ISSN: 2302-1217

JURIS GENTIUM LAW REVIEW

Volume 7, Number 2, September 2020

UNIVERSITAS GADJAH MADA

COMMUNITY OF INTERNATIONAL MOOT COURT UNIVERSITAS GADJAH MADA

JURIS GENTIUM LAW REVIEW

JOURNAL OF INTERNATIONAL LAW

Published by Community of International Moot Court twice a year

Volume 7, Number 2, September 2020

Editor in Chief

Kukuh Dwi Herlangga

Editorial Board

Adinda Lakshmi K Grady Lemuel Ginting Kaysha Ainayya

Muhammad Dwistaraifa Rasendriya

Technical Team

Balqis Fauziah C. Clarissa Intania

Administrator

Aldeenea Cristabel

Executive Reviewers

Adrianus Adityo Vito Ramon
Arif Havas Oegroseno
Christian Donny Putranto
David Price
Devita K. Putri
Fajri Matahati Muhammadin
Fork Yeow Leong
Heribertus Jaka Triyana
Laras Susanti
Laurensia Andrini
Ratna Juwita
Runggu Prilia Ardes
Tetty Lubis
Thomas Schmitz

JURIS GENTIUM LAW REVIEW is an expert-reviewed and peer-edited law journal dedicated as a place for undergraduate and graduate 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 submission requirement is available at the inside back cover of this journal.

FOREWORD FROM THE DEAN
FACULTY OF LAW UNIVERSITAS GADJAH MADA

Legal publication has been influential in the development of law, as it communicates ideas about a particular legal issue, followed by possible solutions. In countries that adopt the common law system, legal reviews are frequently cited as a persuasive authority since it offers intriguing perspectives concerning the discussed legal matter. Yet in Indonesia, the importance of legal reviews is not as recognized and materialized. This is perhaps due to the lack of interest and awareness of its benefits.

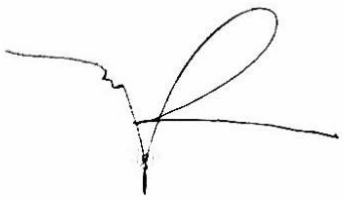
This is where the Juris Gentium Law Review **("JGLR")** steps in: it is the first medium in Indonesia

– run solely by students – that encourages and provides an opportunity for law students from any institution to both enhance their legal research and writing skills and express their views through legal articles regarding issues on the topics of public international law, private international law and even comparative law.

The submitted articles that are written by students will undergo a blind-review process by a handful of Executive Reviewers to ensure its quality. But more importantly, the insights and suggestions will lead to the exchange of ideas that offers new or different perspectives concerning the chosen fields of law.

In this line, I would like to congratulate JGLR and the Community of International Moot Court for publishing another remarkable edition. Hopefully, with the work of the Editorial Board, JGLR can become one of the most renowned legal journals in not only Indonesia, but also worldwide in the future.

Prof. Dr. Sigit Riyanto, S.H., LL.M.



Dean
Faculty of Law, Universitas Gadjah Mada

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

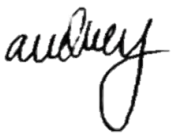
With the ever-evolving issues that arise every day and the borderless world that we live in now, it is essential that we equip ourselves with the knowledge to critically dissect both national and international issues in order to better respond to them. It is my belief that as students, especially, we have the moral obligation to always be aware and educated on everything that occurs all over the world, for it would be our turn to run it someday.

Up to this day, Juris Gentium Law Review (JGLR) has been serving as a platform for students globally to express their views through writing. Through this art and tool that every student should come to master and use to their advantage and the benefit of others, JGLR upholds the value that with it, we would yield the power to listen and be listened to.

We are delighted to present to you this year's edition of JGLR. Each year's journal promotes and analyzes different issues. Through the years, the high expectations continuously set for this publication remains: to find a solution and answers to current issues. CIMC hopes that the publication would reach out to all types of students; from any major, background, with the pursuit of any degree in hopes that it would create awareness and promote further discussion on the plethora of selected issues particular to this edition and beyond. Furthermore, it is also within our expectation that this year's publication would inspire law students to write and submit their own articles in order to apply their knowledge and polish their skills while simultaneously contribute to the public.

As President of CIMC, i would like to express my deepest and sincerest gratitude to the JGLR Editorial Board, Technical Team, and Administrative Team that have dedicated their time and effort to make this year's edition the best it could be. To Editor in Chief, Kukuh Herlangga, and Team - this would not be possible without you all.

Audrey Kurnianti



President of the Community of International Moot Court
Faculty of Law, Universitas Gadjah Mada

FOREWORD FROM THE EDITOR IN CHIEF JURIS GENTIUM LAW REVIEW FACULTY OF LAW, UNIVERSITAS GADJAH MADA

I am delighted to welcome the publication of the second issue on the seventh volume of Juris Gentium Law Review. This issue marks the end of JGLR 2019/2020 administration. As a chief, I saw the progresses that JGLR has made just in one year, not to mention the potential of JGLR if it keeps progresses. We received more interesting manuscripts, and we also invited more expert reviewers compared to previous years.

For this particular issue JGLR features seven articles ranging from comparative studies third party liability and insurance protection for unmanned aircraft system in Indonesia and Europe, benefits and challenges of adopting The Hague System into Indonesia's industrial design registration system, possible coronavirus claims against China under the perspective of international law, Indonesia's response to coronavirus, an analysis on Philippines' legal reasoning in the South China Sea Arbitration and a discussion concerning the environmental protection under Rome Statute.

Lastly, I would like to express my sincere gratitude to JGLR team for their dedication and hard-work that made Volume 7(2) possible: Clarissa Intania, Kaysha Ainayya, Adinda Lakshmi, Aldeenea Cristabel, Grady Ginting, Muhammad Dwistaraifa and Balqis Fauziah that has written an editorial piece in this issue. Allow me to also take this opportunity to thank Universitas Gadjah Mada's Faculty of Law, the Authors and Executive Reviewers. This current issue would not be possible without the support and help received from them.

Kukuh Dwi herlangga

Editor in Chief of the *Juris Gentium Law Review*
Faculty of Law, Universitas Gadjah Mada

JURIS GENTIUM LAW REVIEW

Volume 7, Number 2, January 2020

BENEFITS AND CHALLENGES OF ADOPTING THE HAGUE SYSTEM INTO INDONESIA'S INDUSTRIAL DESIGN REGISTRATION SYSTEM

Vivin Purnamawati[1]

Abstract

The Hague System is a system that offers the possibility of obtaining protection for industrial designs in several states with a single international application filed with the International Bureau of WIPO. In such a system, lower cost and efficiency are seen as the biggest advantages as it unified the registration office, languages and accompanied by a single set of fees paid in one currency. However, some points of the system might be quite challenging for developing countries such as Indonesia – which plans to adopt the system into the amendment of current Industrial Design Law. This article aims to elaborate both the benefits and challenges a country will have to face by adopting the Hague System – in order to give out some insights to the Indonesia government and legislator before adopting the system into the revised Industrial Design Law.

Intisari

Sistem Hague merupakan sebuah sistem yang memungkinkan diperolehnya perlindungan desain industri di beberapa negara sekaligus melalui pendaftaran internasional tunggal dengan Biro Internasional WIPO. Biaya yang lebih rendah dan efisiensi dipandang sebagai manfaat terbesar dari sistem ini dengan adanya kesatuan kantor pendaftaran, bahasa, dan disertai pembayaran biaya dalam satu jenis mata uang. Meskipun demikian, beberapa poin dari sistem ini mungkin cukup menantang bagi negara-negara berkembang seperti Indonesia – yang berencana mengadopsi sistem ini dalam perubahan UU Desain Industri. Artikel ini bermaksud untuk mengelaborasi keuntungan dan tantangan yang harus dihadapi negara dalam mengadopsi sistem Hague – dalam rangka memberikan wawasan tambahan kepada pemerintah dan legislator Indonesia sebelum mengadopsi sistem ini dalam perubahan UU Desain Industri.

Keywords: *the Hague system, industrial design, international registration, benefits, challenges, Indonesia, industrial design law*

Kata Kunci: *sistem Hague, desain industri, pendaftaran internasional, keuntungan, tantangan, Indonesia, hukum desain industri*

[1] 2017, Faculty of Law, Universitas Gadjah Mada, Yogyakarta, majoring in Business Law.

A. Introduction

Industrial property has long been recognized and used by industrialized countries and is being used by an increasing number of developing countries as an important tool of technological and economic development.[2] Through the ratification of Agreement Establishing the World Trade Organization by Law No. 7 of 1994, Indonesia as the member state of the World Trade Organization (WTO) is obligated to abide by the multilateral agreements under WTO, including the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). It is later followed by the ratification of the Paris Convention for the Protection of Industrial Property (Paris Convention) through the Presidential Decree No. 15 of 1997. The norms of industrial design protection prescribed in the Paris Convention and TRIPS are internationally recognized as minimum standards in the intellectual property right administration of every member state.[3] Paris Convention stipulates that the member states shall protect industrial designs.[4] While TRIPS itself also requires the member states of WTO to provide legal measures for various kinds of intellectual property protection[5], including industrial designs. Therefore, Indonesia enacted Law No. 31 of 2000 Concerning the Industrial Design on December 20th of 2000.

According to Art. 1 no. 1 Law No. 31 of 2000, industrial design is defined as a creation on the shape, configuration, or the composition of lines or colors, or lines and colors, or the combination thereof, in a three or two-dimensional form which gives the aesthetic impression and can be realized in a three or two-dimensional pattern and used to produce a product, goods, industrial commodity or a handy craft. The legal protection of industrial design is encouraged by the aims to promote a competitive industry within the scope of national and international trade by encouraging the creation and innovation in the field of industrial design.[6] While targeting a competitive international industry, Indonesia's industrial design legal system has yet been supported by a proper framework in realizing its vision. Indonesia has yet to adopt the international registration of industrial designs system, The Hague Agreement Concerning the International Registration of Industrial Designs – also known as the Hague System – which offers the possibility of obtaining protection for industrial designs in several contracting parties through a single international application filed with the International Bureau of the World Intellectual Property Organization (WIPO).[7]

In most of the countries in the world, industrial design needs to be registered in order to be eligible for the protection.[8] However, due to different points of view in terms of national directions and legal infrastructures in any respective countries, it is common that there are some differences regarding administrative and substantive procedures applied to administer industrial

---

2 Noerhadi, C. C.,. (2013). The Weak Aspects of the Industrial Design Protection System in Indonesia. INDONESIA Law Review, 2(3), 115.

3 Suratno, Budi. (2004). Industrial Design Protection in Indonesia: A Comparative Study of the Law on Industrial Design Protection between Japan and Indonesia. Japan: Tokyo Institute of Technology. p. 2.

4 Article 5^{quinquies} of the Paris Convention for the Protection of Industrial Property [hereinafter Paris Convention]: "*Industrial designs shall be protected in all the countries of the Union.*"

5 Article 1 Paragraph 1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights [hereinafter TRIPS]: "*Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.*"

6 Law No. 31 of 2000 Concerning the Industrial Design [hereinafter Law No. 31 of 2000] Consideration.

7 World of Intellectual Property Organization [hereinafter WIPO]. Hague Guide for Users. Page 11. Available at: <https://www.wipo.int/export/sites/www/hague/en/guide/pdf/hague_guide.pdf> accessed 25 May 2020.

8 Suratno, 'Industrial Design Protection in Indonesia: A Comparative Study of the Law on Industrial Design Protection between Japan and Indonesia' (n 3).

design protection in each country.[9] Therefore, the existence of the Hague System makes it easier with an integrated international application. The system is now based on the Hague Agreement Concerning the International Registration of Industrial Designs, which is constituted by two different Acts, namely the Geneva Act (1999) and the Hague Act (1960).[10] Previously, Indonesia has once been a member of the Hague Agreement Concerning the International Deposit of Industrial Designs (London Act 1934).[11] But the London Act was later terminated on October 18th of 2016.[12]

On the other hand, the ASEAN Economic Community (AEC) through its Blueprint 2025 has encouraged the members to complete accession of several international treaties, includes the Hague Agreement, in order to ensure the development of a more robust ASEAN intellectual property system.[13] Singapore, Brunei Darussalam, and Cambodia are so far the ASEAN countries which had become the party to the agreement. Furthermore, Indonesia also plans on adding the Hague System into the amendment of Law No. 31 of 2000.[14] The revised draft itself is now listed on the National Legislation Program 2020-2024.[15]

Given the plan of adopting the Hague System into Indonesia's legal system, this article will advance a three-part discussion, which is *firstly* to give an overview about the system and how to determine which Act to govern the registration – as the system is constituted by two different Acts (i.e. the Hague Act and the Geneva Act). *Secondly*, the author will thereby advance analysis of the benefits of adopting the system and *thirdly*, on the challenges Indonesia has to face by adopting it. At some parts, another intellectual property international registration system (e.g. Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks – also known as the Madrid System – and The Patent Cooperation Treaty – also known as the PCT System) would also be used as comparations to the Hague System. As Indonesia's parliament is working on the amendment of the existing Industrial Design Act (i.e. Law No. 31 of 2000), this article is drafted with the intention of giving insights to the government so it could be taken into consideration for preparation prior to implementing the Hague System. On a broader note, the author hopes that this article may contribute to increasing the readers' knowledge in the field of intellectual property protection.

B. Overview of The Hague System

Intellectual property rights (IPRs) play a very important role in the progress and development of society.[16] Other than providing an incentive to the creator and enhancing innovation and creativity, IPRs enhance invention and research, ensure the availability of the genuine and original products, and are necessary to stimulate economic growth.[17] In other words, it's important for the creator to have their intellectual properties registered and legally protected by law. But the registration and protection system might differ from state to state – in the case of administrative

9 *Ibid*.
10 WIPO, 'Hague Guide for Users' (n 7), p.10.
11 General Elucidation of Law No. 31 of 2000.
12 WIPO, 'Hague Guide for Users' (n 7), p.10.
13 Association of Southeast Asian Nations [hereinafter: ASEAN]. (2015). ASEAN Economic Community Blueprint 2025. Jakarta: Secretariat of ASEAN. p. 14.
14 Direktorat Jenderal Kekayaan Intelektual [hereinafter: DJKI]. (2018). Sistem Hague Permudah Perlindungan Desain Industri. Retrieved from https://dgip.go.id/sistem-hague-permudah-pelindungan-desain-industri Accessed on 18 May 2020.
15 Parliament Resolution No. 46/DPR RI/I/2019-2020 Concerning the National Legislation Program Draft Legislation 2020-2024.
16 Sharma, D. K.. (2014). Intellectual Property and the Need to Protect it. Indian J.Sci.Res, 9(1), 3.
17 *Ibid*.

procedures, requirements, etc. This results in the presence of various international systems like the PCT System for patent registration, the Madrid System for marks registration, and the Hague System for industrial design registration.[18]

Like the other IPRs, the system for the protection of industrial design is different around the world and national protection of designs requires application and registration in most countries.[19] With the designs successfully registered, it can prevent others from making, offering, putting on the market, importing, exporting, neither using products incorporating the designs.[20] The Hague System confers a bundle of national registration in a single international application, but if the protection is not available in one of the designated countries, the application will be rejected only in that country and thus the rejection in one country will not exclude protection in the other designated countries.[21]

The Hague System is constituted by the Hague Act (1960) and the Geneva Act (1999), which both are independently applicable for their contracting parties. The membership of the Hague Act (1960) is only open to States[22], while an intergovernmental organization may also become a party to the Geneva Act (1999) with provided conditions to be fulfilled.[23] Currently, the Geneva Act (1999) has a total of 64 contracting parties[24], while the Hague Act (1960) has 34 contracting parties.[25]

One single international application through the Hague System might be governed by only one Act or several Acts – depends on which Act the designated contracting parties bound to. There are some principles below which are useful to determine which of the Act applies to the application:[26]

a. *First*, where there is only *one* common Act between the two contracting parties concerned, it is such Act which governs the designation of a given contracting party. In this case, if the applicant's state of origin is bound by both the 1999 and the 1960 Acts and the designated contracting party is bound exclusively by the 1960 Act, thus the 1960 Act applies here.
b. *Second*, where both the contracting parties concerned are bound by *more* than one common Act, it is the *most recent* Act which applies to the designated contracting party. In this case, if the applicant's state of origin is bound by both the 1999 and the 1960 Acts and the designated contracting party is also bound by both the Acts, thus the 1999 Act applies here.
c. *Third*, if there are more than one designated contracting parties:
   – The 1999 Act governs exclusively i.e. all the designated contracting parties are bound by the 1999 Act.

---

18 Indonesia has accessed the Patent Cooperation Treaty through the Presidential Decree No. 16 of 1997 and the Madrid Protocol through the Presidential Regulation No. 92 of 2017.

19 Hallenborg, Louise, *et.al.* (2008). Intellectual Property Protection in the Global Economy. Technological Innovation: Generating Economic Results Advances in the Study of Entrepreneurship, Innovation and Economic Growth, 18, 65.

20 *Ibid.*, 71.

21 *Ibid.*, 69.

22 Article 1 Paragraph (2) of The Hague Act (1960) of the Hague Agreement Concerning the International Registration of Industrial Designs [hereinafter The Hague Act].

23 Article 27 Paragraph (1) of The Geneva Act (1999) of the Hague Agreement Concerning the International Registration of Industrial Designs [hereinafter The Geneva Act].

24 WIPO. Contracting Parties of Geneva Act (1999). See <https://www.wipo.int/treaties/en/ActResults.jsp?act_id=7> accessed on 25 May 2020.

25 WIPO. Contracting Parties of Hague Act (1960). See <https://www.wipo.int/treaties/en/ActResults.jsp?act_id=3> accesed on 25 May 2020.

26 WIPO, 'Hague Guide for Users' (n 7) 17-18.

- The 1960 Act governs exclusively i.e. all the designated contracting parties are bound by the 1960 Act.
- Both Acts govern the application i.e. at least one contracting party are bound by the 1999 Act and at least one contracting party are bound by the 1960 Act (e.g. State A as the state of origin of the applicant is bound by both the Acts and the applicant applies to state B, C, and D which are under the 1960 Act and state E which is under the 1999 Act. Therefore, in the international application, the 1960 Act applies in respect of the contracting parties B, C, and D, and the 1999 Act applies in respect of the contracting party E).

C. Benefits of The Hague System

With the Hague System, design owners are relieved from the need to make separate national applications in each of the contracting parties in which they require protection, thereby avoiding the complexities arising from procedures that may differ from state to state.[27] The application is submitted through a "one door system" to the International Bureau of WIPO which later will be transferred to the designated contracting party for substantive examination and final decision purposes.

Upon publication of the international registration in the International Designs Bulletin[28], the office of each designated contracting party can proceed with the substantive examination according to its national legislation and send the statement of grant of protection or notify a refusal of protection to the International Bureau within the applicable refusal period.[29] In this case, the role of the designated contracting party is clear – which is only to proceed substantive but not the formal examination. The separated roles between the International Bureau and the designated contracting party also make it easier for the designated state at the national level. In comparing to the national registration in Indonesia where the Directorate General needs to conduct the formal examination firstly which later followed by announcement and substantive examination[30], with the Hague System, the workload of the designated state for international registration is reduced by freeing them from the responsibility of formality examination which had been transferred to the International Bureau.

Besides the decreasing workload, the Hague System itself is also very beneficial to the adopting country in the globalization era. Globalization brings a significant impact on economic activities nowadays and the trade of goods and services across state borders. Industrial design as one of the intellectual properties holds a very important role in the said economic and trade activities. In an attempt to develop global industrial designs over Indonesian local products and to develop small and medium-sized enterprises capability to compete in the global market, an effective and efficient international registration system, *in casu* the Hague System is advantageous and necessary for one country in securing legal protection to support global trade.

---

27 *Ibid*., 14.

28 International Designs Bulletin is an official publication of the Hague System which contains data regarding new international registrations, renewals, and modifications affecting existing international registration. See WIPO. International Designs Bulletin. <https://www.wipo.int/haguebulletin/?locale=en> accessed on 26 May 2020.

29 A refusal of protection must be notified within six months from the date of publication. However, under the 1999 Act, any contracting party whose office is an examining office or whose law provides for the possibility of opposition to the grant of protection may declare that the refusal period of six months is replaced by a period of twelve months. See WIPO, 'Hague Guide for Users' (n 7) 13.

30 Article 24 Paragraph (1) jo. Article 25 Paragraph (1) jo. Article 26 of Law No. 31 of 2000.

In the Hague system, the applicants may also avoid filing documentation in various languages,[31] while using translation services is unavoidable in the case of making separate national applications. They are given options to file in whether English, French, or Spanish.[32] Thus, with the Hague System, additional translator fees for each state are excluded. Comparing to the PCT System, the Hague System is much simplified. Patent registration through the PCT System is classified into the international phase and national phase. The language in which an international application must be filled depends on the receiving office which is indicated in Annex C of the PCT Applicant's Guide – International Phase.[33] Besides, in order to enter into the national phase, each state generally requires translation of the international application into their national language to be submitted.[34]

In addition, the applicants through the Hague System may avoid the need to pay fees in various currencies.[35] The payments of application are paid in one currency – which is the Swiss currency – through the International Bureau.[36] In the case of PCT System, though the payment of international fee is unified in one currency – Swiss Franc – but it doesn't apply the same for a national fee, which depends on the requirements of each state.

Furthermore, unlike the marks international registration under the Madrid System[37], the Hague System does not require any prior national application or registration. Thus, the protection for an industrial design can therefore be applied at the international level through the Hague System *for the first time*.[38] This is especially beneficial for those who have yet obtained registration in their state of origin. They may directly file for an international registration without formerly going through additional procedures for national registration. Moreover, the applicant may apply for several different designs in a single international application.[39] The limit is up to a maximum of 100 and they must belong to the same class of the international classification of Locarno.[40] This indicates a pretty efficient side of the Hague System in the registration of the industrial designs.

Another extra point of the Hague System is in the event of the absence of the statement of grant of protection. In principle, the office of the designated contracting party must send to the International Bureau a statement of grant of protection to the industrial designs registered if there

---

31 *Ibid*., 14.

32 Rule 6 (1) Common Regulations Under 1999 Act and the 1960 Act of the Hague Agreement [hereinafter Common Regulations].

33 WIPO. PCT Applicant's Guide – International Phase. Page 10. Available at: <https://www.wipo.int/export/sites/www/pct/guide/en/gdvol1/pdf/gdvol1.pdf> accessed on 25 May 2020.

34 e.g. Thailand requires translation into Thai, Poland requires Polish, Uzbekistan requires Uzbek or Russian, Indonesia itself requires Indonesian, etc.

35 WIPO, 'Hague Guide for Users' (n 7) 14.

36 Rule 28 (1) Common Regulations.

37 Prior registration of marks in the country of origin is obligated in the case of Madrid Protocol. See Article 3 Paragraph (1) of the Madrid Agreement Concerning the International Registration of Marks [hereinafter Madrid Agreement]: "*Every application for international registration must be presented on the form prescribed by the Regulations; the Office of the country of origin of the mark shall certify that the particulars appearing in such application correspond to the particulars in the national register, and shall" mention the dates and numbers of the filing and registration of the mark in the country of origin and also the date of the application for international registration.*" See also Article 52 Paragraph (3) of Law No. 20 of 2016 Concerning Marks and Geographical Indications [hereinafter Law No. 20 of 2016].

38 WIPO, 'Hague Guide for Users' (n 7) 11.

39 *Ibid*.

40 Locarno Classification is an international classification under the Locarno Agreement (1968) for the purposes of the registration of industrial designs. See WIPO. Locarno Classification. Retrieved from https://www.wipo.int/classifications/locarno/en/ accessed on 26 May 2020.

isn't any notification of refusal within the applicable refusal period.[41] However, even though such a statement is not sent by the office, it remains the case that the industrial designs registered are protected as long as there is no refusal within the period.[42] In this case, it can be seen that the protection of the applicants is higher enough.

Besides all the points mentioned above, the Hague System also provides subsequent management of the protection obtained for registered industrial designs. A change in the ownership or the name or address of the holder can be recorded in the International Register with effect in all the designated contracting parties by just one simple procedural step.[43] It can relieve the owners from the complicated procedures they might have to face in case there is any transfer of ownership of the designs to the third party. At the same time, the new owners are relieved from the need to re-apply for international protection of the designs.

Regarding that two different Acts are constituting the Hague System, Indonesia Government is planning to accede the Geneva Act (1999).[44] It's a wiser and better choice considering the Geneva Act (1999) is "newer" and is the one that will bind the mutual parties in the case where the States are both parties to different Acts.[45] Besides, the Act also introduced a certain number of features to extend the Hague System to new members, e.g. the entitlement to file an international application is expanded[46] also to nationals of member states of an intergovernmental organization that is a contracting party and the filing right based on habitual residence.[47] Another example of new-added features in the system is regarding the two types of special requirements that may be notified by a contracting party and with which the applicant has to comply to, i.e. special requirements concerning the applicant and special requirements concerning the unity of the design. The latter one is quite interesting and beneficial as the Indonesia Industrial Design Law also contains a requirement of unity of design. It's accorded in Art. 13 of Law No. 31 of 2000 where an application can only be filed for one industrial design or *several industrial designs that constitute a unity of an industrial design or that have the same class*. Therefore, as if Indonesia has notified the fact to the Director General of WIPO, for an applicant who applies for two or more industrial designs included in the same application, those designs have to conform to the same creative concept.[48]

D. <u>Challenges of Adopting The Hague System</u>

With adopting the Hague System, the possibility of the applications flooding from all around the world is increasing. Thus, even though the workloads of the designated state is reduced by the separated roles with the International Bureau as mentioned above, they are challenged with more applications to be examined substantively. Moreover, an office is given only six or twelve months in examining and deciding whether to grant or refuse to protect the designs.[49] The applicable refusal period signifies the period of substantive examination, which is quite disadvantaging for

41 Rule 18*bis* (1) Common Regulations.
42 WIPO, 'Hague Guide for Users' (n 7) 13.
43 *Ibid*., 13.
44 DJKI. (2017). DJKI Bersama K/L Bahas Rencana Aksesi Hageu Agreement Pendaftaran Desain Industri Internasional. Retrieved from https://dgip.go.id/djki-bersama-k-l-bahas-rencana-aksesi-hageu-agreement-pendaftaran-desain-industri-internasional Accessed on 4 Aug 2020.
45 Article 44 of The Geneva Act.
46 The filing right according to the Hague Act (1960) is only given to nationals of contracting states and persons who, without being nationals of any contracting state, are domiciled or have a real and effective industrial or commercial establishment in the territory of a contracting state. See Article 3 of The Hague Act.
47 Article 12 jo. Article 13 of The Geneva Act.
48 Article 24 of The Geneva Act.
49 Article 8 Paragraph (2) The Hague Act. See also Article 12 Paragraph (2) The Geneva Act.

the office of the designated state considering the expected increasing amount of application. Thus, the examiners are challenged to "upgrade" their examining performances in adjusting to the condition. In this case, the role and support of the government, *in casu* Directorate General, are no less important in providing, such as skills training, counseling regarding the technical issues in implementing the Hague System, etc.

Regarding the substantive examination, there is one fundamental weakness in the current Indonesia Industrial Design Law. In the event of no objection filed against the application within the announcement period, Directorate General thereby shall issue and grant the Industrial Design Certificate – at the latest thirty days since the termination of the announcement period.[50] Therefore, there is no substantive examination of the whole application process. In another word, there will be no substantive examination unless there is opposition.[51] The legal framework *status quo* can cause legal uncertainty concerning the "novelty" and the true rights holder of a design.[52] *Firstly*, the applicants might register designs with "bad faith" without the knowledge of the true rights holder. Thus *secondly*, with no knowledge of the applicants' doings, the true rights holder might miss out on the timing to file an objection and so on the substantive examination is excluded which later ended up with the "bad faith" applicants getting their application approved. It seems like the political will was as if to require the rights holder to keep on checking the announcement of the registered applications and filing objection against them if there is any, but the author personally thinks the substantive examination shall still be undertaken, regardless of having objection or not.

Besides, the "no opposition no substantive examination" principle in the local registration itself is contradictive with the main role of the designated state in the Hague System – which is to conduct the substantive examination to the international applications. According to Art. 3 para. (1) TRIPS, "*Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property…*" – thus the "no opposition no substantive examination" at the local level is not accorded to the "national treatment" principle as stipulated in the Art. 3 of TRIPS. Hence, in amending the existing Industrial Design Law, the government shall also put attention to this mentioned issue so the modified legal framework shall be able to accommodate both the national and international registrations accordingly.

As a comparison, see how the substantive examination of marks registration is regulated in the existing Law No. 20 of 2016 Concerning Marks and Geographical Indications. Following the had been satisfied minimum formal requirements with a given filing date, the applications would be published in the mark gazette for two months and any party may file an opposition within the period of publication.[53] Thereby the formality so far is no different from the local registration of industrial designs. What makes the difference is in the marks' registration, a substantive examination is bound to be carried out both in the event of there is opposition or no opposition.[54] It is also stipulated clearly in Art. 12 para (1) Government Regulation No. 12 of 2018 Concerning International Registration of Marks Based on the Protocol Relating to the Madrid Agreement

---

50 Article 29 jo. Article 26 Paragraph (2) of Law No. 31 of 2000.
51 Noerhadi, 'The Weak Aspects of the Industrial Design Protection System in Indonesia' (n 2) 118-119.
52 Noerhadi, 'The Weak Aspects of the Industrial Design Protection System in Indonesia' (n 2) 119.
53 Article 13 Paragraph (1) jo. Article 14 jo. Article 16 Paragraph (1) Law No. 20 of 2016.
54 Article 23 Paragraph (2) jo. Paragraph (3) Law No. 20 of 2016.

Concerning the International Registration of Marks.[55] Meanwhile, in the industrial designs' registration, a substantive examination is only to be conducted if there is opposition to the registrations.

As to how it is explained before, the absence of the grant of protection statements within the applicable refusal period might don't bring any legal consequences to the applicants. But in the meantime, they are required to wait for as long as six or twelve months in uncertainty. Instead of being notified for the grant of protection, they probably need to wait until the end of the refusal period to know for sure whether the protection is granted or not – by using the notification of refusal as a parameter.

The Hague System and the Madrid System have a similarity in which they are not quite convenient for the applicants to obtain information regarding the designated state's substantive examination. Researching won't be easy as the applicants don't interact with any of the local agents from the designated state.[56] Meanwhile, it's another case in the patent registration through the PCT System. As there is a "national phase" under the PCT System, it is allowed for the designated office to require non-resident applicants to be represented by an agent or to have an address for service in the country.[57] While in both of the Hague and Madrid Systems, it may relieve the applicants from additional local agent fees, but in the PCT System, the applicants may obtain more trusted and useful information regarding the substantive examination. Therefore, the possibility of the application being accepted is thus getting higher. Even though it isn't obligated to use local agents' service in the Hague System, but the applicants may consider this "pricey" option for a certain level of assurance of getting the application approved.

Strengthening the intellectual property system can improve the developing countries' ability to promote exports of the products they produce.[58] The international registration system, *in casu* the Hague System, is meant to provide greater protection for local designers in the globalization era. It is also meant to boost more local creativity and innovation in the future. While it is potentially cost-saving with no translation costs neither local counsel expenses needed[59], the level of protection of the designs depends on the financial capability of the design owners in paying other needed costs. According to the Rule 12 (1) Common Regulations Under the 1999 Act and the 1960 Act of the Hague Agreement, the international application shall be subject to the payment of a basic fee, a publication fee, and in respect of each designated contracting fee, either a standard or an individual designation fee.[60] Besides, the payments shall be paid in Swiss Franc

---

55 The substantive assessment shall be undertaken toward International Registrations, either having objection or not having objection.

56 Hidayati, Nurul, and Naomi Yuli Ester S. (2017). Urgensi Perlindungan Merek Melalui Protokol Madrid (Trademark Protection Urgency Through the Madrid Protocol). Jurnal LEGISLASI INDONESIA, 14(2), 181.

57 Article 27 Paragraph (7) of the Patent Cooperation Treaty jo. Rule 51bis.1 of the Regulations under the Patent Cooperation Treaty.

58 Goans, Judy Winegar. (2003). *Intellectual Property and Developing Countries An Overview*. Washington: USAID. Page 6.

59 Lukyanenko, Natalya, and Yuri Pylnev. The Hague System for the International Registration of Industrial Designs is Now Available in Rusia. Retrieved from https://s3.amazonaws.com/documents.lexology.com/0a55c147-3280-4695-9921-d1f7b509c81e.pdf?AWSAccessKeyId=AKIAVYILUYJ754JTDY6T&Expires=1590237135&Signature=MN9GTBifaYxFSGlDz0e%2BCT4zEaQ%3D accessed on 25 May 2020.

60 See Article 7 Paragraph (2) of The Geneva Act: "*Any Contracting Party whose Office is an Examining Office and any Contracting Party that is an intergovernmental organization may, in a declaration, notify the Director General that, in connection with any international application in which it is designated, and in connection with the renewal of any international registration resulting from such an international application, the prescribed designation fee referred to in paragraph (1) shall be replaced by an individual designation fee,…*" Currently, the contracting parties which have designated individual fee for the international applications consist of African Intellectual

(CHF), which has a much higher value comparing to Indonesia Rupiah (IDR).[61] These indicate that the Hague System would be quite expensive for design owners who belong in the middle to lower incomes class. Thus, the Hague System might be only benefiting those who are more capable financially while many other local designs might are left weak-protected. The government shall consider the possibility of providing incentives for local designers and/or applicants (e.g. small and medium-sized enterprises/SMEs or known as *Usaha Mikro, Kecil, dan Menengah*/UMKM in Indonesia) in order to develop the local industries capability to be able to compete in the global market.

E. Conclusion

Conclusively, the Hague System brings multiple benefits to both the contracting states and applicants, e.g. (i) simplified procedures with one office, one language, and one currency payments; (ii) no prior national application obligation; (iii) designated state is exempted from the need to execute formal examination, as it had been done by the International Bureau in prior; (iv) the protection is granted even in the event of an absence of its statement, as long as there was no refusal within the applicable refusal period; and most importantly (v) the Hague System supports the global trade in the globalization era by securing legal protection to industrial designs.

However, the concerns that may arise out from the system, i.e. (i) increasing application prediction with the "not very long" substantive examination duration; (ii) legal uncertainty and contradiction which arise from the "no opposition no substantive examination" principle in the current Indonesia industrial design law; (iii) uncertain waiting period for the applicants; (iv) the disadvantages of no interaction with local agents; and (v) it's quite pricey for applicants from the middle to lower incomes class – shall still be taken into account by the government of Indonesia before adopting and implementing the Hague System. The government may consider providing skills training, counseling regarding the technical issues in implementing the Hague System, or other related topics to the examiners and the possibility to provide incentives for local designers and/or applicants who are less-privileged in the case of expensive fees coming from the system. Regarding the upcoming revised Industrial Design Law, the government may consider to repeal the "no opposition no substantive examination" principle and undertaking the substantive examination regardless there is an or no opposition. It's to ensure legal certainty and national treatment accordingly. As to how the current Marks and Geographical Indications Law adopted the Madrid System, the revised Industrial Design Law shall adopt the Hague System accordingly and shall later regulate the technical provisions in the implementing regulation, i.e. a Government Regulation.

Property Organization (OAPI), Canada, European Union, Hungary, Israel, Japan, Kyrgyzstan, Republic of Korea, Republic of Moldova, Russian Federation, and the United States of America. See WIPO. (2020). Individual Fees under the Hague Agreement. <https://www.wipo.int/hague/en/fees/individ-fee.html> accessed on 25 May 2020.

61 As on May 23rd of 2020, 1.00 CHF values 1.029500 USD while 1.00 IDR values 0.000068 USD. Converted online at <https://www.x-rates.com/calculator/?from=IDR&to=USD&amount=1> on 23 May 2020.

BIBLIOGRAPHY

Books and Journal Articles

Association of Southeast Asian Nations (ASEAN). (2015). *ASEAN Economic Community Blueprint 2025*. Jakarta.

Goans, Judy Winegar. (2003). *Intellectual Property and Developing Countries An Overview*. Washington.

Hallenborg, Louise, Marco Ceccagnoli, Meadow Clendenin. (2008). '*Intellectual Property Protection in the Global Economy. Technological Innovation: Generating Economic Results Advances in the Study of Entrepreneurship, Innovation and Economic Growth*' *18* 63-116.

Hidayati, Nurul, Naomi Yuli Ester S. *(2017)*. '*Urgensi Perlindungan Merek Melalui Protokol Madrid (Trademark Protection Urgency Through the Madrid Protocol)*' *14 (2)* Jurnal LEGISLASI INDONESIA, 14(2), p. 171-184.

Noerhadi, Cita Citrawinda. '*The Weak Aspects of the Industrial Design Protection System in Indonesia*' *2(3) 2013* INDONESIA Law Review 115-123.

Sharma, Dushyant Kumar. '*Intellectual Property and the Need to Protect it*' *9(1)* 2014 Indian J.Sci.Res, 82-87.

Suratno, Budi. (2004).*Industrial Design Protection in Indonesia: A Comparative Study of the Law on Industrial Design Protection between Japan and Indonesia*. Japan. Tokyo Institute of Technology.

Treaties and Conventions

Agreement on Trade-Related Aspects of Intellectual Property Rights (January 1, 1995)

Common Regulations Under 1999 Act and the 1960 Act of the Hague Agreement (January 1, 2019)

Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs (1999)

Hague Act of the Hague Agreement Concerning the International Registration of Industrial Designs (1960)

Madrid Agreement Concerning the International Registration of Marks (April 14, 1981)

Paris Convention for the Protection of Industrial Property (March 20, 1883)

Patent Cooperation Treaty (June 19, 1970)

Regulations under the Patent Cooperation Treaty (July 1, 2019)

Legislations

Law number 20 on the Concerning Marks and Geographical Indications 2016

Law number 31 on the Concerning the Industrial Design 2000

Parliament Resolution number 46/DPR RI/I/2019-2020 on the National Legislation Program Draft Legislation 2020-2024 2019.

Miscellaneous

DJKI, 'Sistem Hague Permudah Perlindungan Desain Industri' (2018) <https://dgip.go.id/sistem-hague-permudah-pelindungan-desain-industri> accessed on 18 May 2020

DJKI, 'DJKI Bersama K/L Bahas Rencana Aksesi Hageu Agreement Pendaftaran Desain Industri Internasional' (2017) <https://dgip.go.id/djki-bersama-k-l-bahas-rencana-aksesi-hageu-agreement-pendaftaran-desain-industri-internasional> accessed on 4 Aug 2020

Lukyanenko, Natalya, Yuri Pylnev, 'The Hague System for the International Registration of Industrial Designs is Now Available in Rusia' <https://s3.amazonaws.com/documents.lexology.com/0a55c147-3280-4695-9921-d1f7b509c81e.pdf?AWSAccessKeyId=AKIAVYILUYJ754JTDY6T&Expires=1590237135&Signature=MN9GTBifaYxFSGlDz0e%2BCT4zEaQ%3D> accesed on 25 May 2020

WIPO, 'Individual Fees under the Hague Agreement' (2020) <https://www.wipo.int/hague/en/fees/individ-fee.html> accessed on 25 May 2020

WIPO, 'Contracting Parties of Geneva Act (1999)' <https://www.wipo.int/treaties/en/ActResults.jsp?act_id=7> accessed on 25 May 2020

WIPO, *'Contracting Parties of Hague Act (1960)'* <https://www.wipo.int/treaties/en/ActResults.jsp?act_id=3> accessed on 25 May 2020

WIPO, *'Hague Guide for Users'* <https://www.wipo.int/export/sites/www/hague/en/guide/pdf/hague_guide.pdf> accessed on 25 May 2020

WIPO, '*International Designs Bulletin*' <https://www.wipo.int/haguebulletin/?locale=en> accesed on 26 May 2020

WIPO, '*Locarno Classification*' <https://www.wipo.int/classifications/locarno/en/> accesed on 26 May 2020

WIPO, 'PCT Applicant's Guide – International Phase' <https://www.wipo.int/export/sites/www/pct/guide/en/gdvol1/pdf/gdvol1.pdf> accessed on 25 May 2020

X-RATES, 'Online Currency Calculator' <https://www.x-rates.com/calculator/?from=IDR&to=USD&amount=1> accesed on 23 May 202

IN CHINA'S THREE LINE OF DEFENCE: ADDRESSING THE CORONAVIRUS CLAIMS AGAINST CHINA UNDER INTERNATIONAL LAW

Balqis N. Fauziah[62]& Stephanie Kristina S.[63]

[62*] Balqis Nazmi Fauziah, Bachelor of Law, Faculty of Law, Universitas Gadjah Mada, Indonesia.
[63*] Stephanie Kristina Susanto, Bachelor of Law, Faculty of Law, Universitas Gadjah Mada, Indonesia.

Abstract

The surge of cases of the Coronavirus pandemic have resulted in a rippling impact towards States across the world, increasing mortality rates and causing economic collapse. There have been discussions on whether China, as the epicenter of the virus outbreak, can be held liable for its negligence in domestically containing the virus and as a result, allowing its spread to traverse so viciously across international borders. This paper will identify the many factors that contribute to the spread of the pandemic. It will then highlight the legal challenges in establishing a direct, causal link between China and the spread of the virus for China to be held solely responsible under the regime of international responsibility.

Intisari

Melonjaknya kasus virus corona telah menyebabkan runtuhnya perekonomian global dan meningkatnya angka kematian pada negara-negara di seluruh dunia. Hal ini menyebabkan terjadinya banyak diskusi mengenai tuntutan kepada negara China atas kelalaiannya dalam menangani kasus Corona secara domestik, yang diduga telah mengakibatkan menyebarnya virus secara masif ke banyak negara. Artikel ini akan menitikberatkan pada pembahasan mengenai pembuktian hubungan kausal antara perilaku China dan kontribusinya terhadap penyebaran virus Corona dan juga tantangan hukum lain yang timbul dalam menuntut pertanggungjawaban negara China di bawah ranah hukum internasional.

Keyword: *State responsibility, pandemic, Coronavirus, China, shared responsibility, Monetary Gold principle.*

Kata Kunci: *tanggung jawab negara, pandemi, Coronavirus, China, tanggung jawab bersama, prinsip Monetary Gold.*

A. Introduction

On December 31, 2019 the World Health Organization ["**WHO**"] was relayed news regarding a potentially deadly virus of an unknown etiology by government authorities in Wuhan, China.[64] The virus, now broadly known as the Coronavirus, was officially labelled by the WHO as a pandemic in early 2020, after multiple countries witnessed staggering amounts of newly infected persons.

[64] World Health Organization. (2020, January 5). Pneumonia of unknown cause – China.

At the time of writing, over twenty million people have been infected globally, and more than seven hundred thousand in numerous countries have died.[65]

The severity of the situation has caused legal scholars and politicians to engage in discourse regarding individual State responsibility over a global pandemic. Perhaps one of the most widely heard claims has been voiced by US President Donald Trump, who called for the responsibility of the Chinese government for the Coronavirus pandemic, although the specific type of responsibility has never been detailed.[66] US Senator Lindsey Graham has also stated that his committee will push forward on the amendment of the 1976 Foreign Sovereign Immunities Act, the law that protects foreign countries from lawsuits in US courts.[67] More recently, the European Union has also followed suit and publicly demanded for China's responsibility.[68]

Furthermore, in the pursuit of responsibility, a number of US states, individuals, and small businesses have also filed a total of 14 lawsuits within the US,[69] and two from other States; one submitted by a group of Nigerian lawyers[70] and another by Argentinean lawyers.[71] Though the trend of submitting lawsuits in national courts have been increasing, legal experts such as Mary Ellen O'Connell, a professor from Notre Dame Law School, have stated that little success were to be expected out of the lawsuits, saying that the "cases filed in US courts need to overcome immunity and prove causation" which is not a simple task.[72] Thus, with more challenges arising with regard to domestic means, the discussion then shifted towards a more plausible avenue; international adjudication.

Under international law, States are provided with more diverse routes. States can choose to undertake dispute mechanisms provided by Bilateral Investment Treaties, international tribunals such as the International Tribunal for the Law of the Sea, or even recourse to the World Trade Organization to initiate proceedings. One judicial organ, however, seems to be favored by legal scholars above all others for this particular case. The International Court of Justice ["**ICJ**"] appears to best facilitate the adjudication against China.[73] V.O Mazzuoli, one of the many scholars undertaking research on said avenue, has recently found the jurisdictional basis applicable to compel a case towards China, which is a clause conferring the ICJ's jurisdiction under Article 75 of the WHO Constitution.[74]

Additionally, under the framework of State responsibility provided by the Articles on Responsibility of States for Internationally Wrongful Acts ["**ARSIWA**"], potential remedies are offered to parties injured by the "wrongful acts" of a State.[75] In this case, as a consequence of China's supposed inaction and negligence during the early stages of the outbreak, which

---

[65] World Health Organization. (n.d.). WHO Coronavirus Disease (COVID-19) Dashboard.
[66] Schwartz, M. S. (2020, April 18). Trump Warns Of "Consequences" If China Was "Knowingly Responsible" For Outbreak. National Public Radio.
[67] Flatley, D., & Woodhouse, S. (2020, June 24). Graham Backs Letting U.S. Citizens Sue China Over Coronavirus. Bloomberg.
[68] Nicolás, E. S. (2020, June 11). EU: China, Russia responsible for Covid-19 disinformation. EU Observer.
[69] Mirski, S., & Anderson, S. (2020, July 10). What's in the Many Coronavirus-Related Lawsuits Against China? Lawfare.
[70] Nigerians sue China for $200B over coronavirus pandemic. (2020, July 7). Anadolu Agency.
[71] 李.缘. (2020, April 29). 全球追责升级 阿根廷律师刑事起诉中共 - 大纪元. Epoch Times.
[72] University of Notre Dame. Lawsuits against China, WHO are not the way forward, Notre Dame expert says. (2020, May 27). University of Notre Dame.
[73] Tzeng, P. (2020, April 2). Taking China to the International Court of Justice over COVID-19. EJIL:Talk.
[74] Mazzuoli, V. de Oliviera. (2020b). Is It Possible to Hold China Responsible in the Case of COVID-19? SSRN Electronic Journal, 1–5.
[75] International Law Commission. Draft Articles on Responsibility of States for Internationally Wrongful Acts. (2001). UN Doc A/56/83. ["ARSIWA"].

allegedly allowed the global spread of the Coronavirus, States can claim for reparations for the monetary damages that have been incurred because of the Coronavirus.

However, while the discussion regarding the potential claims against China has been detailed and intense, there has been little to no scholarly work regarding the potential legal defences to be brought by China in such events. Accordingly, this article will elaborate on the potential responses to the claims brought against China, utilizing the characterization of obligation in international law and the application of the Monetary Gold principle. In addition, it will also demonstrate the application of the guiding principles of shared responsibility and how it can enhance the enforcement of international cooperation as it fills in the gaps of traditional State responsibility by providing an adequate framework to assess States' liabilities in the unprecedented event of a pandemic.

B. Obligation of Conduct

As a member State to the WHO Constitution and the 2005 International Health Regulations ["**IHR**"], China has the positive obligation to "prevent, protect against, control and provide a public health response to the international spread of disease."[76] This obligation manifests itself in many forms, one of which is regulated under Articles 6 and 7 of the IHR, where it provides that each member State is required to assess events occurring within their territory and provide timely, accurate and sufficiently detailed public health information regarding the event to the WHO.[77]

This specific article has been utilized as a basis in several scholarship, as the main obligation by which China has been argued to have breached, meaning that China has supposedly conducted an internationally wrongful act and can be sued in the ICJ. The arguments of this claim were first developed as a response to a news article which opined that China had already known of the deadly virus since November, and deliberately withheld information from the WHO, a statement which has not yet been verified for its accuracy until this day.[78]

Upon deeper reflection of the obligations, Article 6 of the IHR provides that each State party shall notify the WHO "within 24 hours of assessment of public health information, of all events which may constitute a public health emergency of international concern within its territory" and "continue to communicate to WHO timely, accurate and sufficiently detailed public health information available to it on the notified event." The implementation of this specific article after its 2005 alteration has only been done once, and that is during the outbreak of the H1N1 influenza pandemic in 2009. During that time, Mexican authorities began to receive reports of an influenza-like illness in March 2009, however, it was not until mid-April that they began to seek advice from the WHO Pan-American branch and reported the virus.[79] The WHO later declared the outbreak as a pandemic on June 11, 2009.

Although Mexico's behaviour was not timely, there were never any allegations set out towards the Mexican authorities by the international community for any tardiness in its communication regarding a potential pandemic to the WHO, even though many States were impacted. This was potentially because the obligations set out by Article 6 of the IHR, were understood as an obligation of conduct, rather than an obligation of result or of consequence. Meaning that it requires member States "to employ all means reasonably available to them, so as to prevent [an

[76] World Health Assembly. International Health Regulations 2005. (2006). ["IHR"]. Art 2.
[77] IHR, Arts 6 & 7.
[78] Ma, J. (2020, March 14). Coronavirus: China's first confirmed Covid-19 case traced back to November 17. South China Morning Post.
[79] Smith, G. J. D., et al. (2009). Origins and evolutionary genomics of the 2009 swine-origin H1N1 influenza A epidemic. Nature, 459(7250), 1122–1125.

event] so far as possible"[80] as an act of due diligence in preventing any further outbreaks, and not to obtain a "specific determined result" in completely eradicating or isolating the virus.[81] Moreover, given the nature of viruses, which are constantly mutating and spreading, irrespective of borders or nations, the expectation for States to analyze, confirm, and report evidence of potential PHEICs in 24 hours is simply unfeasible, much less giving responsibility towards States to contain such indiscernible viruses using its own capacity. This furthers the argument that the obligations imposed by the IHR must be obligations of conduct and not of result.

Accordingly, China could also argue that they can not be held liable for responsibility for the Coronavirus pandemic, as based on existing knowledge, China had already submitted reports to the WHO China Country Office on December 31, 2019 when the Chinese government authorities identified the new type of Coronavirus.[82] China had also kept communicating on a daily basis with the WHO and submitted reports of new Coronavirus cases, including the 41 newly diagnosed cases which took place in the city of Wuhan in early January.[83] Moreover, China had also shut Wuhan's borders on the 23rd of January,[84] despite having no recommendations from the WHO regarding the matter, which proves China's willingness to cooperate and take all necessary precautions to isolate the virus in preventing other potential Coronavirus outbreaks outside of Wuhan.

C. Application to the Monetary Gold Principle

While States are adamant that China should be responsible for the global outbreak, there are many factors other than China's response that have played into the spread of the virus, such as other States' missteps and inactions. This means that their conducts have to be taken into consideration in attributing the legal injury to China. However, in accordance with the indispensable third party rule, the ICJ will not proceed with claims brought against a State if it "implicates another State that has not consented to the Court's jurisdiction,"[85] with the said State's conduct constituting the very subject-matter of the proceedings before the Court.[86]

This principle is illustrated in the renowned *Monetary Gold Removed from Rome in 1943* case, the ICJ was asked to decide to which State, either Italy or the United Kingdom, a quantity of monetary gold removed from Rome by Germany in 1943 should be delivered to.[87] The Court concluded that in order to decide on this submission, it would have to determine whether Albania had committed any wrongful act against Italy and whether there was any compensation that would be needed to be paid to Italy.[88] Because Albania's legal interests form the "subject matter" of the claim, Albania would be needed to be part of the proceedings and thus in that case, the Court would not be able to decide on such legal issue without the inclusion of Albania.[89]

---

[80] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro). (2007) Merits. I.C.J Rep. 43, para. 430.
[81] Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area. (2010). Advisory Opinion, I.T.L.O.S. Case No. 17, para. 110.
[82] Wuhan Municipal Health Commission (ed.). (2019, December 31). "武汉市卫健委关于当前我市肺炎疫情的情况通报".
[83] *Ibid*.
[84] World Health Organization. (2020, January 23). Novel Coronavirus (2019-nCoV) Situation Report (No. 3).
[85] Tams, C., Berster, L., & Schiffbauer, B. (2014). *Convention on the Prevention and Punishment of the Crime of Genocide*. Munich, Germany: C.H. Beck/Nomos/Hart, p. 306.
[86] *Ibid*.
[87] Monetary Gold Removed from Rome in 1943 (Italy v. France). (1954). Judgment, Preliminary Question, I.C.J Rep. 19, p. 6.
[88] *Ibid*., pp. 16-17.
[89] International Court of Justice. (2017, October 27). Speech by H.E. Mr. Ronny Abraham, President of the International Court of Justice, before the Sixth Committee of the General Assembly, p. 6.

The Court therefore declares itself unable to rule on a question which may affect Albania, as a third State not part of the proceedings, and specifically, that it cannot rule on the rights and obligations of Albania.[90]

Parallel to this case, the Court would not be able to rule on China's liability because in order for the Court to invoke State responsibility and grant reparation, the Court would have to make further assessments on other States that had potentially taken part in failing to take necessary measures to prevent the harmful outcome.

To understand the Court's inability to adjudicate such cases would be to answer the question of reparation in this context when trying to establish State responsibility. If the US, for instance, were to institute this proceeding against China, the US would have to establish that there is a failure to act on its international obligations by the government of China and how this omission constitutes a breach of China's international obligations under international law pursuant to ARSIWA.[91]

It is then vital to identify the issue of causality where the injury to the US must have been caused by the internationally wrongful act of China toward the US.[92] So even if there exists an obligation of consequence, which would be very unlikely, the US has to prove that the casualties or infected persons in other countries have a direct causal relationship with China. This threshold of causality needed to claim for reparation is illustrated in the *Costa Rica v. Nicaragua* case, where there has to be a "direct and causal nexus between the wrongful act and the injury suffered."[93] Therefore, the Court must not only determine the existence of any damage, but also whether there exists a direct and certain causal link between such damage and China's activities.[94]

There are two elements to identify a sufficient causal link between the damage and China's omission,[95] which are first, a factual causation and second, a legal causation. If both accumulative elements are fulfilled, China would be obliged to make reparations for the injury *caused* by the internationally wrongful act.[96]

1. Factual Causation

Because the basis of China's responsibility derives from its failure to respond immediately towards the virus outbreak, failing to act on its legal obligation, suggesting that the conduct has resulted in an omission. The law sees omissions as a potential source of responsibility.[97] The Necessary Element of a Sufficient Set ["**NESS**"] offers a test nuanced for such cases of omission because it shifts its focus not on whether the wrongful act was *the* cause of the harmful outcome, but whether it was *a* cause of said outcome.[98]

---

[90] *Ibid*., p. 5
[91] ARSIWA, Art. 2.
[92] Gattini, A. (2007). Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment. European Journal of International Law, 18(4), 695–713, p. 708.
[93] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua). (2018). Judgment, Question of Compensation, I.C.J Rep. 15, p. 5.
[94] *Ibid*., p. 4.
[95] Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v Plurinational State of Bolivia. (2015). Award, I.C.S.I.D Case No. ARB/06/2, para. 382.
[96] ARSIWA, Art. 31.
[97] Plakokefalos, I. (2015). Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity. European Journal of International Law, 26(2), 471–492, p. 477.
[98] K. Joachim and S. Tania, (2020). Causation in International Investment Law: Putting Article 23.2 of the India Model BIT into Content, *Indian Journal of Arbitration Law 8(2)*, 83–86, p. 87.

The injured State would need to prove that the failure to act on China's obligations under the 2005 IHR and/or the WHO Constitution is one of the several causes, if not the underlying cause,[99] that led to the spread of the Coronavirus and injured the State in whichever way the State claims for—such as the loss of lives of their people[100] or economic repercussions.[101] For instance, the US would have to prove that the Coronavirus spread in its territory due China's lack of initiative to notify the WHO, and thus delayed warnings for other States to limit or even prohibit international travel as part of their immediate response. The US could argue that this causal link has been fulfilled, supported by reports stating that the beginning of the spread of the Coronavirus began with a traveller who arrived in the region from Wuhan on January 15, 2020 which would be around the time that the US received its first reports of victims of the Coronavirus.[102]

2. Legal Causation

The second element operates to limit liability, imposing parameters of the direct or proximate cause test.[103] This test would only be fulfilled if the injury inflicted was proximately caused by China's omission,[104] rendering China liable whether the act operated directly by China or through an indirect channel.[105] However, where the causal connection between the act and the loss is broken, tangled, and remote that it cannot be traced, China would not be deemed liable.[106]

This prong of the causal link may be an even harder challenge to prove due to the many factors involved in the spread of the virus in an injured State that may not necessarily be as a proximate consequence of China's wrongful act, but the conduct or omission of many different States too remote to be traced back to China. The people in the US may, for instance, be affected by people that travelled from another State besides China and it was a result of said State's non-compliance of international health laws and regulations that caused the damage to the US. In this way, China would not necessarily be the one responsible for the loss of lives in the US. Because of the different factors involved, the Court would not be able to rule on the claim as the application of the Monetary Gold principle would hinder the assessment of a causal link between the damage and the acts of other States besides China.

D. Multiplicity of International Actors

With a huge transboundary issue such as a pandemic, the abovementioned "other factors" that have affected the spread of the Coronavirus would mean considering multiple international actors' involvement at different stages of the chain reaction. International actors that have obligations towards other subjects of international law would not only be limited to only States, but include international organizations as well, and in this context, it is the WHO.

1. Other States

Recent findings have suggested that the Coronavirus was already circulating in several other countries apart from China during the initial 2019 outbreaks, such as in France,[107] Italy,[108] and

---

[99] Elettronica Sicula S.p.A. (United States of America v. Italy). (1989). Judgment, I.C.J Rep. 15, p. 62.
[100] S.S. Lotus, (France v. Turkey). (1927). Judgment, P.C.I.J. Series A No.10, p. 5
[101] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda). (2005) Judgement, Merits, I.C.J Rep. 168, para. 181.
[102] Baker, M. (2020, June 1). When Did the Coronavirus Arrive in the U.S.? Here's a Review of the Evidence. The New York Times.
[103] Joachim and Tania, *supra* note 37, p. 88.
[104] Plakokefalos, *supra* note 36, p. 488.
[105] War-Risk Insurance Premium Claims, (United States v. Germany). (1923). Award, R.I.A.A 33, p. 55.
[106] *Ibid*.
[107] Czaja, M. (2020, May 7). Coronavirus : un premier cas dès le mois de novembre en Alsace. France Bleu.
[108] Kelland, K. (2020, June 19). Italy sewage study suggests COVID-19 was there in December 2019. Reuters.

Brazil.[109] It would be unjust to burden China with the sole responsibility of not containing the virus, especially considering the fact that only China had notified the WHO of the emergence of a potentially lethal PHEIC in early January and closed off the borders of Wuhan. Other States that have been alleged to have the virus within their borders at that exact same time should have taken precautionary measures to protect their own territories. Therefore, another defence which could be utilized would be the attribution of the injuries suffered by the applicant to its own failure to act in a timely manner.

In February, the WHO urged all States worldwide that "uncompromising and rigorous measures such as extremely proactive surveillance to immediately detect cases, very rapid diagnosis and immediate case isolation, rigorous tracking and quarantine of close contacts, and an exceptionally high degree of population understanding and acceptance" were the only measures sufficient to fight off the human-to-human transmission.[110]

This should have prompted States to quickly adapt in the face of the emerging pandemic. However, very few States have taken this warning seriously, wary of the significant economic impact it may impose on their respective countries. For instance, the Indonesian Government did not acknowledge the Coronavirus to exist within Indonesian borders, arguing that the virus could not survive in tropical climates, until early March when it finally admitted that the government had withheld information to avoid panic and decided to act accordingly to respond to the disease.[111]

The reason for this was largely due to the concern of halting trade, investment, and tourism.[112] Economic priority was a significant factor of denial of the Coronavirus in its early stages amongst developed countries as well. This is evident in Italy where instead of declaring state emergency lockdowns at the earliest opportunity, the response to the warnings from scientists were politicians making gestures such as engaging in public handshaking in Milan in order to convey the message that the economy should not be compromised.[113]

In the end, States became subjected to the consequences of their own inactions due to their own failure to grasp the severity of the circumstance.

2. International Organizations

States are not the only international actors to have been accused of contributing to the vicious spread of the disease. The WHO has been in the center of these allegations due to its negligence in not investigating into serious concerns about the nature of the virus. The WHO should be held internationally responsible for violating its obligations. As discussed in the *Reparations* case,[114] the capacity for an international organization to carry out its rights and obligations was due to its international personality conferred from its members. Similarly, there exists in the WHO Constitution an explicit referral to the legal capacity and privileges and immunities[115] to be

---

[109] Fongaro, G., et al. (2020). SARS-CoV-2 in human sewage in Santa Catalina, Brazil, November 2019. MedRxiv, 1–9.
[110] World Health Organization. (2020, February 24). Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19).
[111] Post, T. J. (2020, April 9). Indonesia was in denial over coronavirus. Now it may be facing a looming disaster. The Jakarta Post.
[112] *Ibid*.
[113] Pisano, G. P., Sadun, R., & Sadini, M. (2020, August 14). Lessons from Italy's Response to Coronavirus. Harvard Business Review.
[114] Reparations for Injuries Suffered in the Service of the United Nations. (1949). Advisory Opinion, I.C.J Rep. 174, p. 179.
[115] Eccleston-Turner, M., & McArdle, S. (2020). The Law of Responsibility and the World Health Organisation: A Case Study on the West African Ebola Outbreak. Infectious Diseases in the New Millennium, 89–109, p. 95.

determined by the WHO with consultation from the Secretary-General of the UN and concluded between the State members of the WHO.[116]

It is argued by Mark Eccleston-Turner and Scarlett McArdle that the WHO has the obligation to declare a PHEIC in a timely manner due to the obligatory "shall" used in the stipulation of the IHR. A reference was made to the 2014 Ebola epidemic, where the WHO did not declare the epidemic as a PHEIC until a little bit over six weeks after the warning came from Medecins Sans Frontieres that the epidemic was a situation that was "out of control."[117]

Similarly, the WHO only declared the Coronavirus as a PHEIC on the 30th of January 2020.[118] This was a month after Chinese officials provided information to the WHO on the "viral pneumonia of unknown cause" in Wuhan not possessing the character of being a human-to-human transmitted disease. Although the WHO has reacted faster with Coronavirus than it did with Ebola, it still has violated its legal obligation to provide necessary aid upon the request or acceptance of Governments[119] when WHO disregarded alerts from Taiwanese health officials at the end of December about the risk of human-to-human transmission of the new virus.[120]

When Taiwan wrote to the WHO to request more information about the disease's potential to pass between humans, Taiwan did not receive any response regarding the concern nor did the WHO act to share information with other member States.[121] The WHO, under its Constitution, is guided by the principle that in order to adhere to its objective of attaining the highest possible level of health by all people,[122] it should communicate all public health information to other State parties to enable them to appropriately respond to a public health risk.[123] Although Taiwan is not a member State to the WHO,[124] information given by Taiwan regarding the possibility of the Coronavirus being a human-to-human transmitted disease should be considered, investigated, and alerted to all other State parties provided the severity of the repercussions should it be provided to be true. Anything outside the confines of this obligation would be a violation of international law.

E. Shared Responsibility

Independent responsibility sets the limitation of attaining a just outcome by holding responsible the respondent parties involved.[125] Notwithstanding the ICJ's inability to proceed with the case due to the application of the Monetary Gold principle, the Court formulated an exception to this principle which stipulates the concurrent or joint responsibility for a wrongful act by different States, or even other actors of international law, does not debar the exercise of the ICJ's jurisdiction under the ambit of shared responsibility.

This claim is further substantiated by the Guiding Principles on Shared Responsibility in International Law ["**Guiding Principles**"], which is considered to be "an interpretative nature" of existing rules of international responsibility reflected in ARSIWA and the Articles on the Responsibility of International Organizations ["**ARIO**"], as the scope of the Guiding Principles

---

116 World Health Assembly. Constitution of the World Health Organization. (1946). ["WHO Constitution"]. Art. 68.
117 Eccleston, *supra* note 54.
118 World Health Organization. (2020, April 27). Archived: WHO Timeline - COVID-19.
119 WHO Constitution, Art. 2.
120 Riordan, P. (2020, March 20). Taiwan says WHO failed to act on coronavirus transmission warning. Financial Times.
121 Chan, W. (2020, April 7). The WHO Ignores Taiwan. The World Pays the Price. The Nation.
122 WHO Constitution, Art. 1.
123 *Ibid*., Art. 11.
124 Chen, Y. J., & Cohen, J. A. (2020, April 9). Why Does the WHO Exclude Taiwan? Council on Foreign Relations.
125 Nollkaemper, A. (2018). The Duality of Shared Responsibility. Contemporary Politics, 24(5), 524–544, p.527.

applies for both States and international organizations [“**international persons**”].[126] They follow the definition with the rules of the law of international responsibility of ARSIWA and ARIO. Although it is still quite unclear the role of the Guiding Principles due to its novelty, the instrument has been intended to build on the existing rules of the law of international responsibility.[127] The content of the Guiding Principles will give insight of how to impose responsibility on multiple actors before the ICJ.

However, the Guiding Principles only apply in this context when international persons contribute to an indivisible injury of another person.[128] This means that that the injury must be as a result of two ore more necessary and sufficient causes by different international persons, otherwise it would not invoke the Guiding Principles. In this case, there is invocation of Principle 4 of the Guiding Principles in which the conducts of international persons result from a situation in which international persons separately commit the internationally wrongful acts, regardless of the fact that the violations were towards different obligations.[129] To pinpoint the conducts that trigger international responsibility, and ask for reparation, the causal test would need to prove the type of contribution that is present in this case.

As opposed to individual contribution where there is one conduct that can be attributable to multiple international persons, and concurrent contributions where each respective conduct is enough to cause the injury,[130] there exists cumulative contributions in this case. This means that the injury is contingent to take place on multiple accumulated internationally wrongful acts. The Arbitral Tribunal in the *Naulilaa* case, which follows Portugal claiming compensation for damage after a German offensive, held that cumulative contributions exist due to the German’s offensive that made Portugal redirect its forces as it would not have occurred independently of the aggression.[131]

Similar to this case, China’s failure to release information more promptly and accurately would not be sufficient to cause the adverse spread of the disease had the WHO fail to not investigate and declare PHEIC based on Taiwan’s warnings, or if other countries decided to exercise a stricter measure at the earlier stages of the outbreak.[132] The failure of many international persons to comply with obligations under the WHO Constitution and/or the IHR can result in the injury.[133] Even though these international actors did not orchestrate these conducts together, their independent acts combined still enabled the global spread of the Coronavirus, and thus creating a chain of events that mutually influence each other’s response towards the virus.

This is important to note because arguably, in order for an injured party to receive reparation by the respondents, there needs to be some sliver of divisibility to an extent where a causal link will be strong enough to attribute the damage to the multiple internationally wrongful acts of international persons. This is exemplified in the aforementioned *Naulilaa case* above, where although it is a circumstance of cumulative contribution, it is still identifiable which cause affected Portugal to redirect its forces and the clear cause and effect between German’s act of aggression and Portugal’s command of forces.

---

[126] United Nations, Guiding Principles on Shared Responsibility in International Law. (2019), [“Guiding Principles”], Principle 1.
[127] Nollkaemper, A., d’Aspremont, J., Ahlborn, C., Boutin, B., Nedeski, N., & Plakokefalos, I. (2020). Guiding Principles on Shared Responsibility in International Law. European Journal of International Law, 31(1), 15–72, p.21.
[128] Guiding Principles, Principle 2
[129] Nollkaemper, *supra* note 66, p.34.
[130] *Ibid*., p. 25.
[131] *Ibid*., p. 27; The Naulilaa Case, (Portugal v. F.R.G.). (1928). Judgment, 1 R.I.A.A 11.
[132] Rocha, R. (2020, June 22). What countries did right and wrong in responding to the pandemic; Oxford University. (2020, March 18). Coronavirus Government Response Tracker. Blavatnik School of Government.
[133] Nollkaemper, *supra* note 66, p.26.

That is not the case here. Where indivisibility is so prominent in a damage that the entire world is facing, and thus connected to many States' conducts, including those of their nationals, it would be impossible to proceed with this case now, or anytime in the near future, especially where the nature of transmission and effects of the Coronavirus are still yet to be certain or founded.

Conclusion

In sum, the challenge of bringing China before the ICJ to take responsibility for the Coronavirus pandemic would be an ambitious effort for *any* State to take on. Besides the applicant's burden of having to prove that China's behaviour towards the initial outbreak was not enough, the unprecedented situation of the case being intricately bound to many variables under the WHO Constitution and the IHR, in which implementation and enforcement have never before been formally questioned, renders the case challenging for the Court to determine whether there is enough evidence that bears direct and causal link to the damage suffered by potential applicants for reparations to be granted.

Furthermore, applicants also have to demonstrate that the injuries suffered were caused *independently* by the acts committed by China—a challenging task given the far-reaching effects of the Coronavirus and the likelihood of other international persons to have contributed to the injuries. Were there to be found even a minor link that the injuries suffered by the applicant were caused or affected by the conducts of other States not part of the proceeding, the Court would surely renounce the case in accordance with the Monetary Gold principle. Lastly, even if the Court was willing to apply the novel concept of shared responsibility, it would still be difficult to pinpoint which State or international actor has breached which obligation, and the extent of their responsibility for a collective damage.

BIBLIOGRAPHY

Books and Journal Articles

Eccleston-Turner, M., & McArdle, S. (2020). The Law of Responsibility and the World Health Organisation: A Case Study on the West African Ebola Outbreak. Infectious Diseases in the New Millennium. Springer. https://doi.org/10.1007/978-3-030-39819-4_5.

Fongaro, G., et al. (2020). SARS-CoV-2 in human sewage in Santa Catalina, Brazil, November 2019. MedRxiv,. https://doi.org/10.1101/2020.06.26.20140731.

Gattini, A. (2007). Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment. European Journal of International Law, 18(4),. https://doi.org/10.1093/ejil/chm038.

K. Joachim and S. Tania, (2020). Causation in International Investment Law: Putting Article 23.2 of the India Model BIT into Content, Indian Journal of Arbitration Law 8(2). https://www.lalive.law/wp-content/uploads/2020/04/IJAL-vol-8-No-2-2020-Causation-in-International-Investment-Law.pdf.

Mazzuoli, V. de Oliviera. (2020). International Responsibility of States for Transnational Epidemics and Pandemics: The Case of COVID-19 from the People's Republic of China. Revista de Direito Civil Contemporâneo, https://doi.org/10.2139/ssrn.3584944.

Mazzuoli, V. de Oliviera. (2020b). Is It Possible to Hold China Responsible in the Case of COVID-19? SSRN Electronic Journal, https://doi.org/10.2139/ssrn.3597799.

Nollkaemper, A. (2018). The Duality of Shared Responsibility. Journal of Contemporary Politics, 24(5),. https://doi.org/10.1080/13569775.2018.1452107.

Nollkaemper, A., d'Aspremont, J., Ahlborn, C., Boutin, B., Nedeski, N., & Plakokefalos, I. (2020). Guiding Principles on Shared Responsibility in International Law. European Journal of International Law, 31(1).. https://doi.org/10.1093/ejil/chaa017.

Plakokefalos, I. (2015). Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity. European Journal of International Law, 26(2), 471–492. https://doi.org/10.1093/ejil/chv023.

Smith, G. J. D., et al. (2009). Origins and evolutionary genomics of the 2009 swine-origin H1N1 influenza A epidemic. Nature, 459(7250). https://doi.org/10.1038/nature08182.

Tams, C., Berster, L., & Schiffbauer, B. (2014). *Convention on the Prevention and Punishment of the Crime of Genocide*. Munich: C.H. Beck/Nomos/Hart. https://doi.org/10.5771/ 9783845258911.

Conventions

International Law Commission. Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001).

World Health Assembly. Constitution of the World Health Organization. (1946).

World Health Assembly. International Health Regulations 2005 (2006).

UN Documents

United Nations, Guiding Principles on Shared Responsibility in International Law. (2019). Retrieved August 10, 2020 from https://www.un.org/en/ga/sixth/74/pdfs/1_november_2019_Guiding_Principles.pdf.

Jurisprudences

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro). (2007). Merits, I.C.J Rep. 43.

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda). (2005) Judgement, Merits, I.C.J Rep. 168.

Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua). (2018). Judgment, Question of Compensation, I.C.J Rep. 15.

Elettronica Sicula S.p.A. (United States of America v. Italy). (1989). Judgment, I.C.J Rep. 15.

Monetary Gold Removed from Rome in 1943 (Italy v. France). (1954). Judgment, Preliminary Question, I.C.J Rep. 19.

Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v Plurinational State of Bolivia. (2015). Award, I.C.S.I.D Case No. ARB/06/2.

Reparations for Injuries Suffered in the Service of the United Nations. (1949). Advisory Opinion, I.C.J Rep. 174.

Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area. (2010). Advisory Opinion, I.T.L.O.S. Case No. 17.

S.S. Lotus, (France v. Turkey). (1927). Judgment, P.C.I.J. Series A No.10.

The Naulilaa Case, (Portugal v. F.R.G.). (1928). Judgment, 1 R.I.A.A 11.

War-Risk Insurance Premium Claims, (United States v. Germany). (1923). Award, R.I.A.A 33.

WHO Documents

World Health Organization. (2020, April 27). Archived: WHO Timeline - COVID-19.

World Health Organization. (2020, February). Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19) (16-24 February 2020).

World Health Organization. (2020, January 5). Pneumonia of unknown cause – China.

World Health Organization. (2020, January 23). Novel Coronavirus (2019-nCoV) Situation Report (No. 3).

World Health Organization. (n.d.). WHO Coronavirus Disease (COVID-19) Dashboard.

Internet Sources

李.缘. (2020, April 29). 全球追责升级 阿根廷律师刑事起诉中共 - 大纪元. Epoch Times. https://www.epochtimes.com/gb/20/4/29/n12068906.htm.

Baker, M. (2020, June 1). When Did the Coronavirus Arrive in the U.S.? Here's a Review of the Evidence. The New York Times. https://www.nytimes.com/2020/05/15/us/coronavirus-first-case-snohomish-antibodies.html. Accessed on August 10, 2020

Chan, W. (2020, April 7). The WHO Ignores Taiwan. The World Pays the Price. The Nation., https://www.thenation.com/article/world/taiwan-who-coron avirus-china/. Accessed August 5, 2020.

Chen, Y.-J., & Cohen, J. A. (2020, April 9). Why Does the WHO Exclude Taiwan? Council on Foreign Relations. Retrieved August 6, 2020, from https://www.cfr.org/in-brief/why-does- who-exclude-taiwan.

Czaja, M. (2020, May 7). Coronavirus : un premier cas dès le mois de novembre en Alsace. France Bleu. https://www.francebleu.fr/infos/sante-sciences /coronavirus-un-premier-cas-des-le-mois-de-novembre-en-alsace-1588830642. Accessed on August 8, 2020

Flatley, D., & Woodhouse, S. (2020, June 24). Graham Backs Letting U.S. Citizens Sue China Over Coronavirus. Bloomberg. https://www.bloomberg.com/news/articles/2020-06-23/ graham-backs-letting-u-s-citizens-sue-china-over-coronavirus.

Kelland, K. (2020, June 19). Italy sewage study suggests COVID-19 was there in December 2019. Reuters. https://www.reuters.com/article/us-health- coronavirus-italy-sewage/italy-sewage-study-suggests-covid-19-was-there-in-december-2019-idUSKBN23Q1J9. Accessed on June 1, 2020. .

Ma, J. (2020, March 14). Coronavirus: China's first confirmed Covid-19 case traced back to November 17. South China Morning Post. https://www.scmp.com/news/china/society/article/3074991/coronavirus-chinas-first-confirmed-covid-19-case-traced-back. Accessed June 6, 2020.

Mirski, S., & Anderson, S. (2020, July 10). What's in the Many Coronavirus-Related Lawsuits Against China? Lawfare. https://www.lawfareblog.com/whats-many-coronavirus-related-lawsuits-against-china. Accessed on August 8, 2020.

Nicolás, E. S. (2020, June 11). EU: China, Russia responsible for Covid-19 disinformation. EU Observer. https://euobserver.com/eu-china/148618. Accessed on 9, 2020

Nigerians sue China for $200B over coronavirus pandemic. (2020, July 7). Anadolu Agency. https://www.aa.com.tr/en/africa/nigerians-sue-china -for-200b-over-coronavirus-pandemic/1902797. Accessed on August 10, 2020.

Oxford University. (2020, March 18). Coronavirus Government Response Tracker. Blavatnik School of Government. https://www. bsg.ox.ac.uk/research/research-projects/coronavirus-government-response-tracker. Accessed on 10, 2020.

Pisano, G. P., Sadun, R., & Sadini, M. (2020, August 14). Lessons from Italy's Response to Coronavirus. Harvard Business Review. https://hbr.org/2020/03/lessons-from-italys-response-to-coronavirus. Acessed on August 17, 2020.

Post, T. J. (2020, April 9). Indonesia was in denial over coronavirus. Now it may be facing a looming disaster. The Jakarta Post. https://www.thejakartapost.com/academia/2020/04/09/indonesia-was-in-denial-over-coronavirus-now-it-may-be-facing-a-looming-disaster.html. Accessed May 24, 2020.

Riordan, P. (2020, March 20). Taiwan says WHO failed to act on coronavirus transmission warning. Financial Times. https://www.ft.com/content/ 2a70a02a-644a-11ea-a6cd-df28cc3c6a68. Accessed on May 24, 2020.

Rocha, R. (2020, June 22). What countries did right and wrong in responding to the pandemic. CBC. https://www.cbc.ca/news/canada/ covid-19-coronavirus-pandemic-countries-response-1.5617898. Accessed on August 10, 2020.

Schwartz, M. S. (2020, April 18). Trump Warns Of "Consequences" If China Was "Knowingly Responsible" For Outbreak. National Public Radio https://choice.npr.org/index.html?origin=https://www.npr.org/2020/04/18/837545140/trump-to-hold-briefing-on-coronavirus-developments. Accessed on August 9, 2020.

Trigt, V. E. (2020, May 12). Could China be Taken to ICJ over COVID-19 Pandemic? | Peace Palace Library. Peace Palace Library. https://www.peacepalacelibrary.nl/2020/05/could-china-be-taken-to-icj-over-covid-19-pandemic/. Accessed on May 23, 2020.

Tzeng, P. (2020, April 2). Taking China to the International Court of Justice over COVID-19. EJIL:Talk. https://www.ejiltalk.org/taking-china-to-the-inter national-court-of-justice-over-covid-19/. Accessed on May 30, 2020.

University of Notre Dame. Lawsuits against China, WHO are not the way forward, Notre Dame expert says. (2020, May 27). University of Notre Dame.

https://www.newswise.com/articles/lawsuits-against-china-who-are-not-the-way-forward-notre-dame-expert-says.

Wuhan Municipal Health Commission (ed.). (2019, December 31). "武汉市卫健委关于当前我市肺炎疫情的情况通报, http://wjw.wuhan.gov.cn/. Accessed on May 29, 2020

Others

International Court of Justice. (2017, October 27). Speech by H.E. Mr. Ronny Abraham, President of the International Court of Justice, before the Sixth Committee of the General Assembly. https://www.icj-cij.org/files/press-releases/0/00 0-20171027-PRE-01-00-EN.pdf. Accessed on 29, 2020.

LEGAL ANALYSIS ON THE LEGAL REASONING OF THE PHILIPPINES IN THE SOUTH CHINA SEA ARBITRATION

Rahmah Candrika Ramadhaniati[1]

Abstract

*The South China Sea Arbitration marks as a prominent case in the International Law of the Sea. This paper contributes to the legal analysis of the primary legal reasoning from the Philippines to initiate arbitrary proceedings against the People's Republic of China (**China**). It also contributes to the legal basis and legal issues that the Philippines used as arguments to held China responsible for maritime entitlements as well as exploitation in the South China Sea. This legal analysis on the legal reasoning of the Philippines discusses both the fair and justifiable legal reasoning and the misleading legal reasoning from the Philippines in the South China Sea Arbitration. In the end, the writer concludes whether the Philippines' legal reasoning was entirely justifiable or not. The writer finds the Philippines' legal reasoning is not entirely justifiable due to several reasons.*

Intisari

*Kasus Arbitrase Laut Tiongkok Selatan ditandai sebagai kasus yang penting dalam Hukum Laut Internasional. Tulisan ini berkontribusi pada analisis hukum dari penalaran hukum utama dari Filipina ketika memulai proses arbitrase terhadap Republik Rakyat Tiongkok (**Tiongkok**). Tulisan ini juga berkontribusi pada dasar hukum dan masalah hukum yang digunakan Filipina sebagai argumen untuk menuntut Tiongkok bertanggungjawab atas hak maritim serta eskploitasi di Laut Tiongkok Selatan. Analisis hukum pada penalaran hukum di Filipina ini membahas alasan hukum yang adil dan dapat dibenarkan serta alasan hukum yang menyesatkan dari Filipina dalam Arbitrase Laut Tiongkok Selatan. Pada akhirnya, penulis menyimpulkan apakah alasan hukum Filipina sepenuhnya dapat dibenarkan atau tidak. Penulis menemukan bahwa alasan hukum Filipina tidak sepenuhnya dapat dibenarkan karena beberapa alasan.*

.

Keywords: South China Sea, Arbitration, Philippines, China, UNCLOS.

Kata Kunci: *Laut Tiongkok Selatan, Arbitrase, Filipina, Tiongkok, UNCLOS.*

[1] 2017, Faculty of Law, Universitas Gadjah Mada, Department of International Law, rahmahcand@yahoo.com

A. Introduction

In the year of 2013, the Philippines declared that China has breached certain rights and obligations under the United Nations Law Of the Sea (**UNCLOS**) that is beyond the control of the Philippines as one of the coastal states in the South China Sea. On 22nd January 2013, the Philippines enacted arbitral proceedings against China to support such declaration.[1] China's self-proclaimed jurisdiction has dominated and exploited the South China Sea with maritime entitlement called the "nine-dash line". The nine-dash line extends as far as 2,000 km from the Chinese mainland to the Philippines, Malaysia and Vietnam within a few hundred kilometres.[2] In its *notes verbales*[3], China claimed that it has "indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof. China's sovereignty, supported by abundant historical and legal evidence".[4] However, the nine-dash line deems to have no legal basis by the Permanent Court of Arbitration (**PCA**) in The Hague.[5] Thus, making this dispute fascinating to analyze the claims made by the Philippines.

The focal point of this case is when the Philippines finally decided to enact arbitral proceedings against China, the People's Republic of China released its Position Paper on the Matter of Jurisdiction in the Philippines' SCS Arbitration initiation.[6] China contended that "the Tribunal has no jurisdiction over the disputes and China was determined that it would not involve in any arbitral proceedings regarding the South China Sea dispute".[7] For this reason, China's Position Paper was not meant to be China's Counter-Memorial[8], Hence it is not treated as such by the Tribunal.[9] China's absence before the Arbitral Tribunal obligates China to provide its comments towards the questions posed by the Philippines, as the appearing party, as well as China's supplemental arguments in regards to the dispute.[10] However, China did not respond to the Philippines' arguments at all.[11] China's actions lead the Arbitral Tribunal to rule in favour of the Philippines. Therefore, it is appealing for the writer to analyze the overall legal reasoning from the Philippines.

---

1 Sa, L. (2017). Sino-Philippine Arbitration on South China Sea Disputes: A Perspective from the Principle of Good Faith. *China Oceans Law Review,* Vol. 2017, No. 1, 2017.

2 Zhen, L. (2020, April 28). *What's China's 'nine-dash line' and why has it created so much tension in the South China Sea?*. Retrieved from https://www.scmp.com/news/china/diplomacy-defence/article/1988596/whats-chinas-nine-dash-line-and-why-has-it-created-so.

3 A formal diplomatic note.

4 Beckman, R.. (2013). The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea. *The American Journal of International Law,* Vol. 107, No. 142, p. 148.

5 Beech, H. (2020, April 30). *Just Where Exactly Did China Get the South China Sea Nine-Dash Line From?*. Retrieved from https://time.com/4412191/nine-dash-line-9-south-china-sea/.

6 Gau, M.S. (2015). The Sino-Philippine Arbitration on the South China Sea Disputes: Ineffectiveness of the Award, Inadmissibility of the Claims, and Lack of Jurisdiction, with Special Reference to the Legal Arguments Made by the Philippines in the Hearing on 7-13 July 2015. *China Oceans Law Review,* Vol. 2015, No. 2, p. 96.

7 China Daily. (2020, April 28). *China's Position Paper on South China Sea, 7 December 2014*. Retrieved from http://www.chinadaily.com.cn/china/2014-12/07/content_19037946.htm.

8 *ibid.*

9 Permanent Court of Arbitration. (2020, April 29). *Press Release by the Tribunal, 17 December 2014*. Retreived from http://www.pca-cpa.org/showfile.asp?fil_id=2846.

10 The Permanent Court of Arbitration Rules 2012, Article 25 (2).

11 Gau, 'The Sino-Philippine Arbitration on the South China Sea Disputes: Ineffectiveness of the Award, Inadmissibility of the Claims, and Lack of Jurisdiction, with Special Reference to the Legal Arguments Made by the Philippines in the Hearing on 7-13 July 2015' (n 6) 96.

It is only natural that the Philippines complained about China considering all of the breaches that China has made over the South China Sea. The Philippines asserted that China's actions over the South China Sea violate the Philippines' rights and sovereignty, based on five reasons. These five reasons are: China's claim to historic rights based on the "nine-dash line" is unlawful, as the claims contradict the UNCLOS[12], the Mischief Reef that China has occupied belongs to the Philippines' continental shelf[13], China claims the region means claiming maritime entitlements beyond twelve nautical miles, which is unlawful[14], China has unlawfully "claimed and exploited the living and non-living resources in the Philippines' Exclusive Economic Zone (**EEZ**) and continental shelf[15], and China has unlawfully interfered the Philippines' navigation rights under UNCLOS".[16]

The outcome of the proceedings was overwhelmingly in favour of the Philippines.[17] For that reason, a lot of credits have been given to the Philippines for asserting its claims into the Permanent Court of Arbitration (**PCA**). Additionally, it is the superpower state that the Philippines was facing. Acknowledging the five legal reasoning from the Philippines, the writer is going to elaborate each of the legal reasoning one by one in the analysis. Given the highlighted violations that China did, the writer decides to analyze both the fair and justifiable legal reasoning and the misleading legal reasoning from the Philippines in the South China Sea Arbitration. In the end, the writer determines whether the legal reasoning asserted by the Philippines was fair and entirely justifiable or not.

B. Analysis

a. Philippines Legal Reasoning in the South China Sea Arbitration

1. Nine-dash line as the Landmark to initiate Arbitral Proceedings against China

The Philippines' based the nine-dash line as the foundation for its claims in the South China Sea Arbitration because China has asserted its historic rights by that line. Specifically, the Philippines requests the Tribunal to claim that "China is entitled only those rights stipulated in the UNCLOS…" meaning rights such as geographic or substantive limits.[18] The Tribunal therefore claimed that the rights stipulated by UNCLOS should not be supplemented or modified by historic rights, including those within the "nine-dash line" of China.[19] Hence, UNCLOS does not recognize China's historic rights and thus, inadmissible by the Tribunal.
Despite never received recognition in the international community, China has long contended "nine-dash line" or the "U-shaped line" as a legitimate claim to their maritime boundary line in the South China Sea.[20] The Philippines counters China's "nine-dash line" legitimacy by

---

12 The Philippines' Memorial on South China Sea, ¶ 1.28.
13 Gau, 'The Sino-Philippine Arbitration on the South China Sea Disputes: Ineffectiveness of the Award, Inadmissibility of the Claims, and Lack of Jurisdiction, with Special Reference to the Legal Arguments Made by the Philippines in the Hearing on 7-13 July 2015' (n 6) 92.
14 *ibid.*, pp. 92-93.
15 The Philippines' Notification, ¶ 31 (eighth and ninth claims) & 41 (tenth and eleventh reliefs).
16 *ibid.*, ¶ 31 (tenth claims) & 41 (twelfth and thirteenth reliefs).
17 Panda, Ankit. (2020, April 23). *International Court Issues Unanimous Award in Philippines v. China Case on South China Sea*. Retrieved from https://thediplomat.com/2016/07/international-court-issues-unanimous-award-in-philippines-v-china-case-on-south-china-sea/.
18 As noted in the South China Sea Arbitral Tribunal Award on Jurisdiction and Admissibility at p. 62.
19 *ibid.*
20 Keyuan, Z. (2012). China's U-Shaped Line in the South China Sea Revisited", *Ocean Development and International Law*, p. 18.

professing, "international law did not historically permit such expansive claim".[21] Even if one insists on using the historic right as a legal assertion, specific historical records collected by the Tribunal from the *Bibliotheque Nationale de France* and the *Archives Nationales d'Outre-Mer* provide no proof to support the claim of China.[22] Therefore, it is fair and justifiable for the Philippines to claim that there is no legal basis for China's "nine-dash line" claims and for the Tribunal to dismiss China's historic claims.

2. China's unlawful occupation on Mischief Reef according to the Philippines

The Philippines has acknowledged the construction activities conducted by China at Mischief Reef and McKennan Reef. The Philippines argues that "China's activities at Mischief Reef have breached Articles 60 and 80 of UNCLOS relating to the artificial islands, installations and structures".[23] Article 60 (1) stipulated that "*In the EEZ, the coastal state shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of artificial islands, installations and structures*".[24] Moreover, the exclusive right also extends to continental shelf in accordance to Article 80.[25] The Philippines highlighted the fact that "Mischief Reef is located within 200 M of Palawan (archipelagic province of the Philippines) instead of within 200 M of any feature claimed by China".[26] Therefore, the area shall fall under the Philippines's jurisdiction and authority.[27]

Moreover, the activities in the area are unlawful acts due to the Philippines' assertion that it is an attempted appropriation of Mischief Reef and McKennan Reef by China.[28] China's flag at the Mischief Reef strengthens the attempted appropriation argumentation, which indicates China's claim of jurisdiction over the area.[29] Finally, the Tribunal found that "Mischief Reef is a low-tide elevation that falls within the Philippines' jurisdiction and it constitutes part of the EEZ and continental shelf of the Philippines".[30] Therefore, the Philippines has exclusive rights of the Mischief Reef. However, the writer found that there is a lack of jurisdiction in regards to matters on Mischief Reef, which will be explained later on in Section B.

1. China Unlawful Claim on Maritime Entitlements beyond its Twelve Nautical Miles

In this regard, the Philippines submits "Scarborough Shoal, Johnson Reef, Cuarteron Reef and Fiery Cross Reef are rocks as understood in Article 121 (3) of UNCLOS".[31] Thus, they are only entitled to a twelve Nautical Miles territorial sea. China's claim is invalid because it is beyond twelve Nautical Miles from these features.[32] Article 121 (3) stipulated, "*Rocks which cannot sustain human habitation or economic life of their own, shall have no exclusive economic zone or*

---

21 *Republic of the Philippines v. People's Republic of China*, PCA Case No. 2013-19, UNCLOS, Award, 12 July 2016, Rep. of Intrl. Arb. Awards, ¶ 192.
22 *ibid.,* ¶ 198.
23 *ibid.,* ¶1010.
24 United Nations Convention on the Law of the Sea (UNCLOS) (1982) established by the United Nations Article 60.
25 The Philippines' Memorial, ¶ 6.101.
26 *ibid.,* ¶ 6.103.
27 *ibid.*
28 *ibid.,* ¶ 6.105-6.107.
29 Merits Hearing Tr. (Day 2), p. 211.
30 *Philippines* (n 21) ¶ 1030.
31 The Philippines' Notification and Statement of Claim, ¶ 31.
32 McDorman, T.L. (2017). An International Law Perspective on Insular Features (Islands) and Low-Tide Elevations in the South China Sea. *The International Journal of Marine and Coastal Law*, Vol. 32, No. 2, p. 310.

c*ontinental shelf*".[33] In submitting their claim, the Philippines has heavily relied on treaty interpretation to thoroughly established the meaning of rocks under Article 121 (3). The Philippines argues that the text of the provision creates a cumulative requirement where the overall negative structure of the sentence means that there is a cumulative criterion describing the circumstances in which such maritime zones will be denied a feature.[34] It means that, if a feature is capable of sustaining, either "human habitation or economic life of its own", it will qualify as a fully entitled island.[35]

It is proven that China felt entitled to Scarborough Shoal and insisted that Scarborough Shoal is an island, which may generate an EEZ, through the Chinese Foreign Ministry Statement regarding Huanyan Dao (Scarborough Shoal):

"Huangyandao has always been Chinese territory, and its legal position has been long determined. According to Article 121 of UNCLOS, Huangyandao is surrounded by water on all sides and is a natural dry land area that is higher than the water level during high tide."[36]

As noted by the Tribunal, China regards Scarborough Shoal as being part of the Zhongsha Islands, hence claiming territorial sovereignty over it.[37] Therefore, China considers "Scarborough Shoal as an island, which may generate an EEZ".[38] However, this conclusion is inconsistent with the Tribunal's knowledge because "China has declared its twelve miles territorial sea from the Zhongsha Islands instead of the Scarborough Shoal".[39] That being said, China has misplaced its parameter in determining the status of Scarborough Shoal.

On the other hand, the Tribunal has respected the Philippines' submissions. The Tribunal declared that "the high-tide features at Scarborough Shoal, Johnson Reef, Cuarteron Reef and Fiery Cross Reef are constitute as rocks that cannot sustain human habitation or economic life on their own under Article 121 (3)". Thus, they are not entitled to EEZ or continental shelf.[40] The fact that the Tribunal considered that Scarborough Shoal, Johnson Reef, Cuarteron Reef and Fiery Cross Reef as rocks consequently means that they generate a total of a maximum twelve nautical territorial sea.[41] It also means that anything beyond is unlawful under UNCLOS; further invalidating China's claim, which stretches beyond the coverage as mentioned earlier. Therefore, it is justifiable for the Philippines to submit this matter.

3. China's Unlawfully Claim and Exploitation of the Living and Non-Living Resources in the Philippines' EEZ and Continental Shelf

The Philippines contends that "China has illegally interfered with the enjoyment and exercise of the sovereign rights of the Philippines to the living and non-living resources of its EEZ and

---

33 UNCLOS (n 24) Article 121 (3).
34 P*hilippines* (n 21) ¶ 493.
35 *ibid*.
36 Gau, M.S. (2019). The Interpretation of Article 121(3) of UNCLOS by the Tribunal for the South China Sea Arbitration: A Critique. *Ocean Development & International Law*, Vol. 50, No. 1, p. 6.
37 The South China Sea Merits Award, supra note 1, ¶ 459.
38 *Ibid*., ¶ 463.
39 *Ibid*., ¶ 459-460.
40 Philippines (n 21) ¶ 643-644.
41 Bautista, Lowell. (2016). Philippine Arbitration against China over the South China Sea. *Asia-Pacific Journal of Ocean Law and Policy*, p. 122.

Continental Shelf".[42] The Philippines have also reported that since 2010, "several incidents have occurred in which China allegedly prevented the Philippines from utilizing the non-living and living resources within the EEZ (the waters that lie within 200 Nautical Miles) of the Philippines' baselines".[43] China's claim over South China Sea leads to it prohibiting Philippine nationals from conducting activities that allow them to utilize the resources, such as fishing, in the area. It also declared a moratorium on fishing by the Nanhai District Fishery Bureau under the Chinese Ministry of Agriculture in the South China Sea.[44] Through this moratorium, the government punished those who carried out fishing activities, it stated that "those who violated the prohibition shall have their fishing catch and any legal gains derived from there confiscated, as well as a fine up to 50,000 yuan".[45] China has also conducted prevention of fishing against Philippine vessels at Second Thomas Shoal.[46] This move impacted the Philippines fishermen's ability to earn for living as they become fearful to continue their means of living.[47] Therefore, the Tribunal stated that this moratorium had breached Article 56 of UNCLOS, which allocates the coastal state, the Philippines, the sovereign rights for exploring.[48]

On the other hand, in regards to the Non-Living Resources, China expressed its dissatisfaction over the appointment of Forum Energy Plc, a "UK-based oil and gas exploration and production company", as the operator of Sterling Energy. This is because the Philippines permits Sterling Energy to explore oil and gas reserves located at Reed Bank through a Service Contract.[49] China delivered its strong objection because it is situated in the waters of China's Nansha Islands.[50] China claimed "it has indisputable sovereign rights and jurisdiction over Nansha Islands and its adjacent waters".[51] However, as the Tribunal has repeatedly claimed it, in the waters of South China Sea there is no legal basis for any historic rights or sovereign rights for China specifically from the basis of "nine-dash line". China is therefore not entitled to announce its objections to Forum Energy. Moreover, China's exploitation over the area is also indicated through the aggressive manoeuvre by China Marine Surveillance vessels when they approached "M/V Veritas Voyager", a Singaporean flagged seismic survey vessel that was surveying for Forum Energy.[52] Seeing the groundless and unjustifiable conduct by China, the Tribunal is in favor of the Philippines.

2. China Unlawfully Interfered with the Philippines of its Rights of Navigation under UNCLOS

In its Relief Sought, the Philippines declared "China has unlawfully interfered with the exercise of Philippines' rights to navigation". It is including other rights under the Convention in areas

---

[42] The Philippines' Notification, ¶ 31 (eighth and ninth claims) & 41 (tenth and eleventh reliefs).
[43] *Philippines* (n 21) ¶ 650.
[44] *ibid.*, ¶ 671.
[45] People's Republic of China, Ministry of Agriculture, South China Sea Fishery Bureau, Announcement on the 2012 Summer Ban on Marine Fishing in the South China Sea Maritime Space (10 May 2012) (Annex 118).
[46] *Philippines* (n 21) ¶ 679.
[47] Affidavit of A.G. Perez, Director, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines (26 March 2014) (Annex 241).
[48] *Philippines* (n 21) ¶ 716.
[49] Forum Energy plc. 'SC72 Recto Bank (Formerly GSEC101)' (Annex 342).
[50] Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs, Republic of the Philippines, No. (10) PG-047 (22 February 2010) (Annex 195).
[51] *ibid.*
[52] *Philippines* (n 21) ¶ 656-659.

within and beyond the EEZ of the Philippines.[53] The Philippines professed "China had established *de facto* control over the South China Sea by preventing fishing activities carried out by Philippines vessels while tolerating fishing by Chinese nationals and vessels in areas comprising the EEZ of the Philippines".[54] Chinese fishing vessels have been occupying the Mischief Reef and the Second Thomas Shoal. The Philippines considers Mischief Reef as part of its jurisdiction as it is situated "126 Nautical Miles off the coast of Palawan". However, since 1995, China has prevented Philippines vessels from fishing there.[55] Accordingly, a similar case also happens in Second Thomas Shoal, which is also considered as part of the Philippines' EEZ.[56]

On the other hand, China argues "China does not consider the Philippines to have rights in the area of Second Thomas Shoal and Mischief Reef because it possesses sovereignty over the usage and other activities in the Nansha Islands and its adjacent waters".[57] As the nine-dash line deemed to be lacking of legal basis, the sovereignty that China claims to have is consequently deemed inadmissible. Therefore, the Tribunal concluded that China had breached the Philippines' navigational rights at Mischief Reef and Second Thomas Shoal.[58]

b. The Extent of the Philippines' Legal Reasoning being Fair and Justifiable

As abovementioned, the Philippines' claim in the South China Sea Arbitration was admissible in the eye of the Arbitral Tribunal. The five legal reasoning was argued to be fair and justifiable in its claim resulted in the Arbitration Award in favour of the Philippines. However, the writer believes that there are three misleading legal reasoning given by the Philippines that led its claim to be not entirely fair and justifiable.

1. The Philippines' Failure to Showcase the Principle of Good Faith before the South China Sea Arbitration

In regards to its victorious title in the South China Sea Arbitration, the Philippines probably has the narrative that their legal reasoning as the claimant state instituting arbitral proceedings against China was in its entirety correct and flawless. However, there is something that the Philippines were missing before pursuing the arbitral proceedings, which is pursuing the principle of good faith before claiming any disputes.

In the international law sphere, good faith acts as the landmark principle before starting any agreement or any dispute. One of the wise means to achieve good faith in a dispute settlement mechanism is to at least begin with a negotiation that would reach an agreement in order to resolve a dispute.[59] However, it must be done in the most generous way where mutual gain should be the cornerstone to any negotiation. The International Court of Justice (ICJ) stated, "the obligation to negotiate requires that the parties enter into negotiations to arriving at an agreement, as opposed to completing a formal process of negotiation as a sort of prior

---

[53] Bautista, L. (2014). The Arbitration Case Between Philippines and China over their Dispute in the South China Sea. *Jati*, Vol. 19, p. 18.

[54] *Philippines* (n 21) ¶ 724.

[55] The Philippines' Memorial, ¶ 6.36.

[56] *Ibid*.

[57] Note Verbale from the Ministry of Foreign Affairs, People's Republic of China to the Embassy of the Republic of the Philippines in Beijing, No. (2015) Bu Bian Zi No. 5 (20 January 2015) (Annex 681).

[58] *Philippines* (n 21) ¶ 757.

[59] Reinhold, S. (2013). Good faith in International Law. *UCL Journal of Law and Jurisprudence*, Vol. 2.

condition for the sake of proceeding to other procedures".[60] Hence, applying the principle of good faith in the international law of the sea disputes under UNCLOS is no exception for the Philippines to conduct.

Before the Philippines undertaken the measure to institute an arbitral proceedings to the Permanent Court of Arbitration, ASEAN states and China has signed a Declaration on Conduct (DOC) for the South China Sea in November 2002, which was the first time China engaged in a multilateral agreement over the issue.[61] The DOC generates both the Philippines and China's agreement to epitomize the regional approach to carry out peaceful settlement of maritime disputes through friendly consultations and negotiations between the States directly concerned.[62] The approach provided by the DOC is not incompatible with the UNCLOS and rather encouraged as it is qualified as "peaceful means of the parties' own choice" under UNCLOS Part XV, section 1.[63] Consequently, the Philippines had carried out unilateral action when it initiated the arbitral proceedings, which then were firmly rejected by China. The outcome of this initiation was formally responded by China by saying that it will oppose these proceedings, and it will never take part on them.

Article 282 of UNCLOS provides that "If the State Parties which are parties to a dispute concerning the interpretation or application have agreed through a general, regional or bilateral agreement or otherwise, that such dispute shall at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree."[64] Although according to the Arbitral Tribunal award on jurisdiction and admissibility, the Tribunal does not consider "the DOC to constitute a legally binding agreement within the meaning of Article 282 of UNCLOS."[65] The Philippines had broken its commitment to maintain peace and stability in the DOC. Hence, the Philippines' unilateral submission constitutes a "deliberate act of bad faith" and *pacta sunt servanda* where agreements must be kept.[66] Reflecting on the above explanation, the Philippines seems to be misleading because it forgets that the principle of good faith can resolve a complex dispute. Especially, when China has given preliminary trust and agreements towards the Philippines long before the South China Sea Arbitration.

2. Misleading Claims by the Philippines Led to a Lack of Dispute

The existence of a dispute is the foundation of any arbitral proceeding and it is found that UNCLOS has limited jurisdiction on what to be constituted as "dispute". It is restricted to "any dispute concerning the interpretation or application of this Convention."[67] Nevertheless, according to UNCLOS Section XV, the existence of a dispute concerning the interpretation or

---

60 North Sea Continental Shelf Cases, Judgment, ICJ Reports1969, ¶ 85.

61 Buszynski, L. (2003). ASEAN, the Declaration on Conduct, and the South China Sea. *Contemporary Southeast Asia*, Vol. 25 No. 3, p. 343.

62 Talmon, S., & Jia, B. B. (2014). *The South China Sea Arbitration: A Chinese Perspective*. Bloomsbury Academic. p. 7.

63 *ibid.*

64 UNCLOS (n 24) art. 282.

65 The South China Sea Arbitral Tribunal Award on Jurisdiction and Admissibility, ¶ 299.

66 Swaine, Michael D. (2016, August 30). Chinese Views on the South China Sea Arbitration Case between the People's Republic of China and the Philippines. Retrieved from https://www.hoover.org/research/chinese-views-south-china-sea-arbitration-case-between-peoples-republic-china-and

67 UNCLOS (n 24) arts 286, 288(1).

application of UNCLOS is among the conditions for initiating the arbitration under Annex VII.[68] Any argument that cannot even constitute a dispute does not fall within the limits of UNCLOS Arbitral Tribunals' *ratione materiae*[69] and thus inadmissible. Since the subject of the dispute determines the scope of the Arbitral Award, the jurisdiction of the Tribunal must apply in its entirety to the subject-matter of the dispute.[70] However, as stated previously, UNCLOS Arbitral Tribunals can only focus on the "disputes regarding interpretation or application under the UNCLOS". Hence, the real question is whether the claims made by the Philippines are amount to a real dispute or not.

The result is that there is in fact a lack of dispute by the Philippines. It becomes problematic when the Philippines requests the Tribunal to declare that it "is entitled, under UNCLOS, to a 12 nautical miles Territorial Sea, a 200 nautical miles Exclusive Economic Zone and a Continental Shelf, measured from its archipelagic baselines."[71] It is problematic because Arbitral Tribunals are not responsible for declaring a maritime area entitlement. The real purpose of arbitration brought by the Philippines, is to make China adheres to the fact that "there is an international legal consensus, based on an interpretation of the UNCLOS, which accepted by China that applies to the dispute" and in this situation China's refusal to engage in the proceedings of the Tribunal also does not shield it from an interpretation of the UNCLOS.[72]

Therefore, the Philippines' request is a hypothetical assertion that is totally stripped from any legal or realistic context. The arbitral tribunals in *Larsen v the Hawaiian Kingdom* confirmed, "the function of international arbitral tribunals in contentious proceedings is to determine disputes between the parties, not to make abstract rulings."[73] The Philippines should have taken into account that there are other coastal states in the South China Sea such as Malaysia, Indonesia, Brunei, and Vietnam. According to Article 57 of UNCLOS, "the Exclusive Economic Zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."[74] Even if the Tribunal decides to make declarations where the Philippines is entitled to a 12 nm territorial sea or 200 nm EEZ, the distance between the opposite or adjacent coasts of these countries will be less than 400 Nautical Miles.[75] Hence, considering the coastal states in the South China Sea such as Malaysia, Indonesia, Brunei, Vietnam or China, it will thus create potentially conflicting arguments. In conclusion, because the Philippines' was asking for abstract declaration in its claims as explained above, it is devoid of any legal purpose and thus created lack of dispute from the Philippines.

3. Lack of Jurisdiction in the Philippines' Claims About Concerning Activities at Mischief Reef

---

68 It is stipulated in Article 283 of UNCLOS the existence of a dispute is required before the dispute settlement mechanism of Part XV of UNCLOS can operate.

69 By reason of the matter.

70 Talmon, S. (2014). The South China Sea Arbitration: Is There a Case to Answer?. *Bonn Research Papers on Public International Law*, No. 2, p. 13.

71 The Philippines' Relief Sought, bullet point 10, identical with Claims, bullet point 8.

72 Wu, S., & Zou, K. (2016). *Arbitration Concerning the South China Sea: Philippines versus China*. New York, USA: Routledge. p. 43.

73 Larsen v Hawaiian Kingdom (2001) 119 ILR 566, 587 [11.3]. The Tribunal comprised James Crawford, Gavan Griffith, and Christopher Greenwood.

74 UNCLOS (n 24) art. 57.

75 Talmon, 'The South China Sea Arbitration: Is There a Case to Answer?' (n 75) 16.

In the Philippines' Relief Sought, it declared, "Mischief Reef and McKennan Reef are maritime features that form part of the Philippines' Continental Shelf under Part IV of the Convention, and that China's occupation and construction activities on them violate the Philippines' sovereign rights". This declaration concerns the questions of sovereignty and other rights over land territory.[76] At the outset, this is problematic because the Philippines previously stated in its Notification and Statement of Claim that "it does not seek in this arbitration which party enjoys sovereignty over the island claimed by both of them."[77] Moreover, the question of sovereignty and rights over land territory are not dealt with in the UNCLOS and thus fall outside the jurisdiction of the Tribunal.[78]

Furthermore, China announced on June 2015 that, "China would soon complete the formation of islands – shifting sediment from the seafloor to a reef".[79] It seems that China has built on the islands namely; port facilities, military buildings and an airstrip, with recent documentation supporting the allegations with images of two more airstrips under construction.[80] The fact that there were so many things being built by China at Mischief Reef elevated the status of the dispute into concerning activities. However, the Tribunal found that the Mischief Reef is a low-tide elevation located within the EEZ of the Philippines and there is no legal basis for China's entitlement to maritime zones in the Mischief Reef area.[81]

Despite the conclusion made by the Tribunal, the writer finds that there was something problematic in the claims made by the Philippines. Firstly, the Philippines focused on the premise that the continental shelf in the South China Sea is delineated, and there are no conflicting continental shelf claims in the South China Sea by the Philippines, China, Vietnam, Brunei nor Malaysia that call for a delimitation.[82] The fact is that the features of Spratly Island (including the Mischief Reef) are a group of islands, islets and cays, including more than 100 reefs located off the coasts of the Philippines, Malaysia and southern Vietnam.[83] Spratly features are the most important archipelagos in the South China Sea; and it is also an attractive island due to its location on strategic shipping routes.[84] With its appeal, it generates a longstanding conflict amongst five littoral coastal parties, which are the Philippines, China, Vietnam, and Malaysia.[85] The conflict has been unresolved for many years, owing to its nuanced existence. However, the Philippines submits that Mischief Reef and McKennan Reef are maritime features that form part of the Philippines' Continental Shelf, this fact implies that the Philippines has abandoned the idea that it is not the only coastal state in the line of the South China Sea. Therefore, it can be concluded that the Philippines' entitlement over the

---

76 Talmon, S., & Jia, B. B., '*The South China Sea Arbitration: A Chinese Perspective*' (n 63) 31.

77 *ibid.*

78 *ibid.*

79 Watkins, D. (2020, May 2). *What China Has Been Building in the South China Sea*. Retrieved from https://www.nytimes.com/interactive/2015/07/30/world/asia/what-china-has-been-building-in-the-south-china-sea.html.

80 *ibid.*

81 *Philippines* (n 21).

82 The Note Verbale No. 000819 from the Philippine Mission to the United Nations to the UN Secretary General (4 August 2009) www.un.org/Depts/los/, protesting against the Joint Submission by Malaysia and Vietnam to the Commission on the Limits of the Continental Shelf concerning the outer limits of the continental shelf beyond 200nm in the South China Sea.

83 WWF. (2020, 4 May). *South China Sea, between the Philippines, Borneo, Vietnam, and China*. Retreieved from https://www.worldwildlife.org/ecoregions/im0148.

84 Hasan and Jian. Spratly Islands Dispute in the South China Sea: Potential Solutions. *Journal of East Asia and International Law*, Vol. 12 No. 1, p. 146.

85 *ibid.*

Mischief reef is a total disregard of other coastal states, and it creates a doubt of the jurisdiction that the Philippines claims to have.

Secondly, it is about the problematic of what constitutes "military activities" within the scope of Article 298 (1) (b), which leads to the question whether or not China activities at Mischief Reef are constitute as one.[86] It is stipulated in Article 298 (1) (b) of UNCLOS, "*disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction are* ***excluded*** *from the jurisdiction of a court or tribunal*".[87] Therefore, any dispute with an element pertaining to military activities, the Tribunal would not examine the dispute because it falls outside of the *ratione materiae* of the Tribunal. In deciding whether or not the activities involved in Mischief Reef constitute military activities, the Tribunal has taken into account the claims made by China that the activities involved are intended to serve civilian purposes and have no effect on any nation.[88] In the end, the Tribunal reiterated the clear stance of China that it is intended for civilians and stated that the behavior of China is beyond Article 298 (1) (b).[89]

However, the writer here would like to point out the fact that China was constructing military buildings and the People's Liberation Army (PLA) has carried out the construction.[90] It is reported that the PLA is a "unified organization of China's land, sea, and air forced and it is one of the **largest military forces in the world**".[91] The fact that the PLA has been involved in this construction strengthens the fact that China was not building something merely for civilian purposes. Therefore, depending on the extent to which PLA has been included in the South China Sea dispute, they are subject to an optional exception from the jurisdiction of the Tribunal of disputes relating to military activities under Article 298 (1) (b) of UNCLOS.[92] In conclusion, the Tribunal should have declared that it lacked jurisdiction pertaining to the military activities that China has carried out with the PLA.

C. Conclusion and Recommendations

In conclusion, the writer finds that, out of the five legal reasoning that the Philippines claim to be fair and justifiable, there is one that seems to be misleading which is concerning the military activities by China in the Philippines along with the other two misleading legal reasoning in the Philippines' claims. Therefore, the writer submits that the Philippines' legal reasoning is not entirely fair and justifiable. Although, there were legal reasoning made by the Philippines that are "legitimate", "justifiable" and "well-founded in fact and law". The writer highlights a few misleading legal reasoning. The misleading legal reasoning are the Philippines' failure to showcase the principle of good faith before the South China Sea Arbitration, misleading claims by the Philippines that led to a lack of dispute, and lack of jurisdiction in the Philippines' claims with regard to concerning activities at Mischief Reef.

---

86 Award on Jurisdiction (n 66), ¶ 372, 396, 409.
87 UNCLOS (n 24) Article 298 (1) (b).
88 Xinhua. (2020, May 4). *China not to pursue militarization of Nansha Islands in South China Sea: Xi*. news.xinhuanet.com/english/2015-09/26/c_134660930.htm.
89 *Philippines* (n 21) ¶ 1028.
90 Talmon, 'The South China Sea Arbitration: Is There a Case to Answer?' (n 75) 21.
91 The Editors of Encyclopaedia Britannica. (2020, May 3). *People's Liberation Army*. Retrieved from https://www.britannica.com/topic/Peoples-Liberation-Army-Chinese-army.
92 Talmon, 'The South China Sea Arbitration: Is There a Case to Answer?' (n 75) 21.

Firstly, the Philippines' has failed to pursue the principle of good faith because it is proven that the Philippines' has broken China's trust in the DOC agreement and in turn institute a unilateral arbitral proceeding against China regarding the South China Sea. Secondly, the writer finds that there is a lack of dispute in the claims made by the Philippines because it requests "the Arbitral Tribunal to declare that it is entitled, under UNCLOS, to a 12 M Territorial Sea, a 200 M Exclusive Economic Zone and a Continental Shelf". However, asserting UNCLOS Section XV, this request is inadmissible. It is because according to UNCLOS Section XV, to initiate a dispute to an Arbitral Tribunal, the dispute must be concerning the interpretation or application of UNCLOS, and the Arbitral Tribunals are not responsible for a declaration to claim maritime entitlements. Thirdly, the writer finds that there is a lack of jurisdiction in the Philippines' claims concerning military activities at Mischief Reef. It is because China's construction activities involve the PLA and it is a military group from China. Hence, the Tribunal should have lacked jurisdiction to hear the concerning activities at Mischief Reef in respect to Article 298 (1) (b) of UNCLOS.

Taking into account the fact that the Philippines' claims are not entirely justifiable, the writer recommends that the Philippines' should have conducted joint development. In regards to joint development, it is an excellent approach to resolve the political situation situated in the South China Sea. The issue of South China Sea is sensitive because it contains potential conflict with different national interests from different coastal states.[93] Notably, the joint development would have a significant impact on the Spratly Islands, which is currently under multiple and maritime claims.[94] In order to balance peace and security, joint development is important to know the coastal states' interests as well as cooperation in distributing resources in the South China Sea.

[93] Keyuan, Zou. (2006). Joint Development in the South China Sea: A New Approach. *The International Journal of Marine and Coastal Law*, Vol. 21, No. 1, p. 83.
[94] *ibid.*

BIBLIOGRAPHY

Books & Journal Articles

Bautista, Lowell. (2016). Philippine Arbitration against China over the South China Sea. *Asia-Pacific Journal of Ocean Law and Policy*.

Bautista, Lowell. (2014). The Arbitration Case Between Philippines and China over their Dispute in the South China Sea. *Jati*, Vol. 19.

Beckman, Robert. (2013). The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea. *The American Journal of International Law,* Vol. 107, No. 142, 2013.

Buszynski, Leszek. (2003). ASEAN, the Declaration on Conduct, and the South China Sea. *Contemporary Southeast Asia*, Vol. 25 No. 3.

Gau, M.S. (2019). The Interpretation of Article 121(3) of UNCLOS by the Tribunal for the South China Sea Arbitration: A Critique. *Ocean Development & International Law*, Vol. 50, No. 1.

Gau, M.S. (2015). The Sino-Philippine Arbitration on the South China Sea Disputes: Ineffectiveness of the Award, Inadmissibility of the Claims, and Lack of Jurisdiction, with Special Reference to the Legal Arguments Made by the Philippines in the Hearing on 7-13 July 2015. *China Oceans Law Review,* Vol. 2015, No. 2.

Hasan and Jian. Spratly Islands Dispute in the South China Sea: Potential Solutions. *Journal of East Asia and International Law*, Vol. 12 No. 1.

Keyuan, Zou. (2012). China's U-Shaped Line in the South China Sea Revisited. *Ocean Development and International Law*.

Keyuan, Zou. (2006). Joint Development in the South China Sea: A New Approach. *The International Journal of Marine and Coastal Law*, Vol. 21, No. 1.

McDorman, T.L. (2017). An International Law Perspective on Insular Features (Islands) and Low-Tide Elevations in the South China Sea. *The International Journal of Marine and Coastal Law*, Vol. 32, No. 2.

Reinhold, Steven. (2013). Good faith in International Law. *UCL Journal of Law and Jurisprudence*, Vol. 2.

Sa, Luo. (2017). Sino-Philippine Arbitration on South China Sea Disputes: A Perspective from the Principle of Good Faith. *China Oceans Law Review,* Vol. 2017, No. 1.

Talmon, S., & Jia, B. B. (2014). *The South China Sea Arbitration: A Chinese Perspective*. Oxford. Bloomsbury Academic.

Talmon, Stefan. (2014). The South China Sea Arbitration: Is There a Case to Answer?. *Bonn Research Papers on Public International Law*, No. 2.

Wu, S., & Zou, K. (2016). *Arbitration Concerning the South China Sea: Philippines versus China*. New York, USA: Routledge.

Zhao, Suisheng. (2018). China and the South China Sea Arbitration: Geopolitics Versus International Law. *Journal of Contemporary China*, Vol. 27, No. 109.

Legislations

The Permanent Court of Arbitration Rules 2012.

United Nations Convention on the Law of the Sea 1982 (UNCLOS).

Jurisprudences

North Sea Continental Shelf Cases, Judgment, ICJ Reports 1969.

South West Africa (Ethiopia v South Africa; Liberia v South Africa) (Preliminary Objections) [1962] ICJ Rep 319, 328.

Miscellaneous

Affidavit of A.G. Perez, Director, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines (26 March 2014) (Annex 241).

Beech, Hannah. (2020, April 30). *Just Where Exactly Did China Get the South China Sea Nine-Dash Line From?*. Retrieved from https://time.com/4412191/nine-dash-line-9-south-china-sea/

China Daily. (2002, April 28). *China's Position Paper on South China Sea, 7 December 2014*. Retrived from http://www.chinadaily.com.cn/china/2014-12/07/content_19037946.htm

Forum Energy plc. SC72 Recto Bank. *Formerly GSEC101* (Annex 342).

Final Transcript Day 2 - Hearing on Jurisdiction and Admissibility. T*he Republic of Philippines v. the People's Republic of China*. PCA, pp. 34-35.

Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs, Republic of the Philippines, No. (10) PG-047 (22 February 2010) (Annex 195).

Note Verbale from the Ministry of Foreign Affairs, People's Republic of China to the Embassy of the Republic of the Philippines in Beijing, No. (2015) Bu Bian Zi No. 5 (20 January 2015) (Annex 681).

Panda, Ankit, (2020, April 23). *International Court Issues Unanimous Award in Philippines v. China Case on South China Sea*. Retrieved from https://thediplomat.com/2016/07/international-court-issues-unanimous-award-in-philippines-v-china-case-on-south-china-sea/

People's Republic of China, Ministry of Agriculture, South China Sea Fishery Bureau, Announcement on the 2012 Summer Ban on Marine Fishing in the South China Sea Maritime Space (10 May 2012) (Annex 118).

Permanent Court of Arbitration. (2020, April 29). *Press Release by the Tribunal, 17 December 2014*. Retrieved from http://www.pca-cpa.org/showfile.asp?fil_id=2846

Swaine, Michael D. (2016, August 30). Chinese Views on the South China Sea Arbitration Case between the People's Republic of China and the Philippines. Retrieved from https://www.hoover.org/research/chinese-views-south-china-sea-arbitration-case-between-peoples-republic-china-and

The Philippines' Memorial on South China Sea.

The Philippines' Notification and Statement of Claim.

The Philippines' Relief Sought.

The South China Sea Arbitral Tribunal Award of 12 July 2016.

The South China Sea Arbitral Tribunal Award on Jurisdiction and Admissibility of 29 October 2015.

The South China Sea Merits Award of 12th July 2016.

The Note Verbale No. 000819 from the Philippine Mission to the United Nations to the UN Secretary General (4 August 2009).

Watkins, Derek. (2020, May 2). *What China Has Been Building in the South China Sea*. Retrieved from https://www.nytimes.com/interactive/2015/07/30/world/asia/what-china-has-been-building-in-the-south-china-sea.html

WWF. (2020, May 4). *South China Sea, between the Philippines, Borneo, Vietnam, and China*. Retrieved from https://www.worldwildlife.org/ecoregions/im0148

Xinhua. (2020, May 4). *China not to pursue militarization of Nansha Islands in South China Sea: Xi*. Retrieved from news.xinhuanet.com/english/2015-09/26/c_134660930.htm

Zhu, Xiaolei. (2020, April 30). *China Calls on the Philippines to Talk on Their Territorial Disputes*. Retrieved from http://world.huanqiu.com/exclusive/2013-01/3577769.html (in Chinese).

NOT ALL ROADS LEAD TO ROME: QUESTIONING THE ENVIRONMENTAL PROTECTION UNDER THE ROME STATUTE

Bernhard Ruben Fritz Sumigar[1]

Abstract

It is incontestable that armed conflict is not only bringing suffering to human being but also it causing depletion to the environment as its silent casualty. Moderation between International Environmental Law, International Humanitarian Law and International Criminal Law (ICL) is paramount to be observed for mitigating its impact of armed conflict to the environment. With respect to ICL, this Article will discuss about the environmental protection in times of armed conflicts under the Rome Statute of the International Criminal Court (Rome Statute). In time of international armed conflict, Article 8(2)(b)(iv) of the Rome Statute mandated the International Criminal Court to exercise jurisdiction over war crime of intentional attack that causing widespread, long-term and severe damage to the natural environment that clearly excessive in relation to the concrete and direct overall military advantage anticipated. Unfortunately, this provision along with its interpretation is vague. Whilst similar arrangement in times of non-international armed conflict is nowhere to be found in the Rome Statute. Consequently, this placed the environmental protection in limbo situation. To that end, this Article is present to offer numerous solutions for improving the environmental protection in times of armed conflict under the Rome Statute.

Intisari

Tidak dapat disangkal bahwa konflik bersenjata tidak hanya membawa penderitaan bagi manusia tetapi juga menyebabkan kerusakan lingkungan sebagai korbannya. Moderasi antara Hukum Lingkungan Internasional, Hukum Humaniter Internasional dan Hukum Pidana Internasional (HPI) sangat penting untuk diperhatikan untuk mengurangi dampak konflik bersenjata terhadap lingkungan. Sehubungan dengan HPI, Artikel ini akan membahas tentang perlindungan lingkungan pada saat terjadi konflik bersenjata berdasarkan Statuta Roma dari Mahkamah Pidana Internasional (Statuta Roma). Pada saat konflik bersenjata internasional, Pasal 8(2)(b)(iv) Statuta Roma mengamanatkan Mahkamah Pidana Internasional untuk menjalankan yurisdiksi atas kejahatan perang dari serangan yang disengaja yang menyebabkan kerusakan luas, jangka panjang dan parah terhadap lingkungan alam yang jelas berlebihan dalam kaitannya dengan keuntungan militer konkrit dan langsung secara keseluruhan yang diantisipasi. Sayangnya, ketentuan ini beserta penafsirannya tidak jelas. Sementara pengaturan serupa pada masa konflik bersenjata non-internasional tidak dapat ditemukan dalam Statuta Roma. Akibatnya, hal ini menempatkan perlindungan lingkungan dalam situasi in limbo. Untuk itu, Artikel ini hadir untuk menawarkan sejumlah solusi guna meningkatkan perlindungan lingkungan pada saat terjadi konflik bersenjata berdasarkan Statuta Roma.

Keywords: *Environmental protection, Rome Statute, armed conflict, international humanitarian law*

Kata Kunci: *Perlindungan lingkungan hidup, Statuta Roma, konflik bersenjata, hukum humaniter internasional*

* Master of Laws, International Law Institute, Kutafin Moscow State Law University (MSAL).

A. Introduction

It is incontestable that war or armed conflict is not only bringing suffering to men, women and children but also it causing depletion to the natural environment as its silent casualty. This is at least predated long before the Rome Statute of the International Criminal Court ("Rome Statute") being formulated in July 1998. The intersection between armed conflict and environment in the late century is at a glance seen since World War II when the United States detonated two nuclear weapons in the Japanese cities of Hiroshima and Nagasaki. This deplorable situation has indeed negatively affected the environmental situation surrounding the areas of these cities.[1]

Another precedent relating to the impact of armed conflict on the natural environment was seen during the set of the Vietnam War. At that time, the United States military conducted aerial sprays of more than 100,000 tons of toxic herbicides and defoliants or known as the "Agent Orange".[2] They also involved in the "Roman Plough" program, where they used heavy bulldozers to clear forests and destroy the soil layer against the Vietnamese guerrillas.[3] The consequences of such methods of warfare are still felt by civilians, as they live in contaminated areas, and the land can no longer be used for agricultural purposes.[4] Furthermore, the Iraqi forces spilt a large quantity of oil into the Persian Gulf and set more than 600 Kuwaiti oilfields ablaze during the 1991 Gulf War marked the environmental destruction arose from the methods of warfare itself.[5]

In light of these situations, reasonable moderation between International Humanitarian Law ("IHL") and International Environmental Law ("IEL") is paramount. This is at least seen when 170 countries agreed to sign the Rio Declaration on Environment and Development ("Rio Declaration") in 1992, which stipulated:

> "*Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and co-operate in its further development, as necessary.*"[6]

The International Court of Justice ("ICJ") reaffirmed this approach on its Advisory Opinion concerning the *Legality of the Threat or Use of Nuclear Weapons* ("*Nuclear Weapons*") in 1996. Given the recognition of the environment as a representation of the living space, the quality of life and the very health of human beings, including generations unborn,[7] the ICJ therefore suggests:

---

1 Harwell, Christine C. "Experiences and Extrapolations from Hiroshima and Nagasaki" on M.A. Hartwell and T.C. Hutchinson (eds). (1985). *Environmental Consequences of Nuclear War Volume II: Ecological and Agricultural Effects*. London: John Wiley & Sons Ltd, p. 16.

2 Braige, Morsi Naim. (2014). *Международно-правовая охрана окружающей среды в ситуациях вооруженных конфликтов (International Legal Protection of the Environment in Situations of Armed Conflicts*). Dissertation, Kazan (Volga Region) Federal University, p. 172.

3 Kotlyarov, Ivan I. (ed). (2012). *Международное гуманитарное право (International Humanitarian Law)*. 3rd ed. Moscow: Unity, p. 126.

4 Kuvrychenkova, Tatiana V. (2016). "К вопросу охраны окружающей среды во время вооруженных конфликтов" (To the Question on the Protection of Natural Environment in Time of Armed Conflicts). *Vestnik TvGU. Series Law*, 2, p. 129.

5 Roberts, A. "Environmental Issues in International Armed Conflict: The Experience of the 1991 Gulf War" on Richard J. Grunwalt, et al. (eds). (1996). *Protection of the Environment during the Armed Conflict*. International Law Studies Vol. 69. Newport: Naval War College, p. 247.

6 Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26 (vol.I) (1992) Principle 24.

7 *Legality of the Threat or Use of Nuclear Weapons*. Advisory Opinion. I.C.J. Rep. 226 (1996) para. 29 [*Nuclear Weapons*].

> "*States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.*"[8]

Despite such moderation, the attack towards the natural environment after the Rome Statute being made is continued. For example, according to the 2001 report submitted to the Parliamentary Assembly of the Council of Europe, the NATO bombings during the 1999 Kosovo crisis caused severe damage to the country's natural environment. The damage is extended to several other southeast European countries.[9] Meanwhile, in 2006 conflict between Israel and Lebanon, the Israeli Air Force bombings of the Lebanese El-Jiyeh power plant resulted in the release of about 15,000 tons of fuel oil into the Mediterranean Sea, leading to the contamination of 150 km of Lebanese and Syrian coastline.[10]

Unfortunately, none of these incidents has been brought to justice. The only available precedence relating to the environmental damage in time of war occurred when the Uganda People's Defence Forces ("UPDF") occupied the Ituri District in the Democratic Republic of the Congo ("DRC"). In the view of the ICJ, the UPDF's involvement in the looting, plundering and exploitation of Congolese natural resources, which according to DRC is amounted to "massive war damage", constitutes the violations of the *jus in bello* enshrined under Article 47 of the 1907 Hague Regulations.[11] For this reason, Uganda can be held accountable for its troops conducts in DRC's territory.

Another avenue to protect natural environment during armed conflict is also vanguarded by the International Criminal Law ("ICL"). Primarily, ICL governs international criminal liability of individuals who commits international crimes, including grave breaches of IHL. This preposition extends to those who committed environmental war crimes.

The attempt for ICL to penalize the environmental war criminals appeared during the creation of the International Criminal Court ("ICC"). Although 160 countries that were participating at the 1998 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC have provided a guarantee for environmental protection in time of armed conflict under Article 8(2)(b)(iv) of the Rome Statute, there is no single precedent up to this day that put an individual for committing environmental war crime under the said provision before the ICC.

Accordingly, this Article is intrigued to analyse whether Article 8(2)(b)(iv) of the Rome Statute is challenging to be enforced due to the inconsistencies of its interpretation under other rules of IHL governing the environmental protection in time of international armed conflict ("IAC"). Moreover, this Article also explores the failure of the Rome Statute drafters to regulate the environmental war crime committed during non-international armed conflict ("NIAC"), particularly noting to the facts that most of the current civil wars are fuelled from the exploitation of natural resources.[12]

---

8 *Ibid*, para. 30.

9 Kurykin, S. (2001). *Environmental Impact of the War in Yugoslavia on South-East Europe*. Report of the Committee on the Environment, Regional Planning and Local Authorities. P.A.C.E. Doc. 8925, paras. 6-7, 57.

10 *Oil Slick on Lebanese Shore*. Report of the Secretary-General. U.N. Doc. A/62/343 (2007) para. 3.

11 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*. Judgment. I.C.J. Rep. 168 (2005) para. 250.

12 Jensen, David and Halle, Silja (eds). (2009). *Protecting the Environment during the Armed Conflict: An Inventory and Analysis of International Law*. Nairobi: UNEP, p. 8 [Jensen/Halle].

A. *Status Quo* of Environmental Protection in Time of Armed Conflict under IEL and IHL

Indeed, the malicious influence of individual acts that arose in international law in connection with armed conflicts has caused damage to the entire community.[13] One of the harms that have caused by the armed conflicts is the depletion of natural resources, as well as the destruction of the natural environment itself.[14]

By virtue of this circumstance, Prof. Grigory Ivanovich Tunkin asserted that the formation of the international legal protection of environmental change has been and is taking place within the overall process of the progressive development of international law. In his view, the regulation of environmental activities of States was formed under the unquestionable influence of many universal international treaties that they either contain relevant environmental provisions or directly or indirectly, but they contribute to the improvement of the planetary environments.[15]

In that respect, IEL and IHL are several relevant branches of public international law governing the protection of the environment during an armed conflict situation.[16]

In IEL, Prof. Philippe Sands has enumerated certain international treaties relating to the protection of the environment in time of armed conflict. He observed that most of the environmental treaties are silent on this matter.[17] For example, there are certain treaties that preclude civil liability for damage that occurs as a result of armed conflict.[18] There are also treaties that allowing for the suspension of its operation in case of war or other hostilities,[19] whilst other instruments strictly prohibit its applicability for military activities.[20]

A contrario to the treaties as mentioned above, other international environmental treaties guaranteed the environmental protection at all times, including in time of armed conflict. That provision can be seen in the 1959 Antarctic Treaty and the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses.[21]

Meanwhile, from the perspective of IHL, the protection of the natural environment has been widely recognized in certain instruments. Numerous scholars pointed out that the narration on

---

[13] Kudryavtsev, Vladimir N. (1999). *Международное уголовное право: учебное пособие* (*International Criminal Law: Tutorial*). Moscow: Nauka, p. 3.

[14] Westing, Arthur H. (1980). *Warfare in a Fragile World: Military Impact on the Human Environment*. London: Taylor & Francis, pp. 192-194.

[15] Tunkin, Grigory I. (ed). (1982). *Международное право: учебник* (*International Law: Textbook*). Moscow: Yuridicheskaya Literatura, p. 478.

[16] Vincze, Viola. (2017). "The Role of Customary Principles of International Humanitarian Law in Environmental Protection". *Pe□cs Journal of International and European Law*, 2(19), pp. 22-23 [Vincze].

[17] Sands, Philippe. (2003). *Principles of International Environmental Law*. Cambridge: Cambridge University Press, pp. 309-310.

[18] These treaties encompass, *inter alia*, the 1960 OECD Convention on Third Party Liability in the Field of Nuclear Energy (Paris Convention) (art.9); the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (art.4(2)(a)); the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities (art.8(4)(b)).

[19] The 1954 International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL) (art.XIX(1)) and the 1952 International Convention for the High Seas Fisheries of the North Pacific Ocean (art.IV(2)) are several notable example of these environmental treaties.

[20] It was evinced in the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention) (art.VII(4)), the 1976 Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft (Barcelona Protocol) (Annex I), and the 1986 Protocol for the Prevention of Pollution of the South Pacific Region by Dumping (Noumea Protocol) (art.10(2)).

[21] See Antarctic Treaty. 402 U.N.T.S. 71. Dec. 1, 1959, art. I(1); Convention on the Law of the Non-Navigational Uses of International Watercourses. 2999 U.N.T.S. 52106. May 21, 1997, art. 29.

environmental protection during the war has implicitly existed in the 1868 St. Petersburg Declaration that renouncing the use of explosive projectiles under 400 grams weight and the 1899 Hague Declaration that prohibiting the use of projectiles that capable of dispersing asphyxiation or deleterious gases.[22]

Given the essence of IHL is represented by the principle of humanity, thus Prof. Igor Pavlovich Blishchenko contended that the realization of Article 13 of the Fourth Geneva Convention 1949, which is intended to alleviate the sufferings caused by war, can be achieved through the protection of the natural environment, which is necessary for human survival.[23]

The protection of the natural environment under IHL reaches its culmination under the 1977 First Additional Protocol to the Geneva Conventions 1949 ("AP-I") and the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques ("ENMOD Convention").

In AP-I, Articles 35(3) and 55(1) firmly prohibits the use of methods or means of warfare that are intended or may be expected to cause, widespread, long-term and severe damage to the natural environment, which represent a customary law.[24] On the other hand, Article I of the ENMOD Convention stipulates the prohibition of the deliberate environmental modification techniques in order to inflict widespread, long-lasting or severe effects as a means of destruction, damage or injury to another State Party.[25] Nevertheless, the customary nature of the provision under the ENMOD Convention remains questionable.[26]

From such legal construction, it can be understood that neither AP-I nor ENMOD Convention is duplicating to one another. Andronico O. Adede has identified the differences between these instruments, namely: first, AP-I is specifically designed to protect the natural environment against damages that could be inflicted on it by any weapon. Meanwhile, the ENMOD Convention is targeted to prevent the environmental modification techniques only, rather than the use of weapons at large. Secondly, AP-I applies only to an armed conflict situation, while the ENMOD Convention has a broader application as it encompasses all environmental modification techniques for military or any other hostile purposes.[27]

The formulation of environmental protection under IHL is also manifested through its legal principles, which has been codified in Rules 43 and 44 of the the International Committee of the Red Cross' ("ICRC") Customary International Humanitarian Law, namely the principles of distinction, necessity, proportionality and precautionary.[28]

Under the distinction principle, the warring parties are proscribed to attack the natural environment unless the combatants use it, thereby altering its status as the military objective.

---

[22] Vincze, *Op.Cit.*, p. 20; Kiss, Alexandre and Shelton, Dinah. (2007). *Guide to International Environmental Law*. Leiden: Martinus Nijhoff Publisher, p. 54.

[23] Blishchenko, Igor P. (1984). *Обычное оружие и международное право* (*Conventional Weapon and International Law*). Moscow: Mezhdunarodniye Otnosheniya, p. 91.

[24] Henckaerts, Jean-Marie and Doswald-Beck, Louise. (2009). *Customary International Humanitarian Law (Volume I: Rules)*. Cambridge: ICRC, p. 152 [Henckaerts/Doswald-Beck].

[25] Article II of the ENMOD Convention defines the environmental modification techniques in question as any technique for changing through the deliberate manipulation of natural processes – the dynamics, composition or structure of the, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.

[26] Henckaerts/Doswald-Beck, *Op.Cit.*, p. 155.

[27] Adede, Andronico O. (1994). "Protection of the Environment in Times of Armed Conflict: Reflections on the Existing and Future Treaty Law". *Annual Survey of International & Comparative Law*, 1(1), p. 166.

[28] Henckaerts/Doswald-Beck, *Op.Cit.*, Rules 33-34.

The clear example of this principle was reflected in Article 2(4) of the 1980 Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons that stipulates:

> "*It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.*"[29]

The importance of respecting the environment is also stemming from the necessity and proportionality principles.[30] The necessity principle assures the warring parties do not carry out wanton destruction causing serious environmental damage without the imperative military necessity.[31] The proportionality principle confers to the balancing between the military advantage and the environmental destruction as its collateral damage. As per Article 51(5)(b) of the AP-I and paragraph 13(c) of the 1994 San Remo Manual, an attack is disproportional if the damage caused [to the environment] is excessive to the concrete and direct military advantage anticipated.

Another central principle on environmental protection during armed conflicts situation is the precautionary principle, which has been widely recognized in both IEL[32] and IHL landscapes. The centrality of this principle lies on the obligation of the parties to the conflict to take all feasible precautions to avoid or at least to minimize, in their military operations, all acts liable to damage the environment.[33]

B. Challenges for Environmental Protection in Time of Armed Conflict under the Rome Statute

In addition to the extensive legal regulation on environmental protection during armed conflict situation under IEL and IHL, ICL also provides legal protection for the natural environment during armed conflict situation by providing international criminal liability to those who committed environmental war crimes.

As one of the international criminal judicial institution, the founders of the ICC have envisioned the importance of environmental protection in time of armed conflict. This is at least evinced in Article 8(2)(b)(iv) of the Rome Statute that criminalises individuals who violates the laws and customs applicable in IAC in the form of:

> "*Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or* ***widespread, long-term***

---

[29] Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons. 19 I.L.M. 1523. Apr. 10, 1980, art. 2(4).

[30] *Nuclear Weapons*, para. 30.

[31] Similar passage is found in paragraph 44 of the 1994 San Remo Manual on International Law Applicable to Armed Conflicts.

[32] Preamble of the 1992 Convention on Biological Diversity and Principle 15 of the Rio Declaration are the clear example for IEL recognition of the precautionary principle.

[33] Vincze, *Op.Cit.*, p. 30.

> ***and severe damage to the natural environment*** *which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.*"[34]

In light of this provision, this section will discuss certain legal challenges emanating from that provision. This question arose because, despite its existence under the ICC statutory provision, no individual has been charged under this Article for committing environmental war crime up to this day. This Article suspects that this situation was influenced by the lack of clarity for interpreting the criteria of "*widespread, long-term and severe damage*" laid down in that provision. Moreover, this Article contends that the drafter of the Rome Statute also failed to provide similar environmental protection in time of NIAC.

a. The Ambiguous Criteria under Article 8(2)(b)(iv) of the Rome Statute

According to Article 8(2)(b)(iv) of the Rome Statute, an individual that intentionally launched an attack in the knowledge that such attack will cause widespread, long-term and severe damage to the natural environment, which would be excessive to the military advantages anticipated, may be charged on this basis.

Even though the Rome Statute provides little guidance to interpret its provisions, the ICC has provided other avenues to decipher the provisions under the Rome Statute. As per Article 21(1)(a) of the Rome Statute, such avenues can be pursued through the Elements of Crimes ("EOCs").[35] The EOCs to Article 8(2)(b)(iv) of the Rome Statute has identified five fundamental elements, namely:

1) The perpetrator launched an attack.

2) The attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

3) The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

4) The conduct took place in the context of and was associated with an international armed conflict.

5) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Unfortunately, both the Rome Statute and the EOCs also failed to interpret the phrase "*widespread, long-term and severe damage*" to the natural environment and the element of

---

[34] Rome Statute of the International Criminal Court. 2187 U.N.T.S. 3. July 17, 1998, art. 8(2)(b)(iv).

[35] Article 9(1) of the Rome Statute rules that the EOCs shall assist the ICC in the interpretation and application of Articles 6, 7, 8 and 8 *bis* of the Rome Statute.

"*excessive*" itself.[36] The existence of such a vague provision is indeed undermined the legality principle (*nullum crimen sine lege*) that requires crimes to be as specific and detailed as possible.[37]

In order to resolve this obstacle, it can only be attained through other sources of law, as recognized by Article 21(1)(b)-(c) of the Rome Statute. The ICC has previously accepted this approach in *Al Bashir*, where the Pre-Trial Chamber I of the ICC concludes:

> "*(…) According to article 21 of the Statute, those other sources of law provided for in paragraphs (l)(b) and (l)(c) of article 21 of the Statute, can only be resorted to when the following two conditions are met: (i) there is a lacuna in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such lacuna cannot be filled by the application of the criteria of interpretation provided in articles 31 and 32 of the Vienna Convention on the Law of the Treaties and 45 article 21(3) of the Statute.*"[38]

From this standpoint, Article 21 (1)(b) of the Rome Statute permits, where appropriate, the utilization of international treaties as one of its applicable law.[39] With this modality, certain international treaties to the very least could enlighten the meaning of "*widespread, long-term and severe*" criteria under the Rome Statute.

This article suggests that the definition of those criteria can be found in two treaties, which are AP-I and the ENMOD Convention. However, these instruments offer different approaches for interpreting those criteria.

As regard to its terminology, both instruments also provide a distinguish definition, despite its identical terms. According to the Understanding to Article I of the ENMOD Convention, the "*widespread*" effect encompasses the affected area on the scale of several hundred square kilometres, while AP-I considers that term as the damage that may be less than several hundred square kilometres.[40]

Furthermore, the Understanding to Article I of the ENMOD Convention also emphasized that the term "*long-lasting*" applies to damages that last for several months or approximately a season. In contrast, AP-I defined "*long-term*" damage as the damage that last for several decades.[41]

As per the Understanding to Article I of the ENMOD Convention, the definition of "*severe*" effect involves the damage that seriously or significantly disrupts or harms human life, natural and economic resources or other assets. However, this term is insufficiently defined by AP-I.

---

[36] Triffterer, Otto and Ambos, Kai (eds). (2016). *The Rome Statute of the International Criminal Court: A Commentary*. 3rd ed. München: C.H. Beck/Hart/Nomos, pp. 378-379 [Triffterer/Ambos].

[37] Cassese, Antonio et al. (eds). (2013). *Cassese's International Criminal Law*. 3rd ed. Oxford: Oxford University Press, p. 23.

[38] *Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir")*. ICC-02/05-01/09-3. (2009). Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, para. 44.

[39] *See Situation in Uganda*, ICC-02/04-01/15 (2005), Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, para. 19.

[40] Antoine, Philippe. (1992). "International Humanitarian Law and the Protection of the Environment in Time of Armed Conflict". *International Review of the Red Cross*, 32(291), p. 526.

[41] Sandoz, Yves et al. (eds). (1987). *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Geneva: ICRC/Martinus Nijhoff Publishers, p. 416.

Anthony Leibler argued that severe damage as the damage that is causing death, ill-health or loss of sustenance to thousands of people, at present or in the future.[42]

Despite the above-mentioned interpretation, the ICRC argued that the threshold of widespread, long-term and severe damage to the natural environment set by Articles 35(3) and 55 of the AP-I is remain open for further interpretation.[43]

The interpretation relating to the phrase "*widespread, long-term and severe*" damage to the natural environment has also reached the attention of the International Law Commission ("ILC") in 1991. During the drafting process of Article 26 of the Draft Code of Crime Against the Peace and Security of Mankind, the ILC articulated the said phrase as:

> "*The extent or intensity of the damage, its persistence in time, and the size of the geographical area affected by the damage. It was explained in the Commission that the word 'long-term' should be taken to mean the long-lasting nature of the effects and not the possibility that the damage would occur a long time afterwards.*"[44]

Moreover, unlike AP-I and ENMOD Convention, Article 8(2)(b)(iv) of the Rome Statute provides a distinctive characteristic for charging environmental war criminal. This provision requires the perpetrators' conduct to be "*clearly*" excessive in relation to the concrete and direct "*overall*" military advantage anticipated (proportionality test).[45] In other words, if the environmental damages were not obviously excessive to a very substantial military advantage,[46] an individual would be freed from any criminal liability under this provision.

Previously, the evaluation for determining the excessiveness of collateral damage to the natural environment has been discussed in the Final Report of the Committee Established to Review the NATO Bombing Campaign. The Committee suggested that the determination of relative values must be that of the "*reasonable military commander*".[47]

This threshold is difficult to be achieved by the Prosecutor to indict a military commander due to the lack of information[48] that indicating that commander, prior to the attack, quantifying and assessing any potential damages to the natural environment in the ordinary course of events. The ICRC even admitted that it is not easy for that commander to know in advance exactly what the scope and duration of some environmentally damaging acts will be.[49]

The discrepancies from various sources in interpreting the "*widespread, long-term and severe*" threshold coupled with the additional element of proportionality test are indeed causing environmental protection in times of IAC under Article 8(2)(b)(iv) of the Rome Statute even more difficult to be defined and enforced by the ICC. Consequently, the absence of uniform

---

[42] Leibler, Anthony. (1992). "Deliberate Wartime Environmental Damage: New Challenges for International Law". *California Western International Law Journal*, 23(1), p. 111.

[43] Dörmann, Knut. (2004). *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*. Cambridge: ICRC/Cambridge University Press, p. 175 [Dörmann].

[44] Report of the International Law Commission on the Work of its Forty-Third Session (29 April-19 July 1991), U.N. Doc. A/46/10 (1991) p. 276.

[45] Triffterer/Ambos, *Op.Cit.*, p. 379. Phrase "*concrete and direct '<u>overall</u>' military advantage anticipated*" under Article 8(2)(b)(iv) of the Rome Statute was nowhere to be found in AP-I and ENMOD Convention.

[46] *See* ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 39 I.L.M. 1257 (2000) paras. 21-22.

[47] *Ibid*, para. 50.

[48] Schabas, William A. (2014). *An Introduction to the International Criminal Court*. 4th ed. Cambridge: Cambridge University Press, p. 137.

[49] *Protection of the Environment in Times of Armed Conflict*, Report of the Secretary-General, U.N. Doc. A/47/328 (1992) paras. 20, 63.

interpretation of "*widespread, long-term and severe*" requirement under Article 8(2)(b)(iv) of the Rome Statute would unlikely result to the applicability of the *favour rei* principle[50] for every charge brought under this provision before the ICC due to the vagueness of Article 8(2)(b)(iv) of the Rome Statute in dealing with the environmental war criminals.

a. The Environmental Protection during the Armed Conflict of Non-International Character is not guaranteed under the Rome Statute

Although the existence of Article 8(2)(b)(iv) of the Rome Statute is imperfect, this provision is undoubtedly provided assurance that no one is immune for committing an environmental war crime in IAC situation. This assertion is built because the *chapeau* of Article 8(2)(b) of the Rome Statute is designed as a codification of the laws and customs applicable in IAC.[51] Accordingly, Article 8(2)(b) (iv) of the Rome Statute is inapt to be applied for NIAC situation.

In the time of NIAC, there is no identical provision as what was written in Article 8(2)(b)(iv) of the Rome Statute. Articles 8(2)(c) and (e) of the Rome State are silent in penalizing the perpetrators that causing environmental degradation during the NIAC situation. However, historical record noted that similar provision in Article 8(2)(b)(iv) of the Rome Statute has been inserted for NIAC under Article 8(2)(d) of the Draft Statute, but later being dropped by the drafters during the Rome Conference without any significant debate of the issue.[52]

In the view of Carl E. Bruch, the decision of the drafters of the Rome Statute to omit environmental war crime in NIAC context must be seen as a step back from the ENMOD Convention that is designed to both IAC and NIAC situation, as long as it provides its transnational impact to its member States.[53]

On the contrary to the legal framework for environmental protection in time of NIAC under the Rome Statute, there are at least 18 civil wars around the world that was instigated by the exploitation of natural resources,[54] such as, in Angola, Nigeria and Sudan.[55]

As illustrated *infra*, there are also certain examples where NIAC can cause environmental degradation. During the Rwanda civil war, poaching of the endangered mountain gorillas and land mining the national parks, such as the Parc National des Volcans and the Parc National de l'Akagera, have become common practices.[56]

---

[50] *Favor rei* principle is understood as "in favour of the Suspect". This principle has been encapsulated in Article 22(2) of the Rome Statute.

[51] Triffterer/Ambos, *Op.Cit.*, p. 354; Dörmann, *Op.Cit.*, p. 128.

[52] Lawrence, Jessica C. and Heller, Kevin J. (2007). "The Limits of Article 8(2)(b)(iv) of the Rome Statute, the First Ecocentric Environmental War Crime". *Georgetown International Environmental Law Review*, 20(1) fn. 130 [Lawrence/Heller].

[53] Bruch, Carl E. (2001). "The Environmental Law of War: All's Not Fair in (Civil) War: Criminal Liability for Environmental Damage in Internal Armed Conflict". *Vermont Law Review*, 25(695) p. 703.

[54] Jensen/Halle, *Op.Cit.*, p. 8.

[55] See Gonzalez, Adrian. (2010). "Petroleum and its Impact on Three Wars in Africa: Angola, Nigeria and Sudan". *Journal of Peace, Conflict and Development*, 16.

[56] Drumbl, Mark A. (1998). "Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes". *Fordham International Law Journal*, 22(1) p. 145 [Drumbl].

Likewise, the internal armed conflict between the government forces and the rebels in Colombia marked with the Colombian guerrilla groups' strategy to destroy the oil pipelines and spill millions of barrels of oil into the Catatumbo River basin.[57]

Another example of how NIAC can negatively affect the natural environment was found in Cambodia. From 1985 to 1989, the Government of the People's Republic of Kampuchea deploying K5 Plan or known as the "Bamboo Curtain" in order to prevent the Khmer Rouge guerrilla for re-infiltrating Cambodia by means of trenches, barbed wire fences and minefields.[58] As a result, this military tactic failed to deter the Khmer Rouge.[59] Instead, such measure caused acute deforestation and transformed hundreds of thousands of hectares of it into minefields in forms of dry deciduous forest or savannah.[60]

In light of these circumstances, the inability of the Rome Statute in providing a guarantee for environmental protection in time of NIAC will indeed defeat the purpose of establishment of the ICC to put an end to impunity for the perpetrators of environmental war crimes, as these culprits cannot be tried before the ICC due to the lack of legal provision under the Rome Statute itself.

C. Solutions

Given the above-mentioned challenges for the environmental protection in times of IAC and NIAC under the Rome Statute (*vide* Section C), the author proposed numerous solutions to mitigate those challenges, as enunciated *infra*.

As regards to the provision of Article 8(2)(b)(iv) of the Rome Statute, the high threshold of "*widespread, long-term and severe*" damage to the natural environment in time of IAC is necessary to be modified. The Assembly of the State Parties ("ASP") needs to amend the EOCs[61] by providing additional footnote that describes the meaning of such phrase. Should the ASP faced with the difficulties to translate those criteria; the ICC may, to the very least, play an important role to interpret the "*widespread, long-term and severe*" threshold under Article 8(2)(b)(iv) of the Rome Statute towards any case law brought before it under this charge.

Notwithstanding to the ASP and the ICC's ability to translate that threshold, the most progressive approach for ensuring the environmental protection in time of IAC has been articulated by Mark Drumbl, Jessica C. Lawrence and Kevin J. Heller, which suggested for lowering that threshold by omitting phrase "*widespread, long-term, and severe damage*" into a broad category of "*damage*", thereby avoiding the potential anthropocentrism of an AP-I based requirement.[62] The author is strongly supporting this suggestion to be presented during the discussion for the amendment of the Rome Statute before the ASP.

---

[57] Sánchez-Triana, Ernesto et al. (eds). (2007). *Environmental Priorities and Poverty Reduction: A Country Environmental Analysis for Colombia*. Washington D.C.: World Bank, p. 374.

[58] Deth, Sok Udom. (2009). *The People's Republic of Kampuchea 1979-1989: A Draconian Savior?*. Thesis, Ohio University, p. 110; Slocomb, Margaret. (2001). "The K5 Gamble: National Defence and Nation Building under the People's Republic of Kampuchea". *Journal of Southeast Asian Studies*, 32(2), p. 198.

[59] Crochet, Soizick. (1997). *Le Cambodge*. Paris: Karthala, Chap. 4.

[60] Kim, Sophanarith et al. (2005). "Causes of Historical Deforestation and Forest Degradation in Cambodia". *Journal of Forest Planning*, 11(1), p. 27.

[61] The rules relating to the amendment of the Rome Statute and the EOCs must comply with the mechanism established in Articles 9(2)-(3) and 121 of the Rome Statute.

[62] Drumbl, *Op.Cit.*, p. 129; Lawrence/Heller, *Op.Cit.*, p. 33.

With respect to the issue of proportionality test under Article 8(2)(b)(iv) of the Rome Statute, the author suggests the ASP to remove the words "*overall*" and "*clearly*" from the construction of proportional test under the said provision. With such omission, it is expected for Article 8(2)(b)(iv) of the Rome Statute to be applied to any intentional attack that would cause damage to the natural environment which would be excessive in relation to the concrete and direct military advantage anticipated.

Meanwhile for the context of NIAC, the author recommends the ASP to provide a parallel provision of Article 8(2)(b)(iv) of the Rome Statute in the NIAC section of Article 8(2)(c) or 8(2)(e) of the Rome Statute. This suggestion is reasonable since the *travaux preparatoire* to Article 8(2)(b)(iv) of the Rome Statute do not indicate the drafters' clear objection to extend the application of that provision in NIAC situation.[63] Thus, opening a discussion for this particular topic in the future is critical to mitigate and further prevent the impacts of civil wars and other forms of NIAC to the detrimental of the natural environment itself.

D. Conclusion

The narration between armed conflict and its impact on the natural environment is no longer become a new subject in modern society. Rachel Carson has previously testified it at the C.B.S. Reports program entitled "The Silent Spring of Rachel Carson" on April 3, 1963, where she stated "*But man is a part of nature, and his war against nature is inevitably a war against himself*."[64]

To that end, an intersection between numerous branches of international law (such as IEL, IHL and ICL) must be proportionately observed for ensuring the protection of the natural environment during armed conflicts. However, this Article found the misbalance between these instruments, thereby contributing to the weak of current protection of natural environment *per se*.

One of its primary challenges lies in the failure of the Rome Statute to provide clear guidance as to how the ICC can prosecute the environmental war criminals. Despite its existence, the vagueness of Article 8(2)(b)(iv) of the Rome Statute to define the war crime of intentional attack that causing a widespread, long-term and severe effects to the natural environment, creating a complicated difficulty for the Office of the Prosecutor of the ICC ("OTP") to bring charges against the perpetrators on that basis.

Furthermore, the weaknesses of the Rome Statute also found in the construction of Articles 8(2)(c) and 8(2)(e) of the Rome Statute that does not provide similar provision in Article 8(2)(b)(iv) of the Rome Statute for the context of war crime committed in non-international character. This condition is definitely creating a leeway for the environmental war criminals to escape from criminal liability due to the absence of a particular provision in NIAC situation.

Ideally, we should seek more profound solutions to these difficulties. Employing the ASP to amend the Rome Statute and its EOCs, on the one hand, must be seemed as the appropriate strategy to clarify the environmental protection in time of armed conflicts [both IAC and NIAC]

---

[63] Lawrence/Heller, *Op.Cit.*, p. 37.

[64] See Carson, Rachel. "In Memoriam – Rachel Carson". <http://www.rachelcarson.org/mRachelCarson.aspx> (accessed May 20, 2020).

under the Rome Statute. On the other hand, consistently with the principle of *iura novit curia*,[65] the important role of the ICC to interpret the "*widespread, long-term and severe*" threshold under Article 8(2)(b)(iv) of the Rome Statute is equally crucial for environmental protection. By virtue of these recommendations, it is expected that the Rome Statute can effectively play its role in ensuring the penalization for the environmental war criminals in the future.

[65] The principle *iura novit curia* is a legal maxim that means the court, *in casu* ICC, alone is responsible for determining which and how law applies to a particular case.

BIBLIOGRAPHY

Books & Monographs

Blishchenko, Igor P. (1984). *Обычное оружие и международное право (Conventional Weapon and International Law)*. Moscow: Mezhdunarodniye Otnosheniya. (in Russ).

Cassese, Antonio et al. (eds). (2013). *Cassese's International Criminal Law*. 3rd ed. Oxford: Oxford University Press.

Crochet, Soizick. (1997). *Le Cambodge*. Paris: Karthala.

Dörmann, Knut. (2004). *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*. Cambridge: ICRC/Cambridge University Press.

Harwell, Christine C. "Experiences and Extrapolations from Hiroshima and Nagasaki" on M.A. Hartwell and T.C. Hutchinson (eds). (1985). *Environmental Consequences of Nuclear War Volume II: Ecological and Agricultural Effects*. London: John Wiley & Sons Ltd.

Henckaerts, Jean-Marie and Doswald-Beck, Louise. (2009). *Customary International Humanitarian Law (Volume I: Rules)*. Cambridge: ICRC.

Jensen, David and Halle, Silja (eds). (2009). *Protecting the Environment during the Armed Conflict: An Inventory and Analysis of International Law*. Nairobi: UNEP.

Kotlyarov, Ivan I. (ed). (2012). *Международное гуманитарное право (International Humanitarian Law)*. 3rd ed. Moscow: Unity. (in Russ).

Kiss, Alexandre and Shelton, Dinah. (2007). Guide to International Environmental Law. Leiden: Martinus Nijhoff Publisher.

Kudryavtsev, Vladimir N. (1999). *Международное уголовное право: учебное пособие (International Criminal Law: Tutorial)*. Moscow: Nauka. (in Russ).

Roberts, A. "Environmental Issues in International Armed Conflict: The Experience of the 1991 Gulf War" on Richard J. Grunwalt, et al. (eds). (1996). *Protection of the Environment*

during the Armed Conflict. International Law Studies Vol. 69. Newport: Naval War College.

Sánchez-Triana, Ernesto et al. (eds). (2007). *Environmental Priorities and Poverty Reduction: A Country Environmental Analysis for Colombia*. Washington D.C.: World Bank.

Sandoz, Yves et al. (eds). (1987). *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Geneva: ICRC/Martinus Nijhoff Publishers.

Sands, Philippe. (2003). *Principles of International Environmental Law*. Cambridge: Cambridge University Press.

Schabas, William A. (2014). *An Introduction to the International Criminal Court*. 4th ed. Cambridge: Cambridge University Press.

Triffterer, Otto and Ambos, Kai (eds). (2016). *The Rome Statute of the International Criminal Court: A Commentary*. 3rd ed. München: C.H. Beck/Hart/Nomos.

Tunkin, Grigory I. (ed). (1982). *Международное право: учебник (International Law: Textbook)*. Moscow: Yuridicheskaya Literatura. (in Russ).

Westing, Arthur H. (1980). *Warfare in a Fragile World: Military Impact on the Human Environment*. London: Taylor & Francis.

Journals

Adede, Andronico O. (1994). "Protection of the Environment in Times of Armed Conflict: Reflections on the Existing and Future Treaty Law". *Annual Survey of International & Comparative Law*, 1(1).

Antoine, Philippe. (1992). "International Humanitarian Law and the Protection of the Environment in Time of Armed Conflict". *International Review of the Red Cross*, 32(291).

Bruch, Carl E. (2001). "The Environmental Law of War: All's Not Fair in (Civil) War: Criminal Liability for Environmental Damage in Internal Armed Conflict". *Vermont Law Review*, 25(695).

Drumbl, Mark A. (1998). "Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes". *Fordham International Law Journal*, 22(1).

Gonzalez, Adrian. (2010). "Petroleum and its Impact on Three Wars in Africa: Angola, Nigeria and Sudan". *Journal of Peace, Conflict and Development*, 16.

Kim, Sophanarith et al. (2005). "Causes of Historical Deforestation and Forest Degradation in Cambodia". *Journal of Forest Planning*, 11(1).

Kuvrychenkova, Tatiana V. (2016). "К вопросу охраны окружающей среды во время вооруженных конфликтов" (To the Question on the Protection of Natural Environment in Time of Armed Conflicts). *Vestnik TvGU. Series Law*, 2. (in Russ).

Lawrence, Jessica C. and Heller, Kevin J. (2007). "The Limits of Article 8(2)(b)(iv) of the Rome Statute, the First Ecocentric Environmental War Crime". *Georgetown International Environmental Law Review*, 20(1).

Leibler, Anthony. (1992). "Deliberate Wartime Environmental Damage: New Challenges for International Law". *California Western International Law Journal*, 23(1).

Slocomb, Margaret. (2001). "The K5 Gamble: National Defence and Nation Building under the People's Republic of Kampuchea". *Journal of Southeast Asian Studies*, 32(2).

Vincze, Viola. (2017). "The Role of Customary Principles of International Humanitarian Law in Environmental Protection". *Pécs Journal of International and European Law*, 2(19).

Legislations

Antarctic Treaty. 402 U.N.T.S. 71. Dec. 1, 1959.

Convention on Biological Diversity. 1760 U.N.T.S. 69. June 5, 1992.

Convention on the Law of the Non-Navigational Uses of International Watercourses. 2999 U.N.T.S. 52106. May 21, 1997.

Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention). 1046 U.N.T.S. 120. Dec. 29, 1972.

Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention). 1108 U.N.T.S. 151. Dec. 10, 1976.

Convention on the Regulation of Antarctic Mineral Resource Activities. 27 I.L.M. 868. June 2, 1988.

ICC. Elements of Crimes. I.C.C. Doc. RC/11. 2011.

International Convention for the High Seas Fisheries of the North Pacific Ocean. 205 U.N.T.S. 65. May 9, 1952.

International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL). 327 U.N.T.S. 3. May 12, 1954.

International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. 11 I.L.M. 284. Dec. 18, 1971.

OECD Convention on Third Party Liability in the Field of Nuclear Energy (Paris Convention). 956 U.N.T.S. 251. July 29, 1960.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). 1125 U.N.T.S. 3. June 8, 1977.

Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft (Barcelona Protocol). 1102 U.N.T.S. 92. Feb. 16, 1976.

Protocol for the Prevention of Pollution of the South Pacific Region by Dumping (Noumea Protocol). 26 I.L.M. 65. Nov. 25, 1986.

Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons. 19 I.L.M. 1523. Apr. 10, 1980.

Rome Statute of the International Criminal Court. 2187 U.N.T.S. 3. July 17, 1998.

Jurisprudences

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda). Judgment. I.C.J. Rep. 168 (2005).

Legality of the Threat or Use of Nuclear Weapons. Advisory Opinion. I.C.J. Rep. 226 (1996).

Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir"). ICC-02/05-01/09-3. (2009). Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir.

Situation in Uganda. ICC-02/04-01/15. (2005). Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification.

Miscellaneous

Braige, Morsi Naim. (2014). *Международно-правовая охрана окружающей среды в ситуациях вооруженных конфликтов (International Legal Protection of the Environment in Situations of Armed Conflicts)*. Dissertation, Kazan (Volga Region) Federal University. (in Russ).

Carson, Rachel. "In Memoriam – Rachel Carson". <http://www.rachelcarson.org/mRachelCarson.aspx> (accessed May 20, 2020).

Deth, Sok Udom. (2009). *The People's Republic of Kampuchea 1979-1989: A Draconian Savior?*. Thesis, Ohio University.

ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 39 I.L.M. 1257 (2000).

Kurykin, S. (2001). *Environmental Impact of the War in Yugoslavia on South-East Europe*. Report of the Committee on the Environment, Regional Planning and Local Authorities. P.A.C.E. Doc. 8925.

Oil Slick on Lebanese Shore. Report of the Secretary-General. U.N. Doc. A/62/343 (2007).

Protection of the Environment in Times of Armed Conflict, Report of the Secretary-General, U.N. Doc. A/47/328 (1992).

Report of the International Law Commission on the Work of its Forty-Third Session (29 April-19 July 1991), U.N. Doc. A/46/10 (1991).

Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26 (vol.I) (1992).

63
San Remo Manual on International Law Applicable to Armed Conflicts. June 12, 1994.

UNMANNED AIRCRAFT SYSTEM: THIRD-PARTY LIABILITY AND INSURANCE PROTECTION IN INDONESIA AND THE EUROPEAN UNION

Aldhanti Bodhihanna[1] and Yeselia Salim[2]

Abstract

This article explores the legal framework of Unmanned Aircraft System ("UAS") in Indonesia and European Union ("EU"). Both Indonesia and EU is similar in a way that both do not have a third-party liability regulation for UAS. As no uniform law on third-party liability is found in EU, national legislations (France and Spain) will be used as comparisons. This article aims to compare the different minimum amount of insurance coverage between Indonesia and the EU, and find out what lessons can Indonesia extract from the practice of EU. It is recommended that the Indonesian government refers to the practice of EU member states such as Spain and France where UAS operators are bound with more responsibilities for the operation of UAS, such as the requirement of the third-party protection system or establishing a protection area and safe recovery zone. The Indonesian regulation also needs to clarify on the party to seek compensation from. Lastly, the minimum requirement for insurance coverage should also be included within the regulation because it serves as a protection towards third-party in case the insurance purchased by the UAS operators could not cover the amount of loss that the injured party suffer.

Intisari

Artikel ini membahas kerangka hukum Pesawat Tanpa Awak ("UAS") di Indonesia dan Uni Eropa ("UE"). Indonesia dan UE memiliki kesamaan dimana keduanya tidak memiliki peraturan pertanggungjawaban pihak ketiga untuk UAS. Oleh karena tidak ada hukum yang seragam tentang tanggung jawab pihak ketiga di UE, perundang-undangan nasional (Prancis dan Spanyol) akan digunakan sebagai perbandingan. Artikel ini bertujuan untuk membandingkan jumlah minimum pertanggungan asuransi antara Indonesia dan UE serta mencari tahu pelajaran apa yang dapat diambil Indonesia dari praktik di UE. Pemerintah Indonesia juga direkomendasi untuk merujuk pada praktik negara nggota UE seperti Spanyol dan Prancis di mana operator UAS terikat dengan lebih banyak tanggung jawab untuk pengoperasian UAS, seperti persyaratan sistem perlindungan pihak ketiga atau membangun area perlindungan dan zona pemulihan yang aman. Peraturan Indonesia juga perlu mengklarifikasi pihak mana yang harus dituju untuk meminta pertanggungjawaban. Terakhir, persyaratan minimum untuk pertanggungan asuransi juga harus dimasukkan dalam peraturan sebab hal tersebut berfungsi sebagai perlindungan terhadap pihak ketiga jika asuransi yang dibeli oleh operator UAS tidak dapat mencakup jumlah kerugian yang diderita oleh pihak ketiga yang dirugikan.

Keyword: *Unmanned Aircraft Systems, liability, third-party liability, insurance*

Kata Kunci: *Pesawat tanpa awak, tanggung jawab, tanggung jawab pihak ketiga, asuransi*

[1] International Business Law Program, Universitas Prasetiya Mulya, aldhanti.bodhihanna@student.pmsbe.ac.id
[2] International Business Law Program, Universitas Prasetiya Mulya, yeselia.salim@student.pmsbe.ac.id

A. Introduction

The use of Unmanned Aircraft Systems ("UAS") or commonly known as drones, is gradually expanding to different industries. The multipurpose functions of UAS break through several stagnant and conventional ways of business. For instance, Japan's electronic commerce and online retailing company, Rakuten Inc., utilized UAS to deliver products from Lawson convenience stores to customers who would otherwise need to travel long distances to shop.[1]

Besides commercial purposes, UAS plays a crucial role in this COVID-19 pandemic by sending medical supplies to rural areas in Ghana and Rwanda.[2] However, it should be noted that the operation of UAS should carry a third-party liability protection just like any other aircraft. Third-party liability is when one can be held liable for causing damage, loss, or injury to a third-party. UAS can potentially interfere with the route of a flying aircraft, like the near-miss collision with Airbus A320 soon after it took off at Heathrow Airport[3]. It might also be used to facilitate an attack or any other criminal activity. Hence, the state legislature is left with no choice but to regulate the usage and operation of UAS for civilian uses.

The International Civil Aviation Organization ("ICAO") defined UAS as 'an aircraft and its associated elements which are operated with no pilot on board.' The *magna carta* of aviation law, the Chicago Convention on International Civil Aviation 1944[4] ("Chicago Convention") also recognized UAS as 'pilotless aircraft' on Article 8, where it states that pilotless aircraft can be flown over the territory of a contracting State only with special authorization by that State and in accordance with the terms of such authorization. Furthermore, each contracting state undertakes to insure that the flight of such pilotless aircraft in regions open to civil aircrafts is controlled in order to obviate danger to civil aircraft.

In the meantime, there is no international convention regulating UAS, and member states of ICAO have urged the organization to create an international legal framework for UAS that operates outside of the IFR international area.[5] As of today, the ICAO have reviewed the regulations of UAS between states and their best practices in the absence of an international regulatory framework. Consequently, the ICAO released a Model UAS Regulations and supporting Advisory Circulars to guide member states in adopting or supplementing their existing UAS Regulations.[6]

The Model UAS Regulations take into account the issue regarding certification, standard operating condition, manufacturing standards, approval from Approved Aviation Organization, and other concerns. Despite all that, this model law does not include any materials regarding the minimum liability of UAS. Certainly, UAS could potentially lead to a third-party liability, which includes an injury towards a person and damage to property. There is an absence of legal framework for the protection of third-party liability in the international regime.

The Indonesian Minister of Transportation Regulation No. 90 of 2015 on Operational Control of Unmanned Aircraft Systems in Indonesian Airspace Provided by Indonesian Air Service

---

1 (2017, November 1). Rakuten Drone Delivers Hot Meals to Fukushima Customers. Retrieved from https://rakuten.today/blog/rakuten-drone-delivers-hot-meals-fukushima.html. Accessed 16 May 2020.

2 Lewis, N. (2020, May 12). A Tech Company Engineered Drones to Deliver Vital COVID-19 Medical Supplies to Rural Ghana and Rwanda in Minutes. Retrieved from https://www.businessinsider.com/zipline-drone-coronavirus-supplies-africa-rwanda-ghana-2020-5?IR=T> accessed 16 May 2020.

3 Forest, C. (2018, June 13). 17 Drone Disasters that Show Why the FAA Hates Drones. Retrieved from https://www.techrepublic.com/article/12-drone-disasters-that-show-why-the-faa-hates-drones/. Accessed on 16 May 2020.

4 Chicago Convention on International Civil Aviation (7 Desember 1944) [hereinafter Chicago Convention]

5 ICAO. Model UAS Regulations. Retrieved from https://www.icao.int/safety/UA/UAID/Pages/Model-UAS-Regulations.aspx. Accessed on 18 May 2020.

6 *Ibid.*

("Minister Regulation No. 90") defines UAS as a flying machine that functions with remote control by a pilot or is able to control itself by aerodynamics.[7] Fortunately, the Indonesian Ministry of Transportation regulates the liability of UAS through Minister of Transportation Regulation No. 47 of 2016 on Amendment of Minister of Transportation Regulation No. 180 Year 2015 on Operational Control of Unmanned Aircraft Systems in Air Services Provided by Indonesia ("Minister Regulation No. 47"). When applying for a UAS license or permission to operate on Indonesian airspace, one of the documents required is an insurance document including third-party liabilities caused by human errors or technical failures. However, there is again a lack of legal certainty under Indonesian law as no minimum amount of liability insurance coverage is specified.

This article explores the legal framework of UAS in Indonesia and European Union ("EU"). EU has regulated about insurance requirements for air carriers and aircraft operators (including UAS) since 2004. Besides, Indonesia and EU is similar in a way that both do not have a third-party liability regulation for UAS. Since no uniform law about third-party liability is found in EU, national legislations (France and Spain) will be used as comparison even though these national laws are only sufficient when UAS is operated within the territory of the country. Furthermore, this article also aims to compare the different minimum amount of insurance coverage between Indonesia and the EU. Lastly, the final objective of this article is to find out what lessons can Indonesia extract from the practice of EU (member states).

B. Current Regulatory Framework in Indonesia

Civilians and governments in Indonesia have been utilizing UAS more often to fulfill their necessities. For instance, UAS is used for traffic monitoring during the month of Ramadhan or to gather evidences against illegal palm oil companies in Borneo.[8] Indonesian Defense Department has been investing more in UAS utilization for military operations. In August 2006, Smart Eagle II became the highlight of the Geospatial Technology Exhibition held in Jakarta Convention Center. This local UAS is designed to carry out tactical air surveillance tasks suitable for military operations.[9] Aside from that, the defense department purchased several Searcher MK II UASs and actively utilized it for military purposes since 2012.[10]

Acknowledging the massive growth of UAS utilization, the government has managed to develop regulations in order to maintain the Indonesian aviation safety level.[11] Potential hazards caused by the operation of unmanned aircraft and how it concerns safety and security encourage the Ministry of Transportation to initiate the Minister Regulation No. 90 as mentioned as its basis of consideration. This provision mainly focuses on classifying prohibitions in several regions into prohibited and restricted areas, such as the public airport, military airport, presidential palace, nuclear installation, etc.[12] Altitude limitations and licensing issues are also included in this provision.[13] Pilots are required to obtain flight permits in order to ensure safety and security.[14] One needs to provide insurance documents in order to attain the permit.[15]

As a member of the ICAO, Indonesia needs to adhere to the standards and regulations established by ICAO. The Ministry of Transportation adopted ICAO's Civil Aviation Safety

---

7 Minister Regulation No. 90, Annex I, 1.2.2.

8 Nugraha, R. A., Jayodi, D., & Mahem, T. (2016). Urgency for Legal Framework on Drones: Lessons for Indonesia, India, and Thailand. Indonesia Law Review, 6(2), 139.

9 Hutahean, P. (2006) HAPS dan UAV Serta Manfaatnya dalam Peningkatan Kesejahteraan Masyarakat Indonesia. Pusat Analisis dan Informasi Kedirgantaraan Lembaga Penerbangan dan Antariksa Nasional, 1, 191.

10 *Ibid.*

11 Nugraha, R. A., Jayodi, D., & Mahem, T. *Op. cit,* 140.

12 Government Regulation No. 4 Year 2018 on Security of Indonesian Airspace, Article 7-8.

13 Minister Regulation No. 47, Article 3 paragraph (1).

14 Minister Regulation No. 47, Article 3 paragraph (4).

15 *Ibid.*

Regulations ("CASR") Part 107 about Small Unmanned Aircraft System into Minister of Transportation Regulation No. 163 of 2015 on Civil Aviation Safety Regulations Part 107 on Small Unmanned Aircraft System. The provisions address restrictions over the general UAS utilization, operating rules, operator certification, and UAS registration.
In November 2015, a few changes were made to Minister Regulation No. 90 to better comply with CASR provisions which led to the revocation of the regulation. The previous regulation did not classify unmanned aircrafts into any categories based on types, sizes, nor functions. Meanwhile, Minister of Transportation Regulation No. 180 of 2015 on Operational Control of Unmanned Aircraft Systems in Air Services Provided by Indonesia ("Minister Regulation No. 180") classifies recreational unmanned aircrafts as weighing no more than *55 lbs* in accordance with CASR Part 107. Meanwhile, unmanned aircrafts weighing more than *55 lbs* will require an experimental certificate for research and development needs and special flight permits for production flight-testing new production aircraft in compliance with CASR Part 21 and Part 91.
Later on, the Ministry of Transportation made several adjustments which resulted in the latest regulation, Minister Regulation No. 47. The current regulation requires insurance documents, which include third party liability and applicable administrative penalties. Article 5 paragraph (1) Minister Regulation No. 47 limits these penalties into certain measures: for pilots who do not have legitimate permits as required, operates not according to the permission granted, and operates UAS in an emergency condition which prohibits the use of UAS.[16] A separate regulation, the Minister of Transportation Regulation No. 78 of 2017 on Imposition of Administrative Sanctions for Violations of Laws and Regulations in the Field of Aviation stipulates administrative penalties applicable in the aviation field. However, this provision still hasn't taken third party liability issues into consideration.

As a type of aircraft under Law No. 1 of 2009 on Aviation ("Law No. 1/2009"), every UAS operator is obliged to compensate the losses suffered by everyone involved, including the third party.[17] There is no provision regarding who will be held liable for the damage related to a third party and how much each should be compensated. Thus, there is no legal certainty to protect the third parties based on Indonesian Law.

C. Potential Third-party Liabilities Caused by Unmanned Aircraft Systems

In 2016, a UAS was flying above a populated area in Cape Town, South Africa. The pilot lost control of the UAS and it ended up crashing into a 5th story office window, then hit a man on his head and other properties around him.[18] Another incident also happened in 2013 where a UAS crashed onto the grandstand during the Great Bull Run, a public festival in Virginia. The incident led to minor injuries to four or five people.[19] This is a precise example of how UAS may be held liable for a third-party damage. On August 2015, a Phantom 2 UAS fell on the courtyard of Menara BCA building at Central Jakarta.[20] Recently in 2019, a UAS crashed onto the State Palace area in Jakarta (prohibited area), precisely on the

---

16 Minister Regulation No. 47, Article 5 paragraph (1).

17 Law No. 1/2009, Article 1 number 3:
"An airplane is any machine or device that can fly in the atmosphere due to the lift force from the reaction of the air, but not because of the reaction of air to the surface of the earth used for flight."

18 Perel, D. (2016, April 12). The World Thinks I Faked A Drone Crashing Through My Office Window and into My Head. Retrieved from https://medium.com/@obox/the-world-thinks-i-faked-a-drone-crashing-into-my-office-window-and-head-10a732d62e74. Accessed on 20 May 2020.

19 Weil, M. (2013, August 26). Drone Crashes into Virginia Bull Run Crowd. Retrieved from https://www.washingtonpost.com/local/drone-crashes-into-virginia-bull-run-crowd/2013/08/26/424e0b9e-0e00-11e3-85b6-d27422650fd5_story.html. Accessed on 21 May 2020.

20 Tempo.co. (2015, August 4). Drone Jatuh di Menara BCA Bundaran HI, Ini Isi Gambarnya. Retrieved from https://metro.tempo.co/read/689137/drone-jatuh-di-menara-bca-bundaran-hi-ini-isi-gambarnya/full&view=ok. Accessed on 2 August 2020.

courtyard of the Radio Republik Indonesia Building.[21] Fortunately, no one was injured in the two incidents. UAS may not be used to carry any passenger but its operation carries a huge risk to the people, property, or any other objects around or below it.

UAS accidents resulting in injury, damage to property, or others will later require legal indemnity for the injured party. The court should be able to determine the actor at fault in the indicated situation. Ergo, there are two approaches that can be applied in determining which parties are liable in a UAS accident: strict liability or vicarious liability.

In common law countries, the practice of strict liability does not impose the defendant to prove its negligence or intent on the grounds that every action executed by UAS is merely complying with a previous command input.[22] Therefore any harm resulted from the operation of UAS becomes the responsibility of the operator. Although there are certain cases where the manufacturers are liable. In 2018, DJI, a UAS manufacturing company, announced an official warning regarding the occurring power issues with DJI Matrice 200.[23] The UK's Civil Aviation Authority claimed that the power failure causes UAS to fall directly to the ground.[24] Similar issue happened to GoPro's first UAS, the Karma. These UAS were found falling out of the sky due to a loose connection between the UAS and their batteries during the night of the US Presidential Election.[25] In the case of product defects, the manufacturer is going to be held to strict liability for the accident.[26]

Another applicable method is implementing vicarious liability principle. Unlike strict liability, this principle will hold an individual employee as liable. The employer in this case is not liable for his employee's actions. Within the narrative, the operator is considered as the employer, while the UAS is the employee. This approach is rather difficult to be applied without the essence of proof. Hence the plaintiff is imposed to prove that the employee (UAS) committed a tort and acted outside of the employer's intention.[27]

The Indonesian legal framework does not specifically emphasize on the types of third-party liabilities, whether it is damage to property, injury to people, or any other types. As to the courtroom approach in resolving indemnity caused by UAS accidents is still unknown due to the absence of convoked UAS cases in Indonesian court.

D. Comparative Analysis of Unmanned Aircraft Systems Legal Framework in Indonesia and the European Union

a. *Applicable Domestic Law for Unmanned Aircraft Systems Third-party Liability*

Minister Regulation No. 47 has eluded the need to include third party liabilities caused by human errors and technical failures. Aside from Article 3 paragraph (11) regarding insurance, Article 5 para (2) in Minister Regulation No. 180 not only protects third parties but also fellow users in order to avoid air-to-air collision.[28] This preventive provision is necessary,

---

21 Epriyadi, Z. (2019, June 20). Sebuah Drone Jatuh Saat Terbang di Sekitar Gedung MK. Retrieved from https://video.tempo.co/read/15102/sebuah-drone-jatuh-saat-terbang-di-sekitar-gedung-mk. Accessed on 2 August 2020.

22 Harris, K-K. (2018). Drones: Proposed Standards of Liability. Santa Clara High Technology Law Journal, 35(1), 67.

23 (2018, October 30). Police Ground Drones After Reports They Fall Out of the Sky. Retrieved from https://www.bbc.com/news/technology-46032019. Accessed on 31 July 2020.

24 *Ibid.*

25 Murphy, Mike. (2017, July 25). People are Complaining That Their New DJI Spark Drones are Falling Out of the Sky. Retrieved from https://qz.com/1037497/people-are-complaining-that-their-new-dji-spark-drones-are-falling-out-of-the-sky/. Accessed on 31 July 2020.

26 Harris, K-K, *Op. cit,* 68.

27 Harris, K-K, *Op. cit, 73.*

28 Minister Regulation No. 180, Article 5 paragraph (2):
"Decisive action is taken by considering:

but it still does not accommodate the current necessity. It is possible for a UAS to have operational or technical failure beyond the operator's responsibility. In another instance, the product manufacturer can be held liable for damage resulting from product failure.[29]
In 2018, Airnav Indonesia reported four new cases of recreational UAS operating in an airport area although Minister Regulation No. 47 has stated the airport as a restricted area which prohibits the use of UAS.[30] A year later, another recreational UAS was found flying around I Gusti Ngurah Rai Bali International Airport.[31] Fortunately, none of the cases caused any casualties or damaged any facilities. The airport operators were quick to react and took down the UAS. This would be a warning to government if another incident happened in the near future as it raises a question on who will be held liable and which regulation would be applicable.
Even so, anyone who experienced loss due to the conduct of others may refer to the tort law adopted in Indonesia. Tort is regulated under the Indonesian Civil Code in Article 1365 to Article 1380. Article 1365 states that, every act that violates the law and causes damage to other(s), obliges the person who caused the damage due to his mistake to compensate the loss.[32] It is possible for the injured third party to file a lawsuit towards the wrongdoer who causes the damage to seek for compensation.
However, the tort law itself is not enough because a specific governance is still needed to accommodate the whole operation of UAS as the scope of the liability of an aircraft is extensive. In spite of that, the Indonesian law requires insurance for every UAS operation. By equipping every UAS operation with a third-party insurance protection, it will provide another alternative (compromise settlement) instead of filing a lawsuit. At the same time, it guarantees the protection of third-party liability. Insurance is mostly applicable to any types of potential liabilities damages.

b. ***Legal Framework for Third-party Liability in the European Union***

There is currently no uniform EU regulation concerning third-party liability. Despite that, there are efforts made by member states such as France and Spain to provide a legal framework regarding third-party liability that may be potentially caused by UAS.

France regulates the use of UAS under two regulations, the *Arrêté du 17 décembre 2015 relatif à l'utilisation de l'espace aérien par les aéronefs qui circulent sans personne à bord* (Order of 17 December 2015 on the Use of Airspace by Unmanned Aircraft) ("Order on Use of Airspace"),[33] and the *Arrêté du 17 décembre 2015 relatif à la conception des aéronefs civils qui circulent sans personne à bord, aux conditions de leur emploi et aux capacités requises des personnes qui les utilisent* (Order of 17 December 2015 on the Creation of Unmanned Civil

---

a. the interests of the safety of users of the area / airspace;
b. protection of buildings and humans which are under the area and the airspace used by the unmanned aircraft."

29 Nurbaiti, S. (2013). Aspek Yuridis Mengenai Product Liability Menurut Undang-Undang Perlindungan Konsumen (Studi Perbandingan Indonesia – Turki). Jurnal Hukum Prioris, 3(2).

30 Jatmiko, B. (2019, July 17). Kemenhub: Di 2018, Ada 4 Kasus Drone yang Masuk ke Bandara. Retrieved from https://money.kompas.com/read/2019/07/17/130245126/kemenhub-di-2018-ada-4-kasus-drone-yang-masuk-ke-bandara. Accessed on 17 May 2020.

31 (2019, July 24). Terbangkan Drone Tanpa Izin di Sekitar Bandara Bisa Kena Denda Rp 1 Miliar. Retrieved from https://www.liputan6.com/bisnis/read/4020748/terbangkan-drone-tanpa-izin-di-sekitar-bandara-bisa-kena-denda-rp-1-miliar. Accessed on 23 May 2020.

32 Indonesian Civil Code, Article 1365:
"Tiap perbuatan yang melanggar hukum dan membawa kerugian kepada orang lain, mewajibkan orang yang menimbulkan kerugian itu karena kesalahannya untuk menggantikan kerugian tersebut."

33 *Arrêté du 17 décembre 2015 relatif à l'utilisation de l'espace aérien par les aéronefs qui circulent sans personne à bord* [Order of 17 December 2015 on the Use of Airspace by Unmanned Aircraft] https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031679868&dateTexte=20160330.

Aircraft, the Conditions of Their Use, and the Required Aptitudes of the Persons that Use Them) ("Order on Creation and Use").[34] Both regulations define UAS as "any aircraft flying without anyone on board".[35] The scope of Order on Use of Airspace does not include tethered balloons, kites, or military UAS.[36] On the other hand, Order on Creation and Use does not apply to free-flying balloons, tethered balloons used at a height of less than 50 meters with a payload of a mass less than or equal to 1 kilogram, rockets, kites, and aircraft used inside closed and covered spaces.[37]

The above French regulations do not specifically govern the UAS operator's liability for third-party damages. Nonetheless, UAS is still considered as an aircraft and thus is included within the scope of *Code des transports* ("Transportation Code")[38]. Articles L. 6131-1 and L. 6131-2 of the Transportation code specify that the aircraft operator will be held liable in case of injury or damage on the ground.[39] In other words, the operator is strictly liable for damages caused by UAS to persons or property on the ground. The liability of the UAS operator can be defended, however, by proving that the victim solely causes the third-party damage to occur.[40]

Although the latest regulations in 2015 do not deal with third-party liability, France has a different approach towards minimizing the risk of damages on third-party through its regulation. Annex 3 of Order on Creation and Use requires that heavier-than-air UAS of more than 2 kg to be equipped with a third-party protection system.[41] Moreover, UAS of more than 4 kg must be equipped with a system that could indicate the speed of the aircraft and satisfy the protection system requirements.[42] Noncompliance with the requirements under the law may subject the UAS operator to a punishment of up to one year in jail with a €75,000 fine.[43]

Similarly, the provision on the use of UAS also exists in Spain's national law. The use of UAS was prohibited until the Royal Decree No. 1036 of 2017 on the Civil Use of UAS ("RD No.

---

34 *Arrêté du 17 décembre 2015 relatif à la conception des aéronefs civils qui circulent sans personne à bord, aux conditions de leur emploi et aux capacités requises des personnes qui les utilisent* [Order of 17 December 2015 on the Creation of Unmanned Civil Aircraft, the Conditions of Their Use, and the Required Aptitudes of the Persons That Use Them] https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031679906&dateTexte=20160330.

35 Order on Use of Airspace, Article 1, Order on Creation and Use, Article 1.

36 Order on Use of Airspace, Article 1.

37 Order on Creation and Use, Article 1.

38 *Code des transports* [Transportation Code] https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000023078234&cidTexte=LEGITEXT000023086525.

39 Transportation Code L. 6131-1.

40 Transportation Code L. 6131-2.

41 Order on Creation and Use Annex III Chapter II Section 2.7.

42 Order on Creation and Use Annex III Chapter II Section 2.7.3:
"In addition, for aerodynes with a mass greater than 4 kg:
a) The remote pilot has an indication of the speed of the aircraft in relation to the ground.
b) In addition to the conditions defined in paragraph 2.2.5, the third party protection system satisfies the following additional conditions:
i. the triggering of the device causes the stopping of the propulsion of the aircraft;
ii. the control link of the device is independent of the main command and control link of the aircraft;
iii. the electrical power supplies for the device and its remote control are independent of the main power supplies for the aircraft and its command and control system;
iv. the device signals the fall of the aircraft by an audible alarm;
v. if the device consists of a parachute, it must include an active ejection or extraction system not based solely on gravity;
vi. the correct functioning of the device's triggering mechanism can be checked on the ground by the remote pilot before flight."

43 Transportation Code L. 6232-4.

1036")[44] was passed. The new legislation allows the flying of UAS at night and over urban areas, under certain permission and requirements. The definition of UAS mentioned is similar to that of French law, but instead of "Unmanned Aircraft System", the RD No. 1036 utilizes the term "Remotely Controlled Aircraft (RPA)". It is further indicated by Royal Decree No. 601 of 2016 on Operational Air Circulation ("RD No. 601")[45] that the words "drone" and "unmanned aerial vehicle" are considered to be synonyms for RPA.[46]

UAS operator is liable for every operations of their UAS towards third parties.[47] To minimize the risk of third-party damages, under Article 30 of RD No. 1036, the operator of UAS is also obliged to establish a protection area for take-off and landing within a radius of 30m from people, except in the case of vertical take-off and landing in which the radius may be reduced to a minimum of 10m. In addition, the operator must establish a safe recovery zone on the ground in order to reach the UAS without risking damage to third parties and property of the ground in the event of failure.[48]

Furthermore, UAS is also included within the scope of the definition of aircraft under Article 11 of Law No. 48 of 1960 on Air Navigation.[49] As a result, the liability that applies to conventional aircraft will be applicable to UAS as well.[50] This principle of liability is similar to France wherein the operator is liable for damages on ground towards persons or property.

In 2019, European Commission as the executive branch of the EU, regulated the rules and procedures for the operation of unmanned aircraft through Commission Implementing Regulation (EU) 2019/947 ("Regulation 2019/947"). An implementing regulation is legally binding and has a direct effect on all member states of the EU where no national ratification is required.[51] It prevails over national legislation when there is a conflict of law because the supremacy of EU law plays a role.[52] The Regulation 2019/947 is intended to ensure that there is a uniform regulation throughout EU member states supporting the operation of UAS where it categorized UAS by risk-based - open, specific, and certified. Besides, Regulation 2019/947 also shows a specific differentiation in the types of UAS is crucial as it is directly related to the registration and operational requirements. Nevertheless, this regulation does not specifically touch on third-party liability. Instead, it obliges member states of the EU to insure that the operation of UAS is backed up with adequate insurance policy number to compensate third-party when an accident happens.

---

44 *Real Decreto 1036/2017, de 15 de diciembre, por el que se regula la utilización civil de las aeronaves pilotadas por control remoto, y se modifican el Real Decreto 552/2014, de 27 de junio, por el que se desarrolla el Reglamento del aire y disposiciones operativas comunes para los servicios y procedimientos de navegación aérea y el Real Decreto 57/2002, de 18 de enero, por el que se aprueba el Reglamento de Circulación* Aérea [Royal Decree 1036/2017, of December 15, which regulates the civil use of remotely piloted aircraft, and modifies Royal Decree 552/2014, of June 27, which develops the Regulation of the air and common operational provisions for air navigation services and procedures and Royal Decree 57/2002, of January 18, which approves the Air Circulation Regulation.] https://www.boe.es/buscar/doc.php?id=BOE-A-2017-15721.

45 *Real Decreto 601/2016, de 2 de diciembre, por el que se aprueba el Reglamento de la Circulación Aérea Operativa* [Royal Decree 601/2016, of December 2, which approves the Regulation of Operational Air Circulation] https://www.boe.es/buscar/doc.php?id=BOE-A-2016-11481.

46 RD No. 601 Chapter 1.

47 *Ibid.*

48 RD No. 1036, Article 30.

49 *Ley 48/1960, de 21 de julio, sobre Navegación Aérea* [Law No. 48 of 1960, of July 21, on Air Navigation] https://www.boe.es/buscar/doc.php?id=BOE-A-1960-10905.

50 Abogabos, A. (2019, December 10). Drone Regulation in Spain. Retrieved from https://www.lexology.com/library/detail.aspx?g=5b51712e-4fe7-4b90-a5a6-a1869a84924b. Accessed on 1 August 2020.

51 Solanke, I. (2015). The Supremacy of EU Law. EU Law, p. 167-196. UK: Pearson Education Limited.

52 *Ibid*, p. 201.

Regardless, based on the above explanation, it is shown that the concept of strict liability to third-party is the commonly used accidents caused by UAS. The reason behind the common use of strict liability in civil aviation rule is because it is closely related to public interest. Strict liability is applied when the benefit to the community set aside any potential disadvantage of the person held liable.[53] Arafah and Nursani also mentioned about strict liability as 'liability without fault', where the element of 'guilt' is not relevant because in the context of aviation, if someone suffers a loss for the actions of others, then person who causes the damage must be held accountable.[54]

Although there is no regulation about third-party liability in EU, the governments of France and Spain as member states of the EU have visibly made an effort to provide a protection to third parties who might potentially become victims of an accident caused by UAS. The form of third-party liabilities and the party that should be held liable for an accident are clearly regulated under their national law. Unfortunately, these provisions are not reflected in Indonesian regulations. These are important aspects of UAS liability that should be regulated comprehensively in Indonesian law in order to provide a legal protection to a third-party when accident occurs. At the very least, the law should give a legal certainty on who an injured third-party can request a compensation from.

c. ***Comparison of Insurance Liability between European Union and Indonesia***

Insurance is particularly relevant to third-party liability protection as it may guarantee the coverage of loss suffered by any injured party caused by the operation of UAS. The Regulation (EC) No. 785/2004 of the European Parliament and of the Council of 21 April 2004 ("Regulation 785/2004") regulates the insurance requirements for air carriers and aircraft operators. This regulation is also binding to every member states of the EU and they refer to this limit of liability when a UAS accident occurs. Article 2 of Regulation 785/2004 mentions that the scope of the regulation does not apply to 'model aircraft with an Maximum Takeoff Mass ("MTOM") of less than 20 kg'. It is a fact that many civilian UAS used have a MTOM of 20kg or less. Nevertheless, the above article refers to 'model aircraft', so using it for commercial purposes exclude UAS users from the exemptions of the regulation and must satisfy the requirements of the regulation. Based on Article 7 of the Regulation 785/2004, the minimum insurance coverage for third party liability is outlined below:

Category	MTOM (kg)	Minimum insurance (million SDRs)
1	< 500	0.75
2	< 1 000	1.5
3	< 2 700	3
4	< 6 000	7
5	< 12 000	18
6	< 25 000	80

[53] Civil Aviation Safety Authority. (2018, 6 August). Strict Liability. Retrieved from https://www.casa.gov.au/standard-page/strict-liability. Accessed on 4 August 2020.

[54] Arafah, A. R. & Nursani, S. A. (2019). Pengantar Hukum Penerbangan Privat, p. 29. Jakarta: Prenadamedia Group.

7	< 50 000	150
8	< 200 000	300
9	< 500 000	500
10	≥ 500 000	700

Certain amounts of minimum insurance are required, depending on the category of each UAS. This gives a legal certainty to insurers and UAS users regarding the insurance policy in order to operate UAS in the EU. Most importantly, protection of third party (person or property) is more guaranteed in case of an accident.

Both the EU and Indonesia require insurance for every UAS operation. Hence, for every liability caused, there will surely be a compensation given as an insurance coverage is usually applicable to any types of potential liabilities whether it is for the person or the property's owner. However, the question now would be whether or not the maximum coverage amount of the insurance would be enough to cover the loss of any third-party.

Unlike the EU, the classification of UAS is not divided specifically into categories like the Regulation 2019/947. The Minister Regulation No. 180 distinguished UAS into those with MTOM < 55 lbs and > 55 lbs. As mentioned previously, the Minister Regulation No. 47 demands an insurance document for potential liabilities including a third-party loss as a result of UAS system failure. The regulation of UAS in Indonesia is very limited in scope and not comprehensive enough as it does not guarantee a legal certainty for UAS operators, insurers, and third parties when it comes to liability issues. Additionally, the use of the word 'including' in the above article also means that there can be more than one type of insurance document to cover all liabilities.

The EU divided the MTOM of UAS into categories to determine the minimum amount of insurance coverage for each. Sizes and mass of UAS cause a difference in casualties since the loss suffered are depending on the circumstances. Unfortunately, even though an insurance document is required by Minister Regulation No. 47 when applying for license to operate in Indonesia, the minimum amount of insurance coverage for the liability is not indicated in the regulation. It is important for the government and insurance industry to classify UAS based on their usage.[55] Certainly, the insurance coverage of a small-sized UAS used for hobby is different from a larger UAS used for aerial surveillance.[56] Differentiating the minimum insurance coverage also aims to fulfill the insurance indemnity principle as reflected on Article 277 of Indonesian Commercial Code.[57] This principle aims to prevent insuree from receiving excess compensation where insurer should only compensate for total real loss that happened.[58] The government should prescribe the minimum insurance coverage under UAS regulation, while maintaining the applicability of indemnity principle on insurance contract since minimum insurance coverage could be higher than the amount of compensation.

The lack of minimum insurance coverage requirement becomes a loophole as UAS owners is allowed to select any amount of insurance cover prior to authorization for operation in Indonesia. As a result, the injured party may be disadvantaged as the insurance coverage

---

55 Nugraha, R. A., Jayodi, D., & Mahem, T. *Op. cit,* 150.

56 *Ibid.*

57 *Kitab Undang-Undang Hukum Dagang* [Commerical Code], Article 277:
"*Bila berbagai pertanggungan diadakan dengan itikad baik terhadap satu barang saja, dan dengan yang pertama ditanggung nilai yang penuh, hanya inilah yang berlaku dan penanggung berikut dibebaskan.*
Bila pada penanggung pertama tidak ditanggung nilai penuh, maka penanggung berikutnya bertanggung jawab untuk nilai selebihnya menurut urutan waktu mengadakan pertanggungan itu."

58 Setyawan, G. I. (2019). Perlindungan Hukum Terhadap Hak-Hak Konsumen Penumpang Pesawat Udara dalam Pembelian Premi Asuransi Melalui Situs Traveloka. Jurnal IUS, 7(1), 159.

chosen by the UAS operator may fail to cover the total amount of loss. Additionally, it is also not explicitly stated in the regulations to whom a third-party should seek compensation from as there are many possible parties such as UAS owner, UAS operator, or UAS manufacturer. Thus, it gives a legal uncertainty for victims to claim for reparation.

E. The Way Forward for Indonesia

In reacting to the sudden rapid growth of UAS in Indonesia, the government came up with several regulations from time to time. It started with Minister Regulation No. 90, which now has been replaced with Minister Regulation No. 47. ICAO's CASR part 107 was also adopted by the Indonesian law in the form of Minister Regulation No. 163. However, all of these acts failed to provide legal certainty over third-party liability.

The legal framework in EU established an additional protection over third-party damages, particularly in France where the law requires UAS of more than 2 kg to be furnished with an additional third-party protection system, otherwise the UAS operator would be subjected to a punishment of up to one year in prison and a €75,000 fine. In Spain, UAS operator should establish a protection area and a safe recovery zone for take-off and landing on ground. The provisions above decrease the risk of damaging third-party on the ground in case of failure.

The Minister Regulation No. 163 also limits the operation of UAS above people. There is a restriction to operate UAS over a human being who is not directly participating in the operation of UAS or not located under a covered structure that could provide a reasonable protection from falling UAS. The UAS operator must ensure that UAS will pose no undue hazard to other aircraft, people, or property for any reason.[59] Certainly, the Minister Regulation No. 163 provides a protection towards third parties on ground, even though the approach taken by Indonesia is different from France and Spain. Based on the practice of France and Spain, the Indonesian law could take a tighter approach by increasing the burden of responsibility on the UAS operators to protect third parties.

There is an absence of law in Indonesia regarding the form of third-party liability, the party to be held liable, and the minimum requirement for compensation. Although insurance is one of the requirements in operating UAS, UAS operator has the freedom to decide on the insurance coverage they want to purchase in order to satisfy the requirements of 'insurance document' under Ministerial Regulation No. 47. As an analogy, the Minister Regulation No. 77 of 2011 on the Liability of Air Carriers requires the conventional air carriers to compensate the death of a passenger for Rp1.250.000.000.[60] A lost or destroyed cargo shall be compensated for Rp100.000 per kg.[61] In the context of UAS and third party liability damage, the current regulation does not provide the minimum amount of insurance liability coverage, leaving third parties uncertain of the amount of compensation that they should obtain. To make matters worse, the insurance coverage chosen by the UAS operator may fail to cover the total amount of loss on third party. In addition, the regulation should also implement a strict liability concept on the regulation of UAS to accommodate an accident where negligence from the UAS operator (or owner) is proven, unless they are able to defend themselves by proving that the fault is on the victim's side.

In conclusion, it now becomes a homework for the Indonesian government to implement a regulation that completes the protection of third-party liability. An amendment or creation of a new Ministerial Regulation concerning third-party liability should be a part of the

---

59 Minister Regulation No. 163, Article 107 paragraph (19).
60 Minister Regulation No. 77 of 2011 on the Liability of Air Carriers, Article 3.
61 Minister Regulation No. 77 of 2011 on the Liability of Air Carriers, Article 7.

government's to-do-list. It is recommended that the Indonesian legislators refer to the practice of EU member states such as Spain and France where UAS operators are bound with more responsibilities for the operation of UAS, such as the requirement of the third-party protection system or establishing a protection area and safe recovery zone. The Indonesian regulation also needs to clarify on the party to seek compensation from – whether it will be the UAS operators, UAS owner, or UAS manufacturer. In relation to that, the minimum requirement for insurance coverage should also be included within the regulation because it acts as a protection towards third-party in case the insurance purchased by the UAS operators could not cover the amount of loss that the injured party suffer. Certainly, it is also important for the government and insurance industry to classify UAS based on their usage as different purposes and sizes of UAS should be backed up with different insurance coverage, while parties to an insurance contract should maintain the applicability of indemnity principle as minimum insurance coverage could be different from the amount of compensation.

F. Acknowledgement

The authors wish to thank Mr Ridha Aditya Nugraha as the Head of Air and Space Law Studies – International Business Law Program, Universitas Prasetiya Mulya for the continuous support and guidance throughout the writing process of this article.

BIBLIOGRAPHY

Books

Arafah, A. R. and Nursani, S. A. (2019). *Pengantar Hukum Penerbangan Privat*. Jakarta: Prenadamedia Group.

Focarelli, C. (2019). *The Allocation of States' Governmental Authority* International law. Cheltenham, UK: Edward Elgar Publishing.

Leon, M. D. P. (2017). *Introduction to Air Law* 10th edn. The Netherlands: Kluwer Law International B. V.

Masutti, A., & Tomasello, F. (2018). *Liability Issues for the Use of Non-military Drones in Common Airspace* International Regulation of Non-military Drones. Cheltenham, UK: Edward Elgar Publishing Limited.

Scott, B. I, *et al.* (2016). *The Law of Unmanned Aircraft Systems. An Introduction to the Current and Future Regulation under National, Regional and International Law*. The Netherlands: Alphen aan den Rijn.

Solanke, I. (2015). *The Supremacy of EU Law* EU Law. Edinburgh, UK: Pearson Education Limited, 167-196.

Journals

Ardes, R. P. (2016). *Tanggung Jawab terhadap Pihak Ketiga dalam Pengoperasian Pesawat Udara Tanpa Awak di Indonesia*. Jakarta: Pusat Kajian Kebijakan Penerbangan dan Antariksa Lembaga Penerbangan dan Antariksa Nasional.

Harris, K-K. (2018). *Drones: Proposed Standards of Liability*. Santa Clara High Technology Law Journal, 35(1).

Hutahean, P. (2016). *HAPS dan UAV Serta Manfaatnya dalam Peningkatan Kesejahteraan Masyarakat Indonesia*. Jakarta: Pusat Analisis dan Informasi Kedirgantaraan Lembaga Penerbangan dan Antariksa Nasional.

Nugraha, R. A., Jayodi, D., & Mahem, T. (2016). *Urgency for Legal Framework on Drones: Lessons for Indonesia, India, and Thailand*. Indonesia Law Review, *6*(2), 137-157. http://dx.doi.org/10.15742/ilrev.v6n2.229.

Nurbaiti, S. (2013). *Aspek Yuridis Mengenai Product Liability Menurut Undang-Undang Perlindungan Konsumen (Studi Perbandingan Indonesia – Turki)*. Jurnal Hukum Prioris, 3(2).

Setyawan, G. I. (2019). *Perlindungan Hukum Terhadap Hak-Hak Konsumen Penumpang Pesawat Udara dalam Pembelian Premi Asuransi Melalui Situs Traveloka*. Jurnal IUS, *7*(1), 159.

Legislations

Arrêté du 17 décembre 2015 relatif à la conception des aéronefs civils qui circulent sans personne à bord, aux conditions de leur emploi et aux capacités requises des personnes qui les utilisent [Order of 17 December 2015 on the Creation of Unmanned Civil Aircraft, the Conditions of Their Use, and the Required Aptitudes of the Persons That Use Them] <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031679906&dateTexte=20160330>

Arrêté du 17 décembre 2015 relatif à l'utilisation de l'espace aérien par les aéronefs qui circulent sans personne à bord [Order of 17 December 2015 on the Use of Airspace by Unmanned Aircraft] <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031679868&dateTexte=20160330>

Code des transports [Transportation Code] <https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000023078234&cidTexte=LEGITEXT000023086525>

Commission Implementing Regulation 2019/947 on the rules and procedures for the operation of unmanned aircraft (May 24, 2019)

Convention on Civil Aviation (Dec. 7, 1994) 15 U.N.T.S. 295

Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Oct. 7, 1952) 310 U.N.T.S. 181

Indonesian Commercial Code

Indonesian Civil Code

Indonesian Government Regulation No. 4 Year 2018 on Security of Indonesian Airspace

Indonesian Law Number 1 on Aviation 2009

Indonesian Minister of Transportation Regulation number 77 on the Liability of Air Carriers 2011

Indonesian Minister of Transportation Regulation number 47 on Amendment of Minister of Transportation Regulation No. 180 Year 2015 on Operational Control of Unmanned Aircraft Systems in Air Services Provided by Indonesia 2016

Indonesian Minister of Transportation Regulation number 90 on Operational Control of Unmanned Aircraft Systems in Indonesian Airspace Provided by Indonesian Air Service 2015

Indonesian Minister of Transportation Regulation No. 180 on Operational Control of Unmanned Aircraft Systems in Air Services Provided by Indonesia 2015

Ley 48/1960, de 21 de julio, sobre Navegación Aérea [Law No. 48 of 1960, of July 21, on Air Navigation] <https://www.boe.es/buscar/doc.php?id=BOE-A-1960-10905>

Real Decreto 601/2016, de 2 de diciembre, por el que se aprueba el Reglamento de la Circulación Aérea Operativa [Royal Decree 601/2016, of December 2, which

approves the Regulation of Operational Air Circulation] <https://www.boe.es/buscar/doc.php?id=BOE-A-2016-11481>

Real Decreto 1036/2017, de 15 de diciembre, por el que se regula la utilización civil de las aeronaves pilotadas por control remoto, y se modifican el Real Decreto 552/2014, de 27 de junio, por el que se desarrolla el Reglamento del aire y disposiciones operativas comunes para los servicios y procedimientos de navegación aérea y el Real Decreto 57/2002, de 18 de enero, por el que se aprueba el Reglamento de Circulación Aérea [Royal Decree 1036/2017, of December 15, which regulates the civil use of remotely piloted aircraft, and modifies Royal Decree 552/2014, of June 27, which develops the Regulation of the air and common operational provisions for air navigation services and procedures and Royal Decree 57/2002, of January 18, which approves the Air Circulation Regulation.] <https://www.boe.es/buscar/doc.php?id=BOE-A-2017-15721>

Regulation number 785/2004 of the European Parliament and of the Council on insurance requirements for air carriers and aircraft operators (Apr. 21, 2004)

Miscellaneous

Abogabos A, 'Drone Regulation in Spain' Lexology (December 10 2019) <https://www.lexology.com/library/detail.aspx?g=5b51712e-4fe7-4b90-a5a6-a1869a84924b> *accessed on 1 August 2020*

Civil Aviation Safety Authority, 'Strict Liability' (August 6 2018) <https://www.casa.gov.au/standard-page/strict-liability> *accessed on 4 August 2020*

Epriyadi Z, 'Sebuah Drone Jatuh Saat Terbang di Sekitar Gedung MK' Tempo (June 20 2019) <https://video.tempo.co/read/15102/sebuah-drone-jatuh-saat-terbang-di-sekitar-gedung-mk> *accessed on 2 August 2020*

Forrest C, '17 Drone Disasters That Show Why The FAA Hates Drones' Tech Republic (June 13 2008) <https://www.techrepublic.com/article/12-drone-disasters-that-show-why-the-faa-hates-drones/> *accessed on 16 May 2020*

'Garuda Indonesia Is All Set To Start Testing Drones Capable of Hauling Tons of Cargo' The Business Times (June 25 2019) <https://www.businesstimes.com.sg/transport/garuda-indonesia-is-all-set-to-start-testing-drones-capable-of-hauling-tons-of-cargo> accessed on 25 May 2020

International Civil Aviation Organization, 'Model UAS Regulations' ICAO <https://www.icao.int/safety/UA/UAID/Pages/Model-UAS-Regulations.aspx> accessed on 18 May 2020

Jatmiko B, 'Kemenhub: Di 2018, Ada 4 Kasus Drone yang Masuk ke Bandara' Kompas (July 17 2019) <https://money.kompas.com/read/2019/07/17/130245126/kemenhub-di-2018-ada-4-kasus-drone-yang-masuk-ke-bandara> accessed on 17 May 2020

Lewis N, 'A Tech Company Engineered Drones To Deliver Vital COVID-19 Medical Supplies to Rural Ghana and Rwanda in Minutes' Business Insider (May 12 2020) <https://www.businessinsider.com/zipline-drone-coronavirus-supplies-africa-rwanda-ghana-2020-5?IR=T> accessed on 16 May 2020

McNabb H, 'France Uses Drones to Enforce Coronavirus Restrictions' Dronelife (March 25 2020) <https://dronelife.com/2020/03/24/france-uses-drones-to-enforce-coronavirus-restrictions/> accessed on 26 May 2020

Murphy M. "People are Complaining That Their New DJI Spark Drones are Falling Out of the Sky' QZ (July 25 2017) <https://qz.com/1037497/people-are-complaining-that-their-new-dji-spark-drones-are-falling-out-of-the-sky/> accessed on 31 July 2020

Perel D, 'The World Thinks I Faked A Drone Crashing Through My Office Window and into My Head' Medium (April 12 2016) <https://medium.com/@obox/the-world-thinks-i-faked-a-drone-crashing-into-my-office-window-and-head-10a732d62e74> accessed on 23 May 2020

'Police Ground Drones After Reports They Fall Out of the Sky' BBC (October 30 2018) <https://www.bbc.com/news/technology-46032019> accessed on 31 July 2020

'*Rakuten Drone Delivers Hot Meals To Fukushima Customers*' *Rakuten (November 1 2017)* <*https://rakuten.today/blog/rakuten-drone-delivers-hot-meals-fukushima.html*> *accessed on 16 May 2020*

Tempo.co, 'Drone Jatuh di Menara BCA Bundaran HI, Ini Isi Gambarnya' Tempo (August 4 2015) <*https://metro.tempo.co/read/689137/drone-jatuh-di-menara-bca-bundaran-hi-ini-isi-gambarnya/full&view=ok*> *accessed on 2 August 2020*

'*Terbangkan Drone Tanpa Izin di Sekitar Bandara Bisa Kena Denda Rp 1 Miliar' Liputan6 (July 24 2019)* <*https://www.liputan6.com/bisnis/read/4020748/terbangkan-drone-tanpa-izin-di-sekitar-bandara-bisa-kena-denda-rp-1-miliar*> *accessed on 23 May 2020*

Weil M, 'Drone Crashes into Virginia Bull Run Crowd' Washington Post (August 26 2013) <*https://www.washingtonpost.com/local/drone-crashes-into-virginia-bull-run-crowd/2013/08/26/424e0b9e-0e00-11e3-85b6-d27422650fd5_story.html*> *accessed on 21 May 2020*

The Principle of Reciprocity in Human Rights Limitations: A Perspective on Indonesia's Response to COVID-19

Michael Amos Djohan

Abstract

As COVID-19 continues to spread globally, States are conducting containment measures such as

Abstrak

Dengan penyebaran COVID-19 secara global, negara-negara melakukan berrbagai tindakan

quarantines and social-distancing to limit its spread, often at the cost of economical loss and human rights exercise impediments to its citizens. This Article investigates the principle of reciprocity, which originated in discourses on ethics and public health, and is now gaining traction in international human rights discussions. The Article looks into how the principle of reciprocity imposes an obligation for States to alleviate the economical and human rights exercise impediments caused through imposition of legitimate right-limiting measures: including COVID-19. Finally, the article analyses the impact of economical constraints towards the full implementation of reciprocity. This will yield better understanding of the consideration of States when choosing between differing right-limiting measures.

seperti karantina dan pembatasan sosial untuk menghentikan penyebarannya yang seringkali memberi dampak ekonomi dan hambatan pelaksanaan hak asasi manusia pada masyarakat. Artikel ini mengusut prinsip resiprositas, yang muncul dari diskursus terkait etika dan kesehatan masyarakat, dan bagaimana prinsip ini mulai populer dibahas pada diskusi-diskusi di ranah hak asasi manusia. Artikel ini melihat bagaimana prinsip resiprositas memberikan kewajiban bagi negara untuk mengurangi dampak ekonomi dan hambatan pelaksanaan hak asasi manusia akibat diberlakukannya kebijakan terkait COVID-19. Terakhir, artikel ini akan melihat dampak kendala ekonomi terhadap implementasi sepenuhnya dari prinsip resiprositas. Hal ini akan memberikan pengertian terkait keputusan dan tindakan negara dalam menentukan kebijakan yang mengurangi hak asasi manusia.

Keywords: human rights, reciprocity, economic scarcity, COVID-19, social-distancing

Kata Kunci: hak asasi manusia, resiprositas, kendala ekonomi, COVID-19, pembatasan sosial

A. Introduction:

The rapid contagion of COVID-19 by the SARS-CoV-2 coronavirus strain these past few months has put the world on high alert. Although the virus was first detected as recently as late December 2019 in Wuhan, China,[1] as of 29 July 2020 there has been upwards of 16 million individuals globally that confirmed positive for the virus.[2] These conditions have forced governments worldwide to respond by implementing unprecedented public health interventions, ranging from quarantines, obliging mask-wearing in public, enforcing travel restrictions, to invoking social distancing. Although non-pharmaceutical, those measures have been successfully used in the past to combat the spread of contagious diseases such as influenza.[3] And so far, with the cure for COVID-19 relatively far off in the future, these public

[1] World Health Organization. (2010). Guidance on Ethics of Tuberculosis Prevention, Care, and control, p.1.

[2] World Health Organization. (2020). *Coronavirus Disease (COVID-19) Situation Report-191: Data as received by WHO from national authorities by 10:00 CEST, 29 July 2020*. Retrieved July 30, 2020 from https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200729-covid-19-sitrep-191.pdf?sfvrsn=2c327e9e_2, p.1

[3] Ahmed, F., Zviedrite, N., & Uzicanin, A. (2018). Effectiveness of workplace social distancing measures in reducing influenza transmission: a systemic review. *BMC Public Health, 18:* 518, 525.

health interventions present a stop-gap solution to prevent a massive influx of patients overloading national health infrastructures.

However, public health interventions that prevent and contain the spread of COVID-19 inadvertently limit the free exercise of activities that satisfy the human rights exercise for the very people they are supposed to help—entire populations are prevented from easily accessing basic amenities and services. Furthermore, vulnerable population groups, e.g. those living in poverty and informally employed, are more adversely affected by the pandemic due to the unstable nature of their income.[4] As States understand the effects of overly draconian measures, emphasis has shifted to policies that are least-intrusive, gradual, and proportional to a legitimate goal in accordance with international human rights law. Nevertheless, current COVID-19 public health interventions will inevitably limit the full exercise of human rights of many individuals absent the discovery of the vaccine. With that in mind, some have argued in favour of a policy of compensation, granted by the state on a reciprocal basis each time an individual's rights are limited for public health interests as a way to reach human-right-proportionality in a public health intervention.

This article with focus on the principle of reciprocity in public health interventions as follows: Section B will introduce the principle of reciprocity in public health ethics and human rights discourse, alongside its applications for reducing human rights grievances caused by public health interventions. Section C looks at Indonesia's COVID-19 public health interventions in the context of the principle of reciprocity. Section D highlights the inhibiting factor of economic scarcity towards States' full implementation of the principle of reciprocity. Section E will conclude by highlighting the main findings of this article.

B. The Principle of Reciprocity: Human Rights Discourses of Public Health Interventions

1. Framework of Reciprocity in Public Health Ethics

In broad terms, reciprocity can be understood as notions of mutual regard or fairness. Reciprocity implies a proportional undertaking between what is taken and received.[5] The principle of reciprocity demands that public health interventions which limit the rights of individuals require compensation or restitution as to reduce any intolerable treatment and reduce grievances caused as a result of the intervention. [6] For governments, the application of reciprocity not only prohibits 'unreasonable limitations' that disproportionately burden the rights of individuals, but it also requires that any 'reasonable limitation' to rights must be accompanied with some reciprocal compensation that ease the burdens placed upon individuals.[7]

In applying the principle of reciprocity, compensation or restitution given under the banner of reciprocity cannot be interpreted as transactional consent to the limitation of rights. Instead, it must be viewed as means to reduce grievances caused by limitations to the free exercise of certain rights imposed by government's measures, based upon and within a view of providing fairness and justice.[8] Under that basis, the application of reciprocity in government measures can provide popular legitimacy when public health interventions limit the rights of a given

---

[4] Amnesty International. (2020). *Responses to COVID-19 and States' Human Rights Obligations: Preliminary Observation*. Retrieved May 7, 2020 from https://www.amnesty.org/download/Documents/POL3019672020ENGLISH.PDF, p. 6

[5] Viens, A. M., Bensimon, Cecile M., Upshur, Ross E. G. (2009). Your Liberty or Your Life: Reciprocity in the Use of Restrictive Measures in Contexts of Contagion, *Bioethical Inquiry*, *6*: 207, 211-212

[6] Smith M., J., & Upshur R. (2019) Pandemic Disease, Public Health, and Ethics. In A.C. Mastroianni, J.P. Kahn, and N.E. Kass (Eds.). *The Oxford Handbook of Public Health Ethics* (pp. 797-811). Oxford, United Kingdom: Oxford University Press, p. 805

[7] Viens et al., (n5)

[8] Tulchinsky Theodoroe H., & Varavikova Elena A. (2009) The New Public Health: An Introduction for the 21st Century. (2nd ed.). Cambridge, Massachusetts: Elsevier Academic Press, p. 592

population. Practically, applying the principle of reciprocity also motivates compliance to public health interventions.[9] Additionally, in the context of public health ethics, providing reciprocal compensation for public health interventions provides a two-fold benefit; firstly is providing a populistic basis for the benefit of public health intervention, and second, such compensation incentivizes compliance with public health interventions that limit individual rights. It should be noted however, that the capacity of a reciprocal compensation or restitution to motivate the compliance of individuals in performing certain public health interventions, does not in itself constitute support for the moral justification of those measures. There can be morally legitimate interventions that fail to gain compliance, and morally illegitimate interventions that are broadly supported and complied by the public.[10]

Having understood the principle of reciprocity in ethical discourses of public health, the question then arises whether reciprocity can be applied in human rights contexts.

2. Extracting the Principle of Reciprocity in Human Rights and Public Health

In human rights discourses on right-limitations, the principle of reciprocity can be extracted by looking into Article 18 of the Siracusa Principles on Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles).[11] The Siracusa Principles are drafted by international jurists as a means to interpret and apply the provisions on limitation and derogation of rights under the International Covenant on Civil and Political Rights (ICCPR). The document was published by the United Nations Commission on Human Rights, which was later incorporated into the General Comment Number 14 on the Right to Health. In that sense, the Siracusa Principles reflect 'soft law' that can be used to provide interpretation to the provisions of the ICCPR. It states that "*Adequate safeguards and effective remedies shall be provided by law against illegal or abusive imposition or application of limitations on human rights*."[12] The Search Results Web result with site links Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 14: The Right to the Highest Attainable Standard of Health (GC 14) goes into further detail when interpreting these requirements in context of public health limitations, whereby "…*public health are often used by States as grounds for limiting the exercise of other fundamental rights. The Committee wishes to emphasize that the Covenant's limitation clause … is primarily intended to protect the rights of individuals rather than to permit the imposition of limitations by States*.[13] These provisions can be interpreted in references in Article 18 of the Siracusa Principles and GC 14 whereby a means to provide proportional limitations during public health interventions could include a compensatory mechanism to reduce grievances towards the free exercise of rights..[14]

When looking into the rights under the ICCPR, rights that can explicitly be limited for reasons of public health include, the freedom of movement, the right to peaceful assembly, freedom to manifest religion, and freedom of association. Based on this exhaustive list, one could restrictively interpret Article 18 of the Siracusa Principles and GC 14 to mean that reciprocal compensation is a principle only applicable for those limited number of rights. However, during public health interventions, such as imposition of quarantines and travel bans, restrictions often place hardships of accessing a wider spectrum of positive rights, including the

---

[9] Smith, M. J., Bensimon, C. M., Perez, D. F., Sahni, S. S., and Upshur, R. E. G (2012) Restrictive Measures in an Influenza Pandemic: A Qualitative Study of Public Perspectives. *Canadian Journal of Public Health* 103(5): 348, pp. 350-351.

[10] Viens et al., (n5) 213

[11] UN Commission on Human Rights. (28 September 1984). The *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights. E/CN.4/1985/4*, Article 18

[12] Ibid.

[13] UN Office of the High Commissioner for Human Rights. (11 August 2000). CESCR General Comment No.14: The Right to the Highest Attainable Standard of Health (Art. 12). *E/C.12/2000/4*, para. 28.

[14] Silva D., Smith M., J. (2015). Commentary: Limiting Rights and Freedoms in the Context of Ebola and Other Public Health Emergencies: How the Principle of Reciprocity Can Enrich the Application of the Siracusa Principles. *Health and Human Rights Journal. 17(1)*: 52, 53

right to food, the right to education, and even the right to find adequate work.[15] Therefore, all these possible limitations of human rights during a public health intervention must be taken in consideration with GC 14, which requires adequate safeguards and effective remedies to *all* human rights that are reduced or is consequentially limited due to measures done for public health.[16] Under such an interpretation, there is a normative basis for extracting a principle of reciprocity too alleviate human rights restrictions during public health interventions.
Nevertheless, the application of the principle of reciprocity is not meant to replace existing analysis of the necessity and/or proportionality of States' measure that restricts human rights. The application of reciprocity is useful insofar as a factor of consideration and tool that can be discretionally used by States in order to maintain proportionality during public health interventions that limit the free exercise of rights of individuals. In applying reciprocal measures, every limitation must still be measured in its necessity and proportionality.

3. The Implementation of the Principle of Reciprocity in context of Public Health Interventions

Before the occurrence of the COVID-19 pandemic, the allocation of reciprocal compensation schemes for public health interventions, exists primarily in parts of the world that were significantly impacted by past pandemics. Key examples include reciprocal policies in Hong Kong, Singapore, and Taiwan during the SARS outbreak in 2003,[17] and reciprocal policy during the MERS-CoV outbreak in South Korea.[18] Measures that were granted include:

- Establishment of loan programmes for small and medium-sized enterprises impacted by social-distancing in Singapore;
- Amendment of the Workers' Compensation Act to include SARS patients in Singapore;
- Financial assistance provided to quarantined individuals in Hong Kong and families of SARS;
- Providing full paid leave for all quarantine employers in Taiwan[19];
- Compensation for families that stayed home to prevent transmission of disease in South Korea; and
- Delivering food and basic necessities based on the size of the family[20]

Acknowledging these economic benefits and the exercise of rights provided to individuals, it should be noted that in hindsight, governments were unable compensate each and every affected individual, and in situations where compensation was given, oftentimes it is not enough.[21]
With that said, the inclusion of the principle of reciprocity in human rights should not be interpreted as a formal requirement of compensation or restitution in all contexts of public health interventions. Instead, such principle must be considered, when appropriate and feasible, to reduce limitations of rights for reasons of public health. Nevertheless, the principle of reciprocity does not mandate that States provide a compensatory mechanism to the extent that all burdens to the rights of citizens are eased (nor would it be possible, as will be explained in Part D with Indonesia as a case in point). The principle will serve as a tool that

---

[15] Giubilini A., Douglas T., Maslen H., & Savulescu J. (2018). Quarantine, isolation and the duty of easy rescue in public health. *Developing World Bioeth. 18:*182, 186; Amnesty International (n4) *7*
[16] Silva D., Smith M., J. (n13) *54-55*
[17] Rothstein Mark A., & Talbott Meghan K. (2007). Job Security and Income Replacement for Individuals in Quarantine: The Need for Legislation, *Journal of Health Care Law and Policy, 10*: 239, 243-244
[18] Kim, Ock-Joo. (2016). Ethical Perspectives on the Middle East Respiratory Syndrome Coronavirus Epidemic in Korea. *Journal of Preventive Medicine & Public Health. 49*: 18, 19
[19] Rothstein Mark A., & Talbott Meghan K. (2007). Encouraging Compliance With Quarantine: A Proposal to Provide Job Security and Income Replacement. *American Journal of Public Health, 97*:49, 53
[20] Kim (n27) 20
[21] Holm, Soren. (2020). A General Approach to Compensation for Losses Incurred due to Public Health Interventions in the Infectious Disease Context. *Monash Bioethics Review.*

can be used by States in striving towards a proportional limitation of the free exercise of rights in public health interventions. Thus, the inclusion of inclusion of this principle in discourses of human-right-limitations during public health interventions would add a creative tool that can be implemented by States.[22]

C. A (Brief) Look into Indonesia's COVID-19 Response: A Perspective from the Principle of Reciprocity

The current outbreak of COVID-19 in Indonesia presents a human rights and ethical challenge of balancing between two competing issues, which are: (1) the prevention and containment of COVID-19 through imposing social-limiting measures, and (2) preventing unjustifiable infringements of liberties and disproportionate limitations to human rights caused by these social-limiting measures through reciprocal compensation. This section will attempt to look into Indonesia's COVID-19 response and its ensuing restrictions of human rights, as well as Indonesia's subsequent application of the principle of reciprocity to reduce such restriction of rights. Although this brief elaboration is not intended to be a comprehensive assessment of Indonesia's response against COVID-19, it will hopefully provide a basic understanding on applications of reciprocity in Indonesia's measures against COVID-19.

1. The General Framework of Indonesia's Measures Against COVID-19[23]

Indonesia's measures on preventing and containing COVID-19 are primarily based on the Law on Health Quarantine of 2018. Under the legislation, a Large-Scale Social Distancing (Pembatasan Sosial Berskala Besar, or "**PSBB**") is defined as restrictions on certain activities of populations in an area that are allegedly infected by disease and/or contaminated as to prevent the possibility of the disease spreading or contamination.[24] The imposition of PSBB in any given area is done after considering epidemiology factors, the scale of the threat, the effectivity of the measure, availability of resources, economic impact, and socio-cultural and security factors.[25] Generally, a PSBB is a moderate social-restriction, whereby its application are still subject to exceptions that allow some moderate movement of individuals.[26]

In the specific context of COVID-19, PSBB is implemented through Government Regulation on Large-Scale Social Distancing of 2020 and the Ministry of Health Regulation No. 9 concerning Guidelines on Large-Scale Social Distancing of 2020. These two regulations decentralized the implementation of PSBB, whereby Governors, Regents, and/or Mayors in their respective jurisdictions may propose for the imposition of PSBB for a limited period of time to the Ministry of Health, inconsideration of increasing confirmed cases and/or deaths caused by COVID-19.[27]

Although the specific implementation of PSBB varies between provinces, regencies, and/or cities, these regulations provide the general framework of containing the spread of COVID-19 in a regional level in Indonesia. If granted approval, regional governments will be obliged to limit movement going inside and outside of their jurisdictions, which at the very least, must meet these following criteria:[28]

1. closure of schools and workplace;
2. restriction of religious activities; and/or
3. restriction of activities in public space or public facilities.

---

[22] Silva D., Smith M., J. (n13) 54

[23] All information provided herein are correct at the time of the article's writing.

[24] Indonesia, Law concerning Health Quarantine of 2018, art. 1(11)

[25] Ibid, art. 49(2)

[26] Shidiq, Akhmad Rizal. (2020, April 10). Our health system's capacity vs demand from large-scale social distancing. *The Jakarta Post*

[27] Indonesia, Government Regulation on Large-Scale Social Distancing of 2020, art. 6 (1).

[28] Ibid, art. 4 (1))

In addition to imposing PSBB in areas of the country hard-hit by COVID-19, the government has also prohibited the tradition of annual exodus (*mudik*) for millions of Indonesians during the Lebaran holiday in the month of May.[29] This is done to prevent massive influxes of people from harder hit metropolitan areas moving into rural areas of Indonesia, thus accelerating the likelihood of COVID-19 spreading across the country. Despite the implementation of such policy, COVID-19 continues to bestspread and has currently affected all 34 provinces in Indonesia within 473 cities and/or regencies.[30]

2. COVID-19 Impact and the Application of the Principle of Reciprocity by the Indonesian Government

Although the measures implemented have the potential of effectively preventing and containing the spread of COVID-19, these same measures have the potential of incurring severe losses over the medium-to-long term—all relating to the economy. As an example, the forced closure of workplaces is causing daily compensated workers and those who work in informal 'gig' economies to struggle in meeting basic needs—many are struggling to provide food on their plates.[31] Even if immediate basic needs are covered, the potential repercussions of lost income could amount to repossession of property, eviction, or even default. Given this grim outlook, many Indonesians who have no alternative source of income are voluntarily risking COVID-19 transmission by continuing work in the face of worsening economic conditions.

Realizing this conundrum, the Indonesian government have instated reciprocal measures to provide social aid for affected individuals and lessen the burdens caused by restrictions of human rights. In order to gather necessary funds for the pandemic, the government removed the cap on budget deficits above 3% until the 2022 budgetary year, which will be spent specifically on COVID-19 policies, including aid.[32]

In implementing this regulation, the Ministry of Finance Regulation on COVID-19 Financial Policy of 2020 stipulates that social aid will be allocated towards providing relief to those impacted by COVID-19, which includes:[33]

1. Additional social safety net[34];
2. Financial support for non-wage-earning workers (i.e. those who earn income without a steady wage) and non-workers;
3. Incentives for medical and non-medical workers involved in handling the COVID-19 pandemic, including compensation for the deaths of medical workers during the COVID-19 pandemic, compensation for patients of the COVID-19 pandemic;
4. Supplementary stock for fulfilment of basic and market/logistical operation; and/or
5. Other forms of reciprocity provided by the Indonesian government includes tax incentives,[35] reimbursement of hospital expenditure in treating COVID-19 related patients,[36] reallocation of the Village Funds scheme to reduce economic impact of

---

[29] Indonesia, Minister of Transportation Regulation concerning Transportation Control during Eid Fitr 2020, art. 1(1).

[30] Indonesia, The National Agency for Disaster Countermeasure. (2020). *The COVID-19 Situation in Indonesia.* Retrieved 29 July 2020 from https://covid19.bnpb.go.id/

[31] Nurbaiti, Alya. (2020, April 21). Hunger Hits as many Indonesians struggle during COVID-19 Pandemic. *The Jakarta Post*

[32] Indonesia, Government Regulation in Lieu of Law concerning COVID-19 of 2020, art. 2(1)(a)

[33] Indonesia, Financial Services Authority Regulation concerning Economic Stimulus for COVID-19 of 2020, art. 9(1)

[34] In elaboration of what constitutes additional social safety net, the regulation provides protection, *inter alia*, for unemployed workers and providing electricity subsidies, housing subsidies, and basic necessities for families.

[35] Indonesia, Minister of Finance Regulation on Tax Incentives during COVID-19 Pandemic of 2020, art. 2(1)

[36] Indonesia, Minister of Health Circular Letter on Reimbursement of Hospital Costs of 2020, sec. 3. Criteria of patients that receive guarantee of government subsidy for COVID-19 are; (i) people under observation; (ii) patients under supervision; and (iii) confirmed COVID-19 patients

COVID-19 in villages,[37] credit relaxation and financing for small and medium-sized enterprises,[38] additional funding for schools to provide online learning during the pandemic,[39] and incentives for banks that provide economic stimulus in the form of credit financing for small and medium enterprises affected by COVID-19.[40] All these measures implemented by the government in providing relief for individuals affected by COVID-19 is indicative of the principle of reciprocity.

With the inclusion of these measures to balance human rights restrictions caused by COVID-19 prevention and containment measures, communities and individuals affected by restrictive public health interventions are spared from excessive burdens to human rights throughout the pandemic. As such, under the perspective of human rights, implementation of the principle of reciprocity allows States to provide the least intrusive restriction, in order to achieve proportional balancing between the interest of public health with the restriction on human rights during public health interventions.

D. Economic Scarcity and Reciprocity in Developing States: Indonesia's Reluctance for Quarantine

Ideally, reciprocal compensation should be applied towards all burdens caused by measures limiting the free exercise of human rights by states. However, economic constraints render it practically infeasible even for the most developed states to completely implement reciprocal compensation. Examples of economic constraints in applying the highest standards of reciprocity in the most developed states may take the form of prioritization of the budget towards competing objectives,[41] whilst in worst cases of developing and least developed states economic scarcity takes form in the oft-cited pervasive insufficiency of capital to alleviate human rights impacts of public health interventions.[42]

Given the reality of the situation, it is not surprising that only very few economies, e.g. the most advanced, are implementing truly reciprocal compensatory policies for minimizing the effects of human rights restrictions.[43]

In the developing world, the situation is even more dire: the full implementation of reciprocity remains a luxury that few States can afford. This presents a double conundrum for developing States: they must deal with pervasive concerns of insufficient budget, whilst simultaneously attempting counter the human rights and economic impact of COVID-19 through reciprocal policies during public health interventions.

For policy makers in a COVID-19 pandemic, social limiting measures that restrict human movement remain one of the most effective ways of stymieing the spread of the pandemic. However, higher degrees of restrictions (for example, through a quarantine) will create greater impediments to the human rights of individuals, inducing a proportional push for reciprocal measures that reduce such impediments. Faced with this option, developing States with less economic resources are forced to shy away from the most effective (and reciprocally

---

[37] Indonesia, Minister of Villages Regulation on Utilization of Village Funds, art. 8a(2)

[38] Indonesia, Financial Services Authority Regulation concerning Economic Stimulus for COVID-19 of 2020, art. 7

[39] Indonesia, Ministry of Education and Culture Regulation No.19 of 2020

[40] Indonesia, Central Bank of Indonesia Regulation No.22 concerning Incentives for Banks during COVID-19 of 2020, art. 2(1)

[41] In context of COVID-19, inhibition of reciprocity for the most developed of States could manifest in; (i) debates of the 'right' amount of compensation resulting in less compensation than previously proposed, or; (ii) measures to "open-up" the economy and inducing people to go back to work, whilst simultaneously decreasing funding for social aid to individuals staying at home during the pandemic. Leaving aside those measures' virtue or iniquity, those measures inhibit the application of reciprocity whilst highlight the availability of resources for action rather than inaction due to scarce resources.

[42] Holm (n20)

[43] See German Federal Ministry of Finance. (2020). Emerging from the crisis with full strength. Retrieved July 30, 2020 from https://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Topics/Public-Finances/Articles/2020-06-04-fiscal-package.html

expensive) measures of social limitations, instead relying on less effective (and reciprocally affordable) means of social limitations.

Taking example of Indonesia's response to COVID-19, a limited state budget limit the full implementation of reciprocity in Indonesia. Currently, Indonesia has chosen to implement a Large-Scale Social Distancing towards hard-hit parts of the country under the basis of Law No. 6 of 2018 concerning Health Quarantines. In practice, this means a moderate social-distancing restriction that still allows human activity inside, to, and from the affected area.[44]

However, Law on Health Quarantine of 2018 also contain other options available for the government in order to respond to a disease outbreak, each corresponding with different pecuniary obligations. One such option is the imposition of Regional Quarantine over certain regions to stop the spread of a disease.[45] Under a Regional Quarantine, all access to the affected regions will be heavily guarded and restricted by the police and individuals inside the quarantine region will be prohibited from going outside, thus heavily restricting freedom of movement. Seemingly like a silver bullet, a Regional Quarantine is a more effective public health intervention that would cut disease transmission of COVID-19 considerably faster.[46]

Although it is easy to blame the government of Indonesia of failing its negative obligation to protect its citizens from COVID-19 by only (and belatedly) imposing large-scale social distancing, there is a catch to imposing a regional quarantine. Under the Law on Health Quarantine of 2018, during a Regional Quarantine the basic living conditions of people and livestock inside the quarantined area will be under the responsibility of the central government.[47] Effectively, this would place an absolute obligation of reciprocity to provide for the livelihood of all individuals in a quarantined region. Although a noble goal, this is economically impossible.[48] This should be taken in contrast with reciprocal obligations imposed in Large-Scale Social Distancing, which require only reciprocal obligations of "considering the basic living conditions of citizens" when implementing a Large-Scale Social Distancing.[49] Even with this comparatively conservative application of reciprocity, the government has been forced to uncap its budgetary deficit restrictions from 3% up to a planned 5.07% of the nation's GDP, due to increased pressure for stimulus and social net spending.[50] Given this stark reality, the relative economic scarcity of Indonesia—taking the form of limited budgetary capabilities—presents an inhibiting factor to the full implementation of the principle of reciprocity in Indonesia's responses towards COVID-19.

E. Conclusion

This article has elaborated on the principle of reciprocity in present discussions of public health ethics, its import into human rights discourse, and its implementation into public health interventions. For that reason, when the principle of reciprocity is applied in ethical discourse, it acts as moral validation for public health interventions. In context of human rights, the normative principle of reciprocity can be extracted from existing human rights instruments as an analytical tool and factor to consider when justify restrictions towards human rights in public health purposed measures. Subsequently, this article considered and analysed the

---

[44] Samboh, Esther and Akhlas, Adrian Wail. (2020, April 13). Explainer: Indonesia to finance coronavirus battle mostly through debt. *The Jakarta Post*

[45] Indonesia, Law concerning Health Quarantine of 2018, art. 54

[46] The government has received a considerable amount of flak for failing to implement the Regional Quarantine option under Law No. 6 of 2018.

[47] Indonesia, Law concerning Health Quarantine of 2018, art. 55

[48] As of the time of this article's writing, three provinces in Indonesia is implementing Large-Scale Social Distancing: Jakarta, West Java, and West Sumatra. Notwithstanding other regencies and cities that have independently implemented Large-Scale Social Distancing, the three provinces have populations exceeding 62 million people. If these provinces were to implement Regional Quarantines respectively, the government would be under an absolute reciprocal obligation to provide for all 62 million.

[49] Indonesia, Government Regulation on Large-Scale Social Distancing of 2020, art. 4(3)

[50] Samboh, Esther and Akhlas, Adrian Wail. (2020, April 13). Explainer: Indonesia to finance coronavirus battle mostly through debt. *The Jakarta Post*

implementation of the principle of reciprocity by Indonesia in its response to the COVID-19 pandemic. Although Indonesia has kept the reciprocal implementation of compensating human rights limitations in mind when implementing COVID-19 measures, the full application of reciprocity in Indonesia is limited by economic considerations of a limited budget, which presents an inhibiting factor to the full implementation of reciprocity.

BIBLIOGRAPHY

Books and Journal Articles

Ahmed, F., Zviedrite, N., & Uzicanin, A. (2018). Effectiveness of workplace social distancing measures in reducing influenza transmission: a systemic review. *BMC Public Health, 18:* 518-530.

Giubilini A., Douglas T., Maslen H., & Savulescu J. (2018). Quarantine, isolation and the duty of easy rescue in public health. *Developing World Bioeth. 18:*182-189.

Holm, Soren. (2020). A General Approach to Compensation for Losses Incurred due to Public Health Interventions in the Infectious Disease Context. *Monash Bioethics Review*. 1-15

Kim, Ock-Joo. (2016). Ethical Perspectives on the Middle East Respiratory Syndrome Coronavirus Epidemic in Korea. *Journal of Preventive Medicine & Public Health. 49*: 18-22.

Silva D., Smith M., J. (2015). Commentary: Limiting Rights and Freedoms in the Context of Ebola and Other Public Health Emergencies: How the Principle of Reciprocity Can Enrich the Application of the Siracusa Principles. *Health and Human Rights Journal. 17(1)*: 52-57.

Smith, M. J., Bensimon, C. M., Perez, D. F., Sahni, S. S., and Upshur, R. E. G. 2012. Restrictive Measures in an Influenza Pandemic: A Qualitative Study of Public Perspectives. *Canadian Journal of Public Health* 103(5): 348–352

Smith M., J., & Upshur R. (2019) Pandemic Disease, Public Health, and Ethics. In A. C. Mastroianni, J.P. Kahn, and N.E. Kass (Eds.). *The Oxford Handbook of Public Health Ethics* (pp. 797-811). Oxford, United Kingdom: Oxford University Press.

Rothstein Mark A., & Talbott Meghan K. (2007). Encouraging Compliance With Quarantine: A Proposal to Provide Job Security and Income Replacement. *American Journal of Public Health, 97*:49-56.

Rothstein Mark A., & Talbott Meghan K. (2007). Job Security and Income Replacement for Individuals in Quarantine: The Need for Legislation, *Journal of Health Care Law and Policy, 10*: 239-257.

Tulchinsky Theodoroe H., & Varavikova Elena A. (2009) The New Public Health: An Introduction for the 21st Century. (2nd ed.). Cambridge, Massachusetts: Elsevier Academic Press.

Viens, A. M., Bensimon, Cecile M., Upshur, Ross E. G. (2009). Your Liberty or Your Life: Reciprocity in the Use of Restrictive Measures in Contexts of Contagion, *Bioethical Inquiry, 6*: 207-217.

Regulations

Indonesia, Central Bank of Indonesia Regulation No.22 concerning Incentives for Banks during COVID-19 of 2020

Indonesia, Financial Services Authority Regulation concerning Economic Stimulus for COVID-19 of 2020

Indonesia, Government Regulation on Large-Scale Social Distancing of 2020

Indonesia, Government Regulation in Lieu of Law concerning COVID-19 of 2020

Indonesia, Government Regulation In Lieu of Law concerning Emergency Situations of 1959

Indonesia, Ministry of Education and Culture Regulation No.19 of 2020

Indonesia, Minister of Finance Regulation on COVID-19 Financial Policy of 2020

Indonesia, Minister of Finance Regulation on Tax Incentives during COVID-19 Pandemic of 2020

Indonesia, Minister of Health Circular Letter on Reimbursement of Hospital Costs of 2020

Indonesia, Minister of Transportation Regulation on Transportation Control during Eid Fitr 2020

Indonesia, Minister of Villages Regulation on Utilization of Village Funds

Indonesia, Law concerning Health Quarantine of 2018

Miscellaneous

Amnesty International. (2020). *Responses to COVID-19 and States' Human Rights Obligations: Preliminary Observation*. Retrieved May 7, 2020 from www.amnesty.org/download/Documents/POL3019672020ENGLISH.PDF

Germany. German Federal Ministry of Finance. (2020). Emerging from the crisis with full strength. Retrieved July 30, 2020 from www.bundesfinanzministerium.de/Content/EN/Standardartikel/Topics/Public-Finances/Articles/2020-06-04-fiscal-package.html

Indonesia. The National Agency for Disaster Countermeasure. (2020). *The COVID-19 Situation in Indonesia*. Retrieved 29 July 2020 from https://covid19.bnpb.go.id/

Nurbaiti, Alya. (2020, April 21). Hunger Hits as many Indonesians struggle during COVID-19 Pandemic. *The Jakarta Post*

Samboh, Esther and Akhlas, Adrian Wail. (2020, April 13). Explainer: Indonesia to finance coronavirus battle mostly through debt. *The Jakarta Post*

Shidiq, Akhmad Rizal. (2020, April 10). Our health system's capacity vs demand from large-scale social distancing. *The Jakarta Post*

World Health Organization. (2020). *Coronavirus Disease (COVID-19) Situation Report-107: Data as received by WHO from national authorities by 10:00 CEST, 6 May 2020*. Retrieved May 7, 2020 from www.who.int/docs/default-source/coronaviruse/situation-reports/20200506covid-19-sitrep-107.pdf?sfvrsn=159c3dc_2.

World Health Organization. (2010). *Guidance on Ethics of Tuberculosis Prevention, Care, and Control*

World Health Organization. (2020). *Novel Coronavirus (2019-nCoV) Situation Report-1: 21 January 2020*. Retrieved May 7, 2020 from www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov.pdf?sfvrsn=20a99c10_4.

UN Commission on Human Rights. (28 September 1984). The *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights. E/CN.4/1985/4.*

UN Office of the High Commissioner for Human Rights. (11 August 2000). *CESCR General Comment No.14: The Right to the Highest Attainable Standard of Health. E/C.12/2000/4.*

Author's Instructions

Who May Submit Articles:

- Any **undergraduate student** and **post-graduate student** from any university may submit articles to the *Juris Gentium Law Review*
- An article may only 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
- The article must consist of:
  1. Title (max 15 words)
  2. Abstract in English (100-200 words)
  3. 3500-5000 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
- Articles uses footnotes for citations (**American Psychology Association Referencing System**)
- There should be at least **five references** used, and may only cite reliable sources
- 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 jglr.ugm@gmail.com and/or visit our website at www.jurnal.ugm.ac.id/jurisgentiumlaw or www.cimcugm.org/jglr 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: jglr.ugm@gmail.com
Website: www.jurnal.ugm.ac.id/jurisgentiumlaw or www.cimcugm.org/jglr