



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

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**FOREWORD FROM THE DEAN**  
**FACULTY OF LAW, UNIVERSITAS GADJAH MADA**

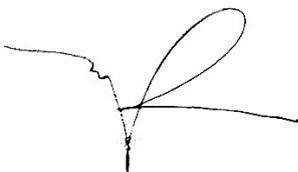
Recognizing the importance of possessing the skills of legal research, analysis and writing, we have the *Juris Gentium Law Review* (“**JGLR**”), aimed at assisting both undergraduate and graduate law students in attaining those essential skills. Indeed, JGLR is very first scientific law journal in Indonesia that is managed entirely by students and acknowledged as the top ten academic journals by Universitas Gadjah Mada.

In this edition alone, JGLR publishes articles submitted by Authors and reviewed by Executive Reviewers from not only Indonesia, but also other parts of the world. As a medium dedicated to share knowledge, we see students convey their personal views and possible solutions on wide-ranging topics from international humanitarian law to even contract law. Thus, it is evident that the JGLR is constantly evolving ever since its first establishment in 2012.

In this line, I would like to congratulate the JGLR Editorial Board for publishing yet another excellent edition. Other than that, I would like to thank everyone who have contributed and/or participated in making this publication possible, which includes but certainly not limited to: the Authors, Executive Reviewers and the Community of International Moot Court.

I look forward to see what JGLR has in store for the upcoming years ahead.

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

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**Dean**  
**Faculty of Law**  
**Universitas Gadjah Mada**

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

The Juris Gentium Law Review (“**JGLR**”) was established as a platform for law students to share their knowledge and express their views on the ongoing legal issues through writing. That being said, JGLR materializes its commitment to nurture the culture of legal writing by annually accepting articles submitted by both undergraduate and graduate law students from different universities all over the world.

With each edition, JGLR has undoubtedly shown consistent growth, striving to reach its greater goal of putting itself on the map as a renowned student-run legal journal that is accessible to any reader. For this particular edition, JGLR contains eight articles from law students from four universities: Universitas Gadjah Mada (Yogyakarta, Indonesia), Universitas Indonesia (Jakarta, Indonesia), University of Toronto (Ontario, Canada), and Ritsumeikan University (Kyoto, Japan). The articles engage the readers in an in-depth discussion on the subjects of international human rights law, international law of the sea, maritime law, international investment law, financial law, and contract law.

As the president of the Community of International Moot Court (“**CIMC**”), I can only hope that JGLR will continue to serve its purpose of promoting the importance of legal writing and sharpening legal students’ critical thinking. In doing so, I am looking forward to see JGLR working hand in hand with CIMC to reach out to a wider variety of law students to submit articles and executive reviewers to review such articles.

On behalf of CIMC, allow me also take this opportunity to express my appreciation towards Universitas Gadjah Mada’s Faculty of Law for all the endless support and of course, the Editorial Boards – Naila Sjarif, Refah Anyar, Rahma Reyhan, Nabila Oegroseno, Felicity Salina, Arinta Pratiwi, and Aicha Rebecca – for their exceptional commitment and hard work to produce this edition.

**Randy Abirawa**

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

**FOREWORD FROM THE EDITORIAL BOARD**  
**JURIS GENTIUM LAW REVIEW**  
**FACULTY OF LAW, UNIVERSITAS GADJAH MADA**

As a law journal that is fully run by students, *Juris Gentium Law Review* (“**JGLR**”) is essentially a manifestation of the spirit of learning through writing as much as by reading. On one hand, JGLR invites law students to pour their knowledge into writing. On the other hand, readers will find themselves engrossed in some of the most intriguing legal issues through the voices of the emerging generation.

In the next following pages, we hereby present eight articles with pride. In the field of international human rights law, Gisella Samudiono analyzes how the contradiction between the 2014 Egyptian Constitution and Presidential Decree Number 444 of 2014 impedes the rights of Nubians to return to their ancestral homelands in “*Decree on Demarcated Areas along Egyptian Borders: Egypt’s Miscarriage of its International Human Rights Duties*”. In “*Statelessness: International Law Perspective*”, Kaysha Ainayya Sasdiyarto delves into the treatment of stateless individuals in light of the regulations governing their existence.

Further, Rininta Ayunina and M. Ibnu Farabi explore the struggles of States in performing their fundamental obligation of non-refoulement due to the upsurge in the number of refugees in “*Let them Drown: States’ Obligation of Non-refoulement Vis-à-vis the Entry of Refugees Through Waterways*”. Meanwhile, Kaizar Nararya and Emilio Bintang’s “*Sink that Vessel: Reflecting Indonesia’s Sinking Vessel Policy in light of UNCLOS*” demonstrates Indonesia’s efforts in response to illegal, unreported and unregulated fishing. Gilang Lukman addresses the considerations and challenges faced by Indonesia in “*Designating the Archipelagic Sea Lane (ASL): The “Epilogue” of the Legal Development of Indonesia’s Maritime Regime*”.

With regards to international investment law, Dioputra Oepangat and Janet’s “*Document Production and Disclosure in Investor-State Arbitration*” weighs the importance of accessing material documents and securing State secrets in investor-State arbitration proceedings. In “*Subjective and Objective Approaches to Contractual Interpretation in Civil Law and Common Law Countries*”, Rachmi Dzikrina provides a comparative study between Indonesia and Canada’s diverged yet intertwining methods of contractual interpretations. Last but not least, Jonathan Hendson magnifies Indonesia’s lack of legal framework regulating cryptocurrency in “*Bitcoin: A Comparative Study of Cryptocurrency Legality in America and Indonesia*”.

Notably, the makings and publication of this edition is indebted to the dedicated works of the Editorial Boards: Refah Anyar, Rahma Reyhan, Nabila Oegroseno, Felicity Salina, Arinta Pratiwi, and Aicha Rebecca. Additionally, I would like to extend my gratitude for the support

and assistance of Universitas Gadjah Mada's Faculty of Law, the Executive Reviewers, and the past Editorial Boards who have equally contributed to the success of JGLR.

We truly hope that you enjoy reading this edition as much as we enjoyed putting it together.

**Naila Sjarif**

A handwritten signature in black ink, appearing to read 'Naila Sjarif', with a stylized, cursive script.

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

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# JURIS GENTIUM

# LAW REVIEW

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## DECREE ON DEMARCATED AREAS ALONG EGYPTIAN BORDERS: EGYPT'S MISCARRIAGE OF ITS INTERNATIONAL HUMAN RIGHTS DUTIES\*

Gisella A. Samudiono\*\*

### Abstract

As the result to the mass displacements, the Nubians in Egypt were being marginalized almost in all aspects of life. Restless demonstration, advocacy, and petition had been conducted in the hope that by returning to the Nubians' ancestral lands they will have a better future. They finally get answered when the government included the Nubians' rights to return to their homelands in the newly amended 2014 Egyptian Constitution. Within the same year, the government issued Presidential Decree Number 444 of 2014, which demarcated areas parallel to the northern, southern, and western Egyptian borders to be forbidden and restricted areas. The demarcated areas are including the ancestral lands targeted by the Nubians to return. The enforcement of the Decree is de facto impeding the rights of the Nubians to return to their ancestral lands. This article analyses the issue of the Nubians from the perspective of international human rights law, showing that by the issuance and enforcement of Presidential Decree Number 444 of 2014, Egypt has violated its international human rights duties preserved in several international human rights treaties, such as ICERD, ICCPR, ICESCR, and ACHPR.

### Intisari

Sebagai hasil perpindahan massal, orang Nubia di Mesir dipinggirkan hampir di semua aspek kehidupan. Demonstrasi, advokasi dan petisi telah dilakukan dengan harapan bahwa jika orang Nubia kembali ke tanah leluhur, mereka akan memiliki masa depan yang lebih baik. Mereka akhirnya mendapat jawaban ketika pemerintah memasukkan hak Nubia untuk kembali ke tanah air mereka dalam Konstitusi Mesir yang direvisi pada tahun 2014. Pada tahun yang sama, pemerintah mengeluarkan Keputusan Presiden Nomor 444 tahun 2014 yang membuat daerah yang sejajar dengan perbatasan utara, selatan, dan barat Mesir menjadi daerah terlarang. Daerah yang dibatasi termasuk tanah leluhur orang Nubia. Penerapan Keputusan tersebut secara de facto menghambat hak orang-orang Nubia untuk kembali ke tanah leluhur mereka. Artikel ini menganalisis isu Nubia dari perspektif hukum HAM internasional yang menunjukkan bahwa dengan terbitnya dan berlakunya Keputusan Presiden Nomor 444 tahun 2014, Mesir telah melanggar kewajiban HAM internasional yang dapat ditemukan dalam beberapa perjanjian HAM internasional, seperti ICERD, ICCPR, ICESCR, dan ACHPR.

**Keywords:** the Nubians, Egyptian Presidential Decree Number 444 of 2014, international human rights treaties

**Kata Kunci:** Nubians, Keputusan Preisdan Mesir No. 444 of 2014, hukum hak asasi manusia internasional

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\*\* 2013. International Law, Faculty of Law, Universitas Gadjah Mada; Yogyakarta, Indonesia. This Article was based on a legal research conducted by the Author as a requirement to obtain the degree of Bachelor of Laws (*Sarjana Hukum*) from Universitas Gadjah Mada under the supervision of Rangga Dachlan, S.H., LL.M. The title, thereof, has been modified from the original work.

### A. Introduction

As today, the Nubians' history has been started way back to the early Neolithic Age (Harkless: 2006). They took a significant role in the Mediterranean-Red Sea world history as Pharaohs of Egypt and Kings of Meroe, on the period between the seventh century B.C. and the fourth century A.D. (Harkless: 2006). Considered as having the descents of a clearly defined civilization, the Nubians are as old as ancient Egypt itself as they bear different ethnicity from the Arabians (Janmyr: 2016). Without doubt, the Nubians was heavily influenced by Egypt because of the social tendency and geographical location. These influences are particularly apparent in Nubian religious practices and burial traditions (Harkless: 2006). They inhabited villages along the banks of the Nile River ("the Nile" or "Nile"), stretching from Aswan in southern Egypt into northern Sudan for thousands of years (Harkless: 2006). Around this area, various Nubian peoples strive to retain their own languages, customs, and cultures (Harkless: 2006).

On 1960s, President Nasser initiated the Aswan High Dam project in order to modernize Egypt. Meanwhile, Nubian villages located along the Nile and under the Lake Nasser. Being submerged shortly after the commencement of the Dam, approximately 50,000 Nubians left with no option than to be settled to the new designated resettlement communities in southern Egypt, around Kom Umbu, about 50kms north of the city of Aswan (Poeschke: 1996). The resettlement by force has caused the marginalization of the Nubians in all political, social, and economy aspects (Poeschke: 1996).

On January 2014, the enactment of Egypt's new constitution with the new elected President Abdel Fattah el-Sisi brought up a fresh wind for the Nubians.

The constitution specifically mentions their rights to return to their ancestral land (Art. 236, *Egyptian Constitution 2014*). However, it turns out that the gesture of the referendum was just an *entr'acte*. The unfortunate situations have not yet left the Nubians. On 29 November 2014, President Abdel Fattah el-Sisi issued Presidential Decree Number 444 ("Decree 444" or "Decree"), which included a stretch in Nubia adjacent to the Egyptian-Sudanese frontier, as a forbidden and restricted military zone. These areas are including 18 Nubian villages that declared as demarcation areas. The provisions that the Nubians considered as their constitutional guarantee have been declined by the presidential decree in force.

Some has argued that Decree 444 was unconstitutional, but somehow it has not been removed until today. Even, more presidential decree having similar aim with Decree 444 was issued at ease in 2016.<sup>1</sup> Despite the existence of the issue of the constitutionality of Decree 444, this article analyses the accordance of Decree 444 to several binding international human rights treaties for Egypt. Based on a legal research conducted using normative legal research and statutory approach, this article explores international human rights treaties binding for Egypt and Egyptian national laws related with the discussion of the Nubians' rights to return to their ancestral lands.

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<sup>1</sup> In August 2016, President el-Sisi issued Presidential Decree Number 355 of 2016 in support of Decree 444. This new decree allocated 922 *feddans* of "Toshka and Forkound" the lands located in Nubians' old villages into a mega-national project.

### **B. The Nubians' Claim to Return to Their Ancestral Lands and The Enforcement of the Egyptian Presidential Decree Number 444**

Decree 444 was intended to protect Egyptian international borders located in the western, southern, and eastern parts of the country. It is also written that the Decree had replaced the Regulation Number 204 of 2010 as the instrument regulating Egyptian demarcation areas of international borders. Decree 444 was also established in consideration of the need to conform to the then newly-established 2014 Egyptian Constitution.

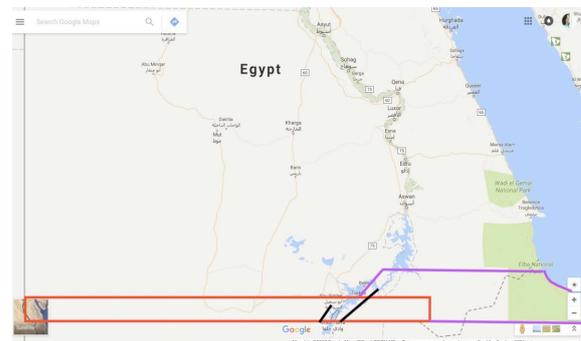
Further, the Decree stipulated two types of area; First, *forbidden areas*, which are only accessible for Egyptian military forces given express authority to protect the demarcated areas; and second, *restricted areas*, which are only accessible to military forces and civilians who have fulfilled specific requirements. It is defined that persons--citizens and immigrants--and transportations--above and under ground--cannot access the forbidden areas.

Article 3 of Decree 444 provides that the restricted areas are accessible for (1) persons granted written military permit; (2) citizens, who have permanent residence permit, whether in Mersa Matruh before 5 July 1967 or in el Bahr, Aswan, El Wadi, El Gadeed before 1 January 1987. The permanent residents of Mersa Matruh Province could even stay without written military permit, but only in the City of El Sallum and not in its high grounds. The residence permit shall also include their assets in those locations. Upon violation to those above provisions, the military forces have been granted authority to perform such measures as seizure of transportation.

Because the Nubians used to live along the banks of the Nile, the areas that they are reclaiming for also extend from Egypt's southern border, 110kms on the eastern

side of the Nile and 25kms to the western side (*Al Jazeera: 2016*). That way, they could live close to their families and relatives who are geopolitically separated by the Egypt-Sudan border.

In the following illustration, it will be shown that among the areas that have been declared forbidden and restricted, there are areas claimed by the Nubians' as ancestral lands to which they have been wishing to return.



**Illustration 1.** The area along banks of the Nile claimed by the Nubians (black lines) inward the forbidden (red lines) and restricted (purple lines) areas in the southern Egyptian border. (**Source:** <http://maps.google.com>; Accessed on 26 April 2017.)

*The size of this illustration has been modified to fit the format of the journal.*

### **C. The Accordance of Decree 444 with Egypt's International Human Rights Duties**

In exercising its full capacity to engage with international relations, Egypt as a sovereign country is bound to the human rights instruments, to which it has expressed consent. Under the United Nations' system, Egypt has successfully ratified almost all of the so-called nine core of international human rights treaties, except for the Convention for the Protection of All Persons from Enforced Disappearance (CED). Even though the Nubians' rights to return to their

ancestral lands are explicitly regulated in Egyptian Constitution 2014, the rights are hardly expressed in international law. However, the situation does not prevent the discussion over those rights, such as what happened in CERD's State Reporting procedure.<sup>2</sup> By searching the most relevant rights to the rights to return to Nubians' ancestral lands, the discussion carries on upon violation of certain rights that likely happens if the rights to return to Nubians' ancestral lands are not to be granted.

Among the human rights treaties that binding for Egypt, the ICERD, ICCPR and ICESCR are the ones relevant to the discussion of the issue of the Nubians. Also, in the regional level Egypt is one of the Member States of the African Union and a state party to the African Charter on Human and Peoples' Rights.

#### I. ICERD

According to Article 1 of the ICERD, the term of "racial discrimination" shall refer to "the distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, of an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life". In any event, the rights preserved in the ICERD must be accorded to the peoples located in one state party's jurisdiction without any discrimination based on race, colour, descent, or national or ethnic origin.

Moreover, Articles 2 and 5 specify the according of right to adequate development, right to freedom of movement and residence, and right to housing, which are relevant to the discussion

of the Nubians' rights to return to their ancestral lands.

Upon ratification, Egypt has submitted a reservation to Article 22 concerning the automatic referral of dispute settlement to the ICJ. It is noted that Egypt has not expressed its acceptance of individual complaints procedure under the ICERD, in accordance with Article 14 (*Report of the CERD, Supplement No. 18*). Therefore, within the procedure of the ICERD, the only thing left is the procedure of State Reporting under the Committee on the Elimination of Racial Discrimination (CERD).

Within that last submission in April 2014, Egypt attempted to put a substantive discussion of the articles of the ICERD, introducing general information on the protection of human rights in Egypt, while also answering the recommendations addressed by the CERD with specific reference to the issue of the Nubians. From the answers, it can be concluded that the Egyptian government acknowledged the displacement suffered by the Nubians as result to the constructions of the high dams. It also affirmed that the Nubians' right to return to their ancestral lands is constitutionally guaranteed. The absence of the discussion on the Decree 444 should be understood as the Decree came in 29 November 2014, meanwhile this report was received by the CERD in 15 April 2014.

The issuance of the Decree 444 depicted that the Egyptian government's conduct was in contradiction to its prior commitments in respond to the CERD concerns and recommendations. Article 236 of the 2014 Egyptian Constitution guarantees that the border and disadvantaged areas are to be developed and given back to the Nubians, but instead, Decree 444 established the areas as demarcated forbidden and restricted areas. Irrespective of the discussion on the

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<sup>2</sup> See below in Section A.

constitutionality of the Decree 444, in the perspective of international law, the Egyptian domestic law shall not be an excuse for the failure to carry on its international duties.

Granting the Nubians' right to freedom of movement and residence within Egyptian borders is Egypt's international duties under ICERD. This right, however, violated by the existence of the Decree 444 in force. Aside from the prohibition to return to their lands, the Nubians are not provided with locations other than the displacement area in Kom Umbu. Their efforts of peace protest and mobilization campaign are negatively perceived by the government as force, arrest, and judicial harassment followed the events (*Front Line Defenders Urgent Appeal: 2017*). The right to housing in their ancestral lands for the Nubians will also not be available in any event of the enforcement the Decree 444. This treatment happened to be suffered only by the Nubians, indicating the discrimination based on racial background.

Hence, Egypt has failed to respect the Nubians' rights under ICERD, considering that it has deliberately violated the rights to return to their lands and subsequently their right to housing. For a short moment, the Egyptian government was successful in enacting the 2014 Constitution, ensuring the Nubians' right to return to their ancestral lands. However, the contradictive actions taken by issuing the Decree 444 proved that the Egyptian government failed to fulfil the enjoyment of the Nubians' rights under the ICERD. The arbitrary displacement suffered by the Nubians, further marginalization resulted from it, and when those problems are prolonged until now, should also be a proof that the mistreatment is the Egyptian government's failure to protect the rights of the Nubians.

## II. ICCPR

Egypt is one among many states who are parties to the International Covenant on Civil and Political Rights (ICCPR). It has ratified ICCPR on 14 January 1982 together with ICESCR. However, Egypt opted not to ratify the two Optional Protocols to the ICCPR (ICCPR-OP 1 and ICCPR-OP 2) and the Optional Protocol to the ICESCR until today.<sup>3</sup> Therefore, it excluded individual complaints procedure made under those two conventions.

It is mentioned in Article 1 that by virtue of the right of self-determination, every individual shall also be free in determining their political status and working for the development of economic, social and cultural aspects of life. Moreover, under Article 12 Egypt as State Party has the obligation to accord the right to liberty of movement and freedom to choose residence without differentiating the Nubians' from other citizens.

After the date of ratification, Egypt consequently submitted four reports, which combined into two reports in 1992 and 2002 to the Human Rights Committee. In respect to the right contained in Article 12, Egypt addressed that through the Egyptian constitution Articles 50-54,<sup>4</sup> The Passport Act No. 97 of 1959,<sup>5</sup> The Emigration Act No. 111 of 1983,<sup>6</sup> and Act No. 89 of 1960,<sup>7</sup> Egypt has protected the rights contained in this article. However, there was no part among those four reports that specifically addressed the Nubians and any measures, which could be associated with them.

<sup>3</sup> The first Optional Protocol to ICCPR establishes individual complaint mechanism under ICCPR; meanwhile Second Optional Protocol to ICCPR is aiming at the abolition of the death penalty.

<sup>4</sup> The 1971 Egyptian Constitution.

<sup>5</sup> This Act is directed for the Egyptians.

<sup>6</sup> *Ibid.*

<sup>7</sup> This Act is directed to the foreigners in Egypt.

Decree 444 by the existence itself was violating the rights of the Nubians under the ICCPR in achieving the freedom of movement and choosing their residences. The Nubians are prohibited to enter and subsequently to reside in their ancestral lands that now declared as prohibited and restricted areas parallel to the Egyptian southern borders. They are not also provided with other lands or locations, indicating that the government only gave the displacement area in Kom Umbu.<sup>8</sup> In regards also to the impediment of their rights to return back to their ancestral lands, the Egyptian government has failed to respect, to protect and to fulfil the enjoyment of the Nubians' rights under the ICCPR.

### III. ICESCR

Having the same spirit of right of self-determination, ICESCR also provides that everyone should have the freedom in determining their political status as well as developing economic, social and cultural aspects of their life. State Parties to ICESCR, including Egypt, therefore, Article 2 particularly obliged to actively undertake to take steps and to ensure the full realization of the rights recognised in this Covenant.

Relevant to the discussion of the rights of the Nubians to return to their ancestral lands, Article 11 provides that Egypt as State Party has the obligation to accord the right of everyone, including the Nubians, to an adequate standard of living, including food, clothing, and housing. By virtue of the right of self-determination, in the event of the Nubians considered that by going back to their ancestral lands they could achieve an adequate standard of living, including adequate food, clothing, and housing, the Egyptian government is

bound to ensure the granting of these rights.

The Committee on Economic, Social and Cultural Rights (CESCR) is the Treaty Body of the ICESCR that monitors the implementation of the rights recognised in the ICESCR by the State Parties of the covenant. Through the regular State Reporting process, CESCR carries out one of the procedures in its monitoring function. Since the date of entry into force for Egypt, it has submitted four reports to the CESCR. The first report in 1998 was the initial report, which was obliged within two years after the date of entry into force.

Together with other issues, toward Egypt's first report, the CESCR concluded recommendations in general that there is a need in establishing a national human rights institution in full compliance to Paris Principles of 1991 (*Concluding Observations of the CESCR for Reports submitted by Egypt, 23 May 2000*). In relevant to Article 11, CESCR urged the government to overcome the massive housing problems by "adopting a strategy and plan of action and by building or providing, low-cost rental housing units" (*Concluding Observations of the CESCR for Reports submitted by Egypt, 23 May 2000*).

As for the second until fourth reports, which was combined and submitted in 11 May 2010, the Egyptian government addressed in detail the government's efforts in the realization of Article 11. Each component such as food, housing, clothing was answered with the government's achievements in providing clean water, healthy sanitation, and establishing national housing projects (*Combined States' Periodic Reports submitted by Egypt, 11 May 2010*). It also marked the establishment of the National Human Rights Council by the Act No. 94 of 2003, in accordance with Paris Principle of 1991

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<sup>8</sup> See above in Section A.

(*Combined States' Periodic Reports submitted by Egypt, 11 May 2010*).

It is a fact that the marginalization and difficulties suffered by the Nubians in the resettlement areas become the underlying reasons of why the Nubians want to return to their ancestral lands near the Nile. Even though the discussions on the Nubians and Decree 444 were absent from those reports, the Egyptian government cannot avoid that it has failed to protect the Nubians' rights under the ICESCR. The Egyptian government is also liable for the marginalization resulting from the displacement suffered by the Nubians. Further, the Decree 444 prevents the Nubians in pursuing a better life with adequate standard of life by going back to their ancestral lands. Therefore, the Egyptian government did not perform its duty in protecting the Nubians' rights under the ICESCR. Moreover, the contrary intention and effectuation of the Decree 444 to the rights recognised by the ICESCR that must be accorded to the Nubians', proved the Egyptian government's failure in fulfilling the full realization of those rights.

#### IV. ACHPR

Other than to several human rights instruments under the United Nations' system, as a state party Egypt is also obliged to adhere to the African Charter on Human and Peoples' Rights. Whether standing as a part of whole population of Egypt or as a part of indigenous people located in Egypt, the Nubians are in both ways entitled to the rights preserved by ACHPR.

By virtue of Articles 1 and 2 of ACHPR, Egypt has the responsibility to recognise and guarantee the enjoyment of the rights and freedoms under ACHPR. It is also promulgated that in recognising the rights and freedoms under ACHPR, States

must "undertake to adopt legislative or other measures to give effect to them". Further, the rights and freedoms shall be accorded "without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status".

Under ACHPR, Articles 12, 14, 22, and 24 are relevant the discussion of the Nubians' right to return to their ancestral lands. The provisions guaranteed the enjoyment of peoples on right to freedom of movement and residence, right to property, right to development, and right to a general satisfactory environment favourable to the peoples' development.

Having submitted reservation to only Articles 8 and 18 (3), Egypt in this particular discussion is obliged to abide by the according of those above-stated rights to all individuals within Egypt's jurisdiction, including the Nubians. Other than reservation, there were several conducts done by Egypt in reference to ACHPR, such as the submission of state's periodic report to the African Commission on Human and Peoples' Rights (ACmHPR).

In its latest state report, the Egyptian government acknowledged that there are human rights problems and stated its readiness to attend those problems (*Concluding Observations of the ACmHPR for Reports submitted by Egypt, 30 December 2004*). Based on that report, ACmHPR recommended the government to "respect the right to freedom of movement and residence". Therefore, by the expressed commitment to address the concerns and recommendations of ACmHPR, Egypt is obliged to inform the steps it has taken between the times to its supposed submission of state report in 2007 (*Concluding Observations of the ACmHPR for Reports submitted by Egypt, 30 December 2004*).

However, not only that the next report was overdue, the government went to blatantly disregard the recommendation given by ACmHPR. Instead of taking action to alleviate the existing human rights problems, implementing the recommendations given by ACmHPR, while also behaving in conformity with ACHPR, the issuance of Decree 444 in 2014 illustrated the government's non-fulfilment of its duties under ACHPR.

ACmHPR noted that the Egyptian government has arbitrarily issued arbitrary declarations of curfews, thus, they had infringed the freedom of movement (*Concluding Observations of the ACmHPR for Reports submitted by Egypt, 30 December 2004*). This corresponding situation with the Nubians' impediment to return to their ancestral lands proved the government's failure to enact domestic law in conformity with its international human rights duties.

Under Article 12, the Nubians' right to their ancestral lands as their properties shall be guaranteed by the State. The government may oppose by justifying that the designation of Decree 444 is for the "public need" and "general interest". Article 12 also mentions that the deprivation of this right based on those two reasons must be in accordance with "the provisions of appropriate laws". However, ACHPR and the 2014 Egyptian Constitution guarantee the right to the possession for the Nubians' ancestral lands. It is very unlikely that the "appropriate laws" would also refer to the laws contradicting the ACHPR. Therefore, rather than Decree 444, the government may only take the Nubians' right by an appropriate law, which adhere to ACHPR.

By pursuing their right to return to their ancestral lands, the Nubians were hoping for better life than the situation they suffered in the resettlement area.

Therefore, the government shall also guarantee their rights to development in their ancestral lands and their rights to have a favourable environment to their development by allowing them to return. For that reason, the issuance and effectuation of Decree 444 have hampered the Nubians to enjoy these rights. It hence evident that the Egyptian government's miscarriage of its international human rights duties is caused by the failure to respect, to protect, and to fulfil the rights exlaimed in ACHPR.

#### **D. Concluding Remarks**

Despite the issue of the constitutionality of Decree 444, it should be evident that Decree 444 is not in accordance with Egypt's international duties bestowed by several legally binding international human rights treaties, especially ICERD, ICCPR, ICESCR, and ACHPR. Even if it can be argued that Decree 444 might be justified under national laws, Egypt could not use its national law to excuse itself from the non-fulfilment of its international duties.

According to Articles 2 and 12 of ICCPR, the Nubians are ought to be granted with the freedom of movement and choosing their residence by the government without being differentiated from other individuals. There were no discussions of the issue of the Nubians in any of Egypt's national reports submitted to the Human Rights Committee. Nevertheless, it cannot be denied that the effectuation of Decree 444 prohibits the Nubians to enter and subsequently to reside in their ancestral lands. For this reason, the Egyptian government has also failed to respect, to protect and to fulfil the enjoyment of the Nubians' rights under ICCPR.

By the issuance of Decree 444, the government have simultaneously disregarded the rights of the Nubians

recognised in ICESCR. It is enshrined in Article 11 that the Nubians have the right to have an adequate standard of living and their families. The government are liable for the marginalization in almost all aspects of life suffered by the Nubians as effect of the displacement. Decree 444, which prevents the Nubians to return to their ancestral lands, manifestly contravenes the rights of the Nubians in pursuing a better life with adequate standard of living.

It has been also proven that the Nubians qualify to be classified as "peoples" referred in ACHPR. The Nubians' right to freedom of movement, as well as to right to property and right to development are guaranteed under ACHPR. By virtue of the obligations, the government should undertake to accord these rights. However, the enforcement of Decree 444 only demonstrated the government's failure to comply with ACHPR.

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## STATELESSNESS: INTERNATIONAL LAW PERSPECTIVE\*

Kaysha Ainayya Sasdiyarto\*\*

### Abstract

Citizenship acts as an identity for an individual to be recognized in the global world. Being Stateless is a different case of 'identity'. This article reviews the phenomenon of Statelessness in international law perspective. Writer will examine how Stateless persons are treated in various example states and to what extent their existence is regulated under international law. Writer will first define the grounding definitions revolving around the concept of citizenship, then will specify to definition and cases of Statelessness. States' sovereignty in the eyes of the international law also have an impact over how Statelessness should be treated in the international community. Human rights in international law also should be examined to understand how approach cases dealing with Stateless individuals.

### Intisari

Kewarganegaraan berperan sebagai identitas bagi seseorang untuk diakui di dunia global. Artikel ini mengulas tentang fenomena tidak mempunyai kewarganegaraan dalam perspektif hukum internasional. Penulis akan melihat bagaimana orang yang tidak mempunyai kewarganegaraan diperlakukan di beberapa negara dan sampai sejauh mana eksistensi mereka diatur dalam hukum internasional. Penulis pertama-pertama akan mendefinisikan istilah-istilah seputar kewarganegaraan, dan kemudian akan menspesifikasikan ke definisi dan kasus dimana seseorang tidak mempunyai kewarganegaraan. Kedaulatan negara dalam hukum internasional juga mempunyai pengaruh terhadap bagaimana orang yang tidak ada kewarganegaraan seharusnya diperlakukan di komunitas internasional. Hak asasi manusia dalam hukum internasional juga perlu dibahas untuk mengetahui cara menghadapi kasus-kasus dimana seseorang tidak mempunyai kewarganegaraan.

**Keywords:** Statelessness, international law, citizenship, sovereignty, human rights.

**Kata Kunci:** tanpa kewarganegaraan, hukum internasional, kewarganegaraan, kedaulatan, hak asasi manusia

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### A. The Concept of Citizenship

There are various definitions of "citizenship". To begin, by looking at the 2017 Merriam-Webster Dictionary, citizenship is simply defined as the status of being a citizen in a State. Similarly, the Duhaime's Law Dictionary defines citizenship as the status of an individual as owing allegiance to, enjoying the benefits of a designated State, and having the right to participate in and to be represented in politics. In other words, citizenship is a collection of rights and obligations that give individuals a formal juridical identity or a status that is bestowed on those who is a member of a community. Anyone who possesses the status of citizenship are equal with respect to the rights and duties with which the status is endowed (T.H. Marshall). As such, citizenship is the result of the legal bond between a State and the person.

The bond or relationship becomes a "political contract", in which a country has constitutional law and sovereignty recognized by the world community (Ko Swan Sik, 2016). In international law, citizenship is seen as a basic human right that an individual in the international community must hold.

As stated by the United Nations, human rights refer to:

"...rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status. Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more. Everyone is entitled to these rights, without discrimination."

In particular, Article 15 of United Nations' Universal Declaration of Human Rights (UDHR) 1948, it states that:

"(1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

Generally, there are three fundamental principles of citizenship in known legal literatures and in practice, i.e. *ius soli* principle, *ius sanguinis* principle, and mixed principle (Asshidique, 2016). From the three principles, the most commonly used principles are *ius soli* and *ius sanguinis*.

*Ius soli* principle means that a person's citizenship is determined based on his/her place of birth (Hau, 2014). Simply put, under this principle, citizenship of a person is determined by the place where a person was born. Subsequently, when a person is considered to be a citizen of a State when he/she is born within such State's territory.

Meanwhile, the *ius sanguinis* principle – or also called as the heredity principle or the bloodline principle – provides that a person's citizenship is determined by his/her lineage, wherein it is inherited from the citizenship of his/her parents (Hau, 2014). As such, a person is considered to be a citizen of a particular State where his/her parents are citizens of such State.

There are numerous causes as to why a person is Stateless. The causes are not only limited to legal causes, but also social and political causes. They include: gaps in nationality laws, State successions, discrimination against certain ethnic and religious groups, and the legacy of colonization. Being Stateless is linked to a person not having their rights fulfilled by the State he/she lives or any State for that matter. Such basic human rights such as going to school, see a doctor, get a job, open a bank account, buy a house or even get married, are not allowed to be acquired because they are not entitled to

those rights by the law. Relating to the aforementioned of the definitions of the citizenship, being a citizen is important for a person to fulfill their human rights designed by any State laws.

### **B. The Regulation of Statelessness in International Law**

UNHR's Refugee Agency describes that a Stateless person is a person that is not a citizen of any state, thus cannot enjoy any states' protection and the rights of which the individual must have gotten. Under UNHCR, a Stateless person is described as "a person who is not considered as a national by any State under the operation of its law". Thus, Stateless people are supposedly recognized in the international community, assumingly contradictory of the normative idea that seemingly only those who hold citizenships are recognized.

The UN released two conventions in regards to fighting Statelessness; 1954 Convention Relating to the Status of Stateless Persons and 1961 Convention on the Reduction of Statelessness. The 1954 Convention establishes the legal definition of a Stateless person, minimum standards of treatment for Stateless people in respect to a number of rights (including the right to education, employment, housing, and more), and a guarantee that Stateless people have a right to identity, travel documents and administrative assistance. By November 2014, the 1954 Convention is ratified by 83 States party. On the other hand, the 1961 Convention establishes an international framework to ensure the right of every person to a nationality, regulating states to establish safeguards in their nationality laws to prevent Statelessness at birth and later in life, establishes that children are to acquire the nationality of the country in which they are born if they do not acquire any other nationality,

establishes important safeguards to prevent Statelessness due to loss or renunciation of nationality and state succession, and setting out the very limited situations in which states can deprive a person of his or her nationality, even if this would leave them Stateless.

There were 61 states party to the 1961 Convention in November 2014. This shows that minority of the States in the world ratify to this Convention which imply there is less fundamental interest or need by many States in which their concern is the Statelessness of the world's population. However, it is important to mention that the Convention's foundation is the article 15 of the UDHR which recognizes that "everyone has the right to a nationality." and "no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." It can be concluded that everyone in the international community shall have a nationality. This means that supposedly the States that adhere to the UDHR, and not necessarily the 1961 Convention, shall have the customary obligation of not discriminating Stateless people and grant people of nationalities when in their territory, by means of following their national laws.

In case of national laws that give strict regulations regarding acquiring nationality in certain circumstance, taking a look at Indonesian Law of Citizenship (12 Year 2006) which states that children shall register their nationalities to the Government maximum of 4 (four) years after the Law is enacted which give difficulties in case of people who are not aware of this Law, then Writer suggests that there shall be revision to the specific regulations in the Law.

According to the UNHCR, there are four main reasons that causes Statelessness:

1. Gaps in nationality laws, concerning the limbo of under what circumstances someone acquires nationality or can have it withdrawn if the law was made thoughtlessly;
2. People moving from countries where they were born, affected by discrimination of gender, races, and ethnicities;
3. Emergence of new states and changes in borders; difficulties for ethnic, racial, and religious minorities in proving their link to the new country's law; and
4. By loss or deprivation of nationality; cases of people living too long outside of their country and changes in law using discriminatory criteria such as ethnicity or race.

From the aforementioned 4 (four) reasons above, it can be seen that each State needs to pay more attention to accommodate population and also have a collaboration in executing the rights of the people of having nationalities.

Referring to the UN Charter, an individual being Stateless or Statelessness is contradictory to Article 15. In the world today, there are around 10 million people who are Stateless (UNHR The UN Refugee Agency). A research shows that at the end of 2013 there were 20 countries worldwide with a reported figure of over 10,000 Stateless persons, making the figure of 10,000 a benchmark of a Stateless people highly-populated State (Institute on Statelessness and Inclusion). The top ten countries of which it is highly populated with Stateless people are Myanmar (810,000), Côte d'Ivoire (506,197), Latvia (267,789), Dominican Republic (210,000), Russian Federation (178,000), Syrian Arab Republic (160,000), Iraq (120,000), Kuwait (93,000), and Estonia (91,281). Many of them are caused by several reasons.

It is worrisome for a great number of people as they will not get as many privileges as their counterparts of people of nationalities do. Writer will explain shortly in the cases of Myanmar and Côte d'Ivoire, who are the first and second top countries experiencing massive Statelessness populations, as example States. Both States also greatly explain the second reason of the four general reasons of Statelessness aforementioned.

In Myanmar, Statelessness is greatly experienced by the Rohingya, which is an ethnic, religious (Muslim) and linguistic minority who predominantly live in the norther Rakhine state. They are heavily discriminated under the regulation of the 1982 Citizenship Act where their specific group is excluded of the lists of the 135-recognised 'ethnic nationalities' of Myanmar. Not only the Rohingya who suffered this, a few of other ethnic groups have been excluded as well. In fact, other reports state that a total estimate of at least 1.33 million Rohingya in Myanmar (1.08 million of whom are in Rakhine state), almost all of whom are Stateless. This shows that even national laws, that are supposed to give care and protection to its citizens, are discriminating them and scraping them off of their basic human rights.

In Côte d'Ivoire, Statelessness of the aforementioned number of people is affected by restrictive national rules that harm the rights of 'descendants of immigrants' (400,000) and 'children abandoned at birth' (300,000), as the government have estimated. Côte d'Ivoire reached its independence in 1960 and in 1972, there was a nationality law that give rights to foreigners/migrants that allow them to be able to opt for Ivorian nationality within one year. However, it was not as effective to the population as there was widespread illiteracy and almost

nobody took the steps. The right to opt was removed in 1973 creating a new national law that favors pure descendants of the country's ancestors. Despite that, immigrants, integrated historical migrants and their descendants were still fully pledged of citizenship as one of the policy of President Félix Houphouët Boigny.

After he died in mid-1990s, Ivorian political leaders adopted a series of measures to deny identification documents to all those who were perceived to be of foreign origin and broke out rebellious acts in 2002. More or less similar to the condition of Stateless population in Myanmar, in Côte d'Ivoire certain ethnic groups are also discriminated into not having the right to citizenship. This again sheds light to how ethnic/race discrimination harms the rights of the immigrants coming to Côte d'Ivoire, as well as affected by unethical political situation, making it a more difficult situation for the people than how it was in the previous regime.

Looking at the cases of international violations above, there needs to be stricter implementation and promotion of the two Conventions to achieve reduced Statelessness in the international community. The ways of which will be discussed in the next chapter.

### **C. To What Extent Shall States Act to Reduce Statelessness?**

Between 2011 and 2015, there were additional 49 accessions to the two Conventions on Statelessness. Still, looking at the few number of States party that ratified both the 1954 and 1961 Conventions is beyond alarming, as in reality there are total of 193 State parties to UN membership by 2011 (UN). In both of the Conventions, many conditions that people of Stateless can benefit from if to

be applied accordingly in all states of the world.

Using the previous State examples, Côte d'Ivoire was not a party of both Conventions until 2013 (UNHCR - States Parties to the 1954 Convention relating to the Status of Stateless Persons and State Parties to the 1961 Convention of the Reduction of Statelessness). This is an appreciative step done by Côte d'Ivoire as an additional State party to the Conventions and in hopes to encourage more States to do so. However, Myanmar has not yet ratified both of the Conventions as the State is nowhere to be seen in the list of State parties. Fortunately, the Conventions are both open to accessions hence it is hopeful that more State shall be parties in the Conventions and help reduce the number of Stateless people in the international community.

The two Conventions already provide a set of comprehensive ways in which States should participate in reducing Statelessness around the world, primarily concerning the ratification and adoption of the Conventions to their national laws. The basic principles of what should the Stateless people get are the basic human rights such as lawful juridical status of the people, getting gainful employment, having basic welfare, and receiving access on the State's administrative facilities as equal human beings to those who have citizenships, compiled in 6 chapters in the 1954 Convention.

The 1961 Convention further promotes now not only the recognition and the definition of Statelessness, but also the condition in which a person has to be given a citizenship when he or she is proven Stateless. Article I Paragraph I states that: "1. A Contracting State shall grant its nationality to a person born in its territory who would otherwise be Stateless. Such nationality shall be granted: (a) at birth,

by operation of law, or (b) upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner prescribed by the national law. Subject to the provisions of paragraph 2 of this Article, no such application may be rejected.”

In this Convention, it is underlined that there are both direct and later measures to which nationality can be acquired, but in essence an individual has to have a citizenship wherever he/she is domiciled all in all to provide those individuals with basic human rights to achieve international welfare. Looking at other human right Conventions, in resonance with Article 2 para. 1 in both International Covenant on Civil and Political Rights (ICCPR) which has 169 State Parties, and International Covenant on Economic, Social and Cultural Rights (ICESCR) which has 166 State Parties, which states are obliged to fulfil everyone’s human rights especially within their respective territories. In the ICCPR, every State Party has legal interest in the performance of every State Party’s obligations (not just their national governments, but also their populations), which emphasizes the importance of collaboration between States in fulfilling their obligation. In the ICESCR, the adoption of the obligations of the States into their respective national laws is the key of fulfilling their obligations (CESCR General Comment No. 3).

Both Conventions upheld the States’ freedom on how to implement their obligations according to their national laws, however in the ICESCR it needs reports and bases made by the States to be publicized so that their measures are not arbitrary. Both Conventions motivate States to utilize their available resources to fulfill their obligations. What Writer wants to stress here is that the articles of the

1961 Convention together with the articles in ICCPR and ICESCR regarding the fulfilment of human’s rights, citizenship included, is that there is no prominent difference in the application of the articles and States shall hand in hand fulfill their obligations as human rights provider.

The existence and application of the two Conventions, complementary with the two Covenants, do not disregard the fact that States, in the international community, are sovereign and have rights to determine their own national laws according to their interests. Such framework is established by exerting limitations for State parties in forming suitable and beneficial laws regarding Statelessness.

Article 9 of the 1954 Convention explains that a State does not have to grant a citizenship to a person that is not in line with national security. Article 2 para. iii (a), (b), and (c) of the same Convention also state that States shall not grant citizenships to people who commit serious, or non-political crimes, and also actions that are against the United Nations. In the 1961 Convention Article 2 (c) explains that citizenship shall be granted to those who do not commit crime against national security or being imprisoned for more than 5 (five) years, which in a *contrario* it means that citizenships shall not be granted to people who commit such actions.

The limitations stipulated by both Conventions already set the very appropriate extent to which State parties shall adhere to the Conventions. It is largely necessary that State parties shall take into account closely to each and every provision stated in both Conventions and apply them to their national laws judiciously and not arbitrarily disregard them.

#### **D. Conclusion**

With the stated data and facts, Statelessness is indeed an international problem that needs to be studied, analyzed, and reduced. Stateless individuals generally do not possess basic human rights that State(s) offer and provide for. Various reasons can cause the Statelessness condition of a person and the general four of them have been mentioned in the analysis. This ultimately brings severe disadvantages to them because in the international community, human rights are recognized as the rights that are non-degradable.

It is true that each and every one of States in the international community have sovereignty over their own laws and regulations, but they must not ignore the fact that they play great roles in bettering many of the world's population lives in general more importantly with collaboration.

One of the best ways to achieve such desired situation is to be State Party to the 1954 Convention Relating to the Status of Stateless Persons and 1961 Convention on the Reduction of Statelessness. It is an important action to do so because both Conventions, provided by the UN, administer the steps in which countries should pay more attention to the phenomenon of Statelessness as well as the ways to scaling it down.

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## “LET THEM DROWN”: STATES' OBLIGATION OF NON-REFOULEMENT VIS-À-VIS THE ENTRY OF REFUGEES THROUGH WATERWAYS\*

Mohamad Ibnu Farabi\*\* and Rininta Ayunina\*\*\*

### Abstract

Under the current regime of international law, and even positively promoted in customary international law of which the status is undoubtedly obligatory, States have the exclusive obligation of non-refoulement for refugees seeking asylum in its territory. Meanwhile, a lot of fluxes in numbers of asylum seekers come through waterways – mainly boats of refugees. The very existence of those boats in itself arguably entails obligation for coastal states to exercise jurisdiction accordingly in its territory, especially its search and rescue (“SAR”) territory. The sudden influx of number of refugees, however, for States are especially worrisome. It has reached a systematic crisis level rather than an emergency. It is unquestioned that States' position in response to this is to think of refugees as burden to its wealth and security. This may lead to instances where States leave the refugees as they are, floating on water, or in other words; let them drown. One particular question then arises; is it not violating States' fundamental obligation to treat people in its jurisdiction's right to life? This paper will elaborate on States' obligation to conduct SAR under current regime for boats in its jurisdictional area, as well as the conjunction to States' jurisdiction in order to secure States' obligation to ensure human rights of people and refugees, especially to its obligation of non-refoulement.

### Intisari

Di bawah rezim hukum internasional saat ini, yang bahkan secara positif dipromosikan dalam hukum kebiasaan internasional yang statusnya wajib, negara-negara memiliki kewajiban eksklusif untuk tidak melakukan penolakan bagi para pengungsi yang mencari suaka di wilayahnya. Namun, banyak jumlah pencari suaka datang melalui jalur air – terutama kapal pengungsi. Keberadaan kapal-kapal itu sendiri memberi kewajiban bagi negara-negara pesisir untuk menjalankan yurisdiksi sesuai wilayahnya, terutama wilayah pencarian dan penyelamatannya (“SAR”). Masuknya jumlah pengungsi secara tiba-tiba sangat mengkhawatirkan bagi Negara. Hal ini telah menjadi krisis sistematis dan bukan lagi keadaan darurat saja. Tidak diragukan lagi, Negara dalam hal ini menganggap pengungsi sebagai beban bagi kekayaan dan keamanannya. Hal ini menyebabkan negara-negara meninggalkan para pengungsi begitu saja, mengambang di atas air, atau dengan kata lain; membiarkan mereka tenggelam. Pertanyaan yang kemudian timbul; bukankah hal ini melanggar kewajiban dasar negara untuk melindungi hak hidup orang-orang dalam yurisdiksinya? Makalah ini akan menguraikan kewajiban Negara untuk melakukan SAR di bawah rezim saat ini untuk kapal di wilayah yurisdiksinya, serta hubungannya dengan yurisdiksi negara dengan kewajiban Negara untuk menjamin pemenuhan hak asasi manusia dan pengungsi, terutama terhadap kewajibannya terhadap prinsip non-refoulement.

**Keywords:** Non-Refoulement, Refugee, Refugee Convention, State Obligation

**Kata Kunci:** Non-Refoulement, Pengungsi, Konvensi Pengungsi, Kewajiban Negara

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### A. States' Obligations of Non-Refoulement at Sea

Principle of *non-refoulement* is expressed firstly in Art 33(1) of the 1951 Geneva Convention relating to the Status of Refugees [**1951 Refugee Convention**] where it protects refugees against being returned to a risk of persecution, which states that:

*"No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion"*

In addition, there are several international instruments, which also pronounce the principle *non-refoulement*, such as Art. 7 of International Covenant on Civil and Political Rights (ICCPR), and Art. 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The principle of *non-refoulement* is considered to be a rule of Customary International Law (J.C. Hathaway, 2005, p. 233, p. 363-367), and hence binds all States – regardless of whether they are parties to these international conventions or not.

Following to the aforementioned provision, Art. 33(2) of the 1951 Refugee Convention gives limitation, wherein this benefit may not be claimed by whom there are reasonable grounds to regard them as a danger to the security of the Country in which he is entering, or by whom there are conviction by a final judgment of a particularly serious crime which constitutes a danger to the community of that country. The 1951 Refugee Convention not only covers recognized refugees but also asylum seekers waiting for status determination. Further, as stated in European Court on Human Rights' case *M.S.S. v. Belgium and Greece*, it also bans both the return to a country where a person would be at risk of persecution or serious harm (direct *refoulement*) and the return to countries where individuals would be exposed to a risk of onward removal to such countries (indirect or onward *refoulement*).

In the implementation of principle of *non-refoulement*, there are two main issues arising out of it, which are, (1) *when* the rejection of an individual can lead to the violation of the principle of *non-refoulement* and, (2) *who* are the individuals protected by this norm.

As the obligation of *non-refoulement* is the only guarantee that refugees will not be returned to persecution causing the departure, it becomes the core of asylum-seekers protection (Feller et al., 2003, p. 87), however it does not guarantee the access to the territory of the destination State or admission to the procedures granting the refugee status. Although there exists the principle of *non-refoulement* at the frontier, which in its meaning of "non-rejection at the frontier" is mostly shared today (Lauterpacht and Bethlehem, 2003, p. 113), but its application to interdiction operations on the high seas or within territorial waters is less clear because of the difficulties related to the determination of the moment of enter into the territory for sea-borne asylum-seekers.

The unlawful entry of asylum-seekers does not exclude them from the scope of application of the *non-refoulement* principle as guaranteed in Art 31(1) of 1951 Refugee Convention (Hathaway, 2005, p. 386). Furthermore, the non-rejection at the frontier was included in the principle of *non-refoulement* in the instruments subsequent to the 1951 Refugee Convention. However, Art 3(2) of the 1967 Declaration on Territorial Asylum states that exception may be made only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.

As the UNHCR has played an important role both in the evolution of the principle of *non-refoulement* to include cases of rejection at the frontier as well as in the evolution of the interpretation of Art. 33, there exists a discrepancy between the *rationae personae* application of the 1951 Refugee Convention and the content of the mandate of the UNHCR. Protection of five

categories of individuals under the mandate of the UNHCR has expanded progressively; (1) those falling under the definition of the 1951 Refugee Convention and 1967 Protocol; (2) broader categories recognized by States as entitled to protection and assistance of the UNHCR; (3) those individuals for whom the UNHCR exercised 'good offices'; (4) returning refugees; (5) non-refugee stateless persons. Meanwhile, the 1951 Refugee Convention applies to the so-called "statutory refugee", i.e. "[the term refugee shall apply to any person who] owing to well-founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or opinion [...]"(UNHCR, 1992, para.11).

Individuals do not possess a subjective right of asylum but he/she is merely entitled to request the status of a refugee and the required State has a discretionary power to accept or refuse the request (Pallis, 2002, p. 329, 341). Notwithstanding the discretion of States, preventing an individual from presenting the request can imply a breach of Art 14 UDHR in its meaning of "right to request" which is safeguarded by the principle of *non-refoulement*.

Particularly in sea regimes, Art. 2(1) of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) provides that, "*the sovereignty of a coastal State extends, beyond its land territorial and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the, described as the territorial sea,*" (Nordquist (ed.), 1993, p. 266). The only general exception to the exclusive powers of the coastal State in its territorial sea consists of the right of innocent passage as stated in Art 17 UNCLOS (Dupuy and Vignes (ed.), 1985, p.688). However, in Art 25 UNCLOS, the coastal State can also prevent a passage which it considers not innocent and suspend the related right in specific areas of its territorial sea when this "is essential for the protection of its security."

Furthermore, Art. 33 of the 1951 Refugee Convention applies to the States

parties' territory including the territorial sea. Since the first State of arrival has the duty to host refugees, at least temporarily, pursuant to the concept of "territorial asylum", the vessel transporting refugees cannot be impeded from entering into the territorial sea upon its arrival at the border of the territorial sea, nor can it be *refoulé* to high seas or to territories where the risk of persecution exists (Trevisanut, 2008, p. 223).

Refugee protection and States' interests pursuant to the law of the sea are not completely incompatible. Moreover, the principle of safety of life at sea permits guaranteeing to boat people minimum protection standards, which are completed by the non-rejection at the frontier dimension of the *non-refoulement* principle for asylum-seekers.

As such, although States possess sovereignty under UNCLOS, the principle of non-rejection at the frontier and eventually *non-refoulementis* still in effect insofar as that territory is the rightful territory of the coastal State's as pronounced in the Refugee Convention.

## **B. States' Obligation to Ensure Right To Life vis-à-vis SAR Operations**

It is out of question that right to life has attained a certain degree of customary international law. Right to life has been pronounced in numerous human rights instrument of which all of them is of particular prominence to States alike, such as Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, as well as regional instruments of human rights such as the American Convention on Human Rights, African Charter on Human and Peoples' Rights, ASEAN Human Rights Declaration, European Convention on Human Rights, and many more. The existence of this pronouncement ultimately means that most, if not all, States in the world are under a positive law regime to protect the rights of the people in its jurisdiction.

In those instruments, not only that States have the obligation to refrain from arbitrary deprivation of life, but this is also a positive obligation for States to protect

the right to life of the people in its jurisdiction by taking appropriate measures to safeguard the lives of the people. This is particularly outlined in the case of *Osman v. United Kingdom*:

*'Where there is an allegation that the authorities have violated their positive obligation to protect the right to life (...), it must be established to the [Court's] satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk'.*

This obligation also includes the obligation to conduct emergency measures in cases where risk may be identified. In the case of *Furdik v. Slovakia*, it is outlined that States have the obligation to perform emergency services in cases where certain risks have been made known to the authorities of the State.

Not only when the risks are made known explicitly, States also have obligation when risks are implied. This is taken *per analogiam* from the case of *Kemaloglu v. Turkey*, in which it was regarding a seven-year-old elementary school student frozen to death from its way back to school. In such case, the school closed early due to snow blizzard, but the authorities failed to inform the shuttle authorities hence leading up to the lateness in the shuttle's arrival. In the meantime, the boy froze to death. Ultimately, the Court decided that Turkish authority failed to take the necessary measures to provide emergency services, which eventually led to the death of the boy. This is of particular importance to States, as this lay out the obligation of States to conduct *due diligence* to avoid risks that may entail from not doing so.

These cases aforementioned are not without importance. These cases mostly concern the peoples' right to life, and States' positive obligation to safeguard such right –by performing emergency measures and due diligence. This is of

particular importance to SAR operations, as will be further elaborated in the following paragraphs. However, to start with, it should be noted that SAR operations is laid out in UNCLOS, particularly in article 98 as follows:

1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

- (a) to render assistance to any person found at sea in danger of being lost;
- (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him; (...)'

These obligations are also included in numerous conventions, such as 1974 Convention for the Safety of Life at Sea (SOLAS Convention), the 1979 Search and Rescue Convention (SAR Convention), and the 1989 International Convention on Salvage.

However, a link is missing; when does jurisdiction start? When does a State start to have the positive obligation to protect the rights of the people in the sea? When does the human rights instrument imposing positive obligations for States start to have binding force? This is then where the aforementioned cases take importance.

Based on the case of *Furdik v. Slovakia*, jurisdiction starts when risks become known to States. With this in mind, we can infer that particularly in cases of SAR operations, States have jurisdiction over the people in the seas after a distress call has been made. Even then, it is hard to tell if the distress call is made from high seas –no one's SAR zone—and therefore there is no positive obligation from regimes of international law (Trevisanut, 2014, p. 12). It is different if the distress call is made from SAR zone of a coastal state, in

which case it will be the obligation of the State to follow-up the distress call.

Even if there is no distress call, if we were to take the case of *Kemaloglu v. Turkey per analogiam*, States still have the obligation of due-diligence in its SAR zones. This is to identify risks and take necessary measures to ensure the protection of people in its SAR zones. Ultimately, SAR is of an undeniable obligation for States, especially after a distress call.

As is made clear in the previous sections, States have the obligations to accept people in its frontier. This obligation shall be effected duly and accordingly before States may take arrangements to transfer the asylum seekers to a third State. This is of course an obligation from an international law regime, which eventually lies on jurisdictional matters.

With regards to SAR obligations, it needs to be taken into account that what is required by customary international law is to render assistance to any persons. Asylum seekers through boats, especially but not limited to those in distress, will undeniably fall into such category. SAR obligation also has to be into account in order to effectively protect the people in the SAR zones' right to life, as inside coastal States' SAR zones would ultimately mean being in the State's jurisdiction as has been extensively elaborated in the previous section.

Sea regimes in UNCLOS specifically lay out the areas of which coastal States may have certain jurisdictional powers, and this is especially important in the current topic. Being in the regulated sea regimes of UNCLOS except for high seas would automatically mean that a boat is inside a place of possible jurisdiction of the coastal State. Even being in the high seas, calls of distress would be a bridge to establish jurisdiction with a particular flagship met in the voyage.

This therefore leads to the fact that *non-refoulement* obligation of coastal State has to most of the time, if not always, be effected. Any SAR operations conducted to a refugee boat would then entail that those refugees enjoy –arguably—the *right* to be rescued, and after entering ports, right to be accepted in the coastal State, pending a possible arrangement to send those refugees to a third State.

### C. Conclusion

As is explained in previous sections, the obligation of States of *non-refoulement* is a customary international law obligation, wherein it is already codified by numerous instruments. This then means that save in circumstances stated in the limitations of the obligations, States will have to accept refugees.

Further, States have the obligation of due diligence to conduct SAR operations in their waterways –which would lead to the findings of refugees entering through their waterways. Considering the right to life of the refugees come to play, in which the States will have to save the refugees in accordance with this right.

Eventually, the obligation of *non-refoulement* and SAR obligations, as well as the protection of right to life of the people rescued is mutually inclusive. States do not have the right to “let them drown” –and this obligation needs to be acknowledged now, more than ever, especially after influx of refugees become a systematic crisis. On the burden placed upon the States' shoulder, that is an inherently, entirely different issue. Albeit such, States still have the obligation to save the refugees coming in through waterways, and accept them pending certain further arrangements.

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## SINK THAT VESSEL! : REFLECTING INDONESIA SINKING VESSEL POLICY IN LIGHT OF UNCLOS\*

Kaizar Nararya\*\* and Emilio Bintang Risanda\*\*\*

### Abstract

The practice of Illegal, Unreported and Unregulated (“IUU”) Fishing has seen substantial growth, primarily in South East Asia. In light of this Indonesia had displayed a more stringent approach in eradicating IUU fishing, and since the adoption Agreement On Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported, and Unregulated Fishing in 2012, Indonesia has frequently conducted Maritime Law Enforcement (“MLE”) over IUU Fishing vessels in form of destruction of the apprehended vessels. This Practices are similar to MLE Practice adjudicated by ITLOS in Tomimaru and Honshimaru, which remained contentious to this day

### Intisari

Praktek Perikanan Ilegal, Tidak Dilaporkan dan Tidak Teratur (“IUU”) telah mengalami pertumbuhan yang substansial, terutama di Asia Tenggara. Mengingat Indonesia ini telah menunjukkan pendekatan yang lebih ketat dalam memberantas penangkapan ikan IUU, dan sejak diadopsinya Perjanjian Tindakan Portabel untuk Mencegah, Menghilangkan dan Menghilangkan Perikanan yang Tidak Terukur, Tidak Dilaporkan, dan Tidak Teratur. Pada tahun 2012, Indonesia telah sering melakukan Penegakan Hukum Laut (“MLE”) di atas kapal Perikanan IUU dalam bentuk penghancuran kapal yang ditangkap. Praktik ini mirip dengan MLE Practice yang diadili oleh ITLOS di Tomimaru dan Honshimaru, yang tetap diperdebatkan sampai hari ini.

**Keywords:** illegal fishing, UNCLOS, ITLOS  
**Kata Kunci:** perikanan illegal, UNCLOS, ITLOS,

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### **A. Sinking Vessel Legal Regime of IUU Fishing In Indonesian Exclusive Economic Zones**

Indonesia has displayed a more stringent approach towards the eradication of Illegal, Unreported, Unregulated (“IUU”) Fishing in its jurisdiction, as demonstrated by the recent sinking of F/V Viking, one of the last of the six vessels of the Bandit 6, which was one of a series of illegal fishing vessels wanted by Interpol and various other national authorities.

After receiving reports regarding F/V Viking’s unreported entry into the Indonesian Exclusive Economic Zone (“EEZ”) from various sources, Task Force 115 arrested F/V Viking for *inter alia* failing to identify herself and her seafaring data as prescribed in Article 193(2) of Indonesia’s Seafaring law, Article 14 of Indonesia’s Governmental Regulation regarding Navigation, and Article 27(3) of Law No. 31 of 2004 regarding Fisheries. Consequently, based on Indonesia’s positive law, F/V Viking was destroyed by Indonesian Taskforce 115 on the basis of sufficient preliminary evidence.

Amongst these notable policies, the bulwark of maritime enforcement in relation to the Vessel Sinking Policy can be seen to be regulated in: Law No. 45 of 2009, Law No 34 of 2004, Law No. 17 of 2008, Governmental Regulation No. 5 of 2010, Law No. 31 of 2004, Presidential Regulation No. 115 of 2015, Presidential Regulation No. 43 of 2016, Ministry of Maritime Affairs and Fisheries Decision KEP.50/MEN/2012, and Ministry of Maritime Affairs and Fisheries Decision KEP.34/MEN/200.

In protecting Indonesian fisheries, The Ministry of Maritime Affairs and Fisheries is supported by the Navy, Coastguard, Sea Police, and Water Transportation Directorate. In executing their respective duties, Article 69(4) of Law No 45 2009 gives them the authority to conduct specific actions such as burning down and / or sinking foreign fishing vessels based on sufficient initial evidence. According to the aforementioned article, sufficient initial evidence is deemed to

have been gathered when the investigator believes that there is strong enough indication of a criminal act that a certain foreign vessel is fishing without having the proper permit. Upon satisfying the requirement of sufficient preliminary evidence, investigators are enabled to take further action.

While the Article does not define the extent of the supervised areas, it is implied that the effective area of operation is within the established Archipelagic Waters of Indonesia through Law No.17 of 1985, which signifies Indonesia’s ratification of the UNCLOS. Therefore in doing so, Indonesia referred to its right to conserve its natural resources within its EEZ as stated in Article 56(1)(a) of UNCLOS. In result, the law in regard to the National Army mandates the Indonesian Navy *inter alia* to conduct national defense at sea, maintenance of sovereignty and law enforcement at sea within national waters.

In the particular case of IUU Fishing, the Navy would then have a role in the sinking of foreign vessels in the investigation stage based on the orders of a court. The newly issued Presidential Regulation No. 115 of 2015 established Task Force 115 that has the specific duty of eradicating IUU Fishing within Indonesian waters. As stated in Article 2 of such Presidential Regulation, Task Force 115 has the authority to take necessary legal measures needed to deal with IUU Fishing. Task Force bases its policies on a Ministry of Maritime Affairs and Fisheries decision where a national plan was drafted to mitigate IUU Fishing Based on the IPOA-IUU Fishing 2001 (No.Kep.50/MEN/2012 concerning National Action Plan for the Prevention and Mitigation of IUU Fishing).

### **B. Court Practice Relating to IUU Fishing**

By the end of 2016, Indonesian Authorities had sunk a total of 115 illegal fishing vessels within its waters. (Sentosa, 2010) Among the sunken vessels, one of the most prominent string of cases were the IUU Fishing cases involving PT. Sino Indonesia Shunlida Fishing.

In one of the cases adjudicated by the High Court of Jayapura, the accused Guo Yunping, the Fish Master of F/V Sino – 29 was sentenced to three years in prison with a fine of Rp. 1.000.000.0000 with additional 6 months of detention. The Court declared Guo Yunping to be guilty of violating Article 93(1) in conjunction with Article 27(1) of the Indonesian Fisheries law. Article 93 and Article 27 of the Fisheries Law regulates the need for fishing vessels, domestic and/or foreign to possess fishing permits whenever fishing is conducted within Indonesian waters.

The Court further charged the accused under the consideration that through the wide media coverage of the sinking of IUU Fishing vessels, it still had not inhibited the intentions of the accused to conduct a fishery crime. Additionally, the Court felt that due to the State's yearly loss of Rp.30.000.000.000.000, it was necessary to further punish the accused by ordering the destruction and prolong the imprisonment so as to create a deterrent effect in conducting IUU Fishing. Thus, in accordance with Article 76A of Indonesian Fisheries Law, F/V Sino – 29 was destroyed by the National Authorities.

### **C. Setting Out Coastal State Regulatory Rights In the EEZ**

To determine whether demolition or sinking foreign vessels policy as illustrated above, are in compliance with the rules and limits set out by the United Nations Convention on the Law of The Sea 1982 (UNCLOS), one must first determine what are the various coastal state competences in her own EEZ?

Article 58 (1) of UNCLOS, and when read together with Article 56 (1), represents a clear polar concepts that are intertwining, a form of tug-of-war, where one polar represent the freedom of navigation along with the freedoms of other state in a coastal state's EEZ and another polar that upheld the sovereign rights that is given to other coastal states in another state's waters (Hoffman, 2011). While Article 56 (1) of UNCLOS and

related articles<sup>1</sup> represents regulatory power of the Coastal State, Article 73 and its related articles <sup>2</sup>represents Maritime Law Enforcement (“MLE”) powers, and both of these subdivisions of Coastal powers are to be taken into consideration in the application of Article 58 of UNCLOS.

### **D. Coastal State Regulatory Powers against IUU Fishing**

Coastal states are given the exclusive right to determine the total allowable catch pursuant to Article 61 (1) of UNCLOS, and consequent to such right, Coastal states may also take proper conservation and management measures in order to maintain and promote optimum utilization, additionally any surplus of the allowable catch must be allowed to be transferred to third state. The logic that flows from this interaction is that nationals of other state that wish to fish in the EEZ of the Coastal state must comply with the fishing laws and regulation, and similarly the laws enacted by the coastal state must strictly abided by third states (Enderson, 2006).

In the application of Article 56 (1), Coastal state are given a far-reaching regulatory power, this include the ability to set the definition of operable vessels, the standard of equipment that are utilized, the types of fish that are permissible to be harvested, and the amount of harvest in the EEZ (Tanaka, 2012).

### **E. Sinking Vessel Policy as a part of State Regulatory Powers against IUU Fishing**

With the vast arrays of technological developments there are certain mode of commercial activities that may not be necessarily covered in the UNCLOS. Activities such as bunkering, refrigerating, transship and other modes of support

<sup>1</sup> Stemming from Article 56 (1) of UNCLOS, the Coastal State Regulatory Rights are also found throughout Article 60-68 of UNCLOS that represents a far-reaching Regulatory power of the state.

<sup>2</sup> Article 73 of UNCLOS are to be read together with Section 7 of the Convention that sets-out the limitation and safeguards in proceeding with enforcement powers.

vessels that deliver supplies and workers now exist and are operating in EEZ in a manner that was not previously specifically regulated by UNCLOS (Ndiaye, 2011),

Thus, the question arises whether the regulatory or enforcement measures adopted by coastal state that are not specifically set out in the UNCLOS are permissible. In short, coastal states may still enact laws and adopt regulatory measures not specifically mentioned in the UNCLOS as long as the measures adopted are within the spirit or are in direct connection of the existing provisions (Schatz, 2016).

ITLOS has reviewed various efforts by coastal state to extend the application of regulative measure in EEZ that are not specifically set out in UNCLOS, for example in the *M/V Virginia G Case* and *M/V Saiga* where The Tribunal questioned whether Guinea and Guinea-Bissau have the jurisdiction to extend its anti-bunkering law and Customs Law in its EEZ. In both of these cases the tribunal unanimously found that the bunkering of fishing vessels are an application of Article 73 (1) that is compliant with the spirit of Article 56 (1) of UNCLOS.<sup>3</sup> The reasoning behind the decision was then further amplified and are adopted as standards assessing whether a particular measures are indeed “extendable” to a coastal state’s EEZ. (Scovazzi, 2015).

This standard is further known as *Direct Connection Standard*. The standard put forward one simple standard in order for a particular measures to qualify as “Extendable” to the EEZ, which is the question whether such measures are (a) In Direct Connection with existing provisions, (b) Supportive and/or accommodating the execution of a particular existing rights, and (c) do not violate the flag state’s rights provided in the Convention (Schatz, 2016; Gullett, 2004).

The wording of Article 69(4) of Law No. 35 Year 2009, it states that *that the*

*authority to conduct specific actions such as burning down and / or sinking foreign fishing vessels [is] based on sufficient initial evidence.* As such, these do not amount to a regulatory power, but a form of MLE. Albeit the discussion on MLE will be discussed in the following part, the principles of *Direct Connection Standard* remains valid to be applied as a test of necessity in MLE thereby shall still be taken into account while applying the test in Article 73.

#### **F. Coastal State Maritime Law Enforcement Powers against IUU Fishing**

As noted above, the sinking vessel policy is a form of MLE, and the nature of MLE are essentially to support and enforce the normative framework. In essence MLE, coastal states are equipped with the ability to enforce certain measures as dictated in Article 73 (1) UNCLOS. This includes the right to board, inspect, arrest and conduct judicial proceeding (Tanaka, 2012). Such article sets out that any enforcement measures may only be conducted when such measures are deemed *necessary* to ensure compliance with the coastal state’s laws<sup>4</sup>

At its core, the necessity test seeks to ask whether the MLE measures undertaken by coastal state *payed particularities to circumstances of the case, as means of last resort, and considered the gravity of the MLE in regard to the scale of the violation*<sup>5</sup> (Gao, 2012). Additionally, other safeguards to MLE Measure are the requirement of Prompt Release as elaborated in Article 73 (2) arrested vessels and crew must be promptly released upon posting of a reasonable bond or other security (Hoffmeister, 2010).

With regard to posting bonds, the Flag state may commence proceedings against the coastal state for its alleged failure to

<sup>3</sup> See *M/V “Saiga” Case* (Saint Vincent and the Grenadines v. Guinea), International Tribunal for the Law of the Sea Case No. 1 and The *M/V “Virginia G” Case* (Panama v. Guinea-Bissau), ITLOS, Case No. 19, Merits, Judgment, 14 April 2014, ¶¶ 215, 452

<sup>4</sup> See *In the Matter of the Arctic Sunrise Arbitration (The Netherlands v Russia)*, PCA case no. 2014-02 [2015] *Arbitral Tribunal* that seeks to elaborate the standards of necessity. in *Maritime Law Enforcement*.

<sup>5</sup> See ITLOS, *The M/V “Virginia G” Case*, ¶¶ 256-257.

comply with the requirement of prompt release, which is the case when the Coastal state fails to post a bond in a prolonged manner, or the bonds that were posted are considered unreasonable in value (Barret, 1998) Other safeguards that are in place for the purpose of the application of MLE are posited in Article 73 (4), which put forward the requirements that coastal state shall notify flag state in cases of arrest or detention of a foreign vessel, including an IUU Vessel. However, the most contentious and highlighted safeguards in the context of this journal, are put forward in Article 73 (4) whereas it is stated that *unless the states had agreed otherwise, imprisonment shall not be an viable recourse for retribution in case of violations of laws applicable in EEZ*, and that corporal punishment is explicitly prohibited.

This dilemma is best painted in the *M/V Saiga* case, where prompt release was ordered without any form of penal action even though the *M/V Saiga* was indeed operating against the laws of Guinea. This decision to the horrors of some of the judges, might cause negative implications in the future as some see that compliance with the Tribunal decision might potentially undermine coastal state enforcement programs, as upon posting bonds, the coastal state is required to release the IUU vessel, thus re-introducing illegal fishers into circulation.<sup>6</sup>

Taking this caveat, we shall see that several states dismiss the prohibition of detention and imprisonment in lieu of deterrent effects,<sup>7</sup> and thus raises the question of whether this allows Indonesia to apply its Sinking Vessel Policy?

#### **G. Sinking Vessel Policy as a part of State's MLE Powers against IUU Fishing**

Although there is no mention of destruction or sinking an IUU vessel as a

recourse of MLE, it is arguable that in principle, an MLE that is not explicitly mentioned in the Convention, such as confiscation and destruction of foreign vessels can indeed be justified, ITLOS had indeed recognized that many states have forfeiture provisions and other MLEs aimed at the prevention and deterrence of illegal fishing activities. This was confirmed in the *Tomimaru* case. Thus, it is possible for the Authors to draw parallels between Confiscation and Demolition/Sinking Vessel.

For the purpose of this paper, the requirement to test the validity of an MLE can be summarized as shown next.

#### **H. Sinking Vessel Policy is not prohibited under any provision of the convention; Article 73 (1) is not exhaustive**

Article 73 (1) is non-exhaustive (Blakely, 2008) and thus, allowing MLE to extend further than what is listed. Article 73 (1) is construed to be an open-ended provision, similar to the construction of Article 56 (1). As observed above, the construction of Article 56 (1) of the Convention is similarly open-ended thereby non-exhaustive to accommodate and to be read together with other provisions (Scovazzi, 2015). Subsequently, destruction and sinking foreign vessels as MLE measures is not excluded. Article 73 (1) may allow extension of MLE measures, as long as such MLE measures are in direct-connection, and are not prejudicial against other provisions.

In addition to this, precedents in ITLOS have accepted MLE Measures not listed in Article 73 (1) as permissible,<sup>8</sup> given such measures are (a) In Direct Connection with existing provisions, (b) Supportive and/or accommodating the execution of a particular existing rights, and (c) do not violate the flag state's rights provided in the Convention, particularly in connection with the Coastal State's right to Prompt Release (Schatz, 2016; Gullett, 2004).

<sup>6</sup> See Dissenting Opinion of Vice President Wolfrum and Judge Yamamoto in the *The M/V "SAIGA"* Case, ¶ 9

<sup>7</sup> See Separate Opinion of Judge Jesus, para 6 (stating that confiscation measures are supported by undisputed state practice)

<sup>8</sup> See deliberations in *M/V Virginia G*, ¶ 257, See also *Tomimaru Case*, ¶¶ 72, 74.

**I. Demolition of IUU could manifest as necessary**

Article 73 (1) allows states to take measures as *may be necessary* to ensure compliance with its laws and regulations relating to living resources. One might be able to argue that this is indicative that new MLE measures, such as confiscation or sinking IUU Fishing vessels, might be a permissible. To adjudicate this, it is wise to reflect the construction of article 73 in general. Firstly, the drafting committee repeatedly opted to allow for broader enforcement jurisdiction in Article 73, as compared to that in other LOSC articles providing for enforcement jurisdiction. Hence, it might act as a possible recourse to justify additional MLE Measures (Blakely, 2008).

Secondly, MLE Measures must comply with the *necessity* test posited in *M/V Virginia G* and *The Red Crusader Case*, wherein Confiscation MLE measures are to be justified when it “*payed particularities to circumstances of the case, as a means of last resort, and considered the gravity of the MLE in regard to the scale of the violations.*”<sup>9</sup>

Judge Ndiaye in *M/V Virginia G* stressed that MLE Measure must be necessary to produce certain goal, and must be conducted in due regard to the gravity of the violations. As illustrated in that case, Confiscation of *M/V Virginia* are only permissible if the measures are proportional with the intended deterrent effect. The severity of MLE Measures must take into consideration the severity of the measure in per-case basis to prevent exceedingly unnecessary damage.

One may still argue that destruction of IUU fishing vessels is indeed *necessary*, especially in Indonesia noting that the government annually loses Rp.30.000.000.000.000 due to IUU Fishing. One may argue that destruction may be a viable option to increase deterrence against future IUU Fishing.

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<sup>9</sup> This formed the two-pronged test of Article 73 (1): Necessity and Proportionality. For further elaboration of the matter, see *ITLOS, The M/V “Virginia G” Case*, ¶¶ 256-257.

Several judges in ITLOS opined that confiscation and destruction of IUU Vessels – though not expressly regulated under Article 73(1) – might just be proportional to produce deterrent effect.

**J. No denial of Prompt Release and offered the flag state to challenge the MLE Measures**

In the *Tomimaru* case, the Tribunal put extra emphasis on the distribution of rights between the coastal state’s authorities to conduct MLE with the Flag state’s right to challenge the confiscation before national court. Although the court does not specifically set out where one can draw the balance, it is evident that *prompt release* standards apply indefinitely.

In essence, MLE measures – either confiscation or destruction – cannot interfere with the function of Article 292, which is the ability of flag state to submit challenge against MLE measures. Therefore, the protection is only true when there is indeed a link between the vessel and the flag state.

As noted in the *Tomimaru* case, the main hurdle to confiscation was the existence of Japan’s right to submit against Russia as a consequence of operation of Article 292 of the convention. On the contrary, the absence of a link between the vessel and the flag state, (*as in the case of IUU Fishing vessels apprehended by Indonesian authorities*) might effectively allow MLE measures, such as confiscation and destruction without regard to *prompt release* right of the flag states.

**K. Conclusion**

In conclusion, there might not be a possible means to determine whether destruction as an MLE Measure is indeed justifiable. One can draw from past precedents to imply that Article 73(1) is non-exhaustive. This creates a leeway to extend the applicable MLE Measures.

As elaborated previously, the destruction of IUU fishing vessels as an MLE Measure is inherently “extendable” as long as such extension is deemed to be *necessary*. However, the parameter of

necessary may be arguable, bearing in mind the rate and gravity of the loss incurred by Indonesia that was caused by the IUU fishing.

Additionally, as far as Indonesian practice goes, the vessels are merely IUU Fishing Vessels that are not recognized by their flag-State. This practically allows Indonesia as a State to adopt far-ranging MLE measures with less restriction set by the *prompt release* standards.

Lastly, the demolition measures could not be considered as arbitrary, as any MLE Measure requires prior court decisions.

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## DESIGNATING THE ARCHIPELAGIC SEA LANE (ASL): THE “EPILOGUE” OF THE LEGAL DEVELOPMENT OF INDONESIA’S MARITIME REGIME\*

Gilang Al Ghifari Lukman\*\*

### Abstract

Throughout the past decades, the legal framework governing Indonesia’s maritime regime has experienced various changes. This is apparent during the enactment of the 1957 Djuanda Declaration and the 1982 UN Convention on the Law of the Sea (UNCLOS) when the novel concept of archipelagic State was introduced. This paper reviewed the historical development of this concept up until the recent issue of designating archipelagic sea lanes (ASL) in Indonesia. Dubbing this issue as the epilogue of Indonesia’s journey towards archipelagic statehood, this paper focuses on (1) the importance of designating ASL for archipelagic States, (2) the kind of considerations that pose challenge to its designation and (3) how these challenges have particularly affected Indonesia’s reluctance to open ASL routes which are internationally sanctioned, particularly with regards to the East-West route. This paper found that such hardship stems from the lack of clarity in relevant UNCLOS clauses on archipelagic States as well as from the inherent rivalry between flag and coastal States. Security concerns have also been crucial in explaining Indonesia’s reluctance to fully abide by international demand. The paper ended with some possible pathways and policy recommendations that Indonesia may take with regards to its ASL regime.

### Intisari

Dalam beberapa dekade terakhir, kerangka hukum yang mengatur rezim maritime Indonesia telah mengalami beberapa perubahan. Hal ini jelas saat Deklarasi Djuanda 1957 dan Konvensi Hukum Laut PBB 1982 (UNCLOS) diadakan di mana konsep baru negara kepulauan diperkenalkan. Tulisan ini meninjau perkembangan historis konsep ini sampai dengan isu terbaru mengenai pengadaan jalur laut kepulauan (ASL) di Indonesia. Menamakan isu ini sebagai epilog perjalanan Indonesia ke arah kenegaraan kepulauan, tulisan ini berfokus pada (1) pentingnya pengadaan ASL bagi negara kepulauan, (2) bentuk pertimbangan yang menjadi tantangan terhadap pengadaannya dan (3) bagaimana tantangan ini mempengaruhi keengganan Indonesia untuk membuka rute ASL yang dikenai sanksi internasional, terutama pada rute Timur-Barat. Tulisan ini menemukan bahwa kesulitan tersebut berakar dari ketidakjelasan klausa UNCLOS akan negara kepulauan serta persaingan yang melekat antara negara bendera dan pesisir. Kekhawatiran mengenai keamanan juga menjadi krusial dalam menjelaskan keengganan Indonesia untuk sepenuhnya memenuhi tuntutan internasional. Tulisan ini diakhiri dengan beberapa kemungkinan jalan dan rekomendasi kebijakan yang dapat diambil Indonesia bagi rezim ASL-nya.

**Keywords:** Archipelagic, Sea, Lanes, Maritime, Indonesia, UNCLOS, Djuanda, Declaration, Route, Coastal, States, Flag, Designation

**Kata Kunci:** Kepulauan, Laut, Jalur, Maritim, Indonesia, UNCLOS, Djuanda, Deklarasi, Rute, Pesisir, Negara, Bendera, Pengadaan

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## Introduction

From 2014 onwards, there exists an observable trend of increasing prioritization and revitalization of the maritime sector in Indonesia. This is particularly apparent when the current President, Joko “Jokowi” Widodo, declared a novel maritime doctrine during his attendance in the 8<sup>th</sup> East Asia Summit in Myanmar. There, President Jokowi floored his aspiration to transform Indonesia into a “global maritime axis” (Sambhi, 2015). Among the visions of this doctrine is boosting port constructions, the inauguration of a “sea highway” linking the main isles, and the strengthening of Indonesian naval force to, ultimately, lay the foundation for Indonesia’s ascent as a regional sea power (Agastia & Perwita, 2015).

While indeed daring and ambitious, this vision is by no means unachievable. Indonesia’s strategic latitude as a crossroad of two continents (i.e. Asia and Australia) and two oceans (i.e. Pacific and Indian) and the presence of major international crossings in its domain, such as Malacca Strait through which 15 million barrels of oil tankers pass daily (Hirst, 2014), could provide Indonesia the strong leverage it needs in securing global attention to its ambition.

Though glorious in name, translating President Jokowi’s maritime axis jargon into action is no easy task. It would prove challenging for Jokowi to maintain so grand a vision when, for instance, the Indonesian navy, who is arguably the most important institution in enforcing Jokowi’s ambition and whose absence may render the entire project meaningless, is still low in funding (Qin, 2015). Adding another tally to the list of challenges is Indonesia’s unique geographical landscape, that is, the absence of unity of its terrestrial territory due to the division of its landmass into five major islands. Indeed, this very feature has, historically speaking, often put Indonesia at many odds.

## A. Indonesia’s maritime regime: then and now

Up until late 1950s, Indonesia’s maritime territory was governed under the legal system of its former Dutch colonizer as outlined under the 1939 Ordinance on Territorial Waters and Maritime Zones. The Ordinance maintained that Indonesia’s territorial sea would only extend 3 nautical miles from the coastal line of each island, and what goes beyond the line would be considered as the high seas (Djalal, Indonesia’s Archipelagic Sea Lanes, 2009). As a consequence, within the huge water bodies between Indonesian main islands, foreign commercial and military vessels could freely exercise the freedom of navigation.

Furthermore, since national regulation was not imposable in this water, this entailed a strong possibility of clash between domestic and foreign interests. Chance of other dangers such as ship collision and espionage by foreign entities was just as high. Similarly, ships travelling from Borneo to Java, for instance, would be treated with the same legal status of international voyage as if they travelled from, say, Australia to Malaysia. In short, Indonesia could not protect its own ship although it sails within the country’s own perimeter.

The 1939 Ordinance provided so much privilege to vessels belonging to *flag States*<sup>1</sup> at the expense of Indonesia’s interest as the *coastal States*.<sup>2</sup> It created “holes” (i.e. high seas) in Indonesia’s own

<sup>1</sup> Flag State is a term for the country to which a ship belongs and whose extra-territorial jurisdiction is exercised aboard the ship. According to UNCLOS Article 94, “every state shall effectively exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag” (Williams, 2014). In the context of this paper, flag State refers to the countries of every foreign vessel passing through the Indonesian sea.

<sup>2</sup> Coastal State refers to the country through whose territory vessels of flag States sail. According to UNCLOS Article 2(1), “the sovereignty of coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.” Coastal State refers to Indonesia, in our discussion.

internal water domain which, according to Butcher (2009), “not only made it extremely difficult for the navy and other agencies to enforce Indonesian law but also deeply offended Indonesians’ sense of nationhood.” Cognizant that the 1939 Ordinance would further jeopardize Indonesia’s national integrity, the then-government began to formulate a new legal framework that treated the internal seas between the main islands as “one total unit” – one that would be *territorially inseparable* and over which Indonesia’s *jurisdiction* would be exercised.

This idea eventually came to fruition under the 1957 Djuanda Declaration. The Declaration stipulated that the baseline of Indonesian territory would be drawn *from the outermost islands of the archipelago*, instead of from each individual island, and that the waters lying in-between would be subject to Indonesia’s sovereignty. Though this declaration had been transformed effectively inside the national legal system.<sup>3</sup> Indonesia’s sudden alteration was ferociously challenged by many Western flag States (Ku, 1991). If such challenge persisted and if Indonesia could not win foreign recognition to its new claim, the Declaration would be legally meaningless in the international realm.

Hence, from 1960 onwards, Indonesian diplomats and legal scholars had been vehement to propagate this “new archipelagic norm”. Indonesia’s unprecedented archipelagic concept, albeit being profoundly radical, was eventually able to acquire enough acknowledgements to become a novel customary practice. This unlikely success can be attributed to (1) the continuous promotion by Indonesian diplomats in various maritime conferences which, in times of post-1960s rapid decolonization era, found positive resonance from newly independent Asia-Africa nations and (2) the shift from (often failed) multilateral recognition into bilateral ones with neighboring Southeast

Asian countries such as Singapore and Malaysia which contributed to the growing regional confidence necessary for future codification.

With the Philippines joining Indonesia’s archipelagic agenda (Santos, 2008), the provision of special status for archipelagic States seemed eminent. The process for codification, however, was long and tiresome. The Conference on the Law of the Sea by the United Nations was picked as the platform to floor both countries’ proposals, but even after attending two conferences (UNCLOS I and II), the clash of interest between flag States and to-be archipelagic States was irreconcilable. The archipelagic concept also lacked political weight, since only two countries i.e. Indonesia and the Philippines advocated its adoption.

Nevertheless, in UNCLOS III of 1973-1982, a significant positive change was observed. As the Bahamas, Papua New Guinea and Fiji joined the advocating camps and as to-be archipelagic States agreed to lower their demand and compromise with flag States’ interests, the archipelagic State was finally codified in the Convention. For many Indonesians, UNCLOS III and its archipelagic State provision was romanticized as a great victory of what the Djuanda Declaration has pioneered in 1957 – a triumph of their 25 years of national struggle.

## **B. Indonesia as an ‘archipelagic State’ in UNCLOS**

The 1982 United Nations Convention on the Law of the Sea embodies an overarching set of 25 maritime topics which were contentiously debated prior to its stipulation; this sheer comprehensiveness makes it natural that some scholars dubbed the Convention as “the constitution of the Oceans” (Spalding, Meliane, Milam, Fitzgerald & Hale, 2013). Of significance importance is the formalization of key maritime concepts such as (1) the sea boundaries of coastal State,<sup>4</sup> with

<sup>3</sup> In 1960, the content of Djuanda Declaration was provisioned into “Government Regulation No. 4 on Indonesian Water”, coded as UU No. 4/PRP/1960 (Ku, 1991).

<sup>4</sup> Article 3 of UNCLOS mandates that “every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12

territorial sea, continental shelf and exclusive economic zone (EEZ) as examples, as well as (2) the right of flag States, with innocent passage and immunity of warships in the high seas to name a few.<sup>5</sup> These newly codified concepts are exercisable to all UNCLOS States Parties, including Indonesia.



**Map 1:** Indonesian territorial waters under 1939 Dutch Ordinance [Source: <http://www.uruqulnadhif.com/2015/06/uu-kelautan-uu-pengelolaan-wilayah.html>];



**Map 2:** Indonesian archipelagic waters, territorial sea and EEZ under 1982 UNCLOS [Source: <http://madeandi.com/2014/12/11/batas-maritim-untuk-orang-awam/>]

nautical miles, measured from baselines determined in accordance with this Convention.” States exercise full sovereignty and competence in their territorial sea and air zone above it (Bardin, 2002); Article 76 defines *continental shelf* as “seabed and subsoil of the submarine areas... [with] a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured”; whereas *exclusive economic zone* is an area which maximum measurement is “200 nautical miles from the baselines from which the breadth of the the territorial sea...”, based on Article 55, in which a state is exclusively entitled for economic (e.g. fishing) and research enjoyment (Robertson, 1983).  
<sup>5</sup> Governed by Article 19, *right of innocent passage* “permits a ship of a foreign nation to enter the coastal waters of another state if the navigation is peaceful and not offensive” (Agyebeng, 2006). *Immunity of warships on high seas* in Article 95.

Part IV of UNCLOS governs the juridical issue of archipelagic States: who are they and what are they entitled to? Archipelagic States can simply be understood as countries whose territory takes the shape of an archipelago, that is, a constellation of many big and/or small islands. Article 47 provides a very detailed measurement formula to limit the scope of the archipelagic States. It says, for instance, that the enclosed water to land territorial ratio must be between 1:1 to 9:1. Hence, although the territory of Greece and the United Kingdom are formed by a collection of islands, they are not considered as archipelagic States due to their insufficient proportion of water to land.

The archipelagic provision of UNCLOS reflects much of the Indonesian stance in the 1957 Djuanda Declaration, only with some caveats. UNCLOS acknowledges Indonesia’s insistence that the colossal body of sea between its five main islands and within the outermost islands is its *internal waters* – much like rivers and lakes. The Convention also, albeit in indirect manner, confirms “*Wawasan Nusantara*” which is a national belief that its land and water is territorially united and inseparable. Not only would the interest of foreign ships be superseded by Indonesia’s security concern in the large water bodies muddling its islands, Indonesia would also greatly enlarge its national reach for economic extraction and development.

According to Djalal (2011), Indonesia’s EEZ and continental shelf have been extended for another 3 million square kilometers. The achievement of UNCLOS is often praised as a national triumph by Indonesians. The reason behind such glorification is very natural indeed: The Convention has provided the nation with so many political and economic merits, particularly due to the Convention’s archipelagic State provision. Nonetheless, as the following section will reveal, the victory is not without compromise.

### C. ASL: a pre-requisite and obligation

Anxieties were high among flag States when the archipelagic State provision was to be included in the 1982 Convention. With regards to the creation of Indonesian commercial ships going to and coming from Australia often find their shortest and cost-effective route by cutting through Indonesia's internal waters. Likewise, the United States objected to the archipelagic concept as it deemed this provision as an impediment to the global reach of its naval armada (Meyer, 1999). If left unaddressed, this division between Indonesia as an archipelagic State and the big powers as flag States could render the Convention unsuccessful. Reconciling both conflicting interests is important to make sure that the Convention can be immediately signed. For this purpose, Article 53 on the *archipelagic sea lanes passage* play a critical role.

Two important concepts must first be distinguished. First is the *right of archipelagic sea lanes passage* or ASLP. In principle, ASLP provides the freedom for flag States to continue the previous usage of normal international routes across archipelagic States as long as the journey is "solely for the purpose of continuous, expeditious and unobstructed transit". The second concept is *archipelagic sea lanes* or ASL, a "sea road" on the archipelagic water over which the right of ASLP is exercised. Article 52(1) states that "archipelagic State may designate sea lanes and air routes [ASL] ... for the continuous and expeditious passage of foreign ships and aircraft" *only within which*, Article 53(2) adds, "all ships and aircrafts enjoy the right of archipelagic sea lanes passage [ASLP]."

Up to this point, we may discern the difference between ASLP and ASL, that is, while the former refers to a *right* (immaterial), the latter refers to an actual geographical feature (material). Moreover, and most importantly, while ASLP is established by *default*, designating ASL is optional; ASLP is *pre-given*, while ASL is artificial. This means that with or without the designation of ASL by coastal States, flag States can by default resume journey

using the pre-1982 Convention normal routes. Since the term "normal routes" may entail multi-interpretation, the possibility of flag States crossing anywhere inside the archipelagic sea is ever-present. For this reason, Djalal (2009), who fully participated in UNCLOS III, suggested that until proper ASL is designated, Indonesia would not have full control over its internal waters and, accordingly, the whole concept of "archipelagic State" would seem rather useless.

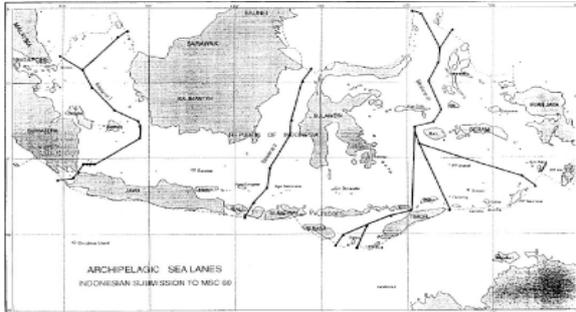
The quest at hand becomes even harder when we take into account the fact that the concepts of ASL and ASLP themselves are new and artificial, meaning that previous States practice on this matter is scarcely evident – if there is even any. Whereas it is arguably easier to enact *declaratory* provisions, which merely serve as a formalization of existing customary laws, ushering in *constitutive* provisions, which embody an entirely novel regulation like ASL and ASLP, would certainly face greater challenge.

This is because flag and coastal States can easily fall into problematic multi-interpretation, provided with no tangible model, both parties in theory may have a greater leeway to tailor the just-born law to fit their interests as no starting-point legal reference is present. Consider the phrase "normal passage route"<sup>6</sup> in Article 53(4) and "competent international organization"<sup>7</sup> in Article 53(9). Whose version of "normal passage route"? who decides which institution is going to be the "competent international organization"?

<sup>6</sup> Article 53(4) of UNCLOS stated that ASL "shall traverse the archipelagic waters and the adjacent territorial sea and shall include all normal passage routes for international navigation or overflight through or over archipelagic waters and, within such routes, so far as ships are concerned, all normal navigational channels, provided that duplication of routes of similar convenience between the same entry and exit points shall not be necessary."

<sup>7</sup> Article 53(9) stipulated, "in designating or substituting sea lanes or prescribing or substituting traffic separation schemes, an archipelagic State shall refer proposals to the competent international organization with a view to their State, after which the archipelagic State may designate, prescribe or substitute them."

These phrases cannot be more ambiguous; and indeed, whenever ambiguity is present in a legal document, conflict between its parties is virtually sealed.



**Map 3:** The three ASL routes of Indonesia

[source: [https://puc.overheid.nl/nsi/doc/PUC\\_1562\\_14/1/](https://puc.overheid.nl/nsi/doc/PUC_1562_14/1/)]

#### D. Challenges to current ASL

After conducting surveys, national coordination and communication with concerned States, Indonesia immediately submitted its proposal for the new ASL routes to the International Maritime Organization (IMO) in 1998. Duly notified, IMO issued Resolution 72(69) accepting Indonesia's proposal,<sup>8</sup> which effectively entered into force four years later under Government Regulation No. 37/2002. The 2002 Regulation enacted *three new ASL routes*, all of which stretch from *North to South*.

Within these three routes, foreign vessels have an *insuspendable*<sup>9</sup> right of passage, not only for commercial vessels but also warships. This designation, however, was protested by some flag States, with the US, the UK and Australia as

their forefront; these countries claimed that that the 2002 Regulation was inadequate (Djalal, 2009). The contentious issue of "normal routes" reemerged when the three flag States argued that the route connecting Arafuru Sea in the East to Sunda Strait in the West constitutes a normal international shipway that should also become an ASL. Since Indonesia refused to incorporate the "normal" East-West route, IMO deemed the current three ASL routes as "partial designation" (Forward, 2009), not as a permanently binding one.

Indonesia has abundant reasons not to codify the East-West route just yet; and among them, national security is of paramount cruciality. Unlike the right of innocent passage which may be revoked when grave security concerns arise, the right of ASLP cannot be suspended in any circumstance (Sea Power Centre, 2005). UNCLOS stipulated in its Article 25(3) on innocent passage:

"The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published."

Actions that the Convention acknowledges as prejudicial to security – and thus may justify the suspension of innocent passage – are also outlined in detail. These include the loading and/or unloading of commodities, act of propaganda, intelligent activities and many more. Contrastingly, the founding legal regime of ASL, which is the 1998 "General Provision for the Adoption, Designation and Substitution of Archipelagic Sea Lanes" or GPASL by IMO, has made it clear that the right of ASLP cannot be suspended by whatsoever reason. Given this, if Indonesia is too hasty in designating ASL routes without long-term preparation, there is a possibility for negligence; and shall this negligence occur,

<sup>8</sup> This acceptance, however, is neither absolute nor permanent. IMO declared Indonesia's three North-South ASLs as "partial designation" since it deems the current designation to be incomplete. A complete designation, according to IMO, should also comprise an East-West route (Puspitawati, 2011).

<sup>9</sup> The phrase "insuspendable" should not be mistakenly interpreted as "completely unrestricted". Article 54 of UNCLOS, in fact, restricts the applicability of undertaking 'ASLP only after the conditions under Articles 39, 40, 42 and 44 are met. The aforementioned articles stipulate, *inter alia*, the prohibition of unconsented survey activities and the abstention of any maneuver threatening national sovereignty.

the “unsuspendedness” of ASL would mean that the country could be subject to perpetual security threats.

The Indonesian Armed Force, whose many naval bases are located in the coastal areas adjacent to the route, is particularly sensitive to the issue. It deems Java Sea, through which the East-West passed, as “the strategic heart of Indonesia” (Sebastian, Supriyanto & Arsana, 2015) and therefore granting foreign vessels unrestricted passage through this area is too high of a demand. Moreover, the metropolis of Java’s northern coast such as the capital city of Jakarta and major port cities including Surabaya and Semarang, within which tens of millions reside, can be very prone to marine environmental accidents like oil spill from foreign tankers or radioactive contamination from nuclear-powered vessels; not to mention how international sea traffic may also disturb the lucrative fishing activities in the area (Supriyanto, 2016).

What further impedes Indonesia’s willingness to immediately set the East-West ASL is the divergence between the flag States on the specific coordinate of the “normal route” map of the UK and the US: the British East-West route is closer to the Java Island than the American one (Buntoro, 2011). If Indonesia listens to the demand of one state, other states would forcedly push theirs — eventually causing a “spaghetti bowl phenomenon” (Sebastian et al., 2015). Apparently, though, not opening the East-West route did not necessarily makes Indonesia very safe as well. In 2003, a U.S. aircraft carrier and F-18 squadron, deeming the East-West route as international waters, entered Java Sea (Caminoz & Cogliati-Bantz, 2014). Offended, Indonesia sent its two F-16s to intercept the American jets near the Bawean Island, eventually causing a brief friction between the two governments. Had Indonesia formally delineate the East-West route, scholars argue, such incident can be preventable.

So, what is ahead for Indonesia? Two pathways are plausible. The first is for Indonesia to maintain the status quo by not

abiding the request of IMO and major flag states to open the East-West ASL route. To begin with, Indonesia may choose to weaken the international acknowledgement of IMO as the “competent international organization”, per Article 53 (4) of UNCLOS, who is given the power to assess coastal States’ proposal of ASL. Indonesia’s reluctance to fully submit to IMO is justifiable by the fact that the organization is often steered by the interest of big flag States inside it; according to Mark and Halladay (2013), IMO regulations such as the 1998 GPASL was “actually negotiated and settled outside the IMO, between a select few members”. It must be reminded that UNCLOS does not explicitly choose IMO to manage the ASL regime per se, so any country including Indonesia is theoretically able to propose the replacement of IMO by other organizations (preferably fairer and less biased), though only if a sufficient number of support is successfully rallied.

In this antagonistic scenario, weakening IMO’s legitimacy must also be followed by a long-term plan to transform the “national security first” policy within ASL designation into a new customary international law. This is to say that individual states should have greater weight in determining ASL and that “competent international organization” should only be given an advisory role, not a “law-making” one. Maintaining the status quo and opting to (radically) introduce a new customary practice, amidst the protest from important flag states, is indeed challenging.

Yet, interestingly, although the U.S. and Australia has been very vocal in rhetoric to protest the current ASL designation, their tangible action to pressure Indonesia is relatively small. There even exist some hints that the two countries somewhat consider Indonesia’s position: instead of bashing Indonesia for the 2003 Bawean Incident, the then-U.S. Ambassador promised that such provocative interception won’t reoccur (Smith, 2003); when Australian Navy vessels entered Indonesian territorial waters in 2014, it apologized with embarrassment (Bateman, 2015). Hypothetically, if Indonesia could

consistently maintain the status quo, just like what it did with the Djuanda Declaration for 25 years until the archipelagic state provision was codified under UNCLOS, the nation might as well patiently wait until its current practice, with regards to ASL, transforms into an accepted customary law.

While the above hypothesis may please the Indonesian Armed Force and nationalist-populist politicians, many legal academicians have suggested the opposite: that it is advisable to revise the status quo by opening the East-West lane. Sebastian et al. (2015) even went further by arguing that Indonesia may actually benefitted more by entertaining the flag states' demand. They suggested that by opening the East-West ASL route, Indonesia may enjoy: (1) greater accuracy in supervising foreign vessels movement, because without ASL these vessels may use various possible routes to pursue "normal navigation", (2) better diplomatic leverage and reputation among flag States and (3) the invigoration of public attention on the issue of navigational safety, which may motivate maritime experts to develop more innovative solutions for future problems.

Nonetheless, even if opening East-West is proven to be beneficial, it should be reminded that Indonesia's maritime security and logistic capability is still very limited to make sure that that such benefits last long (Dirhamsyah, 2005; Rustam, 2016). As national security and territorial integrity are more important than any other considerations, too hastily opening the East-West lane may arguably put so fundamental an interest at risk for so peripheral a gain.

#### **E. Closing remarks**

The legal regime on the sea and maritime sector of Indonesia has gone through many important developments. Primary to this development is the archipelagic concept of land-and-water territorial unity as introduced in the 1957 Djuanda Declaration and codified in 1982 UNCLOS. This development has not reached the finishing line since the designation of an internationally sanctioned ASL regime, which includes the

East-West lane, has not been achieved. If this debate on Indonesian ASL is contextualized in a historical continuum, the opening of the East-West lane may indeed be arguably viewed as the epilogue in the country's "building an archipelagic state" chronicle. This is because designating an internationally sanctioned ASL is (among) the last archipelagic issues which remain unresolved, that is, where foreign discord is still majorly present. By successfully addressing this issue, one may argue, Indonesia would then be "just a distance away" towards achieving the ideal vision of an archipelagic statehood which governs in full harmony with the interest of foreign states.

While the tone of the paper might prompt a perception among its readers that the non-existence of the East-West lane constitutes a legal violation, this absence in itself is actually not problematic; this paper has previously indicated that designating ASL is optional, not obligatory. What thus becomes controversial is that Indonesia has prevented foreign vessels from exercising ASLP in the "normal navigational routes" (i.e. the East-West lane, as demonstrated in the Bawean Incident), which, in the absence of an ASL regime fully consented by "competent international organization" (i.e. IMO), is actually permissible. By behaving so, Indonesia has allegedly committed a legal inconsistency.

Why does Indonesia still maintain its non-opening policy of the East-West lane, despite this allegation? This paper attributed such stance primarily to national security concerns. Indeed, it is the inherent nature of a state to champion the protection of its sovereignty over the demands of foreign states. Nonetheless, having analyzed both the consequence of maintaining the status quo and the prospect of revising it, it is the opinion of this paper that opening the East-West lane would be legally advisable. Tomorrow might indeed be too early for Indonesia to undertake such action; however, this should not discourage the country from considering this option as a favorable agenda worth progressing for.

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## DOCUMENT PRODUCTION AND DISCLOSURE IN INVESTOR-STATE ARBITRATION\*

Dioputra Ilham Oepangat\*\* and Janet\*\*\*

### Abstract

It is not uncommon for states to engage in arbitration proceedings with their investors (“Investor-State Arbitration” or “International Investment Arbitration”) administered under the International Centre for the Settlement of Investment Disputes. When these parties engage in document production during evidentiary proceedings, there arises an issue with regards to documents requested by the investor, which is considered as a “state secret” by the state. Based on the IBA Rules on the Taking of Evidence in International Arbitration (“**IBA Rules**”), states may have particular interest to refuse the production of a document. This is based on the argument that a document may be exempted from production if the document qualifies as a state secret by virtue of Article 9 of the IBA Rules. This paper will discuss appropriate measures to be taken by tribunals in order to allow for material and relevant evidence to be produced during proceedings, which may be crucial in being able to prove the case of the investor in the case of a conflict pertaining to the production of documents containing state secrets.

### Intisari

Tidaklah jarang bagi negara untuk terlibat dalam proses arbitrase dengan investornya (“Arbitrase Investasi Negara” atau “Arbitrase Investasi Internasional”) di bawah Pusat Penyelesaian Sengketa Investasi Internasional. Ketika para peserta melakukan pengadaan dokumen pada tahap pembuktian, muncul masalah di mana dokumen yang diminta investor dianggap “rahasia negara” bagi negara terkait. Berdasarkan Aturan Pengambilan Bukti dalam Arbitrase Internasional IBA (“**IBA Rules**”), negara dimungkinkan untuk memiliki kepentingan tertentu dalam menolak pengadaan suatu dokumen. Hal ini berdasarkan pendapat bahwa sebuah dokumen mungkin dikecualikan dari pengadaan apabila dokumen tersebut termasuk dalam rahasia negara di bawah Pasal 9 IBA Rules. Tulisan ini akan membahas tindakan tepat yang dapat diambil tribunal agar memperbolehkan dikeluarkannya bahan dan bukti relevan yang menjadi penting selama sidang untuk mendukung ihwal dari investor dalam konflik terkait pengadaan dokumen yang mengandung rahasia negara.

**Keywords:** *International, Investment, Arbitration, Evidence, States, Secrets, Sensitive, Disclose, Measures, Material, Relevant, Prove, IBA, ICSID, Document, Production*

**Kata Kunci:** *Internasional, Investasi, Arbitrase, Bukti, Negara, Rahasia, Sensitif, Menyingkap, Tindakan, Bahan, Relevan, Membuktikan, IBA, ICSID, Dokumen, Pengadaan*

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### **A. Introduction**

It is not uncommon for states to engage in International Investment Arbitration. As of June 2016, there were already 570 international investment arbitrations registered under the International Centre for the Settlement of Investment Disputes (“ICSID”) (ICSID Statistics, p. 7). ICSID is a convention-based forum and methods of dispute settlement, where the parties involved are contracting states of ICSID Convention (“State”) and investors in such countries (“Investor”) (ICSID Convention, Art. 25 (1)). These Investor-State disputes arise under international investment treaties, which, in their provisions contain arbitration clauses in case of dispute. ICSID has been a popular institution to administer arbitration.

However, there persists a controversial issue when it comes to evidence which must be produced by a state during arbitration proceedings. One of the discussed issues is document production, which occurs when a party requested the opposing party to produce certain documents to support their case. This production of documents might raise issues with regards to evidence considered as “state secrets” which, in the arguments of the states usually are considered as sensitive information not being able to be disclosed to the arbitration tribunal.

This paper will discuss appropriate measures to be taken by tribunals in order to allow for documents to be produced during proceedings, which may be crucial in being able to prove the case of the non-state party in the case of a dispute arising out of a state secret being produced. Furthermore, this paper will also discuss the weight of material evidence against the sensitivity of state secrets that, in compelling circumstances, must be produced in order to ensure the rights of the party seeking the information in order to be able to present its case. The rules that apply to these ICSID proceedings are the ICSID Convention, which also serves as the arbitration rules, the IBA Guidelines for the rules of evidence, as well as the law of the seat of the arbitration proceedings. It is worth emphasizing that the enforcement of

the proceedings brought before ICSID Tribunals are different from that of commercial arbitration, as arbitration awards issued by ICSID Tribunals are not subject to the New York Convention on the Recognition and Enforcement of Arbitral Awards. Instead, the authorization is given by contracting states when they ratify the ICSID Convention (see ICSID Convention, Section 6).

This paper will also focus on the problems facing the enforcement of an investment arbitration award with regards to if the evidence is not produced and deemed as hindering the principle of parties’ equality. Lastly, this paper will propose a few solutions with regards to balancing interests between the rights of an investor party to present its case and the right of a state party not to disclose state secrets.

### **B. Brief Explanation about Investment Arbitration**

Arbitration in itself is a form of an alternative dispute resolution. With regards to Investment Arbitration, such issues may arise from investment treaties which contain arbitration clauses in them. The most common form of investment treaties which prevail in the world come in Bilateral Investment Treaties (“BIT”). A BIT is an agreement between two states establishing the terms, conditions and protections for investments by one party in the territory of the other. Investors from the contracting states may rely on the protective terms of the BIT without entering into a further contractual relationship with the host state. Investors from the contracting states have access to the remedies specified in the BIT and investors may directly claim for breach by the host state through a dispute settlement mechanism.

Investment Arbitration can be conducted through different forum, which are stipulated under the dispute resolution clause in a treaty. An arbitration clause could point to two kinds of arbitrations. The first is an arbitration administered by an institution, where the parties simply agree for their future dispute to be administered

under a set of rules. The second one could be an ad-hoc arbitration, where the parties can tailor the arbitration agreement and rules that govern their agreement.

The ICSID was established based on a convention which is signed by 153 states around the world (ICSID List). This automatically makes ICSID the most popular institution to submit an investment arbitration to, as arbitration awards issued by ICSID do not require further registration upon their enforcement. This convention included a set of rules for arbitration and conciliation which would become the mandatory arbitration rules used if a state wishes to submit its dispute to ICSID. A sample arbitration clause appointing ICSID would be as follows as cited from Article 10 of the 2008 German Model Treaty:

“Disputes concerning investments between a Contracting State and an investor of the other Contracting State should as far as possible be settled amicably between the parties to the dispute. To help them reach an amicable settlement, the parties to the dispute also have the option of agreeing to institute conciliation proceedings under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID).”

Hence, it needs to be stated that typically, an investment dispute can arise out of disputes of an investor of a state, whose state has entered into an agreement (in the form of a treaty) with the host state. With this perspective in mind, it must be also recognized that any evidence produced in this kind of investment arbitration could be of a different nature than that of commercial arbitration. In international commercial arbitration, where the concerning parties are corporation or individuals, evidence produced would only

implicate corporate matters as well the business in itself. Whereas investment arbitration would produce documents which may be regarded as a secret of the state which considers national matters. Thus, it would become a problem if states are compelled to produce documents, especially when it pursued to prove the case of an investor.

### **C. Grounds to Produce Evidence under the ICSID Arbitration Rules**

The right to present one’s case is a general principle in arbitration, which is also recognized in investment arbitration. ICSID explicitly states the embodiment of such principle under Rule 39(1) of the Arbitration Rules:

“[a]t any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.”

Further, Rule 39(4) of the Arbitration Rules emphasized that:

“[t]he Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.”

With regards to this principle, the right to be heard requires the tribunal to weigh every submission on facts or requests on the taking of evidence, which is realized in a party’s right to present its case (Haugeneder/Netal, p. 168). This principle is enforced by the evidence provisions in Rule 33 of the ICSID Arbitration Rules which states that:

“Without prejudice to the rules concerning the production of documents, each party shall, within time limits fixed by the Tribunal, communicate to the Secretary-General, for transmission to the Tribunal and the other party, precise information regarding the evidence which it intends to produce and that which it intends to request the Tribunal to call for, together with an indication of the points to which such evidence will be directed.”

It is not uncommon in international arbitration to request documents under the right to present a party's case, as the objective of any arbitral procedure should be to allow the parties their opportunity to present the relevant facts in the most reliable, efficient, and fair manner, one of which is the right to receive document production (O'Malley, p. 34). A party is afforded a reasonable opportunity to fully state its case when each party is given reasonable opportunity to present evidence and argument in support of its own case. Tribunals can even order parties to produce evidence in order to fulfill the right of a party to present its case (*Fraport v. Philippines*).

Under Rule 28 of the ICSID Arbitration Rules, there persist two types of evidence which may be present during arbitral proceedings. The first one is evidence, that a party intends to produce. The second type is evidence which a party requests the tribunal to call for from the other party.

First, the principles of a right to be heard and equal treatment have to be observed in respect to various evidentiary issues. As an example, fairness must be observed in organizing an evidentiary hearing, appointing a tribunal expert or ruling on the admissibility of evidence. Second, when considering equality and fairness, a tribunal must also balance the consideration of other legal principles, such as, the observance of attorney-client privilege. A third challenge to the

application of fairness and equality to evidentiary procedure is to find modes of application accepted beyond the boundaries of one legal system as it is very possible that parties may come from two different jurisdictions (O' Malley, p. 5). Clearly, as international arbitration calls upon the service of arbitrators and counsel from a wide variety of legal systems, and involves parties of similarly wide backgrounds, what is considered a “fair opportunity” to present evidence must appeal to those in many arbitrations.

#### **D. The IBA Rules on the Taking of Evidence and the Issue of State Secrets**

##### **1. The Adoption of the IBA Rules as International Standard Guidelines**

The UNCITRAL Model Law, which most pro-arbitration states have adopted, stipulates that where the parties have adopted a set of rules that do not touch on a particular issue, the arbitral tribunal may conduct the arbitration as it considers appropriate, or the common international practice (Lew/Mistelis/Kröll, p. 28). Over the last decade, the IBA Rules on the Taking of Evidence in International Arbitration (“IBA Rules”), have been widely used by international arbitral tribunals as a guide, as it reflects the experience of recognized professionals in the field. The IBA Rules were originally drafted to fill the gap in most arbitration rules on the taking of evidence (IBA Rules' Commentary, p. 2).

Parties and arbitral tribunals may adopt the IBA Rules, in whole or in part, to govern arbitration proceedings, or merely use them as guidelines in developing their own procedures (Preamble of IBA Rules). It is this flexibility that has led the IBA Rules to achieve prominence within international arbitration, as they embody a set of standards for arbitral practice and therefore can be applied even without an expressed provision (Lew/Mistelis/Kröll, p. 154). Generally, ICSID Tribunals adopt the IBA Rules as it provides a balance between evidence hearings in the common law and civil law systems (IBA Rules, Foreword).

It is known that in civil law systems there is limited document production which parties may engage with, whereas in common law countries such as in the United States rely on a wider form of document production which is also referred to as full discovery (Hanotiau, p. 113, O' Malley, p. 39). In the U.S., this discovery practice often includes a "fishing expedition", which are requests for evidence that outweighs the probative value of the information and the disclosure of unspecified evidence. This kind of discovery is not common in international arbitration.

The IBA rules strikes a balance between the systems of different nations in respect to evidence, making it advantageous for both parties at dispute to use.

## **2. Requirements to Produce Documents under the IBA Rules**

The IBA Rules have several rules regarding requirements for being able to request a document, that is spread out throughout article 3 of the IBA Rules. These are, pursuant to article 3(a)(ii) that the document should be "a narrow and specific requested category of Documents that are reasonably believed to exist", pursuant to article 3(b), "relevant to the case and material to its outcome" and lastly, pursuant to article 3(c)(i), not "unreasonably burdensome for the requesting Party to produce such Documents".

First, the IBA Rules required that in order for a document to be "narrow and specific" under article 3(a)(ii), the request should be sufficient to identify the documents requested, by providing quantifiable guidelines such as limited in time frame and subject matter (Ashford, p. 70).

In an arbitration sitting in Switzerland under the UNCITRAL Rules (Caron/Caplan/Pellonpää, pp. 649-650), the tribunal denied the requests of the Respondent who sought the disclosure of "all documents relating to..." a number of broadly defined claims, referring in some instances to nine-month periods of time, or in others, no time limitations were included in the request at all. Moreover, the term

"reasonably believed to exist" is meant to prevent a broad "fishing expedition" found in U.S. style discovery which also, in conjunction with the narrow and specificity requirement, becomes a safeguard for the production of documents which may not be relevant to the proceedings (IBA Rules' Commentary, p. 8). Conclusively, this would mean that a party may not "blindly" request for unspecified documents it thinks might exist and examine them in anticipation to suddenly find a document which would aid their case.

Second, with relevance and materiality pursuant to article 3(b) of the IBA Rules, it must be noted that there is a stark difference between the two. In demonstrating relevance, a party seeking to obtain document disclosure has the burden of demonstrating the relevance of the requested evidence (O'Malley, p. 55). This means that a tribunal should analyze whether a party has put forward a credible argument as to the likely or prima facie relevance of the requested evidence in support of an important contention in the presenting a party's case (Ashford, p. 71). Meanwhile, a set of documents is material if the documents are required for the record and might bear upon the final award. A tribunal may find that a request seeks records that are necessary to establish one's case but ultimately denies disclosure if it does not believe the allegation will impact its final award (O'Malley, p. 58). Furthermore, the documents are needed to allow complete consideration of the factual issues from which legal conclusions are drawn by a tribunal (Marghitola, p. 52).

Furthermore, document production should not burden the party producing the documents. In granting the document production, the tribunal must weigh the probative value of the documents against the reasonableness of ordering the non-requesting party to produce the documents (Waincymer, p. 865). In general, a party must use its own documents to prove its

contention instead of ordering the other party to finish the job for it. The presumption that parties who have access to documents should produce them instead of obtaining the records through document production, is strong, however, and would likely be overcome only in exceptional circumstances pursuant to the tribunal's discretion after weighing the probative value. (O'Malley, p. 45).

Hence, after being able to conform with requirements set out under article 3 of the IBA rules, tribunals would usually look through if there are any objections to the request which may be brought pursuant to Article 9 of the IBA Rules, discussed in the next section.

### 3. "Politically Sensitive" Information as a Shield for States who wish to not produce Documents during Investor-State Arbitration

After an investor has fulfilled all the requirements set out by Article 3(3) of the IBA Rules, the Tribunal would ask the State to comment on the evidence sought by the investor. With that notion, a state may, under the IBA Rules object to produce certain types of evidence. This is vested under Article 9(2) of the IBA Rules which include, among others, documents which are legally privileged or are technically or commercially confidential. Pursuant to Article 9(2)(f), it is stated that the tribunal shall exclude from evidence documents on the "grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling."

However now the question begs whether a document can really be deemed as exempted from evidence pursuant to Article 9(2)(f) or whether it would become a justifiable excuse to deem all documents relating to the government of the state a secret. The latter is clearly possible as in most investor-state related disputes, an investor who might alleges that there persist unfair practices during expropriation may request tribunals to order document production in order to

obtain information pertaining to communication in between government institutions, government decrees, or even expropriation schemes which involve communication and planning with domestic competitors in order to present its case (O'Malley, p. 307; See Pope and Talbot Inc. Case). This kind of evidence could very easily be deemed as secret by the state without the investor being able to object the process of classifying documents into the category stipulated pursuant to Article 9(2)(f).

Of the above considerations, it is the application of the principle of equal treatment and fairness which has on notable occasions conflicted with domestic laws providing for governmental secrecy. To illustrate the point, one may imagine that a domestic law providing the governmental entity with the self-judging, discretionary right to determine which documents will be protected from disclosure, would afford it a distinct procedural advantage vis-à-vis its non-state opponent.

In *Biwater Gauff v. Tanzania* (ICSID Case No. ARB/05/22), the tribunal held that to accept a domestic law permitting a state-party wide, undefined discretion to declare itself immune from the duty to produce documents, would violate the principle of equal treatment, and did not qualify as "grounds" for resisting disclosure under article 9.2(f). The tribunal decided that the public interest immunity exception invoked by the Respondent, the Republic of Tanzania is not a valid objection to the production of documents requested by Claimant, *Biwater Gauff (Tanzania) Ltd.* The tribunal held that:

"... a State might invoke domestic notions of public interest and policy relating to the operations of its own Government as a basis to object to the production of documents which are relevant to determine whether the State has violated its international obligations and whether, therefore, its international

responsibility is engaged...If a state were permitted to deploy its own national law in this way it would, in effect, be avoiding its obligation to produce documents in so far as called upon to do so by this Tribunal... The Arbitral Tribunal considers that the only ground which might justify a refusal by the Republic to produce documents to this Tribunal is the protection of privileged or politically sensitive information, including State secrets restated in article 9.2(f) of the IBA Rules of Evidence... In conclusion, the Arbitral Tribunal decides that the public interest immunity exception invoked by the Respondent is not a valid objection to the production of documents requested by Claimant.”

Hence, pursuant to this precedent, it can be noted that the usage of domestic law to declare, with wide discretion, a document secret could be overruled by a tribunal.

**E. Possible Solutions to conflict between the Right to Present One’s Case/Right to Be Heard and the Protection of State Secrets/Politically Sensitive Documents**

**1. Redaction as means of Blocking Out Sensitive Information**

Redaction is a method in which phrases or sentences in a document are highlighted in a black color so that it covers these phrases or sentences which qualifies as information meeting standards of Article 9(2)(f) of the IBA Rules. Each Party should be entitled to redact truly irrelevant information of a sensitive or confidential nature as well as privileged information. If a document is redacted, it should to the extent possible, not redact the information which permits a reader to identify the author, recipient, document type and date of the document. In the event such

information is redacted, the Party making the redactions must provide the information in question to the other Party so that the basis for the redaction can be appropriately tested (Hamilton, p. 77).

However, considering the voluntary nature of redaction conducted unilaterally by a party, it would be prudent to consider the challenges of knowing whether the redacted information truly does fall within the requirements stipulated under Article 9(2) of the IBA Rules. Hence, even the involvement of the tribunal who may order that the information sought should remain unredacted would be ineffective to control what a party would redact. Direct involvement by a tribunal may also be not possible as the tribunal may examine documents which even they may not see due to the state sensitive nature of the documents.

**2. The Use of a Redfern Schedule**

When considering a request for document disclosure, and the objections that have been raised, it has become common practice in international arbitration for tribunals to use what is known as a “Redfern Schedule” (O’Malley, p. 52). This schedule usually takes the following format:

| Description of the document requested for production | Justification for the request by the requesting party | Comments and/or objections by the other party | Decision of the arbitral tribunal |
|--|---|---|-----------------------------------|
|  |   |   |                                   |
|  |   |   |                                   |
|  |   |   |                                   |

Fig. 1. Sample of a Redfern Schedule

The Schedule is used by a party who wish to request the production of documents from the opposing party. First, the requesting party will list out the documents with the details as set out in Fig. 1 above. This list will be submitted to the opposing party to be commented, and then the tribunal will decide and comment on whether to allow the production of such documents based on the argumentation of both parties. It is also very common that the

tribunal might request additional arguments before deciding on the document production (O'Malley, p. 23).

Using this schedule would strike a balance between what a party might find relevant to proving its case and what a state-party might find as a privileged document. In using this schedule, it would be in the discretion of the tribunal, to determine whether a document should be produced or not. It gives room to the parties to argue on the importance of the document and how material and relevant it would be to fulfill the party's right to be heard. The use of this schedule has its roots under article 3.6 of the IBA Rules, which states that:

“[u]pon receipt of any such objection, the Arbitral Tribunal may invite the relevant Parties to consult with each other with a view to resolving the objection.” This obliges the tribunal to first consider the consultation of the parties before deciding on the specific document production.”

Using the Redfern schedule as a means to debate whether a document should be produced is would however be insufficient. If a document, or a range of specified documents are of such relevance and materiality to the outcome of the proceedings and yet objected by the opposing party, then a separate hearing for the production of documents should be held to determine the implications of producing such documents. The weighing of the rights to be heard against the objections found in Article 9(2) of the IBA Rules would require substantial arguments to be heard rather than submitting a few lines of justification for the request as the violation of fundamental rights on both sides are at stake. Ideally, these hearings should yield interim awards which may be enforced by a party in order to ensure that a party does not refuse the decision of a tribunal which contrasts the current use of redfern schedules in procedural orders.

## F. Conclusion

In conclusion, it is stipulated that the right to be heard, which encompasses the right to present one's case, is one of the most fundamental rights of due process in international arbitration. It is that right which must be balanced against the right of privilege stipulated under the IBA Rules which allows a state not to produce evidence on the basis that the documents are politically sensitive and or a state secret. It is this balance, that would allow arbitrators to produce awards which do not infringe upon the rights of both parties, yet remain enforceable. Furthermore, it should be considered that the instruments that are currently used in arbitration do not create the perfect balance between these rights.

Voluntary measures such as redaction may call for the possibility of abuse by a party as the tribunal would not be involved in the redaction process nor would it be able to control the redaction process. Furthermore, the current usage of a redfern schedule may be insufficient to determine how important the document is in order to fulfill the right to be heard or how the detrimental it would be for a state to produce a state secret forcing it to object using Article 9(2) of the IBA Rules. Documents which may alter the course of the proceedings or the award should be thoroughly examined by the tribunal and their production scrutinized more carefully to respect the rights of the parties.

If a document is deemed to be “relevant and material to the outcome” to the proceedings, then the best measure is to conduct evidence hearings yielding interim awards on whether the document should be produced. In this way, parties would have a full opportunity to present its case with substantial arguments on why a document should be produced or deemed as a state secret. Additionally, a tribunal would have a more complete overview of the “balance” that it needs to achieve.

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## SUBJECTIVE AND OBJECTIVE APPROACHES TO CONTRACTUAL INTERPRETATION IN CIVIL LAW AND COMMON LAW COUNTRIES: INDONESIA AND CANADA\*

Rachmi Dzikrina\*\*

### Abstract

*Traditionally, civil law adopts subjective approach, whereas common law adopts objective approach to contractual interpretation. This research aims to examine the difference in the application of contractual interpretation methods in Indonesia that adopts a civil law system and Canada that adopts common law system. The analysis defines the nature and content of common law and civil law, and the structures and methods of common law and civil law in contractual interpretation. The case study between Indonesia and Canada interestingly shows how their sources of law influence court's approach to contractual interpretation. In their applications, Indonesia, as a civil law country, starts the interpretation exercise with subjective approach and Canada, as a common law country, starts it with objective approach. Nonetheless, in their processes of contractual interpretation, these two countries combine both subjective and objective approaches to achieve accuracy in contractual interpretation. On the other words, it is observed that subjective and objective approaches are completely intertwined and tangled with one another and cannot be separated. Therefore, practically, these two approaches are not mutually restricted of each other in all aspects.*

### Intisari

*Pada umumnya, hukum kontinental mengikuti pendekatan subjektif, sedangkan hukum Anglo-Saxon mengikuti pendekatan objektif untuk menafsirkan kontrak. Penelitian ini bertujuan untuk menganalisa perbedaan dalam penafsiran kontrak di Indonesia yang mempunyai sistem hukum kontinental dan Kanada yang mempunyai sistem hukum Anglo-Saxon. Analisa tersebut mendefinisikan sifat dan struktur sistem hukum kontinental dan Anglo-Saxon, dan struktur dan metode yang dipakai oleh hukum kontinental dan Anglo-Saxon dalam penafsiran kontrak. Studi kasus antara Indonesia dan Kanada menunjukkan bagaimana sumber hukum mempengaruhi pendekatan pengadilan dalam penafsiran kontrak. Dalam praktek, Indonesia, sebagai negara dengan sistem hukum kontinental, memulai penafsiran dengan pendekatan subjektif, dan Kanada, sebagai negara dengan sistem hukum Anglo-Saxon, memulai dengan pendekatan objektif. Namun, seiring proses berjalan, kedua negara ini menggabungkan baik pendekatan subjektif maupun objektif untuk mencapai akurasi dalam penafsiran kontrak. Dalam kata lain, dalam praktek pendekatan subjektif maupun pendekatan objektif berkaitan erat dan tidak bisa dipisah. Sehingga, kedua pendekatan ini tidak saling dibatasi dengan yang lain.*

**Keywords:** contract, interpretation, subjective intent, objective intent

**Kata Kunci:** kontrak, penafsiran, niat subjektif, niat objektif

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## A. Introduction

Contract consists of words, which are sometimes or even often ambiguous. In principle, contract language is ambiguous if it is reasonably susceptible to more than one construction and meaning (Rosen, 2000, para. 17-14; Rowley, 1999, p. 90). For that notion, majority of contract disputes generally involve questions of interpretation. Often, such questions are at the heart of the dispute. Interpreting contracts is a highly practical activity, but judges' approach to the interpretation has important implications for both the theory and the success of dispute settlement mechanism (Karton, 2015, p. 1) and is of paramount importance to achieve accuracy in interpretation. There is little point in giving effect to the intents of the parties if the court has not accurately discerned what those intents are (Hall, 2007, p.7).

Corbin (1951) defines interpretation as "the process whereby one person gives a meaning to symbols of expression used by other person" (p.2), while Chief Justice Menon (2013) describes it as "the process by which meaning is ascribed to the expressions found within a legal text" (p.2). Chief Justice Menon further applies two tests to establish such meaning. The first is to apply an objective test, which is a test theoretically adopted by the common law, to determine what a reasonable person would understand the contract terms to mean in the equivalent circumstances (p.3; McLauchlan, 2005, para. 49). On the contrary, the second is to apply subjective test, a test chiefly adopted by the civil law. It requires court to interpret the terms according to the mutual intents of the contracting parties (Lookofsky, 2000). Therefore, it is commonly acknowledged that common law and civil law jurisdictions have distinctive approaches to contractual interpretation

(Fairgrieve, 2016, p. 125; Valcke, 2008, p. 77; Vey, 2011, p. 501).

In the following, this paper will examine two different approaches of contractual interpretation in two different legal systems. As few researchers have addressed this topic, this research aims to deepen the basic knowledge and understanding of contractual interpretation rules in common law and civil law systems and examine the stringency of the application of contractual interpretation rules in those legal systems. Before starting the analysis, it is necessary to firstly comprehend the meaning of "legal system." David and Brierley (1978) define legal system as:

"Each law in fact constitutes a system: it has a vocabulary used to express concepts, its rules are arranged into categories, it has techniques for expressing rules and interpreting them, it is linked to a view of the social order itself which determines the way in which the law is applied and shapes the very function of the law in that society" (p.18).

In other words, Tetley elucidates that the term refers to "the nature and content of the law generally, and the structures and methods whereby it is legislated upon, adjudicated upon and administered, within a given jurisdiction."

To conduct a comparative study, Valcke (2008) explains that it is imperative to firstly identify "an appropriate neutral common basis, or *tertium comparationis*, upon which to conduct the comparison" (p.79). She then asserts that "a common language, conceptual territory, and set of criteria must be established which are sufficiently abstract to apply to the two terms under comparison without distorting the identity of either, yet not so abstract as to be meaningless" (p. 79). Considering

Tetley's idea of a legal system, to apply Valcke's comparative approach, this paper will first define the nature and content of common law and civil law, and the structures and methods of common law and civil law in contractual interpretation.

It will then differentiate specifically Indonesia as a civil law country from Canada as a common law country in their approaches to contractual interpretation. As further inspired by Tetley's comparative legal research plan, it will review "various specific points of comparison as between the two legal traditions of contractual interpretation together with a number of resulting differences in their respective substantive rules" (p.681).

#### **B. Common Law and Civil Law Approaches to Contractual Interpretation**

A major distinction between civil law and common law is the sources of law, critical materials that must be discovered before a court can interpret the applicable contract law (Karton, 2013, p. 2). Common law applies *stare decisis* rule, compelling lower courts to follow decisions rendered in higher courts (Kalt, 2004, p. 277). Unlike common law, court decisions are not binding in civil law as it is based on written codes where legal doctrines provide guidance in their interpretation, leaving to judges the task of applying law (Cao, 2007, p. 26).

According to the sources of law, as a common law country, precedents will regulate Canadian contractual interpretation. Whenever a judge makes a decision that is to be legally enforced, this decision becomes a precedent, a rule that will guide judges in making subsequent decisions in similar case (Oliphant and Wright, 2013, p.39). To the contrary, Indonesia, as a civil law country, will base its contractual interpretation on general

principles, contained in Indonesian Civil Code ("ICC"), specifically in Articles 1341-1352.

From those sources of law, it can be perceived that Canadian approach to contractual interpretation is more flexible, practical, and open, as it will follow the development of legal facts in contractual disputes and is not limited to certain legal principles. Conversely, in Indonesia, there is a tendency that the judges and legal practitioners construe the law and regulation in contractual interpretation in a very strict and formal legalistic way (Hartono, et.al, 2001, p.viii). Consequently, Indonesia's approach to contractual interpretation is more impractical and closed in the sense that every kind of contract dispute will be governed by a limited number of general principles, which has been particularly stipulated in the ICC.

Contractual interpretation is, for most part, an exercise in giving effect to the intentions of the parties (Hall, 2007, p. 7). It always begins with the words the parties use in the contract because they are the roots of all the various aspects of contractual interpretation (DiMatteo, 2014, p. 84). In practice, Estey J. also implies that the court should give effect to the intentions of the parties as expressed in their written document (*Manulife Bank of Canada v. Conlin*, 1996, para. 79).

As inferred in the Part I, contractual interpretation relates to either the objective or subjective theories of contract or both. Barnes (2008) elucidates that objective theory of contract accentuates the parties' mutual consent by examining knowable evidence of external manifestations of assent rather than the subjective or internal intention of the contracting parties (p.5). To put it simply, contract is formed on the basis of shared understanding, not one-sided knowledge. In addition, he inserts that the subjective theory of contract more

focuses on what the parties subjectively intended to make the contract than the external perceptions. Practically, most of common law countries (the UK, Ireland) objectively commence the contractual interpretation, although they indicate the mutual assent of the parties (Burling and Lazarus, 2011, p. 97).

Pursuant to common law, Zeller (2002) further elaborates that establishing intent is not practical unless it is discovered in the contractual document and understood by a reasonable person [para. 45]. Afterward, the objectivist view prioritizes the external fact of the expression, chiefly because social and economic interaction requires reliance to be held primacy in order to provide security and predictability (Cserne, 2009, p.5). As the objectivist's argument, Cserne states that, "reliance is placed on what others actually say not on what they meant to say" (p. 5). Yet, Lord Hoffmann later clarifies that common law does not fully negate subjective intent, for example, in the case of rectification, where the subjective intent is admissible (Ter Haar, 2017, p.6). It can be said that certain contracts will be ineffectual if they disregard the subjective intent. In civil law, the subjectivist view underlines party autonomy and the free will of the individual (Burling and Lazarus, 2011; Cserne, 2009). When intention and its expression conflict, the intention of the parties prevail (Zeller, 2002). In a nutshell, hypothetically, civil law perceives contract as an expression of the parties' intent, while common law perceives it through the perspective of a reasonable person in the same circumstances to ascertain the intent.

### **C. Subjective and Objective Theories of Contract**

In contract law, Barnett (2010) describes "subjective" as "what is in one's

head" and "objective" as "what one manifests or communicates to another person" (p.68). Theoretically speaking, contract law embraces the objective theory of assent since it does not require the meeting of the minds of the parties. Objective theory of contract is interrelated by nature with reasonableness (Fridman, 2006, p. 15). To the contrary, subjective theory of contract does not require reasonableness, but the subjective discretion must be exerted honestly and in good faith. It means, to apply the subjective test, inexistence of bad motive and some other evidence showing dishonesty must be established (Partec Lavalin Inc. v Meyer, 2001, para. 19).

Endicott (2000) supports the use of objective test in interpreting the contract. In his opinion, the content of an agreement is showed by the parties' subsequent conduct, where its conduct is consistent with the given interpretation. Waddams (2005) also adds that the aim of objective test is to protect the reasonable expectations created by promises. Accordingly, the existence of a promise or an acceptance in a contract should be indicated by the way of a reasonable person would act in the position of the promise (p. 103).

The subjective theory, which represents the French legal system, is concerned with the literal intentions of the parties as inferred in the previous chapters. That is to say, in establishing a binding contract, both parties had to jointly consent to the contract and the external manifestation of consent is simply taken to verify the mutual intent (Barnes). Therefore, the parties are unnecessarily compelled to perform obligation beyond their consent (Tura, 2011, p. 4).

In France, the contractual interpretation rules are specifically stipulated in Articles 1156-1164 of the French Civil Code of 1804. Article 1156 of

the Civil Code instructs that the meaning of a contract should be determined according to the mutual intent of the parties. If the intention is imprecise, the courts will rather find the genuine state of mind of the parties instead of the external appearance of the contract (Nicholas, 1982, p. 46). To establish the parties' actual intent, yet, other courts also examine all available extrinsic evidences (CISG-AC Opinion No.3). Due to the adoption of subjective approach of interpretation, the French civil law emphasizes the theory of "defects of consent", i.e. mistake, "a false assessment of reality made by a contracting party", as found in Article 1110 of the French Civil Code (Fabre-Magnan).

While, pursuant to Barnes, objective theory of contract scrutinizes "the external evidences of the parties' intention as the only relevant consideration", which means contract has nothing to do with the personal or individual intent of the parties (p. 5; Rowley, 1999, p. 84). It is rather perceived as an obligation attached by sheer force of law to certain acts of the parties, which ordinarily supplement and represent a mutual intent (p. 6). Due to its logical pragmatism and vindication of many policy-oriented concerns of contract law, this theory has been well established in the Anglo-American systems and in most of other major jurisdictions (p. 8). It preserves that vague and uncertain terms should be interpreted by examining what the parties said, wrote or did but not what they actually intended to say, write or do (Mckendrick, 1990, pp. 15-16). Correspondingly, in the case of vague language of a contract, the court is necessitated to apply the objective test as a matter of general rule.

#### **D. The Subjective and Objective Tests: Indonesia and Canada**

As a common law country, Canada applies precedent as the sources of law. In this matter, related to contract law, the Supreme Court of Canada (SCC) ruled in *Sattva Capital Corp. v Creston Moly Corp. (Sattva)*, in which the ruling becomes a landmark decision in the law of contractual interpretation. The SCC unanimously departed from the historical approach to contractual interpretation and determined that it now involves issues of mixed fact and law. The SCC held so because it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract. Justice Rothstein wrote that the goal of contractual interpretation is to ascertain the objective intent of the parties – a fact-specific goal – through the application of legal principles of interpretation (para. 55). Thus, it is a fundamental principle of the law of contractual interpretation that the exercise is objective rather than subjective (Hall, 2012, p.24).

The objective approach of contractual interpretation (assessed from the perspective of a reasonable person) can be illustrated in *642718 Alberta Ltd. (c.o.b. CNE Centre) v. Alberta (Minister of Public Works, Supply and Services)*. The issue was whether offer to purchase document (referred to as the "Third Offer") forwarded to the plaintiffs by the defendant Province of Alberta constituted an acceptance of a purported oral agreement to purchase land. Interpretation of the Third Offer was approached on the following basis: "The question then becomes, what should the Plaintiffs reasonably have concluded was intended by the Province when they forwarded this document." This formulation aptly demonstrates the objective perspective to contractual interpretation: the question was

not what the *Defendant* intended by the words it used but rather “what should the *Plaintiffs* reasonably have concluded was intended ...”.

Additionally, to objectively construe the contract, *Sattva* acknowledged “factual matrix” or the “surrounding circumstances” known to the parties at the time of the formation of the contract, particularly, the knowledge that was or reasonably ought to have been within the understanding of both parties at or before the date of contracting (para. 58). Even if the surrounding circumstances are considered in interpreting the terms of a contract, they must never be allowed to depart from the words of the contract (Hall, 2012, p. 30).

The goal of examining such evidence is to deepen decision-maker’s understanding of the mutual and objective intentions of the parties as expressed in the words of the contract (*Sattva*, 2014, para. 57). Nevertheless, it is said that the interpretation of a written contractual provision “must always be grounded in the text and read in light of the entire contract” (Hall, 2012, pp. 15, 30-32). While the surrounding circumstances are relied upon in the interpretive process, *Sattva* reaffirmed that “courts cannot use them to deviate from the text such that the court effectively creates a new agreement” (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.*, 1997). In other words, the fundamental principle of contractual interpretation is that a contract must be construed as a whole (McCamus, 2012, pp. 761-62).

Indonesian contract law adopts three approaches of contractual interpretation: subjective approach, objective approach, and combination of both objective and subjective approaches (Sutiyoso, 2013, p. 213). Subjective approach seeks to determine what the parties subjectively intended. This

approach has been adopted in the ICC. Article 1343 of the ICC stipulates that “if the wording of an agreement is open to several interpretations, one shall ascertain the intent of the parties involved rather than be bound by the literal sense of the words.” While objective approach, according to Sutiyoso, put more emphasis on what is written in the contract rather than the subjective intention of the contracting parties, particularly if the words of a contract are obviously clear. This approach conforms to the plain meaning rule where the plain meaning of a contract is obvious; there is no room for interpretation. This approach can be found in Article 1342, regulating that “if the wording of an agreement is clear, one shall not deviate from it by way of interpretation.” In practice, Sutiyoso also explains that there is no priority in applying the interpretation method. It can be applied alone or combined with other methods of interpretation (p. 214).

Both Indonesian and Canadian contractual interpretations embrace both objectivist and subjectivist elements and have the same overriding aim when construing a commercial contract, which is to give effect to the expressed intention of the parties. Even if Canada favors objective approach in contractual interpretation, such approach generally does reflect subjective intentions of the contracting parties (Barnett, 2011, p. 6). Canadian court will not consider the surrounding circumstances when the language of the written contract is clear and unambiguous.

In relation to surrounding circumstances, if it is further analyzed, Indonesian contractual interpretation rule actually recognizes it in Article 1346 of the ICC. Article 1346 of the ICC stipulates that “if the wording is ambiguous, it shall be interpreted in a manner, which is customary

in the country or in the location where the agreement was entered into". As a civil law country, which is subject to codified legal rule, "surrounding circumstances" adopted by Indonesia are more rigid and specific thus they are limited to what is written in the ICC.

In the case of standard form contract interpretation, Canadian contractual interpretation rule precludes "surrounding circumstances" in interpreting contract. In *Ledcor*, Justice Cromwell admits that "for standard form contracts, there are usually no relevant surrounding circumstances, but, such as the purpose of the contract, the nature of the relationship it creates, and the market or industry in which it operates should be considered when interpreting a standard form contract" (para. 30).

In this matter, Indonesia differs from Canada in having no specific or detailed rule for standard form contract, as said in Article 1345 of the ICC that "wording which is open to two kinds of interpretation shall be interpreted in the sense which corresponds most with the nature of the agreement". This provision is not specifically designed for a standard form contract, but for a contract in general so that it can accommodate all types of contract.

Referring to the standard form contract issue, as Indonesia is subject to codified rule, it is reasonable that the contractual interpretation rules appear to be unclear or even broader as they are not fact-based analysis, that's why they should be able to accommodate all possible legal facts arising. If they are shape to govern more specific issues, it will increase difficulties for the judges to apply the law, where codified rule is the main source of law. Nevertheless, the positive point is that the law is more predictable as certain exact rules will be applied in all

types of cases of contractual interpretation.

Contrarily, Canadian contractual interpretation rules appear to be more specific as they are fact-based analysis, in which its application cannot be predicted. However, the unpredictable application of Canadian rule can result in greater fairness than Indonesian rule as it follows the development of legal facts. Hence, every contractual interpretation dispute will not be treated equally if it contains different legal facts.

Again, it is theoretically said that Indonesia as a civil law country should be "more subjective" than Canada in interpreting contract (Adams and Bomhoff, 2012). But then, Article 1348 of the ICC stipulated that "all stipulations, contained in an agreement, shall be interpreted having regard to their relationship to one another; each shall be interpreted having regard to its relationship to the whole agreement." This provision subtly also reflects a fundamental principle of contractual interpretation, stated in *Sattva* that a contract must be construed as a whole. Therefore, basically, Indonesia and Canada adopt the combination of both approaches. However, due to their different sources of law and application of the rules, the rule of contractual interpretation is constructed differently

## **E. Conclusion**

As previously explained, ideally, civil law upholds subjective approach to contractual interpretation, while common law upholds objective approach to contractual interpretation. Subjective approach seeks to determine what the contracting parties subjectively intended (the true intention of the parties), but the subjective discretion must be exercised honestly and in good faith. On the other hand, objective approach seeks to determine the parties' intention by

examining the understanding of a reasonable person in the equivalent circumstances, which means that it relates to the notion of reasonableness.

In the following, the case study between Indonesia and Canada interestingly shows how their sources of law influence court's approach to contractual interpretation. From the sources of law, it can be concluded that Canadian approach to contractual interpretation is more flexible, practical, and open, as it will follow the development of legal facts in contractual disputes and is not limited to certain legal principles. Conversely, Indonesia's approach to contractual interpretation is more impractical and closed in the sense that every kind of contract dispute will be governed by a limited number of general principles, which has been particularly postulated in the ICC.

In their applications, Indonesia, as a civil law country, starts the interpretation exercise with subjective approach and Canada, as a common law country, starts it with objective approach. Nonetheless, in their processes of contractual interpretation, these two countries combine both subjective and objective approaches to achieve accuracy in contractual interpretation. Simply put, it is observed that subjective and objective approaches to contractual interpretation are completely intertwined and tangled with one another. Therefore, in practice, these two approaches are inseparable; they not mutually exclusive of each other in all aspects.

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## Bitcoin: A Comparative Study of Cryptocurrency Legality in America and Indonesia\*

Jonathan Hendson Passagi\*\*

### Abstract

Bitcoin is widely used and accepted by many countries. The features that are being offered and the positive uprising of its price have made it popular among its users and investors. The value of Bitcoin started from less than a dollar in 2009 and raking up to over two thousand dollar within 2017. In Indonesia, Bitcoin became popular in 2013; a group of people began to form a community and online forum where people with similar interest can gather and conduct exchange of Bitcoin. In early 2014, the community had formed the first professional Bitcoin brokerage service in Indonesia which also known as bitcoin.co.id and over fifty thousand members were registered. With the daily transaction valuing over five hundred million Rupiah, bitcoin.co.id has made its name on South East Asia. However, despite the positive response in Indonesia, the lack of legal framework regulating cryptocurrency and the risk of misusing it to fund illicit activity has become a national concern. This paper provides an analysis of legal problems that are being encountered by Indonesia government and thorough comparison with America's laws on cryptocurrency. By stipulating a law on cryptocurrency, Indonesia's government would have show support for cryptocurrency in Indonesia through reducing the volatility risk and the possible illicit activities derived from the usage of cryptocurrency.

### Intisari

Bitcoin telah banyak digunakan dan diterima oleh berbagai negara. Fitur yang ditawarkan dan peningkatan positif pada harganya telah membuat Bitcoin populer di kalangan pengguna dan investornya. Nilai Bitcoin dimulai kurang dari satu dolar di tahun 2009 dan telah meningkat hingga lebih dari dua ribu dolar pada tahun 2017. Di Indonesia, Bitcoin mulai populer di tahun 2013; orang-orang mulai membentuk komunitas dan forum online di mana orang-orang dengan minat yang sama dapat berkumpul dan melakukan pertukaran Bitcoin. Pada awal 2014, komunitas tersebut telah membentuk layanan broker Bitcoin profesional pertama di Indonesia yang juga dikenal dengan bitcoin.co.id dan lebih dari lima puluh ribu anggota telah terdaftar. Dengan transaksi harian senilai lebih dari lima ratus juta rupiah, bitcoin.co.id telah dikenal namanya di Asia Tenggara. Namun, meski mendapat respon positif di Indonesia, kurangnya kerangka hukum yang mengatur mata uang digital dan risiko penyalahgunaannya untuk mendanai kegiatan terlarang telah menjadi perhatian nasional. Makalah ini memberikan analisis masalah hukum yang dihadapi oleh pemerintah Indonesia dan perbandingan secara menyeluruh dengan undang-undang Amerika tentang pengaturan kriptokurensi. Dengan menetapkan undang-undang tentang kriptokurensi, pemerintah Indonesia dapat memberi dukungan untuk kriptokurensi di Indonesia melalui pengurangan risiko yang membahayakan dan kemungkinan aktivitas terlarang dari penggunaan kriptokurensi tersebut.

**Keywords:** Bitcoin, Bitcoin Legality, Cryptocurrency, Comparative Study

**Kata Kunci:** Bitcoin, Legalitas Bitcoin, Kriptokurensi, Studi Komparatif

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**A. Introduction to Bitcoin as Cryptocurrency**

Bitcoin relies on the concept of peer to peer lending, making it the world's first completely decentralized digital-payments system so that no intermediary is needed hence allowing direct transactions between the users. (Britto, 2013:3) One might question Bitcoin security due to the absence of intermediary role such as in Paypal yet this is not true since it establishes the intermediary in form of electronic instrument as distributed ledger or notably known as *blockchain*. New transactions are checked against the *blockchain* to ensure the same Bitcoins have not been previously spent.

*Blockchain* functions through public-key cryptography that serves as two "keys". (Paar, 2010) One private key functions similar to password and one public key to be shared with the world thus within a transaction of Bitcoin, sender creates a message that contains recipient's public key and later "signed" by sender through her private key. Public-key cryptography ensures all computers within the network have constantly updated and verified record of all transactions so the transfer of ownership of the Bitcoins are recorded, time-stamped, and displayed within a "block" of *blockchain*. (Britto, 2013:5)

Each "block" varies in size which depends on the value of transactions forming a data. Once recorded the data in any given block cannot be altered retroactively without altering all subsequent blocks. Through the ledger mechanism, the risk of fraud or system failure are greatly minimalized.

**Pseudonymity:**

Modern online transactions or payment mostly involves third party as intermediary such as Paypal that keeps record of every transactions and to the extent of personal identity. But in the case of transaction based on cash without any intermediary and both parties have no clue over each other's identities, the transaction is completely anonymous. Bitcoins are similar to cash to the extent upon transfer

of it there is no third party intermediary that records the identity of parties involved. A transaction that happened between two public keys means that relevant information are recorded in the *blockchain* and publicly viewable. (Britto, 2013:8) Despite the public keys for all transactions or Bitcoin addresses<sup>1</sup> are recorded in the *blockchain*, those keys are not tied to anyone's identity. Yet if a person's identity happened to be linked to a public key or users publicize their key addresses publicly (Roberts, 2011), the recorded transactions in the block chain tied to that identity can be traced and accesible publicly hence making Bitcoin pseudonymus. To maximize the pseudonymus feature, user can employ the use of anonymus software like *Tor* and remain responsible by avoiding transacting with Bitcoin addresses that could be tied back to one's identity. However through routinal observation notably known as "entity merging", two or more public keys used as an input to one transaction at the same time, one can gradually link the records together hence the transaction was no longer anonymus. (Ober, 2013:246)

**Potential Virtues & Drawbacks:**

Besides the feature of pseudonymity, Bitcoin also offers various benefits namely from low transaction cost, superior store value, preventing poverty and most importantly stimulate financial innovations. (Britto, 2013:10-17) Since Bitcoin does not involve third party per-se as intermediary, transactions are relatively cheaper and quicker. The imposition of tax is unlikely possible due to every transaction is recorded in the public accessible ledger *blockchain* instead of done by appointed intermediary such as Paypal. Several small businesses have already started to accept Bitcoin as a way to avoid the costs of doing business with credit card companies (Karol, 2013) and to some extent adopting Bitcoin for its

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<sup>1</sup> By default any Bitcoin addresses that being recorded to Blockchain are not tied to anyone's identity.

speed and efficiency in facilitating transactions. (Reutzel, 2013)

Improvement of access to basic financial services can greatly reduce poverty. (Yunus, 2003) It is estimated over 64 percent of people living in developing countries have difficulty to access financial service due to the unbearable cost to be afforded by conventional financial institutions to serve poor or rural areas (Mylenko, 2011:6-11). Bitcoin offers a huge breakthrough in financial service sector by the means of technology. The current mobile banking service further would be left behind by the adoption of Bitcoin. (Spaven, 2013) In a split second, transaction can be done without delay, unnecessary fees and risk of fraud. Hence Bitcoin is one step ahead over conventional financial institutions.

Traditional currencies often accepted as stores of value due to government's influence behind, hence giving them a sense of legitimacy and stability in the eyes of users. This could be a problem if a country is embroiled in conflict, the currency might be affected. If the government decides to inflate its currency for national economy policy, the wealth held by individuals in the form of currency decreases. (Plassaras, 2013:390) Bitcoin as cryptocurrency on the other hand, would answer to market forces rather than the policies of national governments and the various special interests they represent. (Macintosh, 1998:764)

Due to its protocol contains blueprints for various developments on useful financial (Britto, 2013 news) and legal services<sup>2</sup>, Bitcoin is open for extensive innovation. It is not limited only as currency or payment methods. Thus, policymakers should avoid regulation that may quash the promising innovative features offered by Bitcoin's protocol.

With the ongoing benefits and opportunities offered by Bitcoin, there are

also constant drawbacks that should be taken into consideration such as volatility, risk of misuse and security breaches. If Bitcoin is used to store values or units of account, the currency's volatility can endanger it yet if used as medium of exchange, volatility is less of a problem.<sup>3</sup> As more people become familiar with Bitcoin, volatility risk would decrease. (Britto, 2013:18).

There comes also the risk of misusing it to propagate illegal activities. The infamous "Deep Web" black-market site known as "Silk Road" takes advantage of the anonymizing software Tor (Dingledine, Mathewson, and Syverson 2004) and the pseudonymous nature of Bitcoin to enable transactions of illicit drugs, ransoms, stolen credit card information and forged documents. (Kim, 2014) It was estimated that the turnover on the "Silk Road" market as the first to support Bitcoin transactions exclusively valuing \$15 million just one year after it began operation. (Bohme, Christin and Moore 2013:222-223) Bitcoin's association with "Silk Road" has tarnished its reputation. (Britto, 2013:21)

Since it functions as a virtual currency, Bitcoin is prone to be used as a medium for money laundering activities or supporting various criminal activities. Ill-gotten money to fund terrorism and trafficking illegal goods could be concealed simply by converting to Bitcoin. This issue has been highlighted for years, especially after the case of Liberty Reserve, a private, centralized digital-currency service based in Costa Rica, was shut down by authorities for money laundering. (BBC, 2013) China's central bank also banned Chinese banks from relationships with Bitcoin exchanges as to prevent yuan from being moved overseas via Bitcoin. Similarly, despite the high demand of Bitcoin in Argentina, the government policy strictly limits transfers to other currencies. (Bohme, Christin and Moore 2013:224)

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<sup>2</sup>An Argentinian man named Maruel Araoz has managed to utilize Bitcoin distributing computing power as digital notary service to allow people to verify legal document existence through a program named *Proof of Existence*. Other similar program see *Bitnotar* and *Chronobit*

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<sup>3</sup>Use of Bitcoin as speculative investment would increase the risk of its volatility and against its main purpose as an alternative form of payment.

Security had also become prominent issue for Bitcoin. In 2012 Bitfloor a bitcoin exchange lost 24.000 BTC (worth \$250.000) from a net heist. (Coldewey, 2012) A year later, a massive series of distributed denial-of-service (DDoS) devastated a well known bitcoin exchange, Mt.Gox.<sup>4</sup> Network threat also went to the extent of removing pseudonimity as one can trace particular transaction from *blockchain*, stole credentials and personal identity or worst knowing one's private keys. (Miers, Garman and Rubin, 2013) Hence it can be said there is a strong link between Bitcoin's volatility and security.

### **B. The Analysis of Legality of Bitcoin and The Importance of Enacting Cryptocurrency Law in Indonesia**

Before Bitcoin became popular in Indonesia as a method of payment or alternative currency, mobile banking was the first innovation that incorporated the use of technology. These two innovation are the example of financial technology or notably known as "Fintech". There is no exact term for fintech, but generally fintech aims at providing financial services through the incorporation of modern technology.<sup>5</sup> Fintech main objective is to achieve a financial inclusion, to reduce the constraints that exclude people from participating in the financialo sector.<sup>6</sup> There are so many categories of service in Fintech hence Bitcoin together with blockchain falls under the "Crypto currency & Blockchain" categories.<sup>7</sup>

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<sup>4</sup>In 2013, Mt. Gox a well-known Bitcoin exchange suffered from a massive DDoS which led to the fall of Bitcoin's value along with several hacking. With the ongoing hack and inability to pay the refund, Mt. Gox on April 2014, filed for bankruptcy in Japan along with bankruptcy protection in US.

<sup>5</sup>Fintech Weekly defined it in general sense of incorporating technology means in financial service sector

<sup>6</sup>The pursuit of making financial services accessible at affordable costs to all individuals and businesses, irrespective of net worth and size respectively. *Investopedia* further describes how Fintech could help government to achieve financial inclusion.

<sup>7</sup>See further *Fintech Ecosystem* graph provided by *Business Insider*.

As a cryptocurrency, Bitcoin has a different transaction scheme which resulting in different legal relationship. Most currencies have a "triangle" type of transaction termed centralization where banks act as a financial intermediary role between parties thus transfer of payment shall be carried out by banks. (Tampi, 2017:88) On the other hand a bitcoin transactions only needs two parties with mutual consent to exchange certain goods or currencies with a certain amount of bitcoin, therefore it is decentralized unlike banks. (Tampi, 2017:90) (Ferrera, 2004). The legal relationship incorporates basic values of communication such as confidentiality, integrity, authenticity, non-repudiation and availability. (Makarim, 2003:223)

Confidentiality ensures the system to maintain privacy so that only authorized individuals can view sensitive information. Integrity emphasizes the importance of accurate and reliable information of each bitcoin transaction which recorded by blockchain. Authencity means the content of bitcoin transaction can be verified and altered in an unauthorized manner. Non-repudiation incorporates that the origin of any action on the bitcoin system can be traced thus enabling every user to have private key and records of transaction. (Makarim, 2003:223)

Before discussing further about the legality of Bitcoin in Indonesia, a comparison can be made with America on how they regulate the use of cryptocurrency. The Internal Revenue Service or IRS, treats virtual currency as property thus any gains or losses upon an exchange of virtual currency will be subject to taxation. (IRS, 2014) (Pagliery, 2014) In 2013, the U.S Senate Committee on Homeland Security announced plans to start an inquiry aimed at establishing a regulatory framework for Bitcoin. (Lee, 2013)

In 2013, the Financial Criminal Enforcement Network (FinCEN) issued notice that obliged every exchanges and administrators of virtual currency are subject to the Bank Secrecy Act (BSA), Title

Ill of PATRIOT Act (GAO, 2014) and should be registered as Money Services Business (MSB).<sup>8</sup> It was legislated to prevent misuse of virtual currency for money laundering, funding illicit activities or tax evasion. However, even after the obligation to comply with BSA, virtual currency is still used for illegal purposes due to its pseudonymity protocols nature. (Zetter, 2013) With the decentralized and pseudonymity nature of virtual currency, Government Accountability Office (GAO) noted it is necessary to have global cooperation to address these crimes (GAO, 2014:1)

The Securities and Exchange Commission (SEC) had also proposed a bill to regulate virtual currency which being used as securities and prevent illegal activities involving securities by means of virtual currency. The bill further regulates that virtual currencies are equal as money, so investing money (virtual currencies included) in a token with an expectation of profit derived from the managerial efforts of other people points to a virtual currency being a security, and that it's required to be regulated as such. (Churchouse, 2017)

A notable virtual currency case had also forced the US government to form a uniform cryptocurrency law. On July 23, 2013 the SEC charged Shavers for committing ponzi scheme to defraud investors through his company, Bitcoin Savings and Trust (“BTCST”). Through BTCST, Shavers solicited and accepted all investments and paid all purported returns in the form of virtual currency, Bitcoin. The conduct done by Shavers was found to meet the definition of investment contract. Since it was security crime, the court had absolute jurisdiction over the case through the Securities Act.

An investment contract is defined as “any contract, transaction, or scheme involving: (1) an investment money; (2) in a common enterprise; (3) with the expectation of profits would derived from

the efforts of the promoter or a third party. The main question was whether Bitcoin invested into Shaver’s ponzi scheme qualified as an investment money. Since Bitcoin can be used to purchase goods or services, afford individual living expenses and be exchanged for fiat currencies, Bitcoin constituted an investment of money or “reserve fund”. (SEC v. Shavers, pg.1-16, 2013)

With the ongoing use of virtual currency and its extensive development, the current regulations would not be able to fill in the legal vacuum. Thus the US government had proposed a uniform regulation of virtual currencies business act. The proposed regulation will regulate licensing requirements, reciprocity, consumer protection, cyber-security, anti-money laundering and licensee’s supervision coupled with sanctions. (Redman, 2017)

### 1. Legality and Problems of Bitcoin in Indonesia

As discussed before, due to the absence of intermediary to help transaction happens between parties, the Indonesia Civil Code through article 1338 and 1320 can be incorporated to regulate legal relation involving exchange of Bitcoin. Under 1138, the contract for exchange of Bitcoin shall be the law for both parties (*Pacta Sunt Servanda*), and cancellation of contract shall be based on parties consent or reasonable by law (Miru, Pati, 2008:78).

Some might conclude that Bitcoin can be regulated by Law Number 11 of 2008 Concerning Electronic Information and Transaction through Article 1 paragraph 1 “*Electronic information means one cluster or clusters of electronic data, including but not limited to...*” thus it is categorized as electronic data which is not limited by the definition of electronic information. The supporting elements of Bitcoin transactions such as blockchain, hash, public and private key can be listed as sign and access code that have been processed and understandable by qualified persons. (Tampi, 2017)

<sup>8</sup> See further FinCEN’s guide paper 2013-G001 on its regulations application to persons administering, exchanging, or using virtual currencies.

Furthermore, Article 1 paragraph 2 of the law defined electronic transaction as a legal act that is committed by the use of computers, computers networks, and or other electronic media. Despite Bitcoin transaction happens through the use of computer, the action of transacting itself has not been regulated. However due to the principle of *nullum delictum nulla poena sine praevia lege poenali* (Pangaribuan, 2016), this does not mean transaction of bitcoin is illegal.

Similar to the Law Number 11 of 2008, the Law Number 8 of 2010 on Prevention of Money Laundering, Article 1 paragraph 16 had implicitly regulated documents including not limited to electronic recorded documents, thus incorporating Bitcoin for criminal activity followed by money laundering can be subject to criminal sanction of this law, however if report of money laundry by Bitcoin was made by Administrator or Bitcoin Exchange, it has not been included under Article 17 of Law Number 8 of 2010 on Prevention of Money Laundering. Not to mention also, Bitcoin can be seen as a potential medium by tax criminals for tax avoidance (Marian, 2013:42).

In other laws such as Law Number 10 of 2011 on Future Trading, Law Number 8 Of 1995 on Capital Market, there is no regulation concerning bitcoin. Although as discussed before Bitcoin falls under Fintech, the current law on Fintech issued by Financial Authority Service (OJK), POJK Number 77 of 2016 was concerning *Peer-to-Peer Lending* only. Even worst, the Bank of Indonesia (BI) issued PBI Number 18/40 of 2016 on Processing Transfer of Payment, wherein Article 34 (a) specified a prohibition to process transaction with virtual currency. The lack of uniform regulation concerning virtual currency administration, usage and penalty would risk the future use of virtual currency and directly affect consumer's trust whether to use Bitcoin or remain with conventional cash currency. With the unclear regulation and current restriction by Bank of Indonesia on the use of cryptocurrency, Indonesia's government should respond immediately to

ensure a safe and effective use of cryptocurrency.

## 2. The Importance of Enacting Uniform Law of Cryptocurrency in Indonesia

There are several factors to be taken into consideration as the reasons to enact a law on cryptocurrency.

Firstly, it is due to its well-known and widespread usage globally. The prominent features offered and its increasing value (Plassaras, 2013:389) has attracted people and many people had change to use Bitcoin as a form of payment. As more people involved in Bitcoin transaction, the value of Bitcoin itself would eventually become more stable and attracts Bitcoin investors to Indonesia. Moreover, since there has been several Bitcoin Exchanges in Indonesia such as *bitcoin.co.id*<sup>9</sup>, it would be better to have a proper regulation on cryptocurrency to administer or issue license for financial institution delivering cryptocurrency services, hence it can also foster Indonesia's economic growth.

Secondly, considering the prominent pseudonymity and decentralized features which are prone to be used for criminal activities. Several criminal cases such as money laundering, ponzi scheme, contraband trafficking and possible tax avoidance had proven how devastating cryptocurrency could be over a state economy.<sup>10</sup> In many ways, Bitcoin and cash are similar since both share a key property that makes them both suitable for illegal activity. Neither requires an institutional and subpoenaable intermediary. (Tsukerman, 2015:1147). Having a legal framework on cryptocurrency would stipulate criminal sanction and can significantly reduce illegal activities involving cryptocurrency such as Bitcoin. Further, the enactment of cryptocurrency

<sup>9</sup>*Bitcoin.co.id* is the first and leading cryptocurrency-based Bitcoin exchange in Indonesia ever since 2013 and now expanding its business to include *Ether*, a cryptocurrency that derives from *Ethereum's* block chain

<sup>10</sup>See further the case of *Liberty Reserve* that involves money laundry and its correlation with cryptocurrency, *SEC v. Shavers* on cryptocurrency with Ponzi's scheme, *Silk Road Drug* charges by Manhattan U.S Attorney (Department of Justice),

law enables the cooperation with ITE's act, anti-money laundering act, banking act, capital market act, and many more.

Lastly, regarding Bitcoin's volatility. The Efficient-Markets-Hypothesis (EMH) stated that the market value of an asset is equal to the best available estimate of the value of the income flows it will generate. Since Bitcoin does not generate any earnings and has no intrinsic value, its has to appreciate in value to ensure people to be willing to hold them. (Swartz, 2014:319-335) Most Bitcoin users are acquiring it as a speculative investment, rather than with the intent to purchase goods in which some exchanges show 80% of Bitcoin users purchase it as a speculative tool. (Harvey, 2015:1). By having cryptocurrency law, there can be regulation and requirements to use Bitcoin as a tool of investment thus reducing the risk of volatility. Even the SEC is planning to regulate initial coin offering (ICO), (Marshall, 2017) a phase similiar to initial public offering where company releases its own cryptocurrency with a purpose of funding. (Coggine, 2017)

### **C. Conclusion**

Based on the abovementioned factors and reference to US treatment on cryptocurrency, there are several important conclusions to be taken into consideration. Firstly, due to the widespread use of Bitcoin, the regulator should stipulate a policy that would not quash cryptocurrency in a way hindering its usage. It would be better also to form a committee to conduct comparative study with other countries to enrich the knowledge of regulators by means of research thus ensuring an effective cryptocurrency law upon the enactment of it.

Secondly, considering the transactions recorded in blockchain are anonymus and decentralized, there should be a strict regulation on licensing for those willing to incorporate Bitcoin business or exchange. By having a cryptocurrency law, the authority can oblige Bitcoin service providers to cooperate on tracing transactions and Bitcoin's account owner in

Indonesia. This can minimized the misuse of bitcoin transactions.

Lastly, having a clear legal framework can enable Bitcoin to contribute to Indonesia's economy. As the users and market of Bitcoin grows, equal income distribution and infrastructure development all over Indonesia can be achieved. People will find it convenient to use Bitcoin due to its value, paperless, no additional cost for transfer hence relating to lower tax imposition.

The enactment of cryptocurrency law can embrace the citizens of Indonesia to gradully move from the current exchange system into incorporating Bitcoin and other cryptocurrency to conduct their business.

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