops, military intervention and breaches of regional treaty law. This article will attempt to lay out the manners by which the law may be utilized to raise this shield and veil the responsibility of member states through an international organization. It will also briefly discuss the limited remedies available to counter this veil.

Intisari

Seiring dengan perkembangannya yang pesat, organisasi internasional telah diberikan kepribadian hukum yang terlepas dari kepribadian hukum negara-negara anggotanya. Dengan ini pula, peluang suatu organisasi internasional untuk secara independen melakukan pelanggaran hukum internasional-pun telah terbuka. Walaupun ILC Draft Articles on International Organizations *telah berusaha merumuskan hukum untuk hal ini, ketidakpastian hukum kerap muncul dalam hal hukum pertanggungjawaban organisasi tersebut. Ketidakpastian ini menimbulkan kekhawatiran bahwa organisasi internasional dapat digunakan sebagai sebuah perisai bagi negara-negara untuk mengelak dari tanggung jawab atas sebuah pelanggaran hukum. Hal tersebut dapat dibuktikan dari digunakannya kepribadian hukum independen yang dimiliki oleh organisasi internasional untuk melindungi negara-negara anggotanya dari gugatan untuk tindakan tentara negara-negara anggota, intervensi militer maupun pelanggaran perjanjian regional. Artikel ini akan memaparkan bagaimana hukum dewasa ini dapat digunakan untuk mengangkat tabir antara tanggung jawab negara anggota dan sebuah organisasi internasional, juga membahas sekilas mengenai upaya-upaya hukum terbatas untuk menembus tabir tersebut.*

* Preferred Citation Format: Hanif, Ibrahim & Saphira, Shita Pina. (2014). The Institutional Aegis – International Organization as Shields against Member States Responsibility. J.G.L.R., 2(1), 71-81.

** 2011; Faculty of Law, Universitas Gadjah Mada, Yogyakarta, Indonesia.

*** 2011; Faculty of Law, Universitas Gadjah Mada, Yogyakarta, Indonesia.

A. Background

There is growing usage of international organizations as an actor involved in international relations. In entangling themselves as actors, it is inevitable that international organizations may find themselves engaged in conducts breaching international law. Many of these international organizations have both a separate legal personality[7] and immunity from jurisdiction (Neumann, 2006) leading to concern that they may be used to shield its member states from liability (Wilde, 2006).

The questions that follow, and which will be the focus of this article is whether or not an international organization could act as a shield for member state responsibility.

B. Acts under the Auspices of International Organizations

International organizations are vested with many powers, even to conduct military operations (Abbot & Snidal, 1998).[8] The number and forms of the operations undertaken by international greatly vary, from military, political to economic.

However, it is first necessary to determine which alleged acts would *prima facie* entail the responsibility of the international organization and not its member states or third states. Such operations are those conducted through and under the auspices of an international organization (Stumer, 2007). These may be done through their agents, such as in violations by UN Peacekeepers, or by the organization as a whole, such as the allegation against the International Monetary Fund and World Bank for 'rewarding' Rwanda and Uganda's actions during the Second Congo War. Economic actions under the EU or military interventions by International organizations like ECOWAS in Sierra Leone in 1997 are also close examples to the latter (Levitt, 1998).

C. Responsibility of International Organizations

1. The Legal Personality

For an entity to bear international obligations and liability for breaches of international law, it must be a legal person. Since the *Reparations* case ("Advisory Opinion on the Reparation for Injuries Suffered in the Service of the United Nations," 1949), it has come to be accepted that an international organization is capable of possessing personality under international law, separate from the personality of the organization's member states.

It is widely agreed that the legal personality of an organization arises out of an (express or implied) will of the member states. The organization must also, in fact, be endowed with the functional, material and organic means necessary to express a will distinct from that of its member states (d'Aspremont, 2011).

By establishing a new legal person, States could then undertake collectively what none of them could achieve individually (Sarooshi, 2004). It is important to note that by becoming members of an international organization, States do not give up their legal personality under national or international law. By conferring powers to the international

[7] See for example, Article 6 of the Vienna Convention of 21 March 1986, Article 2(a) of the ILC Draft Articles on the Responsibility of International Organizations. See also, *Reparations Case*, ICJ Advisory Opinion.

[8] See Article 24 of the United Nations Charter and Article 5 of the Inter-American Democratic Charter of the Organization of American States.

organization, they merely limit their own autonomy, but continue to co-exist side-by-side with the international organization ("Case of the S.S. Wimbledon," 1925).

2. Attributing Responsibility to International Organizations

Having concluded that a legal personality is necessary for international organizations to bear responsibilities, the issue now turns to attribution. In analyzing the interplay of the laws of responsibility, it is imperative that it involves the discussion of the ILC Articles on State Responsibility of 2001 [ASR] and the ILC Draft Articles on the Responsibilities of International Organizations of 2011 [DARIO] (Hoffmeister, 2010).

In general, although international organizations are endowed with international personality differing in nature from that of states, they bear responsibility generally mirroring the obligations of states in general pursuant to ASR.[9] Many of the articles in DARIO are based on upon ASR. However, it must be noted that DARIO is not conclusive evidence of the law, but serves as both a starting reference and persuasive evidence (d'Aspremont & Ahlborn, 2011).

3. Attributing Responsibility to Third States and Member States

a. Effective Control

Articles 6, 7, 8 & 9 of DARIO mirror its counterpart in Chapter II of ASR. These articles seem to have gained widespread acceptance and generally impose that, subject to the exceptions below, an act or agent under the auspices of an international organization entails the responsibility of that organization (Talmon, 2005).

The commentaries to Article 7 of DARIO makes it clear that when organs or agents of a state are fully placed at the disposal of an international organization, any responsibility would fall to that international organization. This is analogous to how states act through and are responsible for their agents ("*German Settlers in Poland*", PCIJ).[10] Thus, when control of a conduct is in the hands of the international organization, states are not held liable.

A dispute arose exemplifying the possible use of an international organization as a shield when the European Court of Human Rights [ECtHR] in the cases of *Behrami & Behrami v. France*, found that acts of forces in Kosovo under the UN –acting under Security Council Resolution– must have *prima facie* acted under the effective control of the Security Council [SC],[11] imputing exclusive responsibility to the UN.

This decision has drawn widespread criticism from academics, and threatens to open the gates to an abuse (Bell, 2010). However, subsequent decisions ("*Al-Jedda v. United Kingdom*", ECtHR; "*Nuhanovic v. Netherlands*", Dutch Court of Appeals) attempted to rectify this finding by looking at which party had "effective control"[12] (Dannenbaum, 2010). No definitive consensus exists as to which test is to be used, leading to legal uncertainty in attributing responsibility and possible abuse.

---

9 See *Reparations* case, ASR and DARIO. DARIO has been often said to "reflect" the ASR (Ahlborn, 2011). However, there are key differences, and the two are not identical.

10 See also, Article 4, 6 & 8 of ASR.

11 The ECtHr acknowledged that NATO retained operational matters over matters on the field but argued that ultimate authority nevertheless rested on the SC as they had initially mandated the mission.

12 The standard of effective control here differs in the sense that responsibility lies in the hands of the party who had 'operational command' over the troops over the given act.

The notion of "exclusive responsibility", a form of responsibility entailed solely to a single subject of law (in this case the concerned international organization), has however been regularly debated amongst academics, fearing the possibility of wrongful attribution of responsibility towards member states who did not possess an equal control over the decision-making process of the organization (d'Aspremont, 2007).

These scholars would opt for an alternate type of responsibility, namely joint or concurrent responsibility only to those member states exercising "overwhelming control" over the decision-making process of the organization leading to the breach of international law, further referring to Article 17 of the ASR.

However, this threshold of "overwhelming control" only relates to the "domination over the wrongful conduct" and is alien to any exercise of "oversight" or "influence" of those member states. Given the application of such high standards, general influence exerted does not incur the joint or concurrent responsibility of member states.

Mere domination of one (or a few) state over an international organization or one of its organs –common in international relations– is not sufficient for there to be overwhelming control. Such imbalance opens the possibility of abuse of the legal personality of the organization at the decision-making level. Even though domination itself does not systematically pave the way for overwhelming control, it makes such an abuse of the legal personality of the organization more probable.

Thus, given the above circumstances, a state could avail itself behind the veil of an international organization if its control over the organization did not meet the high standards of responsibility as stipulated under the ASR and DARIO. In this regard, an international organization is an effective tool for avoidance of responsibility.

b. Aiding and Abetting, Direction and Control, Coercion and Circumvention

Concern also lies in Articles 58, 59, 60 & 61 of DARIO regulating the responsibility of states and member states in relation to an international organization.

Article 58 and Article 59 offer no exemption to non-member states when they direct or aid an international organization to commit a wrongful act. Article 60 on coercion goes further and imputes liabilities to members and non-member states alike. These articles have found established practice in European courts ("*Bosphorus*", ECtHR*; "Waite v. Kennedy*", ECtHR*; "M v. Germany",* ECtHR).

However, Articles 58(2) and 59(2) both exempt member states from responsibility so long as the action was taken 'in accordance with the rules of the organization'. This inevitably leads back to the high standard of determining effective control to determine attribution of responsibility.

Article 61 envisions protection against member states using international organizations to circumvent their obligations under international law. However, as noted by the commentaries and applied in *Gasparini v. Italy & Belgium* at the European Court of Human Rights [ECtHR], this liability only applies when a state intentionally attempts to transfer its obligation to the international organization. To prove such intent is difficult, and while the commentaries to DARIO states that Article 61 seems to have acceptance ("*Bosphorus*", ECtHR), it finds little practice outside the EU. Thus, although Article 61 may seem to provide an antidote to the abusive use of international organizations, its non-

customary status has not yet allowed for its general application.

c. *Acceptance and Reliance of Responsibility by Member States*

Finally, Article 62 concludes by laying out two ways by which member states incur liability through an international organization. First, under Article 62(1)(a) is if the member state had accepted responsibility for the act towards the injured party.[13] This is unlikely to be invoked by states acting in bad faith. The more protective clause under Article 62(1)(b) forces a state to become liable if 'it has led the injured party to rely on its responsibility'. Article 62(1)(a) seems to have general acceptance while 62(1)(b) stands on more tenuous grounds (Higgins, 1995).

Leading to reliance ("*Westland Helicopters*", ICC) requires that third states must have indispensably relied upon the support and contribution of an international organization's member states in deciding to engage with that international organization (Higgins, 1995).

The commentaries to DARIO however, found that there is a strong opinion that states do not generally become liable for act of international organizations merely by virtue of membership,[14] and 'leading reliance' bears a heavy burden of proof based on a specific set of circumstances such as the small size of membership.

There is further a wide consensus in the mainstream legal scholarship on the idea that member states do not incur responsibility for the wrongful act of the organization even though it would breach their international obligations if it were formally attributed to them.[15]

Thus, only through these above measures (Effective Control, Circumvention, Acceptance or Reliance) may member states become liable for the actions of an international organization. Although member states may be contractually responsible by virtue of specific agreements with international organizations,[16] generally they are not held liable.

D. Implication of Exclusive Responsibility of International Organizations

Exclusive responsibility of international organizations may make international cooperation through them appealing, since member states are shielded for acts under the auspices of that international organization. In that sense, exclusive responsibility of the organization may thus prove very attractive to them.

Such exclusive responsibility may even embolden states to resort more systematically to international organizations (even to further intervene in the decision making process) as it allows them to conduct their policies at a low cost, without bearing the risk of individual responsibility. It has even been argued that exclusive responsibility constitutes the *raison*

---

13 This is in line with Article 11 of ASR.

14 For discussions where courts have concurred, see *Senator Lines* ECtHR & *Legality of Use of Force* cases by Serbia before the ICJ.

15 See the debate at the International Law Commission on the inappropriateness to include a provision stating a general residual about the absence of responsibility of member States for the wrongful act of an international organization. See Report of the ILC (2006), A/61/10, at 287.

16 For example, in UN peacekeeping operation, see Article 9 of the model contribution agreement as found in A/50/995 and A/51/957. See also, Article 5 of the NATO (Washington).

d'etre for international organization's legal personality.[17]

E. Legal Remedies

Whenever a duty established by any rule of international law has been breached by an act or an omission, the responsible party must respond by making adequate reparation to the injured ("Factory at Chorzow (Germany v. Poland)," 1928).

This principle applies to all international persons, including states ("Draft Articles of State Responsibility," 2001) and international organizations ("Draft Article on Responsibility of International Organizations," 2007).

1. Legal Remedies through Domestic Courts

Current practice, however, has shown that in domestic courts, member states have been absolved of responsibility, even in cases where control of the international organization over the actions leading to the breaches is weak.

UN practice has shown such a reality. In domestic courts ("*Mothers of Srebrenica v. Netherlands*", Dutch Court; "*H.N. v. Netherlands*", Dutch Court) governments have hid behind the veil of the U.N. as an international organization to avoid responsibility for their actions. It was held in these courts, that unless troop contingents followed their own government's explicit directives to *disobey* orders received from U.N. Command, the wrong of peacekeeper are attributable exclusively to the United Nations, even if the organization and its appointees had no significant influence over the impugned conduct (Dannenbaum, 2010).

The United Nations, in turn is immune from civil process in any national or supranational court ("Convention on the Privileges and Immunities of the United Nations," 1946). The International Court of Justice (ICJ) has confirmed that these provisions grant the United Nations full immunity from legal process in national courts for any acts attributable to the organization ("Advisory Opinion on Difference Relating to Immunity from Legal Process of a Special Rappoteur of the Commission on Human Rights," 1999).

This is also the case with many other jurisdictions. International organizations in Italy for example, are immune for actions taken related to their institutional purposes ("FAO v. INPDAI", Italy Court of Cassation). The United States has also adopted this principle (UN Office of Legal Affairs, 1999). In fact, the general rule seems to be that unless otherwise regulated, international organizations exercise immunity in domestic courts for all necessary to conduct of their duties (Neumann, 2006). Thus, as evidenced through practice, international organization proves to be an effective shield in domestic courts.

2. Legal Remedies through International Courts

In submitting claims for the wrongful act of states, an array of relatively more effective legal remedies exist: through the International Court of Justice [ICJ] and bodies such as the Human Rights Commission or regional courts or specialized court such as the European Court of Justice [ECJ], ECtHR and dispute settlements in the World Trade

[17] See the debates mentioned by the ILC Special Rapporteeur in his second addendum to the fourth report, A/CN.4/54/Add/2, at 9-10.

Organization [WTO] or through the International Centre for the Settlement of Investment Disputes [ICSID].

This is not the case however, for claims made towards the wrongful act of an international organization. UN rules, have made the only recourse available to an aggrieved party is for the UN General Assembly, Security Council or other authorized bodies to request an advisory opinion (i.e. a non-binding declaration) from the ICJ ("Convention on the Privileges and Immunities of the United Nations," 1946). The lack of an international judicial forum, let alone an obligatory one, reflects the fact that existing international dispute resolution mechanisms were designed to deal with states, not international organizations, a scenario that "poses an obstacle to binding international organizations to adjudicate in such forums" (Hirsch, 1995).

Both for the UN and for other international organizations, recourse to the ICJ is barred for two reasons. First, international organizations do not fall under its jurisdictional ambit in Article 34, which only allows for states. In any case, attempting to drag an international organization or one of its constituent members to the ICJ will inevitably lead to decision which infringes the right of other members as third states (ICJ, *Legality of Use of Force* cases).[18] This is against the non-third party principle (*Monetary Gold Case,* ICJ) and would render the decision void. It has been suggested that this principle also applies to international organizations, (d'Aspremont, 2007) and could apply in other courts where consent is necessary and such a rule is also present. It is furthermore evidenced by courts such as the ECtHR,[19] that states have yet again hid behind the veil of an international organization (in this case, the UN) to avoid culpability. In these cases, states would shift the liability towards the international organization to render the dispute *rationae personae* nonjusticiable.[20]

With regards to international trade law however, the WTO does seem to provide a mechanism where an international organization could be held directly responsible ("EC-Hormones", WTO; "EC-Bananas", WTO).[21]

Ad hoc methods of dispute resolution between an international organization and those whose actions it affects are in principle possible (Rios, 2012). One may envision *ad-hoc* dispute settlement systems and corresponding rules of responsibilities in an international organization's charter, or in specific agreements involving international organizations. However in practice they do not seem to be implemented.

Thus, observing this relative legal vacuum, especially in civil claims for reparation, there is a need for a specific forum where the international organization has submitted itself to compulsory jurisdiction. As few effective forums exist, many breaches become nonjusticiable.

---

[18] Assuming the other member states of the international organization has not accepted compulsory jurisdiction.

[19] See ECtHR cases of *Behrami v. France* and *Saramati v. France, Germany and Normay*.

[20] *Ibid.* In the cases above, the court held that it had no jurisdiction to hold the UN liable as they were not parties to the European Convention on Human Rights.

[21] In these cases the European Community was held directly responsible for regulations affecting the import and marketing of third country goods.

3. Legal Remedies through Countermeasures and Negotiations

The rules regarding countermeasures against international organizations generally mirror its counterpart the ASR. There seems to be support for the analogous use of the rules on countermeasures.[22] Examples for such actions are limited, but the *EC-Hormones* case for example, has allowed for the use of countermeasures against international organizations.

Negotiated dispute resolutions still work much in the same way as it would in state to state disputes, except for the expanded scope of interested parties, which would complicate matters. The shortcomings here are also similar with those found in non-legal remedies of state disputes, which generally revolve around political, diplomatic or economic leverage and the difficulty to reach consensus (Merrils, 2005).

F. Conclusion

Thus, it can be concluded that international organizations generally have exclusive responsibility given the circumstance that its member states endow the organization with legal personality. Though in principle, the legal personality imposed upon these organizations would enable them to act as states, the laws on attribution of responsibility and legal remedies available to impose liability upon international organization have yet come to place for an effective claim against this legal personality.

For member states, responsibility can only be pierced under effective control, circumvention of obligation, acceptance and reliance. All of which pose their own separate issues of applicability and implementation. This severely limits the means of piercing the veil of the international organization and may lead to other 'innocent' member states being responsible.

When an international organization does have exclusive responsibility, legal remedies are few and far between. It is extremely difficult to bring them to a court and non-legal remedies are likewise fraught with ineffectiveness. Furthermore, there exists considerable tension between the wariness of academics and the pragmatic interests of states in cementing the responsibility of international organizations. Though attempts have been made to fill this legal vacuum, uncertainty still exists in the law of international organizations which consequently leads to the impunity of states. Therefore, it must be concluded that, unfortunately, international organizations can and are being used as shields against member state responsibility.

[22] See discussions in A/CN.4/609 and A/CN.4/637.

BIBLIOGRAPHY

A. Books and Journals

Abbot, K.W. (1998). Why States Act through Formal International Organizations. The Journal of Conflict Resolution, Vol. 42, No. 1, 3-32

Ahlborn, C. (2011). The Rules of International Organizations and the Law of International Responsibility. ACIL.

Bell, C. A. (2010). Reassessing Multiple Attribution: The International Law Commission And The Behrami And Saramati Decision. NY University Journal of International Law and Politics Vol. 42:501 2010, 501-548

d'Aspremont, J & Ahlborn, C. (2011). The International Law Commission Embarks on the Second Reading of Draft Articles on the Responsibility of International Organizations. http://www.ejiltalk.org/the-international-law-commission-embarks-on-the-second-reading-of-draft-articles-on-the-responsibility-of-international-organizations/

Dannenbaum, T. (2010). Translating the Standard of Effective Control into a System of Effective Accountability. Harvard International Law Journal, 51, 113-192

d'Aspremont, J. (2007). Abuse of the Legal Personality of Organizations and the Responsibility of Member States. International Organizations Law Review, 91-119

d'Aspremont, J. (2011). The Multifaceted Concept of the Autonomy of International Organizations and International Legal Discourse. In R. C. N. D. White (Ed.), International Organizations and the Idea of Autonomy: Routledge

Higgins, R. (1995). The Legal Consequences For Member States Of The Non-Fulfilment By International Organizations Of Their Obligations Toward Third Parties. Institute of International Law – Yearbook, volume 66- I, Paris, Pedone 1995

Hirsch, M. (1995). The Responsibility of International Organizations Toward Third Parties: Some Basic Principles: Martinus Nijhoff Publishers

Hoffmeister, F. (2010). Litigating against the European Union and its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations. EJIL Vol. 21 No. 3, 723-747

Levitt, J. (1998). Humanitarian Intervention by Regional Actors in Internal Conflicts: The Case of ECOWAS in Liberia and Sierra Leone. 12 Temp. Int'l & Comp. L.J.

Merrils, J.G. (2005). International Dispute Settlement (Fourth Edition). Cambridge University Press

Neumann, P. (2006) Immunity of International Organizations and Alternative Remedies against the United Nations. Seminar on State Immunity, Summer Semester, http://intlaw.univie.ac.at/fileadmin/user_upload/int_beziehungen/Internetpubl/neumann.pdf

Rios, M. P. a. G. L. (2012). Wrongful Acts of International Organizations: No Effective Remedy Means No Responsibility (Article). Retrieved 29 May 2013, from American International Law Association http://ila-

americanbranch.org/reports/2012-12-18_ABILA_Parish_Rios.pdf

Sarooshi, D. (2004). Conferrals by States of Powers on International Organizations: The Case of Agency. BYIL, 74, 291-332

Stumer, A. (2007) Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections. 48 Harv. Int'l L. J. 553

Talmon, S. (2005). Responsibility of International Organizations: Does the European Community Require Special Treatment?. Bengazzi, M. (ed.), International Responsibility Today (2005)

Wilde, R. (2006) Advancing The Effectiveness of International Law: Is U.N. Reform Necessary?: Enhancing Accountability At The International Level: The Tension Between International Organization And Member State Responsibility And The Underlying Issues At Stake. 12 ILSA J. Int'l & Comp. L. 395

B. Case Law

Al Jedda v. United Kingdom, ECtHR No. 27021/08 (ECtHR 2008)

Behrami & Behrami v. France. ECtHR No. 71412/01 (ECtHr 2007)

Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland, ECHR Reports, 2005-VI (ECtHR 2005)

Case of the S.S. Wimbledon, PCIJ, Ser. A., No. 1, 1923

EC – Measures Concerning Meat and Meat Products (Hormones), WT/DS26

EC – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27

Factory at Chorzow (Germany v. Poland) (P.C.I.J 1928)

Food and Agriculture Organization v. Istituto Nazionale di Previdenze oer I Dirigenti di Aziende Indistusriali, Italian Supreme Court of Cassation, 18 Oct 1982

Gajic v. Germany, ECtHR No. 31446/02 (ECtHR 2007)

Gasparini v. Italy & Belgium, ECtHR No. 10750/03 (ECtHR 2003)

H.N. v. Netherlands (Ministry of Defence and Ministry of Foreign Affairs), District Court of the Hague, September 2008. Court of Appeal of the Hague, 5 July 2011)

Legality of Use of Force, Serbia & Montenegro v. United Kingdom, ICJ Reports 2004

M. v. Germany, ECtHR No. 19359/04 (ECHR 2004)

Monetary Gold Removed From Rome in 1943, ICJ Reports 19 (ICJ 1954)

Mothers of Srebrenica v The State of the Netherlands and the United Nations, case number 200.022.151/01

Mustafic-Mujic, et al v. the Netherlands, Dutch Court of Appeals, Case 200.020.173/01

Nuhanovic v. the Netherlands, Dutch Court of Appeals, ILDC 1742 (NL 2011)

PCIJ, German Settlers in Poland, Advisory Opinion, 1923, Series B., No. 6 (PCIJ 1923)

Saramati v. France, Germany & Norway, ECtHR 78166/01 (ECtHR 2007)

Senator Lines v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom, ECHR Reports, 2004-IV (ECtHR 2004)

Waite v. Kennedy, ECHR Reports, 1999-I (ECtHR 1999)

Westland Helicopter Ltd. v. Arab Organization for Industrialization, et al, International Chamber of Commerce, 1975, Case No. 3879/AS

C. Treaties and Other Documents

Advisory Opinion on Difference Relating to Immunity from Legal Process of a Special Rappoteur of the Commission on Human Rights (International Court of Justice 1999)

Advisory Opinion on the Reparation for Injuries Suffered in the Service of the United Nations, ICJ Rep. 174. (ICJ 1949)

Charter of the United Nations, Entered into Force October 24 1945

Convention on the Privileges and Immunities of the United Nations, U.N.T.S 15 (1946)

Draft Article on Responsibility of International Organizations, (2011)

Draft Articles of State Responsibility, U.N.Doc. A/56/10 (2001)

International Law Commission, Responsibility of International Organizations, 2011

International Law Commission, Responsibility of States for Internationally Wrongful Acts, 2001

Organization of American States, Inter-American Democratic Charter, Entered into Force September 11 2001

Security Council Resolution 1973, S/RES1973

The North Atlantic Treaty, Entered into Force April 4 1949

UN Office of Legal Affairs (1984), Memorandum to the Legal Adviser, UNRWA, UNJYB 1984

UN Office of Legal Affairs. (1999). UNJY 1999

Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, UN Convention on Jurisdictional Immunities.

Author's Instructions

Who May Submit Articles:

- Any **undergraduate student** (not yet inaugurated) from any university may submit articles
- An article may be authored by a **maximum of two authors**

Format and Substantive Regulations

- Articles must provide indepth analysis on any issues within the area of internatonal law (public or private) or comparative law
- Articles must be written in proper English or Indonesian
- The article must consist of:
  1. Title (max 15 words)
  2. Abstract in English (100-200 words)
  3. 3000-5000 words, excluding titles, abstract, bibliography, inside notes, and "about the author", but including footnotes
- The manuscript shall structures with the heading Introduction, Body (as per topic), Conclusion, Bibliography, A paragraph on "About the Author" (Full Name, Entrance Year, University, Faculty, Major, Special Concentration (if any))
- Articles uses inside notes for citations (**American Psychology Association Referencing System**)
- There should be at least **five references** used, and may only cite reliable sources
- Footnotes are allowed for **non-reference** purposes
- Articles are subject to **reviews and selections**
- Editing Staff may at their discretion request author to revise the article prior to publication
- Send the article to jurisgentium.cimc@ugm.ac.id or visit cimc.ugm.ac.id for more information.

9 772302 121011

JURIS GENTIUM LAW REVIEW
Faculty of Law Universitas Gadjah Mada
Jalan Sosio Yustisia Nomor 1 Bulaksumur, Sleman, D.I. Yogyakarta 55281
Email: jurisgentium.cimc@ugm.ac.id
Website: http://cimc.ugm.ac.id/law-journal/