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Community of
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FOREWORD FROM THE DEAN
FACULTY OF LAW UNIVERSITAS GADJAH MADA

It gives me great pleasure to present the first edition of the online *Juris Gentium* Law Review which is initiated by the Community of International Moot Court of the Faculty of Law Universitas Gadjah Mada (CIMC Faculty of Law UGM).

Firstly, I extend a particularly big pride to the UGM Law Mooters --they were the UGM Law Faculty Delegations to several international moot court competitions-- whom have dedicated their thoughts, time and efforts to the establishment of the Community of International Moot Court of the Faculty of Law Universitas Gadjah Mada. Without a clear vision, strong motivation, endless discussions and cooperation among the mooters this Community would not exist. I believe this is an accomplishment of your motto of "Justice for the World, Justice for the Man, Justice for Justice". Next, for the launching of the first edition of the online *Juris Gentium* Law Review as one of the most excellent programs of the CIMC: well done. The journal will open doors of opportunity especially for the students at the Faculty of Law to study, research, express their critical opinion and creative-innovative-solutive analysis on international public law, international commercial law and comparative law studies through a user-friendly nature of the cyber space. Finally, I assure you that the online *Juris Gentium* Law Review has set for an exceptional international standard of review on legal science for law students in Indonesia.

This is only the beginning and small steps to success. This journal will need your perseverance, determination and hard work. Always do everything whole-heartedly and please remember that all things are difficult before they become easy. Enjoy the time of togetherness with your fellow students in this amazing experience.

Once again on behalf of the Faculty of Law Universitas Gadjah Mada, I would like to take this opportunity to congratulate the CIMC UGM Law for this splendid achievement in launching the first edition of the online *Juris Gentium* Law Review.

Thank you,

Sincerely,

Prof. Dr. Marsudi Triatmodjo, S.H., LL.M.
Dean of the Faculty of Law
Universitas Gadjah Mada

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

Today's world is undergoing a tremendous competition and we have to face this reality soon or later. It has been ten years since the Faculty of Law Universitas Gadjah Mada started its very first participation in International Moot Court Competition. During this time, we have been preparing, learning and developing our legal ability in order to create better standards and to improve the quality of students in our Faculty. Since the establishment of Community of International Moot Court (CIMC) Faculty of Law UGM on March 2012, I am convinced that this community will accommodate students' legal ability and to boost their achievements.

I am delighted to welcome the first publication of the Juris Gentium Law Review, a product of CIMC which is solely dedicated to the education of legal aspects. The Juris Gentium Law Review would serve as a platform for disseminating student's critical thinking in the various aspects of Public and Private International Law. As President of the CIMC, I understand the vital role that legal academic writing plays in shaping the students capabilities. I am confident that the Juris Gentium Law Review would carve out a niche for itself in this regard. We, the CIMC board, also believe that the Law Review will be an important tool to increase student in creating greater awareness about legal writing and providing readers with the knowledge in the area of laws.

I want to take this opportunity to give my high appreciation to the Faculty of Law UGM deaneries that have been supporting Juris Gentium Law Review since its being initiated by the CIMC founders. I also want to express my gratitude to the Editorial Board and its staff who have worked hard in ensuring the Law Review until its publication. Thank you for every-

one who has given their contribution to the first edition of Juris Gentium Law Review.

I, therefore, enjoin all stakeholders in the CIMC and Juris Gentium Law Review want to welcome all readers to enjoy the articles in this first edition.

Thomas Peter Wijaya
President of Community of International Moot Court
Faculty of Law Universitas Gadjah Mada

FOREWORD FROM THE EDITORIAL BOARD

We all know the proverb of "knowledge is power", as future leaders of our nations it is better to express our minds through knowledge rather than force. I believe that words are much more efficient to inflict a change to the society, nation, or even the world. Hence the Community of International Moot Court ("CIMC") Faculty of Law Universitas Gadjah Mada has initiated the establishment of Juris Gentium Law Review as a media to accommodate the energy and power of the youths in this nation or even the world to express their voices in the field of law.

In this first edition, we were delighted to receive eleven manuscripts from four universities; Universitas Gadjah Mada (Indonesia), Universitas Padjadjaran (Indonesia), Universitas Islam Indonesia (Indonesia), and National Law University Bangalore (India) of which ten are accepted as eligible articles. The topics include in the area of International Public Law (such as International Criminal Law, International Human Rights Law, International Economic Law, and etc.), International Private Law (Business Law), and Comparative Law (Corporation Law between the United States and Indonesia). We are expecting to have a more diversified topic area in the upcoming publications.

I am exceptionally honored to represent the Editorial Board in writing this foreword. I want to express my greatest gratitude to the Editorial Board Staff: Aulia Rizdha Kushardini, Gita Sembiring and Shita Pina Saphira, who have worked very hard all the way through these months in "assembling" this breakthrough. Immeasurable thanks as well to Ex Officio, Ad Interim President, and one of the Founders of Community of International Moot Court Faculty of Law Universitas Gadjah Mada, Fajri Matahati Muhammadin, and another Founder and Prominent Member of CIMC, Rizky Wirastomo for their extremely appreciated assistance. Not

forgotten, our uttermost gratitude to each and every Expert Reviewers of Juris Gentium Law Review who have put their precious time in reviewing our accepted manuscripts and the Faculty of Law for supporting us in publishing this Law Review. Last but not least, to the Authors who have contributed their works for this inaugural publication of Juris Gentium Law Review.

Enough words from me and now I proudly present to you, in the next following pages, the perspectives and ideas of the youth.

Eldo Kredainou Alwi
Head of Editorial Board Juris Gentium Law Review
Community of International Moot Court
Faculty of Law Universitas Gadjah Mada

A COMPARATIVE STUDY OF SHIP SEAWORTHINESS BETWEEN AUSTRALIA AND INDONESIA*

Ardianto Budi Rahmawan**

Abstract

Since this era is ever changing and the International Business Transaction is developing in a very rapid manner, there are a lot of commercial transactions between parties through delivery of a cargo by using a vessel to transport his cargo because it can amount lot of items. However a problem starts to rise whenever the standard of a vessel to be used in a contract between parties is questionable when the vessel that has been used is sinking, broken during the stages of voyage or failing to deliver the cargo properly. In this journal the writer wants to uphold and describe the legal definition of due diligence in maritime law especially concerning the standard of vessel to

Abstrak

Seiring dengan jaman yang terus berubah dan perkembangan transaksi bisnis internasinal yang amat cepat, terdapat banyak transaksi komersil antara berbagai pihak melalui pengiriman kargo dalam jumlah besar menggunakan jasa pekapalan. Meski demikian, permasalahan mulai muncul saat standar kapal yang digunakan dalam kontrak meragukan; beberapa kapal telah tenggelam, rusak dalam tahap pengiriman, atau tidak berhasil mengirimkan kargo secara sepatutnya. Dalam jurnal ini penulis ingin menegakkan dan mendeskripsikan definisi hukum dari 'legal due diligence' dalam hukum maritim, terutama berkaitan dengan standar kapal yang memenuhi krite-

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** 2010; -; Faculty of Law, Universitas Gadjah Mada; Yogyakarta, Indonesia.

be considered as a vessel that can be fit to enter a contract for delivering the cargo in general also by comparing the standard of seaworthiness in Australia and Indonesia supported by the cases that has been happened in each countries.

ria layak untuk dipergunakan dalam kontrak pengiriman kargo secara umum, serta dengan membandingkan standar kelaiklautan di Australia dan Indonesia sebagaimana didukung oleh studi kasus dalam kedua negara tersebut.

***Keywords**: seaworthiness, international business transaction, due diligence.*

A. Introduction

Over the past thousand years, there has been an exponential growth in the number, scope, and influence of international marine in international trade law. This growth has greatly expanded the capacity of ship owner and a charterer to control the committed acts that detrimentally affect the interests of each individual. The law of contract regulates the performance of obligations which the parties have chosen to be imposed on themselves in the course of their commercial relations. As a result, it has become necessary to decide who is responsible and liable to provide compensation, when an individual breaches the international marine law.

Australia, as one of the biggest state that has a significant recent development in marine business has a lot of issues concerning the seaworthiness of a vessel and the implementation of exercising due diligence to prove whether a vessel is seaworthy or not. On the other hand Indonesia is the largest archipelagic state and having the largest seawater area in the world. Hence it would be very interesting to analyze both of these neighboring states.

Before the enactment of Hague/Visby Rules concerning the obligations of ship owners and charterers was very hard to be determined because there was no fixed standard concerning the obligation of each party; for example the duty of charterers to deliver the ship and the limitation of responsibility for the shipowners if there is a latent defect which was undiscoverable by due diligence. As time

goes, the Hague/Visby rules has been enacted. This followed with an apparent dilemma arising from the obligation to provide only due diligence to make the ship seaworthy. Reflecting to this concern the Author wants to identify the problems concerning the obligation of shipowners to provide a seaworthy ship from the Australian and Indonesian point of view. Since it is obvious, that there is no fixed standard for a vessel to be regarded as a seaworthy ship or not; yet the ship must be in a condition to encounter whatever perils of the sea a ship. ("Steel v. State Line SS Co.," 1877) {Beller, 1994 #5}

The Author also sees the problem In Indonesia concerning the rules and source of law that regulate maritime matters especially for the standard of a vessel to be considered as a seaworthy ship. This is for the reason that in Indonesia, the regulation that handles such matters is just enacted within the Law No. 17 Year 2008.

Reflecting to this concern the Author decides to write a paper that contains the standard of ship to be considered as seaworthy based on the comparison of Australian Maritime Law and Indonesian Maritime Law. In the next section writer will divide these article into three section, they are the definition concerning Due Diligence and Seaworthiness in Australia and Indonesia and an analysis supported by some cases that was happened in both countries.

B. Legal Definition of Due Diligence

Due diligence to make a vessel seaworthy in respect of a loss is one of the most controversial concepts in The Hague or Hague/Visby Rules. Before the advent of the Rules, the obligation of the carrier to make the vessel seaworthy was absolute; it was not sufficient to exercise due diligence.("Steel v. State Line SS Co.," 1877; "The Torenia ", 1983)

Art. 3(1) of The Hague and Hague/Visby Rules reads:

> "The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:
> "a) Make the ship seaworthy;
> "b) Properly man, equip and supply the ship;
> "c) Make the holds, refrigerating and cool chambers,

> and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation."

The due diligence provision of art. 3(1) as stated in the Hague/Visby rules is of public order, in virtue of art. 3(8) and cannot be contracted out of. ("Bundesgerichtshof," 1984) Due Diligence under art. 3(1) is similar, but not identical, to the exculpatory exception at art. 4(2) (p) "Latent defects not discoverable by due diligence.

Due diligence to make the vessel seaworthy may be defined as a genuine, competent and reasonable effort of the carrier[1] to fulfill the obligations set out in subparagraphs (a), (b) and (c) art. 3(1) of The Hague Hague/Visby Rules.[2] It is the diligence of the "reasonably prudent" carrier, as at the time of the relevant acts or omissions, and not in hindsight. ("The Subro Valour," 1995) The English Court of Appeal has held that the test of due diligence is whether the carrier, its servants, agents and independent contractors have exercised "all reasonable skill and care to ensure that the vessel was seaworthy at the commencement of its voyage, namely, reasonably fit to encounter the ordinary incidents of the voyage." ("The Kapitan Sakharov," 2000) The French version of the Hague Rules (which is the official version) uses the words

[1] The "carrier" who owes the duty of due diligence has been held, in the United States, to include the non vessel-owning common carrier (NVOCC) who issues the bill of lading, without there being any requirement for the vessel operating carrier to ratify the bill. See All Pacific Trading v. Hanjin Lines 1991 AMC 2860 at p. 2861 (C.D. Cal. 1991), aff'd 7 F.3d 1427, 1994 AMC 365 (9 Cir. 1993), cert. denied 510 U.S. 1194, 1994 AMC 2997 (1994).

[2] Grain Growers Export Co. v. Canada Steamship Lines Ltd. (1918) 43 O.L.R. 330 at pp. 344-345 (Ont. S.C. App. Div.), upheld (1919) 59 S.C.R. 643 (Supr. C. of Can.), defined due diligence as "not merely a praiseworthy or sincere, though unsuccessful, effort, but such an intelligent and efficient attempt as shall make it so [i.e. seaworthy], as far as diligence can secure it." See also C. Itoh & Co. (America) Inc. v. M/V Hans Leonhardt 719 F. Supp. 479 at p. 504, 1990 AMC 733 at p. 743 (E.D. La. 1989): "…such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case." See also Tuxpan Lim. Procs. 765 F. Supp. 1150 at p. 1179, 1991 AMC 2432 at p. 2445 (S.D. N.Y. 1991): whatever a reasonably competent vessel owner would do under the circumstances.

"diligence reasonable". This illustrates that the diligence required is not absolute, but only reasonable.

C. Legal Definition of Seaworthy Vessel

According to the Australian law, Seaworthiness may be defined as[3]

(a) In a fit state as to the condition of hull and equipment, boilers and machinery, the stowage of ballast or cargo, the number and qualifications of crew including officers, and in every other respect, to:
   (i) encounter the ordinary perils of the voyage then entered upon; and
   (ii) not pose a threat to the environment; and

(b) It is not overloaded. If:
   (i) It is proposed to take a Safety Convention of Ship to sea on a voyage from a port in Australia; and
   (ii) There is in force in respect of the ship the certificate or certificates that may be required to be produced under subsection 206W(2) in respect of the voyage

The state of a vessel in such a condition, with such equipment, and manned by such a master and crew, that normally the cargo will be loaded, carried, cared for and discharged properly and safely on the contemplated voyage. Seaworthiness has four aspects to be fulfilled they are:

"1) the ship, crew and equipment must be sound and capable of withstanding the ordinary perils of the voyage;[4]

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[3] Australian Navigation Act 1912 Sec 207; A similar definition of seaworthiness is to be found at art. 2063 cc (Québec 1994): "At the beginning of the voyage and even before, the carrier is bound to exercise diligence to make the ship seaworthy, properly man, equip and supply it, and make fit and safe all parts of the ship where property is to be loaded and kept during the voyage." See also Canada Steamship Lines Ltd. v. Desgagné [1967] 2 Ex C.R. 234 at p. 244, which discusses art. 1675 of the former Québec Civil Code (the Civil Code of Lower Canada of 1866) and the duties of the carrier under it.

[4] F.C. Bradley & Sons. V. Federal Steam Navigation Co. (1926) 24 Ll. L. Rep. 446 at p. 454 (C.A. per Scrutton L.J.): "The ship must have that degree of fitness which an ordinary owner would require his vessel to have at the

2) The ship must be fit to carry the contract cargo.[5]
3) Fit to meet and undergo the perils of the sea ("Kopitoff v. Wilson," 1876)
4) Degree of fitness which an ordinary careful and prudent owner to face all probable circumstances. ("McFadden v. Blue Star Line," 1905)

Regarding the definition of seaworthiness, those aforementioned theory concerning seaworthiness sometimes can't be used similarly in every situation because it different in each cases and depends on from the opinion of the judge in that proceedings.

In Indonesia, after the enactment of law no 17 of 2008, the government expected that it can help to support and decide the standard of seaworthy ship. The government hopes that it can help to analyze the factors that can affect the seaworthiness of a ship. Hence, it could give a contribution to decide whether Indonesian or foreign vessel is seaworthy and fulfill the standard that has been regulated by Indonesian government.

In the case of *The Teratai Permai,*[6] The vessel was sinking during the voyage. Now what happen in this case the vessel which was regularly sail once a week serves the rout from Samarinda to Pare-Pare. One day the vessel departed from the port of Pare-Pare on Saturday around 17.00 pm and got sunk when they entered the Marene gulf. According to Indonesian national police investigation from the crew which was survived, the accident was occurred to ship due to the tornado that caused waves as high as 2 meters.

The Marene route that has been used by *The Teratai* was a

commencement of the voyage having regard to all the probable circumstances of it.", cited with approval in The Fjord Wind [2000] 2 Lloyd's Rep. 191 at p. 197 (C.A. per Clarke L.J.); The Lendoudis Evangelos [2001] 2 Lloyd's Rep. 304 at p. 306 (per Cresswell, J.), and The Eurasian Dream [2002] 1 Lloyd's Rep. 719 at p. 736 (per Cresswell, J.) (enumerating the following aspects of seaworthiness: physical condition of the vessel and equipment; competence/efficiency of the master and crew; adequacy of stores and documentation; and cargoworthiness).

[5] The Aquacharm [1982] 1 Lloyd's Rep. 7 at p. 11, cited with approval in The Good Friend [1984] 2 Lloyd's Rep. 586 at p. 593. See also The Kriti Rex [1996] 2 Lloyd's Rep. 171 at p. 184.

[6] An incident occurred in Pare-Pare, North Sulawesi in 2009.

dangerous route for a vessel because there are a lot of accidents that have been occurred in that gulf. From year 2007 until 2008 there have been three vessels that sunk in that gulf.

D. Analysis

Relating to those aforementioned cases that has happened in Indonesia it clearly shows a clear and a significant difference between the seaworthiness aspects that has been render and applicable in Australia and Indonesia. For example in Australia in the case of *Great China Metal Industries Co. Ltd. v. Malaysian International Shipping Corporation Berhad (The Bunga Seroja)*[7] the Australian High Court has summarized seaworthiness in Hague/Visby rules as follows:

> "Article III, r. 1 therefore effectively imposes an obligation on the carrier to carry the goods in a ship which is adequate in terms of her structure, manning, equipment and facilities having regard to the voyage and the nature of the cargo."

Moreover, seaworthiness means many things -- a tight hull and hatches, a proper system of pumps, valves and boilers, equipped with up-to-date charts, notices to mariners and navigating equipment and the crew must be properly trained and instructed in the ship's operation and idiosyncrasies and engines, generators and refrigeration equipment in good order. The ship must be bunkered and supplied for the voyage or diligent preparations must have been made in advance to obtain bunkers and supplies conveniently along the route.

Conclusively an Australian vessel must be presumed seaworthy if it fulfill all of the administrative requirements, technical aspects

[7] (1998) 158 A.L.R. 1 at p. 25, [1999] 1 Lloyd's Rep. 512 at p. 527, 1999 AMC 427 at p. 459 (High C. of Aust. per McHugh J.). N.B. The Bunga Seroja must be read with caution, however, because the decision is flawed in concluding that a peril of the sea may exculpate the carrier even if it is expected. The judgment also ignores the delicate balance between due diligence, peril of the seas and care of the cargo under the Hague and Hague/Visby Rules. Finally, the High Court passed over the argument that once a peril has been determined to exist before and at the commencement of the voyage, the carrier is only duly diligent in preparing for that peril if it takes various measures, including, inter alia, avoiding the peril by a change of course, staying in port until the expected storm abates, etc. (This latter argument may not have been properly pleaded, however.)

which proven that the vessel can safely afloat at any stages of voyage ("Quebec Marine Ins. Co. v. Commercial Bank of Canada," 1870) and have a degree of the fitness that can ordinarily careful having regard to the possible all circumstances.

Compare to Indonesia the definition of Seaworthiness is a very important aspect in order to the fulfillment of the service reliable and secure for a ship during his sailing in national and international level. Now what happen in Indonesia, the process to determine the standard of seaworthiness of the vessel does not running optimally, there still lot of problems and difficulty to analyze whether a ship already fulfill the standard of seaworthiness or not. Because, according to the Indonesian law, seaworthiness could be defined as a condition of ship which fulfills ship safety required water pollution prevention from ship, legal status of ship, management for safety and pollution prevention from ship, ship secure management for carry on certain waterway.[8]

[8] Art. 1 Para. 33 Law No. 17 of 2008 on Navigation of Sea.

E. Conclusion

The aforementioned analysis clearly shows that the regulation concerning seaworthiness in Australia is very developed because the regulation is not only to regulate the administrative procedure for a vessel to be considered as a seaworthy ship. But, they also regulate the technical aspects concerning the "*uji kepastian*" or due diligence to ensure that the vessel is appropriate enough. Regarding the aforementioned definition concerning seaworthiness the Author concludes that the term seaworthy creates a strict liability for the ship owners to provide that his ship is proper enough to enter in to the contract. For example when one day during the ship owners still or bound by a contract with a charterer this will create harms if during the contract or the sailing of voyage the vessel get a damage but this damage was a latent defect caused by the construction of the vessel which is undiscoverable even if the master already exercise due diligence in accordance with art. 3(1) of The Hague or Hague/Visby Rules It is the diligence of the "reasonably prudent" carrier, as at the time of

the relevant acts or omissions, and not in hindsight ("The Subro Valour," 1995) and master has held and conduct a proper test to the vessel. Conclusively regarding the standard of seaworthy ship in Indonesia is not strict as the Australia standard because the Indonesian one merely only focusing on the administrative requirement but not consider the technical and the real checking of the vessel to be considered as seaworthy ship.

BIBLIOGRAPHY

A. Cases

All Pacific Trading v. Hanjin Lines, AMC 2997 (1994).

Bundesgerichtshof, ETL 342 (1984).

Canada Steamship Lines Ltd. v. Desgagné, 2 Ex C.R. 234 (1967).

F.C. Bradley & Sons. V. Federal Steam Navigation Co., 24 Ll. L. Rep. 446 (1926).

Grain Growers Export Co. v. Canada Steamship Lines Ltd., 43 O.L.R. 330 (1918).

Kopitoff v. Wilson, 1 QBD 377 (1876).

McFadden v. Blue Star Line, 1 K.B. 697 (1905).

Quebec Marine Ins. Co. v. Commercial Bank of Canada, L. R. 3 P. C. 234 (1870).

Steel v. State Line SS Co., 3 App. Cas. 72 (1877).

The Aquacharm, 1 Ll. L. Rep. 7 (1982).

The Bunga Seroja, 158 A.L.R. 1 (1998).

The Eurasian Dream, 1 Ll. L. Rep. 719 (2002).

The Fjord Wind, 2 Ll. L. Rep. 191 (2000).

The Good Friend, 2 Ll. L. Rep. 586 (1984).

The Kapitan Sakharov, 2 Ll. L. Rep. 255 (2000).

The Lendoudis Evangelos, 2 Ll. L. Rep. 304 (2001).

The Subro Valour, 1 Ll. L. Rep. 509 (1995).

The Torenia, 2 Ll. L. Rep. 210 (1983).

Tuxpan Lim. Procs., 765 F. Supp. 1150 at p. 1179, 1991 AMC 2432 (S.D. N.Y. 1991).

B. Statute

Australian Navigation Act 1912.

Former Québec Civil Code (the Civil Code of Lower Canada of 1866)

A STUDY ON FINANCIAL DEREGULATION AND SUSTAINABLE ECONOMY: HOW THE HAND SHOULD REMAIN VISIBLE*

Aditya Rakhman**

Abstract

This article focuses on the trend of States that are shifting their national economic ideologies from the traditional protectionism to the latest concept of economic liberalism. The inherited ideals of protectionism is to have governments intervene in economic activity. The surge of protectionism came in the late 19th and early 20th century where States felt the need to regulate especially to restrict and protect initial investments made by private companies in sectors that play a huge role in public services, such as communications, electricity, transportation, banking, etc. This article aims to explore and

Abstrak

Artikel ini berfokus pada tren negara – negara yang perlahan mengubah ideologi ekonomi nasional mereka dari proteksionisme tradisional ke konsep terbaru ekonomi liberalisme. Warisan ide proteksionisme adalah untuk memastikan negara – negara dalam ikut campur kegiatan ekonomi di negara mereka. Semangat proteksionisme datang di akhir abad ke-19 dan awal abad ke-20 dimana negara-negara berpendapat bahwa penjagaan ketat dan perlindungan awal terhadap penanaman modal di dalam perusahaan privat terutama di bidang yang memiliki peran penting kepada pelayanan publik,

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analyze the virtues of the current trend, because deregulations do not always come from pure initiatives of a State, so imposed deregulation may exist, and the goal of this article is to test the liberal market system, so the approach used is a cost-benefit analysis. Global economic crises that happen in the current time might be a product of a ripple effect that might have been caused years far before the crisis, and this article seeks to find how regulatory existence in a State economy can prevent, or in contrary propagate an economic meltdown.

seperti pengelolaan komunikasi, pengelolaan energy listrik, pengelolaan bank, dll. Artikel ini bertujuan untuk mendalam dan menganalisis kebaikan dari tren masa kini, karena deregulasi tidak selalu datang dari inisiatif sebuah negara sendiri, sehingga deregulasi mungkin ada, dan tujuan artikel ini adalah untuk menguji sistem market liberal, sehingga pendekatan yang digunakan adalah analisis manfaat biaya. Krisis ekonomi global yang terjadi di masa ini mungkin merupakan produk dan efek turunan yang muncul bahkan bertahun-tahun sebelum krisis terjadi, dan artikel ini mencoba untuk menemukan eksistensi fungsi pengelolaan di dalam sebuah ekonomi negara yang dapat dicegah, atau sebaliknya menyebabkan adanya krisis ekonomi.

***Keywords**: international economy, financial deregulation, protectionism.*

A. Introduction

Nowadays, the world of international business and trade is as globalized as ever. The rise of international economic organizations like the WTO (World Trade Organization), IMF (International Monetary Organization), and the World Bank is a true testament that the development of international economy has shifted states from being the only solitary unit of international subject, into sharing presence with international (economic) organizations.

Pressure to open up a state's economy and liberalize its markets may come both from inside

and outside. Some states liberalize their markets due to pressure and needs of their domestic economy. The United States, Australia, and New Zealand, for example, are all members of the OECD (Organization for Economic Co-operation and Development). Originally formed as the OEEC (Organization for European Economic Co-operation) in 1948, it attempted to implement the Marshall Plan for the reconstruction of Europe post-World War II. Part of the existence of the Marshall Plan was, as stated by Alexander DeConde et al; "Most importantly, these efforts were designed to prevent the spread of international communism" (Encyclopedia of American Foreign Policy Volume 2, p.95; 2002). In the 1960s, the OEEC faced reforms to expand its membership beyond Europe, so the OECD was established. However, it still operates under the spirit of the OEEC, i.e. to promote democracy and market economy.

Mid 1997 was the deadline set by the WTO to finalize OECD members' negotiations on commitments to liberalize financial services. At the time, the highest pressures were towards South Korea and Mexico, two states in transition between developing to developed status. As members of the OECD, they assumed developed country status so they had to adhere to the liberalization.

The case for transition countries in OECD is that while the OECD obliges them to liberalize (Liberalization of Financial Services, Stephen Woolcock; 1997), sometimes their financial services markets are still underdeveloped. Consequently, domestic financial services may not be able to compete with incoming foreign financial services.

Many developing countries now arguably have no other choice but to liberalize to remain competitive in attracting and retaining both their domestic and foreign investments. In the Philippines for example, the contentious proposals for Carter Change (Constitutional reform plan in the Philippines) include amending the economically restrictive provisions of their 1987 constitution.

Some other States liberalized their markets because it is a necessary sacrifice in order to gain capital aid from outside sources. The Ghanaian Government, for ex-

ample, has agreed to undertake liberalization efforts under the SAP (Structural Adjustment Program) framework in exchange for monetary aid. Such liberalization often comes under scrutiny as although it improves the overall allocative efficiency in the services provided on the financial and foreign exchange markets, the macro benefits seem to still remain minimal. This is because most states in the category have yet to open up their markets voluntarily due to (1) differences in economic ideology, (2) the condition of their domestic economy that is deemed unprepared for liberalization, and thus regulations withstand to preserve market resilience.

Depending on the design and purpose of the organization, some organizations do pose certain power and influence on states. WTO's Dispute Settlement Body (DSB), for example, is a highly-regarded institution where the states bind themselves to its rulings and convictions. The IMF since the 1950s has also applied a prerequisite on their loans, obliging states in need of loans to reform their national economy so that it satisfies the IMF standards (Jensen, 2004). Failure to abide to the requisite may result in the termination of the loans by the IMF.

If Martin Basiang defines law as "*the body of rules or principles, prescribed by authority or established by custom which a State, community or society or the like recognizes as binding on its members*" (Contemporary Law Dictionary, 2009: 264), then it is appropriate to establish that the influences of international economic organizations like the WTO and IMF have reached a level of a key subject to international law and its developments.

Following US President Bill Clinton's administration's aggressive financial deregulation campaign in the 1990s, most globalization leaders (States voluntarily, and international economic organizations; among them IMF) started to overturn long-standing restrictions by governments that limited foreign ownership of their banks, deregulated currency exchange, and eliminated restrictions on how quickly money could be withdrawn by a foreign investor (Derber, 2002).

That shows how globalization and its products (deregulation, market liberalization, etc) is a surg-

ing trend among States, either those willingly deregulates and liberates their markets based on their own deliberation, or those that simply abide international regulations influenced by Western economic ideologies (free market).

The remainder structure of this article shall focus on financial deregulations and its merits and risks as a product of globalization, and not on the need for IMF reform on the conditionality policy.

B. Contextualizing Financial Deregulation

In a simple explanation, financial deregulation is when a government reduces its role and allows the industry greater freedom in how it operates (Soifer, 2001).

To contextualize why States currently opens up their markets, one needs to understand why markets are closed, before they were opened. The preceding part of this article has provided subtle introduction on why States before the current trend decided to regulate their economy.

Governments are given mandate by its people based on a social contract. The government is sovereign power with the ability to produce regulation in which people must abide for the general good. The government's job is to ensure that its people are well taken care of. To ensure it, the government's major role among others is to regulate the economy. It must ensure that the economy can create well distributed welfare among the people. Many states, including Indonesia (through Art. 33 of the 1945 Constitution) regulates that major economical sectors that play a major role in providing welfare to the people shall be controlled (regulated) by the State. This covers from communications, natural resource extractions, banking systems, transportation, to electricity. This is to ensure that the orientation on the provision on such services is not purely profiteering (to ensure fair distribution on all societal classes). Even state subsidy is common to ensure that vital services are affordable to all: Indonesian government subsidizes electricity, water, transportation, and oil-gas; In the US, agricultural farming is subsidized.

Regulation also restricts and limits in sectors that are vulnerable, e.g. banking industry. Before

the Great Depression, the United States hardly put any regulation on banking activities. But after the economical recession, the government started to heavily regulate the area. One of them is by The Glass-Steagall act, promoting the creation of the Federal Deposit Insurance Corporation (FDIC). It guaranteed consumer deposits up to a certain level, in case of widespread bank failures. It also prohibited banks to engage in non-banking activities, such as the securities and insurance business. Consequently, firms had to decide whether they wanted to be a savings bank, or an investment bank. The Securities Act of 1933 (popular name: Regulation Q) even obliged full disclosure on their sales of shares, increasing transparency in the primary securities market. The Banking act of 1933 capped savings account interests at 5.25%, and timed deposits at 5.75-7.75%. This was intended to limit rate wars at sky-high levels. (Sherman, 2009).

In the 1970s United States, inflation cased market interest rates to raise above the allowed limits by Regulation Q (which remained relevant when inflation was 3-4%), but interest rates raised to 10-11% (Beebe, 1988). This drove investors to seek alternatives beyond the traditional deposits. Broker and other financial institutions (investment banks included) started making market mutual funds, in which they pooled investors and provided available commercial paper as investments (commercial paper can be; shares, securities, bonds, etc). This then drove the US government to slowly take the interest rate ceiling off, a phase planned to happen in six years (Gilbert, 1986). The events after the deregulation saw the US deposits market offering packages in exuberant yield rates (rate wars). This marks the beginning of a spiral. The US then applied a policy reform that deregulated its market.

Because of its status as a superpower and its similar models of socio-political conditions, other Western countries started mirroring the US, slowly deregulating their economies to allow more investments in.

The rationale of financial deregulation is that fewer and simpler regulations will lead to raised level of market competition, therefore

increasing productivity, and providing competitive pricing overall to society.

The pattern of deregulation usually starts in the liberalization of natural resource extraction, then to privatization of essential public services (transport, communications, etc), then to liberalization of major key economic infrastructures (bank privatization, etc). Elimination to trade barriers promoted by the WTO is also a form of financial deregulation, which makes some States under the pressure of both IMF's conditionality loans, and WTO's agenda to create a free international market economy via the Doha rounds.

C. Literature Review

As stated before, financial deregulation gained momentum (especially in the United States) in the 1970s. Besides the development of trends in various economical activities, the momentum was also propagated by the immense amount of academic support. Most academic publications on economy around the 1970s underlined the need for states to liberate their economy for prosperity.

Theorists believe that history has shown that "where banking was left most free to develop in response to the demand for its services, it produced the best results" (Cameron, 1972). Another opinion added "the best the State can do with respect to money is to provide a framework of legal rules within which the people can develop the monetary institutions that suit them best" (Hayek, 1976).

Most scholars at that time believed that the government intervention halted economical growth. It was apparent in that era that economic scholars were able to convince the State that with more freedom comes faster growth, and that it within the best interest of the society as a whole. Even 20 years after the momentum of deregulation, scholars was still emphasizing that "the proper role of the government policy should be to make markets as resilient and efficient as possible. Government policy makers should get rid of the traditional bottlenecks of overregulation, over taxation, and overprotection" (Lindsay, 1993).

The movement on deregulation was partly caused by the fact

that the emerging trends of investment games have not been tested in freer economic conditions. "Under government patronage the monetary system has grown to great complexity, but so little private experimentation and selection among alternative means has ever been permitted that we still do not quite know what good money would be –or how good it could be" (Hayek, 1989).

The proponents of a globalized market may say that a more open market is better, because it creates an economic system that is more accessible, allows healthier competition, hinders monopoly by the state, and offers competitive valuation for consumers.

But to completely eliminate a system might not be the answer. As an analogy: it is common where law, and the power holding the law, is misused, but in no way that is a reason to eliminate the existence of legal system altogether—because the state still need the law to uphold. Offering reform might work, instead of deregulation altogether. If freedom of economy is something the scholars see virtuous, they might need to take consideration that giving the ability for the market to determine their own limits, their own restrictions, might not be fair to the general public. For those who actually are enjoying freer economy with the ability of taking more risk that usually allowed by governments, may probably have calculated the possible risks if a transaction go bust. But a larger part of society is part of the game without them knowing it at all.

The subprime crisis in the US in 2008 was a testament. Because of deregulations and minimum government involvement in the commercial paper trade and the mutual funds market, banks carrying the debts of millions of debtors combined all their debts, to be sold as commercial paper in the capital market. These are subprime debts—the debtors were people who in their credit rating actually were classified as risky, but because they combined other debts, the collective investment was offered to investors in the money market as AAA-rated investments, a product that is as secure as government bonds (who obviously have larger collateral). These credit packages (derivatives) were then traded in the capital market,

a trade that had the valuation of billions. The derivatives were also insured, so that people could pay insurance companies to insure that their investment is secure from any losses, such is called Credit Default Swaps (CDS). The imminent danger of such trade is that they were collective debts from debtors that do not have a good credit rating track record. The moment credits stall, the securities become worthless, and therefore toxic.

This could happen because of the absence of the ceiling investment regulation. The government did not prohibit securities and their insurance scheme. It did not regulate or supervise the credit rating agencies responsible to publish the fake credit valuations. When the system got out of control, the liquidity of the government was sacrificed to save the economy. That liquidity mostly belonged to taxpayers, who mostly did not or profited from such trade.

President Barack Obama introduced a series of regulatory proposals in June 2009. The proposals cover consumer protection, regulation on banking and derivatives system, and enhanced authority for the Federal Reserve (among others) (Treasury Department Report, 2009). Francis Fukuyama argued that this marked the downfall of Reagan economy.

Iceland before the 2000s was an ideal sort of state. They had clean energy, fisheries that were harvested with a quota system, low unemployment, low government debt, and low crime levels. Things started to change when the Icelandic government decided to allow private extractive companies to extract their natural resources. Not only did this triggered negative environmental effect due to excessive extraction, this also led the government to privatize three of Iceland's biggest banks (Mason, 2008). Because the three biggest banks are now private, they are not bound to the monetary regulations that the government impose to protect the economy. They directly took huge loans from foreign institution, creating a new wave of wealthy businessmen who continuously took loans from the banks to invest abroad, outside of Iceland. In the absence of government regulation, they were able to continuously expand their business by using lent money.

The banking system also set up a mutual money market, in which they attracted individual investors to invest in commercial paper. This meant that the banks and borrowers sold a promissory note simply to repay the note they sold previously. Such scheme is fake investment operation that pays returns to its previous investors from money paid by current investors, rather than from the profit earned by running the allegedly running operations. This scheme is famously know since the 1920s as the Ponzi scheme (Sarah, 2010). The scheme ran so well in Iceland (dubbed emerging economy) that at the start of the crisis, households took on a large among of the debt, equivalent to more than 213% of disposable income (average total personal income minus taxes), which led to inflation (The Economist, 2008) [1].

The Icelandic crisis began to unfold as the banks were unable to refinance their debts. It was estimated that the three major banks were holding foreign debt in excess of 50 billion euro (Central Bank of Iceland, 2008), while Iceland's Gross Domestic Product (GDP) of only 8.5 million euro (Statistics Iceland, 2008).

Such economic catastrophe, as mirrored similarly with the US Subprime crisis, has brought sever economic downfall for both countries. In October 2008, the Icelandic parliament passed an emergency legislation to minimize the impact of the financial crisis. The Financial Supervisory Authority of Iceland used permission granted by the emergency legislation to take over domestic operations of those banks (E24, 2008)[2].

D. Investigating Patterns of Toxic Economy Caused by Deregulation

There is a reason why laws exist. They function to put order in society. They are in the forms of limitations, and they are restrictive in nature. But that's how legal systems are supposed to be.

The laws regulating economical activity should not be any different. Legal systems always thrive to make sure that any economical activity is done in a manner in

[1] The Economist, 9 October 2008.

[2] Gud velsigne Island! (Finankrisen, Makro og politikk, Utenriks)". E24, no. 6 October 2008.

which it does not possess latent potential for economical catastrophe. The government's interest in regulating the economy is as much as it is about growth, as it is about making sure the economic system is not about to fall.

Scholars in the 1970s might have been exuberantly supportive of deregulation, but it seemed to only orientate in the velocity of economic growth. And recent cases of US Subprime loans and Iceland's massive deregulation shows that there might be more to economy than just growing: it's also about being able to keep standing at all in the first place.

E. Conclusion

In comparison to popular theorists and their opinions in the 1970s, it was obvious that deregulations pose huge risks for state economies. It's undeniable that in an emerging economy, to free up and open markets would bring significant rapid growth for the economy.

But now, as history shows, that such rapidity may cause economies to overheat and eventually melt. Economic growth must always be supported by proportional infrastructure and distribution, and one of the ways that a State can ensure that their economy is growing at a proper speed is by regulating.

Imposing ceilings for bank interests and regulating the volume of transactions in the securities market is a necessary and urgent reform. Most governments do not regulate the volume of trade in their capital markets.

Vital economic structures must always be in the hands of the government, or at least the government still maintains key role in regulating. The banking system is a vulnerable system that may overheat due to fear, paranoia and speculations, therefore governments should keep a close eye on the banking system.

In conclusion, there is a need to emphasize that deregulation and market liberalization do pose imminent threat, if done in quick succession under a short amount of time. Free economies do not mean that the hands of the government should be invisible at all, because how an economy develops determines how sustainable it is in the long run.

BIBLIOGRAPHY

Alexander DeConde, e. a. (2002). *Encyclopedia of American Foreign Policy* (Vol. 2).

J. Lawrence Broz, B. B. (2006). *The Political Economy of IMF Voting Power*.

Cox, Robert. Social Forces, States, and World Orders. 1986.

Jeffrey Sachs. (2005) *The End of Poverty: Economic Possibilities*. Penguin Press.

John Sloman, P.S. (2012). Economics. Trans-Atlantic Publications.

Martin Basiang. (2012). *Contemporary Law Dictionary*. Red and White Publication.

Nathan Jensen, e. a. (2004). *Independent Actor or Agent? An Empirical Analysis of the Impact of US Interest on IMF Conditions*. Leitner Program in International Political Economy Yale University.

Stephen Woolcock. (1997). Liberalisation of Financial Services.

AMNESTY FOR JUS COGENS CRIMES: INTERNATIONAL RECOGNITION (SOUTH AFRICA CASE)*

Fajri Matahati Muhammadin ** **and Aulia Rizdha Kushardini** ***

Abstract

The world has compromised justice in many occasions by making amnesty laws to forgive perpetrators of crime. These laws are often passed to resolve conflicts between rebels and government. Albeit, controversy arises when the conflict involves crimes of a jus cogens character. The norm of jus cogens are the highest in the hierarchy of international law, and any laws conflicting them shall be null and void. Among these norms are Genocide, Crimes Against Humanity, War Crimes, and Aggression. The international world have disregarded amnesties given for alleged Jus Cogens criminals, and have chosen

Abstrak

Banyak negara telah mengkompromikan prinsip keadilan dalam berbagai kasus dengan memberikan amnesti yaitu mengampuni para pelaku kejahatan. Hukum-hukum semacam ini ini umumnya dibuat untuk menyelesaikan konflik antara pemberontak dan pemerintah. Walaupun begitu, kontroversi muncul saat konflik tersebut melibatkan unsur-unsur kejahatan jus cogens. Norma jus cogens adalah norma yang paling tinggi dalam hierarki hukum internasional, dan semua hukum yang bertentangan dengan prinsip tersebut akan dianggap tak berlaku. Norma jus cogens mencakup genosida, ke-

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to put the perpetrators to trials, i.e. in Sierra Leone, Chile, Uganda, inter alia. Yet in South Africa in 1995, in which amnesties have been given to the globally infamous actors of the apartheid regime, the world's response was no less than positive. This article will elaborate how this amnesty provision in the National Unity and Reconciliation Act (1995) of South Africa was highly appreciated by the world from the perspective of international law and politics, as they were highly essential to end the long and painful conflict during the apartheid regime and to ensure a peaceful transition in the country.

jahatan terhadap kemanusiaan, kejahatan perang, dan agresi. Dalam kasus-kasus tertentu, masyarakat internasional telah mengabaikan kesepakatan-kesepakatan amnesti yang diberikan pada tersangka pelaku kejahatan jus cogens, dan membiarkan para pelaku kejahatan tersebut diadili. Misalnya saja di Sierra Leone, Chili, dan Uganda. Namun pada 1995, Afrika Selatan—yang memberikan amnesti kepada aktor-aktor rezim apartheid, ditanggapi dengan positif oleh masyarakat internasional. Artikel ini akan menguraikan bagaimana ketentuan amnesti dalam National Unity and Reconciliation Act (1995) dari Afrika Selatan disambut baik oleh masyarakat internasional dalam perspektif hukum internasional dan politik, mengingat betapa hukum tersebut berperan besar dalam mengakhiri konflik yang menyakitkan dan berkepanjangan selama rezim apartheid dan dalam memastikan berjalannya transisi damai di negeri tersebut.

***Keywords**: amnesty, jus cogens, jus cogen criminals, war crimes.*

A. Introduction

Criminal acts are actions against the laws, and are detrimental towards the society. For that reason, criminal laws will always respond to crimes with prosecution

and sanctions (Moeljatno, 2002). When crimes distrupts stability and justice within a society, criminal law functions to restore that justice back (Prasetyo, 2010). But amnesties notably used for necessity sake are exceptions to this principle, as mentioned by Yasmin Naqvi (2003).

An 'amnesty' is "*a sovereign act of oblivion for past acts, granted by a government to all persons (or to certain persons) who have been guilty of a crime or delict, generally political offenses, treason, sedition, rebellion, and often conditioned upon their return to obedience and duty within a prescribed time*" (Garner, 2009). As noted by Judge Mahomed DP (South African Constitutional Court Judgements, 1996), amnesty laws were meant to exempt an individual from criminal responsibility, thereby the individual may not be held criminally liable towards any acts charged against him/her. Karim Khan *et al* (2009) and Antonio Cassese (2003) describes amnesties as a legal impediment to jurisdiction.

Such policies have been implemented many times for the sake of other necessities of which the government in question wishes to achieve. Most commonly, it is considered as a tool to terminate and further resolute conflicts.

The Indonesian Government, for example, has used amnesties as an offer in exchange of surrender towards the rebels of PRRI/PERMESTA in the 1960s (although after the surrender, the Indonesian government prosecuted them anyway), as noted by Jahja A. Muhaimin (2005). Even International Humanitarian Law recognizes customary laws to provide the widest possibility for amnesty after a non-international armed conflict has ended (See the Additional Protocol II of the Geneva Conventions, Article 6[5]), such as what happened after the conflict of Tajikistan (Haenkarts and Doswald-Beck, 2005).

Being a political act within a sovereignty of a state, generally it has not been a problem. But then it can evolve to a problem in the international world when the amnesty is given for *jus cogens* crimes.

B. The *Jus Cogens* Norms: the Highest and Non-Derogable Norms

Jus Cogens means "Compelling Law" (latin), and holds the highest hierarchy in International

Law (Bassiouni, 1990). The norms of *Jus Cogens,* also mentioned as "Preemptory Norms", are those acknowledged and accepted by the whole International Community as of such a level that they are non-derogable and that any treaties conflicting with them are null and void (Bassiouni, 1998. See also The Vienna Convention on the Laws of Treaties, Article 53).

There are some basis to be fulfilled for one crime to be considered of a *jus cogens* level. These basis are: "*(1) international pronouncements, or what can be called international opinio juris, reflecting the recognition that these crimes are deemed part of general customary law; (2) language in preambles or other provisions of treaties applicable to these crimes which indicates these crimes' higher status in international law; (3) the large number of states which have ratified treaties related to these crimes; and (4) the ad hoc international investigations and prosecutions of perpetrators of these crimes.*" (Bassiouni, 1998)

Given those legal basis tests, scholars have concluded that it would be indisputable that at least War Crimes, Aggression, Genocide, and Crimes Against Humanity, would be among the *jus cogens* (Bassiouni, 1998).

Violations of these *jus cogens* norms have had equally huge responses from the international world, as such strong values against *jus cogens* crimes have become a big interest for the international community to strongly react against because it is against the community obligation of the International world (Cassesse, 2003).

Post conflict of Yugoslavia, for example, the International Criminal Tribunal for the former Yugoslavia (hereinafter, the ICTY) was established to have jurisdiction over Crimes Against Humanity, Genocide, Grave Breaches of the Geneva Conventions 1949, and Violations of the Laws or Customs of War (the two latter were among War Crimes, as furtherly enumerated in Article 8 of the Rome Statute of the International Criminal Court).

The world has rejected so many amnesties given to these *Jus Cogens* crimes. The Geneva Conventions of the 1949 has specifically mentioned that there is an obligation to prosecute perpetrators of the Grave Breaches. Further,

Article 148 of the fourth GC clarifies that criminal responsibilities of the Grave Breaches can not be absolved by bilateral treaties.

Judge decisions have ignored or overruled amnesties in many cases. Among which would be the ICTY case of Furundzija (1998), SCSL case of Kallon and Kamara (2004), Appeal Court in Chile (Videla Case in 1994), Federal Judges of Argentina (Cavallo case in 2001), have all noted that *jus cogens* crime are may not be abolished by amnesties, and that those amnesties are national laws from which the international community are not bound by them. The ICRC also holds the same view (addressing specifically war crimes, though), as there are obligations to prosecute them (Haenkarts and Doswald Beck, 2005).

But there has been an exception. The South Africans finally managed to free themselves from the infamous apartheid regime in 1993. Acts of apartheid has been considered as among the crimes against humanity (Bassiouni, 1998). International conventions have previously noted it as a heavy international crime among the crimes against humanity, which is the International Convention on the Suppression and Punishment of the Crime of Apartheid or ICSPCA in 1973. Yet, the Promotion of Unity and Reconciliation Act came with an amnesty for all political crimes –among which were the infamous crimes against humanity. But the world responded warmly and no decisions to grant amnesty have been overruled.

Why was it different this time?

C. Bloody Road to Peace: Role of Amnesties in Negotation

The Apartheid Regime in South Africa ruled from 1948 after the victory of *Herenigde Nasionale Party* (HNR). Within this regime, certain acts of discrimination have been enacted, e.g. the limitation for certain races to access certain areas via 1953 Reservation of Separate Amenities Act.

As more movements against Apartheid rose (i.e. from the African National Congress and Inkatha Freedom Party), more violent responses came from the government, from detentions without trials, bans on a wide range of political and social gatherings, political trials

and executions, to attack towards political activists (going even as far as student unions, churches, and trade unions). (Coleman, 1998).

International reactions at the time were harsh. The UN General Assembly condemned the regime with UNGA Resolution 1761 in 1962, and furtherly there was an arms ban with the UN Security Council Resolution 418 in 1977. A whole new convention was even established in 1973 to condemn apartheid and to classify it as a crime against humanity, which is the International Convention on the Suppression and Punishment of the Crime of Apartheid. Following the ruling of then-UNGA President Abdelaziz Bouteflika, South Africa was suspended from its participation in all General Assembly works and activities in 1974. This is after the joint proposal from Kenya, Cameroon, Iraq, and Mauritania to dismiss South African membership altogether did not draw all necessary support to make it pass in the Security Council, following the veto from France, the UK, and the US (Encyclopedia of the Nations, undated).

A lot of pressure to the ANC government was also resulted from an international-scope boycott movement in sports event. The International Olympic Committee (IOC) withdrew South African's rights of participation in the 1964 Olympic Game for the exclusiveness of its all-white delegation. The Committee encouraged South Africa to adopt a more multiracial approach in sports, but the result were little as in 1970 South Africa was expelled from the IOC (auf der Heyde, 2007).

Things started to change around the 1980s. While De Klerk became fully aware that the overwhelming black Africans were too strong to be held further under a control of apartheid and has forseen a possibility to be forced out of reign, he chose to instead start negotiating an end to the apartheid regime (Callincos, 1994). On the other side, we also have the ANC who were fully aware that they are unable to take the regime by violence (Mallinder, 2009).

The Goldstone Commission recommended a limited amnesty for those who cooperate in investigations. This was under the interest of obtaining evidence with respect to the past conflict (Anglin, 1992).

But then, De Klerk and the apartheid government instead kept on pushing for granting blanket amnesties—with no prerequisites to it (Beresford, 1992). Conflicts arose when the ANC argued that amnesty would not serve them justice unless accompanied with truth. ANC's stance may have stemmed from an inaugural lecture of Kader Asmal, University of Western Cape (empasizing on the importance of truth in times of reconciliation of conflicts), of which top ANC leaders attended and seemed to have been inspired. (Mallinder, 2009)

Both parties kept on bargaining and pressing each other on this issue. Further acts on amnesties (Indemnity Act in 1990 and the Further Indemnity Act in 1992) were issued by the government, and more prisoners were released. But the ANC still kept on pushing for truth in exchange for amnesty, while violence kept on going on. The election was coming closer, but people started to worry about security of the transitional period –while the security force made it clear that amnesty was a price for their commitment to help ensure stability during the period (Borain *et al*, 1994).

This went on until April 27, 1993, when the Interim Constitution that governed the transitional period adopted a postamble managed to meet both sides' demands. The postamble, a consitutional commitment, also binds to the next regime. While accommodating ANC's demand for truth, it also extended amnesty application deadline from the Indemnity Acts and provided extra mechanisms to deal with the amnesty (Sriram, 2004).

D. The Turning Point: the Promotion of National Unity and Reconciliation Act

The agreement then paved the way for the election to be held in April 1994. South Africa's first democratic election went quite in a bungle in terms of management, but marked with a stark absence of violence (Mallinder, 2009). Far deeper than merely an act of using one's political rights, election could also mean "starting a new, post-conflict political order...by conferring legitimacy upon the new political order" (Ndulo and Lulo, 2010). The election results in a landslide victory for the ANC by 60,26%, where NP went second place by 20,4%, and the IFP on third with 10,5% (Callincos, 1994).

A look at the post-election condition would provide us with the fact that politically motivated crimes in South Africa has decreased in number, compared to the pre-election period. HRC monthly reviews from September 1994- December 1996, for instance, shows how politically motivated murders in December 1994 was 'only' 94, the lowest since February 1991 (Coleman, 1998). Compared with 4,363 in 1993, the same report published that there were 'only' 2687 politically motivated crimes throughout 1994. In 1995, the number of politically motivated crime on monthly average is 75, and 42 in 1996.

Following the agreed Interim Constitution, the newly elected government introduced the Promotion of National Unity and Reconciliation Bill –which by the next year would be enacted as 'Act'. As the agreement gives, this act would grant an amnesty to those perpretrators of gross human right violations if the application complies with the act's requirements, if the offences are associated to political objectives committed in the course of the past conflict, and has made a full disclosure of relevant facts.

As of 30 September 1997 (the cut off date), 7116 people applied for the amnesty. 4000-5000 of those were rejected as they were not found to be politically motivated crimes (Pedain, 2004). The mechanism of information and evidence disclosure, despite having so many problems in its technical implementation, was said by the TRC final reports to have discovered far much more truth than it would have shall it were to be pursuit by trials.

E. Peace and The End of Apartheid: The Significance of the Amnesty

Problems occurred here and there due to technical difficulties: such as minimum victim participation and direct reparations, differentiating political and common crimes, but it was clear that it helped ensure a peaceful political transition and an end to the long years of apartheid. (Mallinder, 2009)

Judge Mahomed DP of the South African Constitutional Court in 1996 noted that peace could not be achieved without the amnesty as part of the deal, and that it was evident that it had managed to prevent a civil war (M. Scharf, 1999). Had the amnesty act not

been established, peace would definitely shatter and cause so much more suffering. This was how it happened.

Once the conflict is over, both the 'victim's and 'perpetrators' would all be socially acknowledged as 'the citizens of the state'. The reconciliation process would involve all parties in war, and the installment of a post-conflict society would not exclude one side over another. One individual would live side by side with others regardless of the status they bore during the war, thus relations and contacts among them is inevitable.

There would also be more concerns coming from the losing force, including: (1) ANC to be the only party to control the state's coercive power, (2) ANC to gain a landslide advantage in political power within the new state, and (3) ANC to gain economic advantage within the new state (Hartzell 1999). By gaining one of those three advantage, ANC would be able to diminish the power (and further, rights) of its political competitors and past adversary (i.e. The NP).

This implies one thing: without sufficient amount of trust, peace negotiations cannot properly continue. By trust, we mean the intention to accept vulnerability based upon positive expectations of the intentions or behavior of another (Rousseau, et.al., 1998). If trust is absent, there is a high risk of another social conflict to happen and the impairment of government function due to legitimacy crisis. In other words, trust in South Africa is needed to make society and the government runs effectively.

Building trust among parties was not an easy task in South Africa. For instance, ANC accussed white SADF members, the South African peacekeeping force, for fueling a tension between ANC and Inkatha Freedom Party, at that time South Africans' second most prominent black party (Bairstow, 2008).

Amnesty then came as a tool to spark the sense of trustworthiness, especially to the winning party. By not sending NP members to prosecutions, ANC assured that victor's justice would not happen—they accommodated the demand of the losing party (Guelke, 1999). As important as when De Klerk stood beside Nelson Mandela in the latter's inauguration, amnesty would

give the losing party a guarantee that they are still allowed to contribute to the new South African regime. This action portrays the trait of benevolence –the extent to which a trustee is believed to want to do good to the trustor, which is also an essential element of trust (Mayer et al., 1995).

Without an amnesty, Afrikaners elite were unlikely to agree to shift their power to the democratically elected government for fear of another absolute governing system conducted by the government-elect (Sarkin, 2003). For there is no trust attached, It was also possible that if a coup happened, NP would seek to gain it back and therefore create a chance for another civil war to happen.

F. Compromising Justice for Peace

Reflecting back on the elaborated facts that the long lasting conflict can not be ended without the amnesty, the international community had all the reason not to respond harshly towards the amnesty. When in 1973 they were all for prosecuting and punishing perpetrators of apartheid (through the ICSPCA), now they all applauded the end of the regime without complaining about the amnesty. Clearly, prosecution was no longer justice.

Prosecution, in its basic sense, is how justice deals with crime. The legal basis from which amnesties –the antithesis of prosecution- would work is to go back to the basic principles of law and reunderstanding its functions. Law was meant to achieve peace (Apeldoorn, 1972), criminal laws were made to protect the society (Poernomo, 1993), and its enforcement must also have benefit for the people other than to provide justice and certainty (Mertokusumo, 1991). Such principles also are held in international criminal law.

The world has agreed that the need to maintain peace should prevail shall it conflict with justice, which broadens the perspective of what justice is. This is because the world has a universal goal to maintain international peace and security, as expressed by the Charter of the United Nations. In this case, a limited amnesty combined with an effective truth commission has satisfied the "essential purpose of the right to justice" (Naqvi, 2003) ---if it were not done, many truths about the past may not have been re-

vealed. Not to mention, the conflicts may continue to happen shall the amnesty was not there –prolonged conflicts would mean escalating casualties. Such facts constitutes the need of justice for the South Africans at the time.

The amnesty provided in the Promotion of Unity and Reconciliation Act 1993 does not qualify as a blanket amnesty, as it also comes with other mechanisms as aforementioned. Therefore, it is only reasonable for the judges of the South African Constitutional Court in 1996 to mention how all the amnesty provided will indeed provide better transitional justice for all parties involved in the past conflict. Naqvi (2003) has also mentioned that a limited amnesty combined with an effective truth commission could satisfy "the essential purpose of the right to justice".

Certainly this is then a very different case compared to the ICTY trials of Furundzija, mentioning amnesty in the light of no context at all, therefore should be open to a situational analysis given a very specific context in need.

Meanwhile, the SCSL Appeals Chamber decision in the Kallon and Kamara case has has also chosen to not consider the amnesty provided by the Lome Accord of 1998. The reasoning of the judges was that the Special Court for Sierra Leone's legal personality is not bound by national laws (case in point, the Lome Accord).

The decision to establish the court, to begin with, was because that the Sierra Leone government and the United Nations came to agreement that this was one of the forms of justice needed to deal with the post-conflict situations (negotiations solidified via United Nations Security Council Resolution 1315) after the conflict was over. Therefore, there was simply no reason for the international world –through the extended hand of the United Nations and SCSL—to acknowledge the amnesty (and defer prosecutions to Kallon and Kamara) in interest of peace. As the Revolutionary United Front attacked again approaching the end of May 2000 after the Lome Accord (Muhammad, 2004), definitely giving less incentives towards the Sierra Leone government to acknowledge it seeing that the result of the negotiations was a Special Court ha-

ving jurisdiction *ratione temporis* to the situation since 1996 –obviously deliberately ignoring the Lome Accord.

G. Closing Remarks

There should be a distinction between blanket amnesties given to shield the perpetrators and those that were necessary to achieve peace and national reconciliation, of which if amnesties were given in the latter case then the international community should not push for prosecutions (Cassese, 2003).

While generally the aforementioned international conventions and customary laws have imposed a duty to prosecute perpetrators of *jus cogens* crimes, but conditions where these amnesties are very essential to achieve peace then becomes a very special and exceptional condition (Naqvi, 2003), which creates a prevailing special law beating the general (Mertokusumo, 1991).

It can thereby be concluded that international community can actually acknowledge amnesties for *jus cogens* crimes, with various requirements as elaborated previously –the most important of them to be that it was an imperative necessity to achieve peace. The case of South Africa has been shown to be fulfilling such requirements, and justly earns its place as the most noticeable exception to the prohibition towards amnesty for *jus cogens* crimes when many other amnesties for similar crimes have been overruled.

BIBLIOGRAPHY

A. Books & Journals

Abdullah, Ibrahim, 2004. *Between Democracy and Terror: The Sierra Leone Civil War*. Dakar: Council for the Development of Social Science Research in Africa.

Apeldoorn, L.J. Van, 1972. "Inleiding tot de Studie van het Nederlandse Recht", Zwolle: W.E.J. Tjeenk Willink.

Bairstow, Major Timothy, 2008. *Amnesty, Reconciliation, and Reintegration in South Africa:*

A Monograph. United States Marine Corps.

Bassiouni, M. Cherif, 1998. International Crimes: Jus Cogens *and* Obligatio Erga Omnes, *Law & Contemporary Problems*, 59: 63-74.

Bassiouni, M. Cherif, 1990. A Functional Approach to "General Principles of International Law", *Michigan Journal of International Law*, 768: 801-09.

Borain, Alex, *et al*. (eds.), 1994. *Dealing with the Past: Truth and Reconciliation in South Africa* Cape Town: Idasa.

Callinicos, Alex, 1994. South Africa: End of Apartheid and After. *Economic and Political Weekly*. 29 (36): 2355-2363.

Cassese, Antonio, 2003. *International Criminal Law*. New York, NY: Oxford University Press.

Coleman, Max, 1998. *Crime Against Humanity: Analysing the Repression of the Apartheid State,* Cape Town: David Philip Publishers.

Doswald-Beck, Louis, and Jean-Marie Haenkarts, 2005. *ICRC Customary International Humanitarian Law, Volume I: Rules*. New York, NY: Cambridge University Press.

Garner, Bryan. A (ed.), 2009. *Blacks Law Dictionary (9th ed.)*. St. Paul, MN: West.

Gibson, James L, 2006. The Contributions of Truth and Reconciliaton: Lessons from South Africa. *Journal of Conflict Resolution*. 50(3): 409-432.

Guelke, Adrian, 1999. Truth for Amnesty? The Truth and Reconciliation Commission and Human Rights Abuses in South Africa. *Irish Studies in International Affairs*. 10: 21-30.

Khan, Karim, *et al*., 2009. *Archbold: International Criminal Courts (Practice, Procedure, and Evidence)*. London: Sweet&Maxwell.

Mallinder, Louise, 2009. Indemnity, Amnesty, Pardon, and Prosecution Guidelines in South Africa. *Working Paper No.2 from Beyond Legalism: Amnesties, Transition and Con-*

flict Transformation. Institute of Criminology and Criminal Justice Queen's University Belfast.

Mayer, Roger C., et al., 1995. An Integrative Model of Orgaizational trust. *The Academy of Management Review*. 20(3): 709-734.

Mertokusumo, Sudikno, 1991. *Mengenal Hukum: Suatu Pengantar*. Liberty: Yogyakarta.

Moeljatno, 2002. *Asas Asas Hukum Pidana*. PT Rineka Cipta, Jakarta.

Muhaimin, Yahya A., 2005. *Perkembangan Militer dalam Politik di Indonesia*. Gadjah Mada University Press.

Naqvi, Yasmin, 2003. "Amnesty for War Crimes: Defining the Limits of International Recognition." *International Review of the Red Cross,* 85 (851): 583-625.

Ndulo, Muna, and Sara Lulo, 2010. "Free and Fair Elections, Violence, and Conflict". *Harvard International Law Journal,* 51 (155). Accessed via http://www.harvardilj.org/2010/07/online_51_ndulo_lulo/

Pedain, Antje, 2004. 'Was Amnesty a Lottery? An Empirical Study of the Decisions of the Truth and Reconciliation Commission's Committee on Amnesty' South African Law Journal 121 (785): 819-825

Poernomo, Bambang, 1993. *Asas Asas Hukum Pidana*. Jakarta: Ghalia Indonesia.

Prasetyo, Teguh, 2010. *Hukum Pidana*. Surabaya: Rajawali Press.

Rousseau, D. M., et al. 1998. "Not so Different After All: A Cross-Discipline View of Trust", *Academy of Management Review,* 23: 393-404.

Sarkin, Jeremy, 2003. "To Prosecute or Not To Prosecute: Constitutional and Legal Issues Concerning Criminal Trial", in Villa-Vicencio, Charles, and Erik Doxtader, (eds.) 2003. *The Provocations of Amnesty, Memory, Justice, and Impunity*. Trenton, NJ: Africa World Press, INC.

Scharf, Michael, 1999. "The amnesty exception to the jurisdiction of the International Criminal Court". *Cornell International Law Journal,* 32: 507.

Sriram, Chandra Lekha, 2004. *Confronting Past Human Rights Violations: Justice vs. Peace in Times of Transition.* New York: Frank Cass.

B. Judicial Decisions:

Appeal Court of Santiago, Videla Case. Chile (1994)

Federal Judge of Argentina, Cavallo Case (2001)

International Criminal Tribunal for the former Yugoslavia: Prosec vs Furundzija, Trial Judgements (1998)

South African Constitutional Court: Azanian Peoples Organization vs the Government of the Republic of South Africa (1996)

Special Court for Sierra Leone: Prosec. vs Kallon and Kamara, Appeals Chamber Decision on Challenge to Jurisdiction: Lome Accord Amnesty (2004)

C. International Conventions and Resolutions

International Convention on the Suppression and Punishment of the Crime of Apartheid (1973)

Rome Statute of the International Criminal Court (2002)

Statute of the Special Court for Sierra Leone (2002)

United Nations General Assembly Resolution No.Res/48/159 (1995)

United Nations General Assembly Resolution 1761 (1962)

United Nations Security Council Resolution 418 (1977)

Vienna Conventions on the Law of Treaties (1969)

D. Internet Source

Auf Der Heyde, Peter, 'Apartheid: The Political Influence of Sport', *Mail & Guardian*, 16 January 2007, *http://www.mg.co.za/article/2007-01-16-apartheid-the-political-influence-of-sport*

Encyclopedia of the Nations, 'Membership – Suspension and Expulsion', undated, *http://www.nationsencyclopedia.*

com/United-Nations/Membership-SUSPENSION-AND-EXPULSION.html,

United Nations Treaty Compilation *http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-1-&chapter=1&lang=en*

E. Reports

South Africa Truth and Reconciliation Commission Report (1998)

F. Newspapers

Anglin, Douglas G. 'Weighing South Africa's Crimes of Apartheid', *Globe and Mail*. Ottawa, 27 October 1992.

Beresford, David. 'De Klerk drags his Feet on Hit Squad Investigations' *The Guardian*. Johannesburg, 12 August 1992.

IS THE ASEAN ECONOMIC COMMUNITY BY 2015, WORTH HAVING?*

Sinta Agtrianasari**

Abstract

Living in the society both as individuals and social creatures, people are obligated to interact with each other through relationship. These may include in the relations between sovereign and subject. ASEAN Summit is an annual meeting held by ASEAN in relation to economic and cultural development of Southeast Asian Countries. ASEAN Economic Community or AEC, is the realisation of the end goal of economic integration, which is based on a convergence of interests of ASEAN Members. The aims of AEC themselves is to hasten the establishment of the AEC by 2015 and to transform ASEAN into a region with free movement of goods,

Abstrak

Dalam sebuah masyarakat, manusia hidup sebagai individu dan makhluk sosial yang mewajibkan mereka untuk berinteraksi dan berhubungan satu dengan yang lainnya. Salah satu dari hubungan ini adalah hubungan antara yang berkuasa dengan subyeknya. Konferensi Tingkat Tinggi ASEAN adalah sebuah pertemuan tahunan yang diselenggarakan oleh ASEAN berkaitan dengan perkembangan ekonomi dan kebudayaan negara-negara Asia Tenggara. ASEAN Economic Community atau AEC adalah realisasi dari tujuan akhir integrasi ekonomi, yang dilakukan atas dasar konvergensi kepentingan Anggota ASEAN. Tujuan dari AEC

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services, investment, skilled labour, and freer flow of capital. However, there are certain problems faced by the ASEAN members to establish the AEC, one of the factor is the different welfare between the ASEAN countries.

sendiri adalah untuk mempercepat terbentuknya AEC pada tahun 2015 dan untuk mentransformasi ASEAN menjadi kawasan yang mempunyai pergerakan bebas untuk barang-barang, jasa-jasa, investasi, tenaga kerja terampil dan juga arus modal yang lebih bebas.Namun, terdapat beberapa masalah yang dihadapi para anggota ASEAN dalam pendirian AEC, salah satu faktor tersebut adalah tingkat kesejahteraan yang berbeda antara negara-negara ASEAN.

Keywords: *ASEAN, international economy, ASEAN Economic Community.*

A. Introduction

The increasing number of States declaring sovereignty has given a significant consequence towards other states, specifically to the development of the state itself. Thus, to achieve a massive progress towards a development of the state, one of the solutions is through international cooperation. One kind of international cooperation is known as International Organizations.

According to article 2 paragraph 1(i) of Vienna Convention on the Law of Treaties 1969, "international organization" means an intergovernmental organization. ("Vienna Convention on Laws of Treaties," 1969) To be more specific, international organizations are entities which were established by an agreement between state members that have their own system and structural body, to achieve the mutual purpose for every member; whereas their existence is being recognised by law upon their state members. International organizations have played a crucial role in the sphere of international personality. The idea to establish an international organization was based on several principles; one of the principles is "geographic prox-

imity". The principle of geographic proximity is the principle by which categories are aggregated to form broader categories such as the groups of countries located within a single geographic location. ASEAN is one of international organization using the geographic principle.

As a regional organization, ASEAN has become one of the most sustained supra-national regional organizations of the postcolonial world. The main reason why the region of Southeast Asia conducted the ASEAN regional organization was to maintain a peaceful regional stability from threat. (*Encyclopedia of Public International Law*, 1983)

B. History of ASEAN

The Association of South East Asian Nations (hereinafter referred to as ASEAN) was created in 1967. (Shaw, 2008) To be exact, ASEAN was established on 8 August 1967 in Bangkok, Thailand, by their Founding Fathers which are Indonesia, Malaysia, Singapore, Thailand and Philippines. Afterwards, five other countries – Brunei, Cambodia, Vietnam, Myanmar, and Laos joined as members of ASEAN by signing Bangkok Declaration.

As provided in the ASEAN Declaration, the main purpose of ASEAN was to co-operate in certain fields such as Economic, Social, Cultural Development, Politic, and also maintain the integrity and regional peace along with the regional stability; which in accordance within the United Nations Charter. ("Charter of the United Nations," 1945)[1] In 1967 three agreements were signed: a Treaty of Amity and Cooperation, which reaffirmed the parties' commitment to peace and dealt with the peaceful settlement of disputes by adopting several principles which are mutual respect, non-interference, renunciation of the threat or use of force and effective cooperation among ASEAN nations. The Declaration of ASEAN Concord, called for in-

[1] United Nations Charter Art 1 para 1:"To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disutes or situations which might lead to a breach of peace"; Art.2 para 4 "All members shall settle their international disputes by peaceful means in such a manner that international peace and security are not endangered."

creased political and economic co-ordination and co-operation; and the Agreement of Establishment of the Permanent Secretariat to co-ordinate the national secretariats established under the 1967 ASEAN Declaration. (Shaw, 2008)

C. Ratification of New ASEAN Charter 2007

At the 9th ASEAN Summit in 2003, the ten ASEAN member countries set a vision, by recognising the Declaration of ASEAN Concord II as know as Bali Concord II, which seeks to achieve an ASEAN Community by 2020. Afterwards, there exists the ASEAN Charter which provides a set of rule/codification to the ASEAN legal frameworks. The ASEAN Charter came into force on 15 December 2008 after the ten ASEAN members have ratified it. Singapore is the first ASEAN member who ratified the ASEAN Charter on January 2008 and Thailand is the last ASEAN members who ratified the charter, on September 2008.

The ASEAN Charter serves as a firm foundation in achieving the ASEAN Community by providing legal status and institutional framework for ASEAN. It also codifies ASEAN norms, rules and values; sets clear targets for ASEAN; and presents accountability and compliance. (ASEAN) This can be seen in the article 3 of the ASEAN Charter, ("ASEAN Charter," 2007) stating that "ASEAN, as an inter-governmental organisation, is hereby conferred legal personality." [Emphasis added] this means, that ASEAN is a subject of international law, which has their own right and responsibilities as international organisations.

In regards to ASEAN member states, it is being stipulates on Article 4 of the ASEAN Charter:

> "The Member States of ASEAN are Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam."

The Right and Responsibility of each Member States can be found in Article 5 of the ASEAN Charter, which are:

> "1. Member States shall have equal rights and obligations under this Charter; 2. Member States shall take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter and to comply with all obligations of membership. 3. In the case of a serious breach of the Charter or non compliance, the matter shall be referred to Article 20." [Emphasis Added]

Article 20 of the ASEAN Charter stipulates the consultation and consensus in ASEAN. Accordingly, article 20 paragraph 1 posses the basic principle of decision-making in ASEAN; stating that it shall be **based on consultation and consensus**. This is a quite a unique way of ASEAN to establish a decision, they usually call it by "**The ASEAN Way**". (Davidson, 1997) The ASEAN way means that the Southeast Asians' way of dealing with one another has been through manifestations of goodwill and the slow winning and giving of trust. And the way to arrive at agreements has been through consultation and consensus – *mushawara* and *mufakat*[2] – rather than cross table negotiations involving bargaining and give-and-take that result in deals enforceable in a court of law. (Adolf, 2011) However in practise, apparently a decision was hard to bargain and difficult to reach the consensus for the ASEAN state members itself. Further, relates to dispute settlement among the ASEAN state members, the charter provides:

Article 22 of the ASEAN Charter contains general principles:

"Para 1. Member States shall endeavour to resolve peacefully all disputes in a timely manner through dialogue, consultation and negotiation. Para 2. ASEAN shall maintain and establish dispute settlement mechanisms in all fields of ASEAN cooperation." This dispute settlement principle is in accordance with the United Nations Charter. According to Article 23, ASEAN member states could possibly settle their disputes through several forums; they are good offices, conciliation and mediation. It

[2] The Arabic language for consultation and consensus.

is being stipulated in article 23 of the ASEAN Charter that:

> "Para 1. Member States which are parties to a dispute may at any time agree to resort to good offices, conciliation or mediation in order to resolve the dispute within an agreed time limit; Para 2. Parties to the dispute may request the Chairman of ASEAN or the Secretary-General of ASEAN, acting in an ex-officio capacity, to provide good offices, conciliation or mediation."

However, the decision reached by this dispute settlement body was only recommendations and is not legally binding.

In respect of dispute settlement mechanisms in specific instruments can be seen through, Article 24 of the ASEAN Charter states that:

> "Para 1. Disputes relating to specific ASEAN instruments shall be settled through the mechanisms and procedures provided for in such instruments. Para 2. Disputes which do not concern the interpretation or application of any ASEAN instrument shall be resolved peacefully in accordance with the Treaty of Amity and Cooperation in Southeast Asia and its rules of procedure. Para 3. Where not otherwise specifically provided, disputes which concern the interpretation or application of ASEAN economic agreements shall be settled in accordance with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism."

Within the dispute settlement mechanisms, provides in the article 25 of the ASEAN Charter: "Where not otherwise specifically provided, appropriate dispute settlement mechanisms, including arbitration, shall be established for disputes which concern the interpretation or application of this Charter and other ASEAN instruments." With Regards to the event of the existence of an unresolved dispute, article 26 of the ASEAN Charter comes into play which are contains : "When a dispute remains unresolved, after the application of the preceding provisions of this Chapter, this dispute shall be referred to the ASEAN Summit, for its decision."

The Provisions of the articles mentioned above, indicate that the ASEAN Charter has been quite firm to provide legal certainty to accommodate the interests of member states. Thus, with legal certainty through the ASEAN Charter, which provides enormous support to establish an ASEAN Community in order to achieve the objectives as set out in Article 1 paragraph 1 of the ASEAN Charter "to maintain and enhance peace, security and stability and further strengthen peace-oriented values in the region"; paragraph 2 "(t)o enhance regional resilience by promoting greater political, security, economic and socio-cultural cooperation" [Emphasis Added]; paragraph 3 "(t)o preserve Southeast Asia as a Nuclear Weapon- Free Zone and free of all other weapons of mass destruction"; paragraph 4 "(t)o ensure that the peoples and Member States of ASEAN live in peace with the world at large in a just, democratic and harmonious environment"; paragraph 5 "(t)o create a single market and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is free flow of goods, services and investment; facilitated movement of business persons, professionals, talents and labor; and freer flow of capital" [Emphasis Added]; paragraph 6 "to alleviate poverty and narrow the development gap within ASEAN through mutual assistance and cooperation"; paragraph 7 "to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN"; paragraph 8 "to respond effectively, in accordance with the principle of comprehensive security, to all forms of threats, transnational crimes and transboundary challenges"; paragraph 9 "to promote sustainable development so as to ensure the protection of the region's environment, the sustainability of its natural resources, the preservation of its cultural heritage and the high quality of life of its peoples"; paragraph 10 "to develop human resources through closer cooperation in education and lifelong learning, and in science and

technology, for the empowerment of the peoples of ASEAN and for the strengthening of the ASEAN Community"; paragraph 11 "to enhance the well-being and livelihood of the peoples of ASEAN by providing them with equitable access to opportunities for human development, social welfare and justice"; paragraph 12 "to strengthen cooperation in building a safe, secure and drug-free environment for the peoples of ASEAN"; paragraph 13 "to promote a people-oriented ASEAN in which all sectors of society are encouraged to participate in, and benefit from, the process of ASEAN integration and community building"; paragraph 14 "to promote an ASEAN identity through the fostering of greater awareness of the diverse culture and heritage of the region"; and paragraph 15 "to maintain the centrality and proactive role of ASEAN as the primary driving force in its relations and cooperation with its external partners in a regional architecture that is open, transparent and inclusive."

All of the aforesaid aims of ASEAN enshrined in the Charter are the expected to create a visionary people oriented regional organization called ASEAN Community. The establishment of this ASEAN Community is seen as a crucial and inevitable need to enhance regional development. Therefore, in the 12th ASEAN Summit held in January 2007 within the spirit of new ASEAN, on the basis of the ASEAN Charter and spirit of new ASEAN ("one vision, one identity, one community"), all ASEAN countries affirmed their commitment to accelerating the establishment of ASEAN Community in 2015. ("Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015," 2007)

This ASEAN Community comprises of three pillars, which are first, Political-security community; second, economic community and third, socio-cultural community. One of the three pillars of the ASEAN community that has a significant influence for member countries of ASEAN is the ASEAN Economic Community.

D. ASEAN Economic Community

ASEAN Economic Community (hereinafter referred to AEC), is one of the three pillars of ASEAN Integration concept that has been approved jointly by the Heads of

State from the 10 ASEAN member countries meeting in Bali in 2003 which was confirmed by the Declaration of ASEAN Concord II. The main concept of the AEC is to create ASEAN as a unified single market and production base where there is free flow of goods, services, factors of production, investment and capital as well as the elimination of tariffs for trade among ASEAN countries which are then expected to reduce poverty and economic inequality among the ASEAN countries through a number of mutually beneficial cooperation. The expected result in this cooperation is a dynamic and competitive environment in ASEAN with new mechanisms and measures to strengthen the implementation of its existing economic. (ASEAN, 2011b)

E. Impact of the Existence of ASEAN Economic Community by 2015

ASEAN Economic Community by 2015 would create a sum of consequences, one of most vital one is the elimination of tariffs and non-tariff barriers will be gradually be phased out. ASEAN investors will be free to invest in all sectors throughout the region. There will be a free movement of professionals and skilled labour.

Simple, harmonized and standardized trade and customs requirements are expected to reduce transaction costs. Thus, to encourage the free flow of goods and the development of an integrated regional production network, ASEAN Member States adopted various strategy from several point of views, which firstly, the Trade Facilitation Work Program and the Trade Facilitation Indicators in 2008 and 2009, respectively. The Trade Facilitation Work Programme is a program for trade facilitation reforms to enhance trade within the ASEAN region by reducing transaction costs.

The ASEAN Trade Facilitation Indicators are quantifiable indicators to measure the impact of trade facilitation reforms on both the public and private sectors. In January 2010, Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore and Thailand (ASEAN-6) eliminated intra-ASEAN import duties on 99.65% of their tariff lines. Of these zero-tariff goods, 24.15% are from the Priority Integration Sectors (PIS) agro-based products,

automotive, e-ASEAN, electronics, fisheries, healthcare products, rubber-based products, textiles and apparels, and wood-based products — 14.92% are iron and steel products, 8.93% are machinery and mechanical appliances and 8.3 % are chemical related products. Similarly, Cambodia, Lao PDR, Myanmar and Viet Nam have reduced their import duties to 0-5% on 98.86% of their tariff lines. In addition to the goods noted above, other products originating in ASEAN, such as prepared foodstuffs, furniture, plastics, paper, cement, ceramics, glass and aluminium can enjoy duty-free entry into Brunei, Indonesia, Malaysia, Philippines, Singapore and Thailand.(ASEAN, 2011a)

To establish one single market in ASEAN region by 2015, it would require law enforcement under one perspective. Hence an integration of such an existing measure, which is related to the trade of goods, shall be taken into account. Therefore, within those inquiries, in August 2007, the ASEAN Economic Ministers made CEPT-AFTA or Common Effective Preferential Tariff for ASEAN Free Trade Agreement. In February 2009, all ASEAN countries agree to sign the ASEAN Trade in Goods Agreement ("ATIGA"). Besides the law enforcement, there is another strategic program in order to develop the facilitation for trade among the ASEAN country. The Strategic Program of Customs Development ("SPCD") stipulates the release of any container for shipment within 30 minutes. With a view to modernizing customs operations, Information and Communication Technology ("ICT") applications have been introduced to clear goods through customs in the ASEAN Member States in accordance with international standards. This has contributed to reducing both processing costs and the time required for release of shipments from customs control. ASEAN Customs Administrations are also working in partnership with industries and businesses to strengthen and improve the level of service and compliance.

ASEAN's approach to preparing, revising or applying standards, technical regulations and associated conformance regulations has been based on international standards and practices. This includes alignment, as much pos-

sible, with obligations under the Agreement on Technical Barriers to Trade (TBT), except where legitimate reasons for deviations exist. (ASEAN, 2011a)

Further, the ASEAN Economic Community will continue to improve "public and private sector". Public-private sector engagement within ASEAN is taking place at many levels. Many sectors within its bodies have been established to support ASEAN strategies and programmes in regional development and integration. There are currently about 100 sectoral bodies with mandate relating to the AEC alone. Resource constraints, a comprehensive agenda and the large number of meetings of AEC sectoral bodies mean that not all of the work of these sectoral bodies will have the full engagement of the private sector. As of 2011, about 35% of AEC sectoral bodies have engaged private-sector associations and representatives, either on a regular or ad hoc basis. The ongoing dialogue between ASEAN and private sector representatives has produced several important recommendations in support of more effective ASEAN economic integration. ASEAN Economic Ministers have held annual meetings with the ASEAN Business Advisory Council (ASEAN-BAC) and with representatives of industry associations and business councils within ASEAN and with dialogue partner countries. (ASEAN, 2011a)

To pursue the main goal of AEC by 2015, it is also a significant problem that shall be face by ASEAN members, there are: a different economic level among the ASEAN countries, within the small countries as such CLMV (Cambodia, Laos, Myanmar, and Vietnam) countries compared to ASEAN develop countries, as such Indonesia, Singapore, Malaysia which more higher level in economic. Different political and social perspective, and further, the policy coherence to the ASEAN countries, quiet an issue. Particularly, to the production of tradable agriculture and forest products is an essential component for the realisation of an ASEAN single market. This calls for an appropriate set of macroeconomic policies for sectoral integration in the areas of quality education for farmers; adoption of suitable technologies for increasing food production and improving food security and safety; and com-

munication and marketing arrangements to increase farmers' access to information, capital and inputs for efficient production at reduced cost. Developing sustainable management practices to protect forests and respond to climate change will be critical in meeting increasing consumer demands for sustainably produced goods and positioning the ASEAN region to be competitive in emerging carbon markets. Climate change is a cross-sectoral issue and requires coordination at the local, national and regional levels to enhance collaboration among the economic, environment, development, energy, agriculture, fisheries, livestock and forestry sectors. Strategies for mitigating and adapting to climate change must incorporate the sustainable management of natural resources and ensure food security across the ASEAN region. Promoting capacity building and educational initiatives to increase public awareness about global warming will also play a critical role in pursuing an integrated regional response to the adverse impacts of climate change. (ASEAN, 2011a) In general there are different public and private policies in every single ASEAN state, make it very difficult to create an integration of ASEAN Economic Community by 2015. In addition, skilled and educated workers in each country are different. Specifically, the ASEAN countries shall face the challenges upon the limitation of working capabilities, general knowledge particularly in terms of technological knowledge, and language skills would probably the biggest obstacle, since we already know that ASEAN countries has their own language and it would be foreign for other countries. To response towards the idea of single market, being mentioned in the ASEAN Charter, the consequence would be no boundary at all. This means that we have an equal opportunity to acquire jobs in all ASEAN countries. However, it will not be easier for such a country with less economic and limited education quality compare to other countries which has higher economic and well educated, to compete in the same fields. Last but not least, there still exist an internal problem in each countries, as such corruptions, bilateral agreement, etc.

Those specific issues and challenges towards fostering the ASEAN Economic Community by 2015 shall be taken into consideration by each of the ASEAN member states and still require to be responded.

BIBLIOGRAPHY

A. Books

Adolf, H. (2011). *Hukum Ekonomi Internasional Suatu Pengantar Cetakan*: CV Keni Media.

ASEAN. (2011a). *ASEAN Economic Community Handbook for Business*. Jakarta: ASEAN Secretariat.

ASEAN. (2011b). *Roadmap for an ASEAN COMMUNITY 2009 - 2015*. Jakarta: ASEAN Secretariat.

ASEAN. *ASEAN Economic Community Handbook for Business.*, ASEAN Secretariat Jakarta, 2011.

Davidson, P. J. (1997). The Legal Framework for International Economic Relations. *Singapore Institute of Southeast Asian Nations*.

Encyclopedia of Public International Law. (1983).

Shaw, M. N. (2008). *International Law* (Vol. 6th Edition): Cambridge.

B. Conventions

ASEAN Charter (2007).

Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015 (2007).

Charter of the United Nations (1945).

Vienna Convention on Laws of Treaties, 1155 U.N.T.S. 331 Stat. (1969).

C. Others

ASEAN. ASEAN Charter, from http://www.aseansec.org/21861.htm

LEGAL FRAMEWORK OF INTERNATIONAL ASSISTANCE IN DISASTER RESPONSE: IMPLEMENTATION AND EFFECTIVENESS*

Daisy Kharisma Qisthi**

Abstract

Natural disaster is inseparable in the existence of humankind. The tsunami in Indian Ocean and massive earthquake in 2004 resulted an unprecedented challenge for affected countries and international community. This is the 'awakening' of awareness of international community. Currently, international response towards disaster is increasing, especially on preparedness and assisting affected countries by seeing the fact that several countries even do not have minimum capacity in disaster response. Further in implementation, there are some problems in application standard of international assistance to be implemented, not only for inter-

Abstrak

Bencana alam tidak dapat dipisahkan dari keberadaan manusia. Tsunami di Samudera Hindia dan gempa besar pada tahun 2004 menghasilkan sebuah tantangan yang belum pernah dihadapi sebelumnya, baik oleh negara-negara terdampak maupun oleh masyarakat internasional. Bencana ini menandai 'kebangkitan' kesadaran masyarakat internasional akan pentingnya tanggap bencana. Saat ini, tanggapan internasional terhadap bencana semakin meningkat, terutama dalam hal kesiapan dan pemberian bantuan kepada negara-negara terdampak, karena beberapa negara bahkan tidak memiliki standar minimum

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national organization, but also non-governmental organization, and the countries itself. This paper will analyze further on the international legal framework on international assistance of disaster response.

tanggap bencana. Dalam pelaksanaannya, ada beberapa masalah dalam penerapan standar bantuan internasional. Masalah ini terjadi tidak hanya dalam organisasi internasional, melainkan juga dalam organisasi non-pemerintah dan pemerintahan negara itu sendiri. Tulisan ini akan menganalisis lebih lanjut mengenai kerangka hukum internasional tentang bantuan internasional dan tanggap bencana.

Keywords*: disaster response, international assistance, natural disaster.*

A. Introduction

The growing awareness of disaster has brought improvement on precautionary action to minimize the impact of disaster. The relationship between international law and natural disasters (such as earthquakes, floods, tsunamis, typhoons, hurricanes, volcanoes and droughts) reveals that the relationship has historically been weak. (Fidler, 2005) A lot of international legal framework on disaster response has created international legal foundation, precisely to accommodate legal ground of international assistance. International assistance has played an important role to create quick disaster response and management for post disaster action. These activities are vital in order to save life and human dignity. The strategic emergence action that shall be taken is to build disaster governance in-depth within countries; the Indian Ocean tsunami's impact has reinforced the need not only to respond effectively to disasters but also to prepare and protect the communities from disasters that occur. (*Hyogo Framework*, 2005) Most of cases of massive disaster, for instance tsunami and earthquake in Indian Ocean, occurred in developing countries that have minimum capacities of disaster response. In that

condition, international assistance from international organizations such as International Federation of Red Cross and Red Crescent (IFRC) and non-governmental organization (NGOs) are greatly needed in order to minimize such delays. It requires a good operational environment and systematic cooperation between national, regional and institutional units to ensure the assistance is in the actual situation, and to uphold humanitarian principles and standards. The best way to provide this is trough the development of legal framework and policy in the international level.

B. Legal Framework for International Assistance Overview

The International Federation of Red Cross and Red Crescent Societies ('International Federation') studies found over 300 international instruments has developed specifically for situations that required international disaster response, from treaty to resolutions and declarations to guidelines and codes of conduct covering a range of different aspects relating to international assistance (IFRC & RCS, 2003) The 20th century witnessed the creation of two multilateral treaties directly on disaster response, the adoption dates of one of those treaties took 71 years and while the other one has completely failed.[1] Unlike in the situations of armed conflict, there is no comprehensive multilateral treaty developed specifically to address international response to natural disasters. (Hoffman, 2000) In the history of disaster response, one of the most significant draft frameworks was the *Draft Convention Expediting the Delivery of Emergency Relief*. This draft covered international assistance process, ensuring quality and appropriate assistance, liability risk and claims in the receiving state. (Secretary General, 1984) Although the ideas of a convention on disaster relief had been made, none of them ever legally come into force because it was not universally accepted. Regional treaty in the scope of ASEAN (Association of

[1] The two treaties are the *Convention and Statute Establishing an International Relief Union,* opened for signature 12 July 1927, 135LNTS 247 (entered into force 27 December 1932) *('JRU Treaty')* and the *Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations,* opened for signature 18 June 1998 (entered into force 8 January 2005)

South East Asia) concluded an *ASEAN Agreement on Disaster Management and Emergency Response (AADMER)* specifically for the facilitation of cross-border assistance in the event of disaster. (ASEAN, 2005) This agreement entered into force in 2009. However, this scope of international assistance only applies in several states, not universal standard for international assistance disaster response.

International effort in making such proper legal ground was also conducted through the United Nation resolution. There are over 50 UN resolutions concerning international disaster response situations, either generally or in relation to disaster in specific countries, dating back to 1965. (Katoch, 2003) Between 1965 and 1971 the UN General Assembly adopted a series of resolutions on Assistance in Cases of Natural Disaster on almost annual basis which sought to identify ways to coordinate international disaster relief among various actors and to provide assistance as quickly as possible.

In humanitarian sector, the development of rules of international disaster response and assistance in particular, are developed by the International Red Cross and Red Crescent Movement. A significant resolution was done by the adoption of the *Principles and Rules for Red Cross and Red Crescent Disaster Relief*. (IFRC & RCS, 1977) In addition, in the 20th century, the role and importance of international assistance for both IGOs and NGOs in response to natural disasters have grown significantly through non-binding actions and activities – which what the international lawyers sometimes called it as 'soft law'. However, as a policy matter, the absence of multilateral treaties - 'hard law' –still cannot bridge the absence of capabilities within IGOs and NGOs. (Fidler, 2005) Meanwhile in current condition, International Red Cross and Red Crescent Movement created *Principles of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Response Programs,* which concerns to the series of principles in delivering humanitarian assistance. (IFRC, et al., 1995) This code of conduct is the standard of giving humanitarian assistance which also includes for NGOs to comply with it, yet the

application of its organization itself is conducted voluntarily.

The current issue in disaster response also included such intensive series of technical assistance and building the capacity of preparedness disaster system. Such international assistance is not only applied in the case of disaster yet also covers the situation of post-disaster and even before the disaster occurs.

Since 2001, the International Federation's International Disaster Response Laws, Rules and Principles (IDRL) program has been investigating the legal issues and regulatory frameworks of disaster response focusing on international relief operations. The management of such operations has become increasingly complex, not only due to the rise of number and ferocity of disasters but also to the sharp inclination of the number and diversity of international actors that ready to intervene in highly publicized events.

In November 2007, the state parties to the Geneva Conventions and the components of the Red Cross and Red Crescent Movement unanimously adopted a new set of "Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance" (the "IDRL Guidelines") at the 30th International Conference of the Red Cross and Red Crescent. The adoption of such resolution shall encourage the governments to use the Guidelines in order to strengthen their domestic laws and bilateral and regional agreements on disaster management and invited the International Federation and National Societies to disseminate and promote their use. Furthermore, they invited the International Federation and National Societies to continue their pioneer research on legal issues in the case of disaster management and to develop further tools and models for the improvement of legal preparedness for disasters.

In 2008 and 2009, the UN Economic and Social Council and General Assembly also adopted such resolutions in order to encourage the governments to use of the IDRL Guidelines. In the current condition, from 2010-2011, the International Federation's International Disaster Response Laws, Rules and Principles (IDRL) program will con-

tinue to fulfill its mandate from the 30th International Conference of the Red Cross and Red Crescent to disseminate and promote the use of the Guidelines for the domestic facilitation and regulation on international disaster relief and initial recovery assistance ("IDRL Guidelines"), aiming to reduce unnecessary restrictions, delays and expenses in international disaster relief operations and to increase their quality, coordination and complementarily with domestic efforts. Building on its work in 2008-09, the program's intention is to complete an intensive series of technical assistance and training projects designed to ensure a momentum among States and National Societies with regard to the use of the IDRL Guidelines, which will be self-sustained after 2011. (IFRC & RCS, 2009)

The agenda of IDRL is to minimize the casualties as maximum as possible and to address the assistance is depending on the vulnerabilities of its area. Nowadays, Southeast Asia is having collaboration with World Health Organization as the country-level projects and also making staff program as the resources for "Preparedness Missions" by the UN Disaster Assessment and Coordination (UNDAC) system.

C. International Assistance Challenges in Disaster Response

International assistance in disaster response is really important to minimize casualties, and give assistance to countries that have lack of capacities in disaster response. The International Federation of Red Cross and Red Crescent Societies ('International Federation'), the mission that provide assistance to the populations affected by peacetime disasters, has called the disaster response as a 'long-neglected facet of international law' and argued that 'it is unlikely that any other challenge looming so large in world affairs has received so little attention in the legal realm'. (World Disaster Report, 2000)

Such concerns and controversies about advocacy for the right of humanitarian intervention based on the 'responsibility to protect' and reinforce the reticence of many states to bind themselves to rules concerning disaster relief. (ICISS, 2001) Lack of binding legal ground caused several countries considered

that particular international assistance itself as an intervention from international community. Moreover, despite the fact that various legal instrument are relevant to challenges in international assistance there are many limitation on the ability to enforce the legal instrument itself.

Attempts to create a multilateral treaty as a way of providing a comprehensive legal framework for international disaster response have been wholly unsuccessful on how conventions have not been widely accepted by states such as Tampere Convention and Framework Convention. Similarly, regional treaties have not existed in many regions. When we refer to the binding international law, states prefer to have bilateral agreement between states or international organization. International instruments in this regard fall into the category of "soft law" such as resolutions or treaties. The nature of particular international instruments tends to limit the ability to bind into governments into their provision.

International assistance is also dealing with many aspect of limitation in regard of administration such as visa, tax and duties. There are no specific stipulations under international law on facilitation in regards to disaster response. The framework of convention for example, simply states the privilege, immunity and facilities in carrying out such international assistance (Hyogo Framework, 2005) without any further details on the protection itself. This protection is needed to minimize the barrier that the benefactor should comply.

International instruments should be incorporated with national law to be implemented. Such process is certainly needed in order to put the governments and disaster relief provider in the same understanding. Meanwhile, the International Federation conducted a global research, which, revealed that treaty provisions, resolution, and declaration are rarely taken into account in national level. (IFRC & RCS, 2004) Thus, binding or non-binding instruments do not necessarily improve the access and facilitation to provide maximum international assistance. Another challenge is on the exclusion of non-state actors and on the issue if the states only enforce bilateral treaty of disaster response, which

consequently, it only applies for both states. Hence, any organizations inside a state may only offer their assistance if there is specific stipulation. International disaster response will keep on facing difficulties in providing assistance towards affected state. Referring to the tsunami operation, once again highlights the complexities of getting relief across borders in the shortest time and with the maximum efficiency. Humanitarian organizations are not only having to cope with damaged infrastructure, they are also dealing with 12 different governments and12 different sets of customs regulations. The kind of bureaucracy certainly caused such severe delay and the delay in getting aid to those who need would cost lives. For instances, even in the scope of ASEAN, the implementation of AADMER still has difficulties fulfilling its role effectively because each country has its own system for emergency response.

To be effective, international assistance needs the same standard of operation, most importantly for the non-state actors, to specifically have its legal position under international law in providing international assistance. It is included in UN General Assembly Resolution 46/182, which refers to "Intergovernmental and non-governmental organization working impartially and with strictly humanitarian motives". Moreover, it also needs the encouragement from the State Members and regional organizations to strengthen the operations and legal frameworks in the international disaster relief by taking into account the IDRL Guidelines." (UNGA, 2008) Currently, most states figure that they will sort out their mechanisms for dealing with international assistance when the time has come. Unfortunately, this ad hoc approach is increasingly inadequate to deal with the real complications of international assistance.[2]

D. Effectiveness of International Assistance Legal Framework in Disaster Response

The United Nations Secretary-General praised the international humanitarian response system because it was able to pro-

[2] Remarks of IFRC Secretary-General Bekele Geleta, to the Overseas Development Association at Westminster, London, March 2009.

vide massive relief to all tsunami-affected communities in the Indian Ocean, against all odds, in the course of a few weeks'.[3] Disaster response is included in the **Disaster Rehabilitation**, yet, the provision of life saving disaster relief frequently fails to meet the affected community's need for return and resuming productive development; while the **Disaster Reconstruction** is included in the disaster assistance in returning the affected community to their pre-disaster state; **Disaster Prevention, Mitigation and Preparedness** is aiming to build the community's capacity to mitigate disaster. In giving international assistance international organization or non-governmental organization implement these three steps of disaster response.

The coordination between government and international assistance from state, or NGO may fasten the reconstruction and development in time of disaster, post disaster, and preparedness for possibility of disaster. In the case of Aceh, the concept that introduced is called BRR, "build back better;" maintained by the World Bank, which referred to its mandate for poverty eradication and development; combine with the Red Cross movement through its main mandate of saving lives and preventing further loss of life in the recovery phase. It is also recognized that in all assistance environments these linkages are problematic and multi-layered; they may not be universally appropriate, and may depends on the agency's mandate. In Aceh, most of the actors' main mandates were for reconstruction, with some longer-term development in later years. (Masyrafah and McKean, 2008)

In disaster of Indian Ocean in 2004, the disaster triggered an unprecedented response and generosity from domestic and international communities in those countries that affected by the tsunami. It is estimated that about US$7.7 billion was given as the amalgamation funds from the Government of Indonesia, bilateral and multilateral donors, international NGOs, and communities both from inside

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[3] *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General,* 59th s ess, agenda items 45 and 55, [203], UN Doc A/59/2005 (21 March 2005) (*'In Larger Freedom'*)

and outside of Indonesia towards the reconstruction program. One of the surprising aspects of the composition of aid in Aceh was to the extent where the NGOs came forward with substantial sums of their own money. It shows that the international assistance for disaster relief is really important, specifically on the lack of area's capacity. Continuous and collaborative disaster assistance also fastened and increased the disaster relief within the community. The implementation of collaborative assistance from internal and external assistance need strong legal foundation while, in the case of Indonesia, government cut the bureaucracy and made such emergency law.

Such international direct legal foundation is still needed to empower, to have specific position and also to set a proper standard when it gives international assistance. Current effort in build International Disaster Response Law research is also important. The encouragement of international standard is aiming to build capacity on disaster mitigation and to maintain the vulnerabilities of state that will attach more to scope of states.

E. Conclusion

Theoretically there are a lot of approaches on international standard on international assistance, but most of the legal instruments is only legally binding to several states or cannot enter into force. The development research on International Disaster Response Law (IDRL) quite holistic in nature, but again it is hard in its implementation.

Considering the need of fast assistance for all states in the situation of natural disaster, IDRL program should relief more barrier of international matter in the case preference of humanity in the situation of international assistance. In the matter of operation, it takes all of the aspect of international disaster response instruments to discuss and facilitate more the implementation of disaster response in every stage (in time of disaster, reconstruction, preemptive/ mitigation stage).

The nature of international assistance is to create a fast and effective in disaster response. In the case of natural disaster, it is really essential to have collective effort not only from national assistance

but also from international assistance and decrease the barrier. Therefore it will result to the comprehensive action to maintain the disaster in all states.

To achieve fast relief for natural disaster also requires the cooperation from states. States have such jurisdictional power to allow the intervention of international assistance. Then, if the international standard in international assistance comes into force, again, states have most powerful power. For non-states assistance, the role of NGO has also significant to achieve effective disaster response. Consequently, it needs certainty of position within the international law. There is no doubt about the effectiveness of international assistance, but the enforcement of the legal framework on disaster response itself is certainly needed.

BIBLIOGRAPHY

A. Journal

Fidler, D. P. (2005). Disaster Relief and Governance after the Indian Ocean Tsunami: What Role for International Law? *Melbourne Journal of International*.

Harry Masyarafah, J. M. M. (2008). Post-Tsunami Aid Effectiveness in Aceh Proliferation and Coordinatin in Reconstruction. *Wolfensohn Center for Development Working Paper 6*.

Hoffman, M. (2000). Towards an International Disaster Response Law in International Federation of Red Cross and Red Crescent Societies.

Katoch, A. (2003). International Disaster Response Laws, Principles, and Practice: Reflection, Prospect, and Challenge.

B. Conventions and Conference

Association of South East Asia, *Agreement on Disaster Management and Emergency Response,* (2005).

U.N. GA Res. 63/139, para. 8 (2008).

UN World Conference on Disaster Reduction, *Building the Resilience of Nations and Communities to Disasters: Hyogo Framework forAction 2005-2015,* [4], UN Doc A/CONF.206/L.2/Rev.1 (2 February 2005) *('HyogoFramework')*.

Proposed Draft Convention Expediting the Delivery of Emergency Relief, office of United Nations Disaster Relief Coordinator , Report of the Secretary-General , UN ESCOR, 39th Session (1984).

Principles and Rules for Red Cross and Red Crescent Disaster Relief, adopted by the 26th International Conference of Red Cross and Red Crescent, Bucharest (1977).

C. Reports

International Federation of Red Cross and Red Crescent Societies Report, *International Disaster Response Law Project Report* 2002-2003, (2003).

International Federation of Red Cross and Red Crescent Societies report, *International Disaster Response Law Plan 2010 – 2011*, (2009).

International Federation, *World Disasters Report 2000* (2000) 157 *('World Disasters Report 2000')*.

International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (2001).

In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General, 59th s ess, agenda items 45 and 55, [203], UN Doc A/59/2005 (21 March 2005) .

World Disasters Report 2000, The two treaties are the *Convention and Statute Establishing an International Relief Union,* opened for signature 12 July 1927, 135LNTS 247 (entered into force 27 December 1932) *('JRU Treaty')* and the *Tampere Convention on the Provision of Telecommunication Resources*

for Disaster Mitigation and Relief Operations, opened for signature 18 June 1998 (entered into force 8 January 2005).

Building the Resilience of Nations and Communities to Disaster: Hyogo Framework. (2005). Paper presented at the UN World Conference on Disaster Reduction.

Fidler, D. P. (2005). Disaster Relief and Governance after the Indian Ocean Tsunami: What Role for International Law? *Melbourne Journal of International*.

Hoffman, M. (2000). Towards an International Disaster Response Law in International Federation of Red Cross and Red Crescent Societies.

Katoch, A. (2003). International Disaster Response Laws, Principles, and Practice: Reflection, Prospect, and Challenge.

AADMER Series: Implementation in Indonesia (2011) http://www.humanitarianforum.org/pages/en/aadmer-series-implementation-in-indonesia.html

International Federation of Red Cross and Red Crescent Societies, *International Disaster Response Law Project Report 2002-2003* (2004).

Remarks of IFRC Secretary-General BekeleGeleta, to the Overseas Development Association at Westminster, London, March 2009.

*The Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief,*Prepared jointly by the International Federation of Red Cross and Red Crescent Societies and the ICRC, Annex VI to the resolutions of the 26th International Conference of the Red Cross and Red Crescent.

PIERCING THE CORPORATE VEIL: A COMPARATIVE STUDY OF THE DOCTRINE UNDER AMERICAN AND INDONESIAN LAWS*

Astrid Emmeline Kohar**

Abstract

Even though the doctrine of piercing the corporate veil has been recognized and regulated in Act No. 40 of 2007 on Limited Liability Company, in practice the principle is yet to be implemented. It is certainly a huge disappointment since the doctrine itself has been enacted in Indonesia since 1995 and the abandonment of its enforcement inevitably results in the creditors' under-compensation. Having learned the situation, I am compelled to examine the implementation of veil piercing in the U.S- where it is believed to be the birth country of the doctrine and compare it with the one that applies in Indonesia in order to find out the distinc-

Abstrak

Meskipun doktrin piercing the corporate veil telah diakui dan diatur dalam Undang-Undang Nomor 40 Tahun 2007 tentang Perseroan Terbatas, dalam praktiknya prinsip hukum ini masih belum diimplementasikan. Kondisi ini sangat disayangkan mengingat doktrin tersebut telah diterapkan di Indonesia sejak 1995 dan ketiadaberlakuannya mengakibatkan para kreditur tidak dapat memperoleh kompensasi. Berdasatrkan situasi itu, penulis akan mengkaji penerapan veil-piercing di Amerika Serikat sebagaimana diperaya sebagai negara lahirnya doktrin ini dan membandingkannya dengan kondisi di Indonesia untuk menge-

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tions of its implementation in both countries. In my research, I found that both countries see veil-piercing as a doctrine which disregards the principle of limited liability, hence making corporate shareholders and managers personally liable for fulfilling corporate obligations. The two countries differ however, in their qualifications to pierce the veil.

tahui perbedaan di kedua negara tersebut. Dalam penelitian penulis, penulis menemukan bahwa kedua negara sama-sama memandang veil-piercing sebagai doktrin yang mengesampingkan prinsip pertanggungjawaban terbatas, sehingga para pemegang saham dan manajer perusahaandipertanggungjawabkan secara pribadi atas tindakan korporasi. Namun kedua negara tersebut ternyata berbeda dalam penentuan kualifikasi untuk menyingkap tabir perseroan.

Keywords: *piercing the corporate veil, company law, corporate governance.*

A. Introduction

When Indonesia was struck by financial crisis which caused the collapse of our national economy, politics, and security in 1997, it became clear that existing laws and regulations governing business practices were unfit for the society. In subsequence, the 2004 OECD Principles of

Corporate Governance which introduces *corporate governance* was deemed necessary to improve Indonesia's situation. Unfortunately, the Act No. 1 of 1995 on Limited Liability Company was not up to par with the *corporate governance* standards. For instance, the Act had given no acknowledgement of the social and environmental responsibility nor did it offer any means to monitor the enforcement of the Limited Liability Act.

The incongruity of Act No. 1 of 1995 with the spirit of *corporate governance* cumulated with the rapid progress of economy and science in the globalization era and people's increasing demand of a more efficient and legally certain incorporation procedure later led to the emergence of Act No. 40 of

2007 as a new decree concerning the Limited Liability Company.

This decree later proved to be the change to Indonesian's company laws with its fresher and improved provisions. However, it is noteworthy that the change did not affect any legal theories, philosophies, and doctrines already existed in the former act—such as the principles of *piercing the corporate veil*, *fiduciary duty*, *standard of care*, *self dealing transaction*, *business judgment rule*, *derivate action*. (Widiyono, 2005)

One of the principles recognized by both the Act No. 1 of 1995 and Act No. 40 of 2007 is the concept of *piercing the corporate veil*, which is stated in Article 3 of both laws. It is the legal principle of lifting the company's limited liability which causes the shareholders to be personally held liable for the company's obligation. Unfortunately, it has never been put into practice in this country. Cases of bad business venture were more often ruled solely by the criminal law without realizing that the *veil-piercing* could also be used to protect the victims' rights.

Back in 2006, PT Lapindo Brantas—an Indonesian oil and gas exploration company—was sued for allegedly not equipping the well bore with safety steel casing during its drilling process, thus triggering a natural gas and mud eruption. The outburst was very massive that heavy mud filled the area where the drilling had taken place—Porong, Sidoarjo in East Java—resulting in the submersion and destruction of the district's local highways and villages.

Furthermore, in 2008, a financial institution—Century Bank—fell into a financial crisis, making the bank and its affiliate—PT Antaboga Delta Sekuritas—unable to return the customer's money. Though The Supreme Court had sentenced Robert Tantular to nine years in prison for the violation of banking law by interfering in the bank's operations and embezzlement (Rayda, 2010), up until now, the customers of Antaboga have not yet received their savings.

In theory, both aforementioned cases could be pierced. Yet in reality, the actors were convicted using other provisions which is directed into under-compensation for the victims. According to Dr. Sulistiowati, S.H., M. Hum., up until now

there have been no precedents that made on the basis of *piercing the corporate veil*. It shows that the level of implementation of *veil-piercing* doctrine in Indonesia is dangerously low, which is disappointing since the limited liability company law itself has recognized the principle.

The abandonment of *piercing the corporate veil* in Indonesia has led me to a question whether the same condition happens in the U.S. whose commercial laws are deemed to be more innovative and have influenced legal system on business practices in many countries around the world. Furthermore, as it is believed that the implementation of this principle differs in every country, hence this particular article would like to compare the enforcement of *veil-piercing* principle in the U.S. and Indonesia.

B. Characteristics of Limited Liability Company

Corporations had been expanding its power in the 19th century but had its giant leap when Ronald Reagan took office in 1980. Government's controls over corporations were pretty much eliminated, creating freedom for corporations to do basically what they wanted with minimal government oversight. With that, the amount of investment skyrocketed, a plethora of corporations were created, and mega-mergers became an instant fad. This condition later on resulted in the large number of corporate groups in America. (Drutman)

Before observing the *piercing* doctrine, an understanding of the limited liability company/ corporation's characteristics is crucial. Although the exact definition of corporation varies depending on each country's legal system, its characteristics remain universal. The distinctive attributes of a limited liability company are:

1. Legal personality

As a legal matter, a company is an entity that is entirely separated from the people who own it and work for it. It has the rights and obligations of a natural person as well as a different identity and funds from its members.

2. Limited liability

The limited liability doctrine is derived from the perception of a corporation as an independent legal person. It holds that shareholders of a corporation are not personally liable for corporate obliga-

tions and thus puts at risk only the amount of money that they have invested in buying the shares.

3. Transferability of shares

One of the great advantages of the corporate form is that the shares are freely transferable. When there is an absence of special contractual restrictions, shareholder of the company is free to sell the shares to anybody at any price. A transfer of stock has no effect on the company, except that there is a new voter of those shares. (Bainbridge, 2002)

While the aforesaid characteristics may have attributed to today's prevailing trend of corporation as a form of business organization, they also create drawbacks that shall never be undermined. The limited liability doctrine, for instance, although is believed to be very beneficial by making shareholders not personally liable towards the corporation's debts or obligations, thus will encourage the investment for the risk has been minimized, can potentially serve as a means for the shareholders to evade from fulfilling their obligations to the victims of misconduct in corporate activities.

Having learned the potential hazard posed by the doctrine, *veil piercing* thus plays an important role to ensure that corporate shareholders cannot use the limited liability principle in ways that are inconsistent with public interest.

C. Veil Piercing under U.S. Law

Up until now, *veil piercing* remains as one of the frequently debated legal concepts among scholars and judges. In the U.S., there are still no stringent rules when it comes to pierce the veil, similar to what Benjamin Cardozo, a former New York Court of Appeals Judge once observed[1] and seen from the cases below:

- *Radaszewski v. Contrux, Inc.; Dan Leslie Satterfield; Telecomcorporation*, 891 F.2d 672

Konrad Radaszewski suffered a permanent brain injury when a truck driven by Dan Leslie Satterfield, an employee of Contrux, Inc., struck him by the side of a road in Independence, Missouri. As Contrux had been declared bankrupt,

[1] Judge Benjamin Cardozo once stated in the case of Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y.1926) that *veil piercing* was a doctrine "enveloped in the mists of metaphor".

Radaszewski's guardian then sued Telecom as the parent company. The tribunal set a three-prong test in order to *pierce the veil*:

1. The party seeking to prove that two corporations are not separate entities must show control by one corporation over the other;
2. Such control must have been used to commit fraud, wrong, a violation of a statutory or other legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights;
3. *The control and breach of duty must have proximately caused the injury of which plaintiff complains.*

- *Kinney Shoe Corp. v. Polan*, 939 F.2d 209 (4th Circ. 1991)

Plaintiff Kinney sought to recover money owed on a sublease between Kinney and Industrial Realty Company. The court ruled in favor of Kinney, making Polan as the sole shareholder of the company, personally liable for Industrial's rent payment. The court based its verdict on the satisfaction of a two-prong test:

1. *The unity of interest and ownership is such that the separate personalities of the corporation and the individual shareholder no longer exist;*
2. *An equitable result would occur if the acts are treated as those of the corporation alone.*

However, even though having said that there are no clear standards for the infliction of *veil piercing*, I can at least identify a number of arguments that justify *veil piercing*:

1. Nonconformance of incorporation requirements

When not yet meeting the incorporation requirements, its owners using their personal assets shall carry any of the corporation's settlements out. In other words, before a corporation enters a status of being a legal entity, asset partition has not yet existed. Note that veil-piercing doctrine in this context is not used in the purpose of protecting creditors, but rather as a consequence of failing to observe corporate formalities;

2. *Alter ego* and *instrumentality*

Theoretically, *alter ego* focuses on the relationship between the corporation and its shareholders while *instrumentality* refers to the affiliation between a parent

company and its subsidiary. Yet, in practice, the U.S. Courts tend to use these two theories interchangeably.

Courts would normally pierce the corporate veil, when it is proven that there are:

1. Control. The word 'control' here does not merely refer to the majority or complete stock control, but also to a complete domination in the corporation's financing, policy-making and business practices. This domination will later result in the controlled corporation having no separate mind, will, or existence;
2. Such control is used to commit fraud, wrong, a violation of a statutory or other legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and
3. The control and breach of duty must proximately cause the injury or unjust loss complained of.[2]

Note that bringing up the issue of the control alone without proving that the financial setup of the corporation is only a sham and causes an injustice, will never lead to a *piercing of the corporate veil*.[3]

Remember that inadequacy of payment to creditors is not sufficient to *pierce the corporate veil*. The argument of corporation's insolvency must be backed up with the fact that there is a complete domination by the shareholders and it is used to commit fraud, wrong, or as unjust act against creditors.[4]

D. Veil Piercing under Indonesian Law

The *veil-piercing* doctrine first appeared in Article 3 of Act No. 1 of 1995 on Limited Liability Company, stating:

1. *Company Shareholders are not personally liable for agreements entered into on behalf of the Company and are not liable for Company losses exceeding the nominal value of the shares individually subscribed.*

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[2] See, e.g., Zaist v. Olson, 227 A.2d 552, 558 (Conn.1967); Collet v. American Nat'l Stores, Inc., 708 S.W.2d 273, 284 (Mo.Ct.App.1986); *Radaszewski v. Contrux, Inc.; Dan Leslie. Satterfield; Telecomcorporation*, 891 F.2d 672

[3] See, e.g., Rowland v. Lepire , 99 Nev. 308, 662 P.2d 1332 (1983).

[4] See, e.g., Associated Vendors, Inc. v. Oakland Meat Co, 210 Cal.App.2d 825, 26 Cal.Rptr.806 (Cal.App. 1 Dist.1962).

2. *The condition above will not apply if:*
   a. *The requirements for the Company as a legal entity have not been or not fulfilled;*
   b. *Shareholder, either directly or indirectly, in bad faith, uses the Company solely for personal purposes;*
   c. *Shareholder is involved in torts committed by the Company, or*
   d. *Shareholder, either directly or indirectly, unlawfully uses the Company's assets which causes the Company assets to be inadequate to settle the Company's debts.*

Indonesia's promulgation of the *veil piercing* doctrine continues until today through its Article 3 of the Act No. 40 of 2007 on Limited Liability Company, stating the same provision as its predecessor.

Based on Verse 2, Article 3 of Act No. 40 of 2007, shareholder is personally liable of legal actions on behalf of the company when there is an ignorance of the formal incorporation procedure. Further, shareholder is subject to personal liability when there is domination that causes the company acting as shareholders' mere instrument. It has to be noted that domination alone does not suffice to pierce the veil, but needs to be supported with the existence of bad faith by the shareholders. Moreover, shareholder can also be held personally liable when he/she is proven to take a part in torts committed by the company. The term *tort* in this case refers to Article 1365 of the Civil Code which states:

> *"Every unlawful act of man which causes damage to another obliges him by whose fault it occurred to make reparation."*

Last but not least, in connection with the illegal use of company's assets, in the event of the company failing to pay its debts due to the aforementioned shareholder's act, *veil piercing* doctrine shall be applied to the case.

Based on the above explanation of Article 3, Act No. 40 of 2007 on Limited Liability Company, the Lapindo and Century cases are fine examples of commercial case that should have been pierced. Lapindo's shares are owned by Bakrie

Group through PT Energi Mega Persada. On 29 May 2006, mud began flowing from the Banjar Panji 1 well owned by Lapindo, destroying villages and the local highway in the area. If Lapindo was unable to perform its duties to the victims due to the increasingly dwindled funds, theoretically its veil could be pierced based on the ground of *Shareholder is involved in torts committed by the Company (*Article 3 Verse (2)C of the Act No. 40 of 2007 on Limited Liability Company).

The term *tort* itself can be found in Article 1365 of the Civil Code:

1. Unlawful act. Based on the definition in the post-1919 *Arrest Hoge Raad,* tort is every deliberate act or negligence of man which violates another's right, and/or unsuitable with the actor's legal obligation, and/or goes against moral standards and appropriateness. The mud eruption in Porong, Sidoarjo has had people around the area severely affected. Twelve villages were destroyed leaving approximately 11,881 families with no homes. If Lapindo could not prove that the mud eruption in Sidoarjo was not caused by its negligence of not encasing the drilling equipment, thus the element of "unlawful act" has been met.
2. Fault. The victims will certainly face difficulties in meeting this element since the Civil Code applies the rule of *liability based on fault* and *actori incumbit probatio* (the onus of proving a fact rests upon the man) to determine the existence of fault). It is noteworthy however, that Article 88 of Act No. 32 of 2009 on Protection and Management of the Environment states that every person who causes serious damage to the environment will be held liable in a strictly manner (strict liability). In short, it is not necessary to prove his fault for making him responsible. Therefore, this provision of the Environment Act could be a means to prove Lapindo's fault.
2. Damage. Lapindo's negligence to encase its drilling equipment had triggered a heavy mud outburst that destroyed 12 villages, affecting 11,881 families in the area. (ARA/APO, 2012)

3. A causal relationship between act and damage. Once again, if Lapindo was unable to prove that the mudflow was the result of a natural disaster, thus it occured because of the company's negligence of not using steel casing in its drilling activity, then the qualification of this element would be met.

Having PT Antaga Delta Sekuritas as its subsidiary, PT Bank Century Tbk (BCIC) was initially the selling agent of the latter's investment product. (Wibowo, 2009) Many of the bank's clients were persuaded to put their savings into Antaboga. This persuasion was later proven to be Robert Tantular (one of the company's dominant shareholders)'s influence. Later, an investigation found that the product had never been documented in the Century's financial records nor its list of products. The bank never had any fees regarding its contribution in selling the discretionary fund. More peculiarly, a joint receipt between Century and Antaboga was initially issued for the customers payment. (YOZ, 2011) However, in late 2008, the receipt changed, excluding the Century Bank name from it. (Kurniawan, 2009) Century was also never licensed to sell the discretionary fund and that the product itself had never been approved by investment manager. In short, Antaboga investment product was a scam.

In connection with the *piercing of the corporate veil* doctrine in Article 3 of the 2007 Limited Liablity Company Law, this case could theoretically be pierced. The shareholders had been in bad faith, defrauding their clients by persuading them to put their funds in Antaboga. They were also responsible of looting the total of of Rp 1.38 trillion generated from the scam as money obtained was channeled to Robert Tantular, Anton Tantular, and Hartawan Alwi as the bank's key shareholders. (AMR, 2009)

E. Conclusion

After having analyzed the theories and applications of *veil-piercing* under the U.S. and Indonesian laws, I can conclude that both countries have the same understanding in interpreting the doctrine. Both countries view *veil-piercing* as court's action to disregard the concept of a corporation being a legal person, thus making its shareholders

and managers personally responsible for the damages caused by the corporate activities. The U.S. and Indonesia however, differ in their qualifications of enforcing the doctrine. Under American law, there are no stringent rules when it comes to pierce the veil. Although, in development, states have begun to adopt a two or three-prong test to *pierce the veil*, whereas in Indonesia, the qualifications can be found in Article 3 of Act No. 40 of 2007 on Limited Liability Company.

As for the implementation, *piercing the corporate veil* has been used in many cases in U.S. I have not found any research reporting the number of courts' decisions with the doctrine as their foundation, but it is known that from 1,600 decisions in 1991, the courts decided to pierce the veil of company in more than 40% of those cases (Thompson, 1991) and that was in 1991! Indonesia itself pales in comparison with no records of *veil piercing* since it was first introduced in 1995. It is difficult to be applied in Indonesia probably because the court has such difficulty to gain evidence that the parent company ordered its subsidiary to commit illegal acts since the order itself is mostly done informally. Moreover, political power might also be the culprit of making the courts unwilling to pierce the veil.

Last but not least, Indonesian courts are strongly encouraged to start enforcing *veil piercing* in relevant cases since law does not only talk about the punishment for unlawful acts but also as a remedy and protection for the ones injured, just like the old adage, "*Ubi Jus Ibi Remedium*", which means that for every wrong, the law provides a remedy."

BIBLIOGRAPHY

AMR. (2009, Feb 26). Antaboga-Century Scam Tallies Up Rp 2.8 T in Losses. *The Jakarta Post*. Retrieved from http://www.thejakartapost.com/news/2009/02/26/antabogacentury-scam-tallies-rp-28-t-losses.html.

ARA/APO.(2012,May30).Dampak Lumpur Meluas. *Kompas*. Retrieved from http://regional.kompas.com/read/2012/05/30/03095137/Dampak.Lumpur.Meluas.

Associated Vendors, Inc. v. Oakland Meat Co., 210 Cal.App.2d 825, 26 Cal.Rptr.806 (1962).

Bainbridge, Stephen M. (2002). *Corporation Law and Economics*. New York: Foundation Press.

Berkey v. Third Avenue Railway Co., 244 N.Y. 602 (1926)

Collet v. American National Stores, Inc., 708 S.W.2d 273, (1986).

Drutman, Lee. (date unavailable). *The History of the Corporation*. Retrieved from http://citizenworks.org/corp/dg/s2r1.pdf.

Hukum Online (2011, Oct 12). Nasib Dana Nasabah Antaboga Belum Jelas. Retrieved from http://www.hukumonline.com/berita/baca/lt4e95ba61d45d7/nasib-dananasabah-antaboga-belum-jelas

Kurniawan, M., et al. (2009, Dec 17). Slide Show: Antaboga-Century Customers Remain Unable to Withdraw Money. *The Jakarta Post*. Retrieved from http://www.thejakartapost.com/news/2009/12/17/slide-show-antabogacentury-customers-remain-unable-withdraw-money.html.

Radaszewski v. Contrux, Inc.; Dan Leslie Satterfield; Telecomcorporation, 891 F.2d 672. (1992)

Rayda, Nivell. (2010, May 10). Disgraced Banker Robert Tantular Gets Nine Years in Jail for Embezzlement. *The Jakarta Globe*. Retrieved from http://www.thejakartaglobe.com/home/disgraced-banker-robert-tantular-gets-nine-years-in-jail-for-embezzlement/374226

Rowland v. Lepire , 99 Nev. 308, 662 P.2d 1332 (1983).

Thompson, R. *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L..Rev. 1036

Wibowo, Arinto & Ahniar, Nur (2009, Feb 10). Bank Cen-

tury Awalnya Agen Produk Antaboga. *Viva News*. Retrieved from http://bisnis.news.viva.co.id/news/read/28729-bank_century_awalnya_agen_produk_antaboga

Widiyono, Try (2005). *Direksi Perseroan Terbatas*. Bogor: Ghalia Indonesia.

Zaist v. Olson, 154 Conn 563, 227 A.2d 552, (1967).

PRESIDENTIAL IMMUNITY AND THE INTERNATIONAL CRIMINAL COURT'S 'EXCEPTION'- A CRITIQUE*

Dibyojyoti Mainak**

Abstract

The International Criminal Court (ICC), governed by the 1998 Rome Statute, was set up with the ostentisible objective to end impunity. Much stress has been laid upon the ICC's crucial function in this regard and the weight of the burden placed on the ICC to ensure this objective. However, the ICC was also set up with the primary responsibility, vested to it as an international organization, to respect the sovereignty, political independence and territorial integrity of individual nations. In this article, the author seeks to contend that the ICC, in its recent decisions, has embarked on a dangerous trend of prioritizing its first objective while simultaneously pushing this very important duty to the backseat.

Abstrak

Mahkamah Pidana International (ICC), yang didasari oleh Statuta Roma (1998), didirikan dengan salah satu tujuan utama yakni untuk mengakhiri impunitas. Tujuan tersebut sangat ditekankan, dan menjadi beban yang sangat besar untuk dijalankan oleh ICC. Namun di sisi lain, ICC juga didirikan sebagai organisasi internasional yang harus menghargai kedaulatan, kemandirian politik, dan integritas teritorial dari negara. Melalui artikel ini penulis ingin mengkritisi ICC dalam salah satu putusannya yang terbaru, karena memulai suatu trend berbahaya yakni mengutamakan salah satu tujuannya dan menyisihkan tujuan lain yang sebetulnya sangat penting.

Keywords: *presidential immunity, international criminal court, international court of justice.*

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A. Introduction

The ICC issued in 2009 and 2010, arrest warrants for the incumbent Head of State for Sudan, President Omar Al Bashir[1]. The decision to issue a warrant for a sitting Head of State drew mixed responses from the world community. (Jalloh, 2009) While, the need for the international community to step into Sudan is a political question, here, the Author primarily aims at evaluating the reasoning of the ICC from a purely legal standpoint. The ICC issued a detailed judgment on the validity of the arrest warrant as a response to Malawi's decision to not arrest President Bashir while on an official visit there. Before moving further, it is necessary to clarify a few pertinent points. Firstly, the nation of Sudan is not a state-party to the ICC. Under the Vienna Convention on the Laws of Treaties, states not party to a treaty are not accorded any obligations under any provision of that treaty ("Vienna Convention on Laws of Treaties," 1969) While, the question of Sudan's obligations under the Security Council's referral power under article 13(b) of the Rome Statute is a completely separate debate[2]. It is important to note that Malawi is a party to the Rome Statute and as such is obligated to assist the Court in the implementation of its decisions. ("Rome Statute of the International Criminal Court," 1998)

In this context, it becomes necessary to refer specifically to article 98 of the Rome Statute. The article reads:

> "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity."("Rome Statute of the International Criminal Court," 1998)

It is settled under international

[1] *Warrant for Arrest,* ICC-02/05-01/09-1 and ICC-02/05-01/09-95.

[2] The situation in Sudan was referred to the ICC by the Security Council in 2005 via Resolution *1593, at Clause 1.*

criminal law that the Head of State enjoys immunity ratione personae. (Watts, 1994) The ICJ in the *Tehran Case* held that the immunity accorded to heads of state is fundamental to the continuance of diplomatic relations. ("U.S. v. Iran," 1980) Such immunities are *inviolable* ("United Nations Immunities Convention," 1946) and necessary for the maintenance of foreign relations. Hence, nations have an international obligation to respect such immunities of Heads of State's from arrest requests. Article 98 calls on the nations to respect the same principle.

The ICC, although, did give a different spin to the interpretation on this provision in the *Malawi* decision. It stated "*To interpret article 98(1) in such a way so as to justify not surrendering Omar Al Bashir on immunity grounds would disable the Court and international criminal justice in ways completely contrary to the purpose of the Statute Malawi has ratified.*" ("The Prosecutor v. Omar Hassan Ahmad Al Bashir," 2011) To further the objective of ending impunity, the ICC believed it necessary to read the provisions in light of the preamble. However, the preamble also expresses the clear legislative intent of the Diplomatic Conference to not allow the ICC to infringe upon the political independence of nations. It need not be explained in much detail, the way in which, arrest of an incumbent Head of State, affects the functioning, and thereby, the sovereignty of a nation.

The judgment referred to the objective of the ICC to end impunity without taking into account its duty under the principles mentioned in the same preamble to the statute, which call for it to respect the independence of states. While the Preamble of a statute can be of assistance in the interpretative analysis of the provisions (Winckel, 1999), it is important that any such interpretation is based on a holistic analysis of the principles enshrined in the Preamble and not by selectively choosing certain principles and examining them in isolation.

The ratio of the ICC decision in the *Malawi case* was that there exists an exception under customary international law to the immunity available to a Head of State *when international courts seek a Head of State's arrest for the commission of international crimes.*("*The*

Prosecutor v. Omar Hassan Ahmad Al Bashir," 2011)

It is important to note that the International Court of Justice, in its landmark decision in 2000, in the *Arrest Warrant Case* has already established that immunity ratione personae do not disappear simply because a crime is of an international nature. However, the Court in this case went on to state that such immunity would not have been available had the prosecution been initiated by an *International Court*. ("Democratic Republic of the Congo v. Belgium," 2000) Therefore, the ICC decision must be read as removing immunities not only because; President Bashir was allegedly committing international crimes, but also because the ICC is an international court.

However, it is submitted that the reasoning is flawed for the reason that, in the absence of a definition of an international court, it must be established that the nature of an international court/tribunal is such that these immunities cease to exist. (Akande, 2004) It must be noted that the Arrest Warrant Case was based primarily on the Belgium's decision to initiate proceedings against the foreign minister of Congo. This case was primarily regarding prosecution for international crimes by *national courts*. Hence, in my opinion, the ICJ's observation regarding removal of immunities in international courts must be read as mere obiter.

B. Discussion

Further, the ratio of the *Arrest Warrant Case* that, *no exception exists under customary international law in regard to national courts, ("Democratic Republic of the Congo v. Belgium," 2000)* cannot be circumvented by two or more nations by setting up an international tribunal to bypass immunities otherwise available to Heads of States. The very real possibility of international courts being set up by a group of states solely to waive immunities and rights of certain officials may become a reality if the Arrest Warrant Case is interpreted to apply only to national jurisdictions and not to international courts. In his submissions, the Court appointed Amicus Curiae in the *Charles Taylor Case* recognized this problem. ("Prosecutor v. Charles Taylor," 2004)

Moving into the judgment itself, the ICC has relied on the judgments

of the ICTY and the identical clauses present in the statute of the ICTR to arrive at its decision. Firstly, both leading decisions against the existence of immunities, i.e. the *Blaskic ("Prosecutor v. Blaskic," 1997)* and *Krstic ("Prosecutor v. Krstic," 2003)* cases, can be distinguished on the basis that they deal with immunity ratione materiae and not ratione personae, (Akande, 2004) which is the case at hand here. Secondly, it must be noted that these tribunals were created by the UN Security Council acting under its Chapter-VII mandate.[3] The International Tribunal for Yugoslavia noted in Krstic that *"The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia." ("Prosecutor v. Krstic," 2003)*

In other words, the creation of a tribunal in the case of the ICTY was an exercise of the Security Council's power to enforce its own decisions, not through the cooperation of its members, but rather by acting on its own accord. The Security Council was not binding its members to the diktats of an independent organization but of a UN *subsidiary* organization.

Hence, members of the United Nations are deemed to have assented to the provisions governing these tribunals, including the ones which waive the immunity ratione personae of Heads of States. The ICC, on the other hand, is governed by a separate statute and is not established under the UNSC's Ch VII mandate. Thus, the consent of a state, to the provisions governing the ICC, cannot be assumed unless that state ratifies the Rome Statute.

The ICC also refers to the *Charles Taylor ("The Prosecutor v. Charles Ghankay Taylor," 2003)* decision to buttress its point ("The Prosecutor v. Omar Hassan Ahmad Al Bashir," 2011). However, both the ICC judgment and the Charles Taylor judgment are subject to the same criticism. They refuse to consider the existing state-practice in dealing with this matter. Many nations party to the ICC have cre-

[3] Security Council Resolutions 827 and 955, *Clause 1* reads: "Acting under Chapter VII of the Charter of the United Nations...".

ated enabling legislations in order to implement ICC's requests for arrest and surrender under article 58 (1) of the Rome Statute.The model legislation submitted by the Commonwealth, Kenya and Mauritius clearly show the distinction made between immunity ratione personae of officials belonging to nations, party to the Rome Statute, and those nations which have not acceded to or ratified the Rome Statute.[4] Thus, it casts serious aspersions on both these judgments and the importance with which the ICC treats state-practice while interpreting the Rome Statute.

Given the somewhat unsettled position of law in this area, it is submitted that the following twofold test must be applied to establish whether immunities exist before an international court:

a) It must be clearly established by the terms of the statute establishing such Court that immunities cannot be pleaded before it. (Akande, 2004; "Prosecutor v. Krstic," 2003)
b) The state in question is bound by the instruments creating the international court. (Akande, 2004)

The Rome Statute does not rule out immunities being pleaded absolutely. It provides for respecting of bilateral obligations ("Rome Statute of the International Criminal Court," 1998) and thereby, the obligation of states to respect the immunity ratione personae of Heads of other states. There exists in the Rome Statute, a tension between article 98 and article 27. (Akande, 2004) Existence of such tension, it is opined, is the reason that the ICC's statute does not absolutely rule out respect for international immunities. It is, as Professor Scharf puts it, a c*ompromise* between the universality and consent regimes. (Sharf, 2001) Hence, it is contended that the inherent ambiguity in the statute does not allow it to fulfill the first part of the two fold test.

The second part of the test is not fulfilled in the present case as Sudan is not a member of the Rome Statute. Consequently, it is submitted that President Bashir's immunity

[4] Refer: *Section 29 (2) (a) and (b)* of the Model International Criminal Court Act of the Commonwealth; Article 14 (1) and (4) of the International Criminal Court Act 2011 of Mauritius; Article *51 (2) (a) and (b)* of the International Crimes Act, 2008 of Kenya.

ratione personae as the Head of State of Sudan is intact and the ICC was incorrect in holding that it could initiate proceedings against him till such immunity was exhausted.

Finally, one must question whether the wide ambit granted to the interpretation of article 27 by the International Cirminal Court, has altogether rendered article 98 ineffective. The ICC has clearly resolved the tension between article 27 and article 98 by giving primacy to the former. It must be noted that the Security Council took special note of bilateral agreements between nations while conferring jurisdiction on the ICC.[5]The Security Council's decision to take note of the existence of bilateral agreements of the kind envisaged under article 98 (2) of the Rome Statute must be given interpretive value. As contended by Professor Gaeta, the Security Council's recognition of this international obligation does not give nations a *carte blanche* to violate rules relating to presidential immunity as established under peremptory norms of international law. (Gaeta, 2009) Furthermore, rule 195(2) of the ICC rules of procedure foreclose the option of the ICC to force nations, and therefore, by extension suggest through its decision, to act in contravention of their international law obligations. The rule states that "*The Court may not proceed with a request for the surrender of a per son without the consent of a sending State if, under article 98, paragraph 2, such a request would be inconsistent with obligations under an international agreement pursuant to which the consent of a sending State is required prior to the surrender of a person of that State to the Court.*"

Thus, the nature of the UNSC recommendation for cooperation must be interpreted narrowly to construe assistance in conformity with the Rome Statute and the Rules of Procedure of the ICC. This is precisely due to the lack of unequivocal wording that calls for nations to not comply with their bilateral or international obligations with respect to other states in order to comply with ICC arrest warrants. The UNSC resolution must not be construed as authorizing the ICC to issue requests to states to breach

[5] Perambulatory clauses, Resolution 1593, UNSC, (2005).

their legal obligations towards non-parties to the Rome Statute. It is important to note in this light that the Security Council's resolution contains the word 'urges'[6] and not obligatory words like 'decides' or 'declares'. Hence, the obligation on Malawi to comply with any subsequent ICC request for arrest of President Omar Al-Bashir is merely recommendatory rather than mandatory. This is in stark contrast with the word 'decides 'which it uses to indicate Sudan's obligations to the ICC[7]. Therefore, it is submitted that even if Sudan may have a binding obligation to accept ICC's requests for surrender of President Omar Al- Bashir, a similar responsibility does not vest itself upon Malawi.

C. Conclusion

In this context, it can be stated that the ICC was indeed established with a mandate of ensuring that the *most serious crimes of concern to the international community do not go unpunished. ("Rome Statute of the International Criminal Court," 1998)* However, collective international action, especially in the case of ICC where the nature of the 'international consensus' itself is questionable; must not disregard the principle of *sovereign equality of all states* elucidated in article 2 (1) UN Charter. ("Charter of the United Nations," 1945) It must be noted that the ICC statute, (as of 03/05/2012) has been ratified by 118 nations with prominent members of the world community conspicuous by their absence in the ratification list. The US, China, India etc have not ratified the ICC statute.[8] Unlike the UN Charter, the lack of membership of the ICC, poses a question as to the nature of the global consensus on the principles enshrined in the statute. While, it is not my argument that the ICC's locus to contribute to the development in the field of international law must be questioned, it is my contention that the ICC, for the reason of its membership, must exercise extreme caution while deciding on questions regarding the universal acceptance of certain principles of international criminal law. awing collective opposition from some corners of

[6] Resolution 1593, at clause 2.

[7] *Ibid.*

[8] A list of ratifications is available at: http://www.iccnow.org/?mod=romesignatures, last visited: 03/05/2012.

the world community(Jalloh, 2009). Distrust of the ICC's motives and the use of international organizations as vehicles of subjugation by a combined few over other nations, does not bode well for the successful functioning of the ICC itself. The ICC relies on the cooperation of its member nations for implementing its decisions and has no individual capacity in this regard. (Akande, 2004) In this context, it needs to be emphasized that alienation of its member nations through its actions would only prove to be detrimental for the ICC.

In conclusion, it is submitted that there exists no 'exception' to the existence of personal immunities under customary international law in case of prosecutions by international courts for international crimes. The twin mandate of the international criminal law framework, i.e. ending impunity while respecting the sovereignty inherent to nations in the global arena requires a special balancing act. The ICC, in its future decisions, must reconsider the ratio laid down by this judgment, and seriously question the legal tenability of this view. In any case, one must note that, the ICC is not bound by its earlier decisions and has the independence to begin its discussions a new on the same point of law. Since the principle of *stare decisis* does not find mention under art 21 of the Rome Statute of the International Criminal Court.

BIBLIOGRAPHY

A. Articles

Akande, D. (2004). International Law Immunities and the International Criminal Court. *The American Journal of International Law*, 407.

Gaeta, P. (2009). Does President Al Bashir enjoy immunity from arrest? *Journal of International Criminal Justice, 7*(2), 328-332.

Jalloh, C. (2009). Regionalizing International Criminal Law? *International Criminal Law Review, 9*(3), 445-449.

Sharf, M. (2001). The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position. *Law and Contemporary Problems, 64 (Winter)*, 67-117.

Winckel, A. (1999). The Contextual Role of a Preamble in Statutory Interpretation. *Melbourne University Law Review*.

B. Books

Watts, A. (1994). *The Legal Position in International Law of Heads of States, Heads of Governmentas and Foreign Ministers*.

C. Cases

Democratic Republic of the Congo v. Belgium (International Court of Justice 2000).

Prosecutor v. Blaskic, Case No.IT-95 -14-AR (1997) (1997).

The Prosecutor v. Charles Ghankay Taylor, Case Number SCSL-2003-I-AR72(E) (2003).

Prosecutor v. Charles Taylor, Case No.SCSL-03-01-I (2004) (2004).

Prosecutor v. Krstic, Case No.IT-98-33-A (2003).

The Prosecutor v. Omar Hassan Ahmad Al Bashir (International Criminal Court 2011).

U.S. v. Iran, ICJ Rep. 3 (1980).

D. Statute

Charter of the United Nations (1945).

Rome Statute of the International Criminal Court (1998).

United Nations Immunities Convention (1946).

Vienna Convention on Laws of Treaties, 1155 U.N.T.S. 331 Stat. (1969).

THE CONFLICT BETWEEN DRUG PATENTING AND ACCESS TO AFFORDABLE MEDICATION*

Vulkania Neysa Almandine**

Abstract

This paper discusses the concept of pharmaceutical patents from a legal perspective, assessing the underlying conflict existing between an individual's rights of invention and the morale interest in providing medication for the need of the society. An analysis of law as a tool of public utility highlights how private rights with externalities, such as patents, may be limited by public interest when the general welfare of the people are threaded upon. The author concludes how pharmaceutical patents prescribed by the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) are currently disproportionately favored against the general wellbeing

Abstrak

Paper ini membahas konsep paten obat-obatan dari perspektif hukum, dimana konflik mendasar antara hak penemuan tiap individu dan kepentingan moral untuk menyediakan pengobatan bagi kepentingan umum dianalisa. Analisis hukum sebagai alat utilitas umum menunjukkan bagaimana hak individual dengan eksternalitas, seperti pada paten, dapat dibatasi oleh kepentingan publik saat kesejahteraan umum dikorbankan. Penulis menyimpulkan bahwa penerapan paten obat-obatan seperti diinstruksikan oleh 'Agreement on Trade Related Aspects of Intellectual Property Rights' (TRIPS) saat ini masih secara tidak imbang diprioritaskan melawan kepentingan

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of those in need of the drugs. The justifications for patents are further eclipsed by the need of developing countries for ample and affordable medication, as a balance of rights can still be achieved through alternate means of reward and incentive for drug makers, without heaving penalties upon the society in need.

umum masyarakat yang memerlukan obat-obatan tersebut. Justifikasi untuk paten terlebih lagi tertutupi oleh kebutuhan negara-negara berkembang untuk pengobatan yang layak dan terjangkau, mengingat bahwa penyeimbangan kedua hak yang berbeda tersebut masih dapat dicapai melalui beberapa mekanisme insentif dan reward alternatif untuk para pembuat obat, tanpa menimbulkan penalti kepada masyarakat umum.

***Keywords**: drug patent, monopoly, TRIPS.*

A. Introduction

Among the various functions law deems to serve, protecting private property is one of the most intriguing notions. Originating from feudal eras when those who were endowed with the rights to property were highly revered, scholars today are divided whether the right of a person to own private property should be held highly or be regarded as an impediment to national progress. Nonetheless, law indeed has gone a long way from the days when a person's share of land is protected to an era where the very notion of *idea* itself is protected; changes inevitably induced by the rapid development of technology and innovation marking the turn of the century. It no longer suffice to confine the term 'property' to tangibles—items which may be grasped and seen—instead, the word has expanded to encompass ideas and other intangible assets (Mertokusumo, 1995). However, the underlying principle behind ownership is still steadfast; a person shall have sovereignty over matters which he has rightfully owned or conceived.

Among the most revered of mankind's technological developments are those of drugs and me-

dicinal treatments. Unfortunately, in the threshold of the second millennia, the world is still witness to modern day plagues. Too recently have we have seen the scale of destruction the avian flu pandemic had amounted to, the multitude of lives lost. We may have found *treatments* for lethal diseases such as AIDS and cancer, but a *cure* is yet to be found. Around the globe, the demand for fast and effective medication remains dire.

Despite eminent need, means to earn medication are constantly hampered on the basis of the protection of the intellectual rights of drug makers. Patents are more often than not enforced upon drugs, and have disabled many a nation in procuring sufficient drugs for its people; be it by reason of price or of insufficient quantity. By the time most patent expires and a country is allowed to issue generic drugs, countless lives may have been lost. There is a visible conflict of private and public interests pertaining to drug patents. Shall the rights of property of certain individuals be upheld at the expense of the majority?

B. Rights to Property versus Public Utility

Scholars differ greatly in what may be interpreted as 'property'. Aristotle defines it as "an object of fair distribution", while Blackstone views property as means which provide its owner with complete control over resources, and freedom to control material things as the "guarding of every other right". But from a legal perspective, property is considered as a set of rights over resources that the owner is free to exercise, and is protected from interference by others; personal property rights are tools which enable a person to have liberty over his assets (Cooter & Ulen, 2000:74-75). Despite the universal recognition of personal property rights, there are, however, certain limitations to this notion. Law is a mechanism built for the mediation of conflicting rights, as one's exercise of right may oft impair another's. Such impairing factors are considered as *externalities*, and may be in private or public form (Cooter & Ulen, 2000:150-151). When externalities have become public, governmental officials may deem that it is no longer in the gene-

ral interest of the society to uphold the individual rights of a person. In the interest of justice and general order, the government may circumvent an individual's rights when that right infringes the rights or welfare of other entities. Thus we find that the freedom of our conduct is constantly limited by rules and legislation of the State.

C. Functions of Law

One cannot detach the analysis of property rights, a breed of law, from the fundamental question of whether it fulfills the function of the installation of law. When it is deemed that an application of property rights is in violation of the purpose of law, the extent of such application should be limited, or even abolished.

One of the most basic functions of law is to maintain public order (Farrar & Dugdale, 1990:6). Although this is best achieved by ensuring to uphold as many legitimate interests as possible (thus contenting the majority), public order is impossible to achieve without trade-offs, as one cannot possibly attempt to simultaneously uphold two conflicting rights without constructing some form of limitations to each of the individual's rights. Law has historically evolved as an alternative to private feuds and vengeance, and as a mean to provide conclusive settlement to disputes. According to Alan Gewirth (1982:6), in clashes of rights utilitarian values such as national security, public safety, public order, public health, and public morality may outweigh human rights because they in turn also contain human rights elements.

Differing rights may be of differing value. To take an example, a person's right to life may compel him to smash the window of a store to escape in the event of a fire. The shop owner's rights to property (and of how it was violated by the damaging of his window) may be put aside in this matter as his entitlement to the store he owns is outweighed by the rights and the necessity of the first person to save his life (Mertokusumo, 1995:23). The first person's threat to life is more urgent than the damages the storeowner shall procure. It is the duty of a government to assess and weigh the worth of each right in a dispute in order to determine which rights shall prevail, and which shall be limited.

D. Status Quo of Patents

Rights of intangible matters such as trademarks, patents, design, and models are still in their infancy when compared to rights of tangible matters (Gautama, 1990:5). The development of intellectual property was due to the realization that not unlike material goods, intangible matters are also conceived by investments of time, talent, toil, and money on the creator's behalf. Furthermore, these matters, intangible as they are, also have economic value. When one purchases a book, one does not merely seek to possess a bundle, *any bundle*, of paper. Instead, it is the ideas, the creativity, and the wit of the author itself we are seeking for. The same goes for computer programs, musical compositions, artistic creations and even, certain wording and symbols. Intellectual property rights are in essence not rights to own a certain asset, but rather, a right to exclude others from using it. This impedes the general dissemination and application of the asset, awarding a substantial amount of economic gains to the holder of the right as a 'reward' of his or her innovation for a certain period of time.

Today, one of the most comprehensive international agreements on intellectual property right is the Agreement on Trade Related Aspects of Intellectual Property Rights, which is also known by its abbreviation; TRIPS. The brainchild of the World Trade Organization (WTO), member countries are bound to the provisions of the agreement, which sets forth minimum standards for intellectual property regulations in such countries. As of 23rd July 2008, the WTO has acquired 153 member states, including the United States, Zimbabwe, Indonesia, and the most recent, Ukraine. (WTO:2008)

TRIPS acknowledges several types of intellectual property which are protectable. These are; copyright and related rights, trademarks, geographical indications, industrial designs, patents, integrated circuit layout-designs and protection of undisclosed information (TRIPS, Art. 1, §2.). With the exception of the foremost, these aspects are considered as industrial property (The WIPO Convention, Art. 2, §ii.), meaning that enterprises of industry (including agricultural

and extractive) and commerce shall have the right to wield ownership claims and limitations of distribution of such properties.

E. Analysis on Drug Patents

Patents are applied to technological innovations, and this includes drugs. In practice, there are countless of drugs subjected to patent, ranging from the cholesterol-lowering drug Lipitor, the blood thinner Plavix, to various AIDS drugs such as Efavirenz, and avian flu pills, for example Tamiflu. A patented drug will lose its license after 20 years (TRIPS, Art. 33), and until then patent holders virtually have every right to determine its price and reject and prosecute generic drugs deriving from it.

In understanding why such rights of intellectual property shall be upheld in the case of drugs, there are two reasons that one may take into account. First would be of how intellectual rights are conceived as the birthright of the creator; it is onlyjust that a person who has spent copious amounts of time developing and creating something (in this case, medication) to earn credit for his efforts and receive an economic compensation thereof.

Second of all, protection of such rights will fulfill a secondary, economic purpose of providing an incentive for people to continue on creating. If a person were to invest time and effort in inventing, but another person were to be able to copy and distribute the former's work in a heartbeat, then there would be very little drive for the creation of works of art, literature, medical advancements, everything which intellectual property stands for (European Federation of Pharmaceutical Industries and Association, 2008:12,15). Furthermore, taking away such economic incentive will result in a decline of investors willing to take part in the research process, which may take years and requires hefty funding (Lindsey, 2002:15). This will of course hinder the progress of humanity, especially when the products being worked upon are as crucial and as expensive to develop as drugs. This incentive will also act as a promoting agent of healthy competition (European Commission Development DG, 2008: 88), pushing companies to continuously develop more potent, practical, and cheaper means of medication, which in theory will

enable an easier access of medication for more people.

However, there are counter-arguments to the aforementioned reasons. One would be that it is not necessarily true that the inexistence of an incentive in the form of patent protection shall result in a lack of incentives for people to create. The fact that inventions and scientific discoveries are not 'claimable' does not result in a standstill of developments in the area. While one may argue how economic incentives may provide a push in the development of intellectual property, this is not always the case in reality. History shows how the pharmaceutical industry developed much rapidly in countries where patents were weaker (Boldrin & Levine, 2008:215). When the countries did introduce patent, no significant increase in innovation was to be seen (Scherer, 2003). Merges and Nelson (1990:916) explain 'When a broad patent is granted, its scope diminishes incentives for others to stay in the invention game, compared with a patent whose claims are trimmed more closely to the inventor's actual results'. If its scope is too excessive, a patent will act more as a roadblock than as a stepping stone to further innovations (Henry & Stiglitz, 2010: 241)

More importantly, it is mostly true that most groundbreaking and novel drugs, such as HIV/AIDS drugs, tend to be the sole contenders in the market and are the drugs which are the most expensive. This makes sense as patent rights are quintessentially rights of monopoly; creators of a drug shall be given, for a period of time, an exclusive right to monopolize their creation in enforcing the patent (Gautama, 1990:49-50).

Monopoly is extremely undesirable in the market as it gives a seller great control in determining the price of their goods as well as how much they shall produce. Especially in developing and lesser developed countries who have limited medicinal funding and who may not be able to afford these drugs, assigning a company with the rights to patent, to monopolize, may be a of question of life and death to its people.

F. Conflict of Inventor Rights and Necessities of the Society

A major problem on the issue of drugs is its expense. Many coun-

tries have refused to acknowledge patent rights of certain medication, of these being HIV/AIDS drugs. As of December 2003, more than twenty million people worldwide had died from AIDS, and another forty million people were living with HIV/AIDS (Fisher III & Rigamonti, 2011:2). The rejections of these countries were made on the basis of how costly the patented medicine is, disabling governments to adequately cater to the needs of their citizens who are in dire need of such drugs. Even Brazil, then 12th largest economy in the world, opted for the bypassing of patent as the government deemed that the healthcare system would no longer be able to afford the medical bill of its 75,000 patients, amounting to $580 annually per patient for anti-retroviral medication (MSNBC, 2007).

But the real battle was fought in Africa, where the number of people living with HIV/AIDS accounts for two-thirds of the global sufferer, which was 11 percent of the world's population in the 1990s (UNAIDS, 2004). South Africa was the continent's most developed nation, but even there expenses to provide AIDS drugs tallied up to 20 percent of their gross domestic product. Less than 0,001 percent of people with the disease have access to anti-retroviral drugs in Africa, and by the end of 2003, fewer than seven percent of people in developing countries in urgent need of antiretroviral treatment had access to these medicines (p. 101-102)

The previous paragraph sums up the necessity and urgency of such drugs in the society, and of how, especially in developed and less than developed countries possible lifesaving treatments are continuously being denied to sufferers as a direct result of drug patenting. And cost is not the only issue. By continue on granting monopoly rights on medicine, we minimize the chance for other companies (or even governments) to supply these drugs as well, which means that we shall be utterly dependent on pharmaceutical companies to supply enough drugs as per demand.

TRIPS is in no way silent on these needs. The minimal access to drugs in least developed countries and those lacking production capacity are particularly addressed within the Doha Declaration, where

signatories have sought to accommodate growing health needs by imposing certain flexibilities on patent rights. However, these flexibilities are at best problematic, and do not thoroughly counter the unavailability or the high expense of drugs.

Compulsory licensing on vital drugs is one of these flexibilities. This mechanism allows the government to grant certain licenses and set up royalty on behalf of the patent owner, even at their disapproval. In theory, this would enable governments to supply a steady stream of affordable medicine to those in need, while not *per se* neglecting to reward a drug inventor if only at a reduced profit. Regrettably, this mechanism is not oft implemented for fear that pharmaceutical manufacturers would balk away from investing in countries who could curtain their profits by issuing such licenses.

Parallel importing is another viable, yet problematic option. By importing medicine cheaper than that of the local patented price, parallel importing ensures affordable access to crucial medication. However, this again maims the profit of pharmaceutical enterprises. As the incentive for research diminishes, so does the innovation of new drugs (Skoko & Krivokapic-Skoko, 2005:470). The issue of availability of drugs is also still not addressed by research exemptions. Albeit allowing the research for a drug based off another, prior to the expiration of the latter's patent, the mechanism still prescribes the halting of the manufacture and marketing of the newly developed drug until the patent for the base drug expires.

Generic drugs were regarded as a solution for such dilemmas. Generic drugs are essentially biochemical carbon copies of patented drugs, but they run much less expensive as they do not incur the cost of drug discovery. The average cost of discovering and testing a new drug is estimated to be as much as $800 million (DiMasi et al., 2003:151-185), while the true cost is estimated to be between $100–$200 million. The EU reports that in the period of 2000-2007 they have managed to save € 14 billion by the use of generic drugs, as two years after their entry, the price of generic medicine were on average

40 percent less than their patented counterparts (European Commission Development DG, 2008:85).

Prior to the establishment of TRIPS, patent protections for pharmaceutical drugs were virtually non-existent in poor, developing nations (Mayer, 1998:377,380). Generic drugs flourished, keeping the cost of medication low. Post TRIPS, however, most developing countries have been hesitant to breach intellectual property laws for fear of trade sanctions enforced by the WTO. As a result, generic medicine may only be derived after the patent of a brand-drug has expired; which means it will take at the very least 20 years to obtain cheaper, more accessible version of these vital drugs.

It is then apparent of how in the case of patented medication there is an eminent clash between the rights of property of pharmaceutical companies over their products and the immediate necessity of providing plenty and affordable medication to the world. In determining which governments should rightfully prioritize, one should look back on the theory of the functions of law. Governments, in wielding law as a beacon of public order, should strike balance to conflicting rights.

Despite pharmaceutical companies' rights to gain and benefit from their inventions, when enforcements of such rights have been proven to inflict more harm than good to the general society, governments should tip the balance of rights in favor of the majority. As elaborated in previous sections, private rights may be limited by public goods, or in other words, utilitarian values. Providing easy and affordable access to drugs to those who direly need them is indeed the holy grail of utilitarian motives.

One should bear in mind that the duty and aims of a government in upholding laws is not to protect a select few (drug companies) in the expense of others. In its function of a protector of human interests, law aims to either enforce what is ethically correct, or what brings the most benefit to the general society (Mertokusumo, 1990:64-68). Opting to limit property rights may inflict a degree of unfairness on the companies' behalf, but their loss is insignificant when compared to the loss of lives that may (and has oc-

curred) by the persistence to promote patented medicine to countries which cannot afford them.

G. Solutions

It is not to be said, however, that governments should outright disregard the rights of pharmaceutical companies. There are several plausible measures which may be taken to reward innovation without limiting its dissemination and application. Instead of awarding credit to pharmaceutical companies in the form of a 20-year monopoly, the author proposes that the WTO and its member nations opt to assign economic compensation by means of an invention prize to the inventors of an innovative drug. In exchange for the paid sum, drug makers shall waive their rights of exclusivity of the drug while are still entitled to selling (and having a head start thereof) and producing their product.

Another option would be for the WTO to reassess its position trough a revision of the TRIPS. The WTO has attempted to reinstate how the agreement should be interpreted in light of the goal 'to promote access to medicines for all" as a response to various developed countries which are neglecting this zeal as a result of narrow reading of the terms of the TRIPS (Doha Declaration, 2011). Many developing countries have yet to implement TRIPS flexibilities (such as parallel importing, limits on data protection, and compulsory licensing), due to the lack of legal and technical expertise, which in turn has led these countries to directly copy the intellectual property legislation of developed countries (Finger, 2000:3).

The legality of generic medication, which is the championing vessel of inexpensive and widely available medication, is still unclear (and differing) in many of its member states. The author suggest that the issue of legalizing generic medication in certain developing nations which are financially unstable be looked upon and hopefully implemented, or at the very least, pharmaceutical companies shall charge a substantially lower rate for drugs in such areas.

A last option would be assigning governments with the obligation to (jointly or individually) commission the research and development of new drugs on their own expense, and then distribute them

with a minimal margin of profit (if any) to the society.

H. Conclusion

In the balancing of intellectual property rights and the necessity of procuring essential medication for diseases, the author has concluded that the status-quo tilts too much in favor of personal rights of pharmaceutical companies. Although it is true that an entity is entitled to recognition and economic rewards for its ideas and innovation, this right is not without limitation. The patent rights of drugs in this case should be more restrained as it intervenes with general good and welfare.

The cause of providing medication to as many people as possible is an urgent and utilitarian one. By strictly upholding the rights of the companies in this manner, we are disabling many countries (especially developing and lesser developed countries) in adequately providing the necessary medication to its people. By continuing to revere patent rights above all other necessity, we are sacrificing the general good of the society.

Thus, in upholding the interest of justice and utilitarian as well as ethical purposes of law, pharmaceutical companies should seek to loosen patent policies especially for poorer countries, or the governments of the world and the WTO may invent new means of resolving this conflict of interest without hurting the utilitarian issue of the needs for medication. Property rights should not exceed humanitarian necessities, especially when it deals directly with the continuation of human lives.

BIBLIOGRAPHY

Boldrin, Michele and David K. Levine, 2008, *Against Intellectual Monopoly*, Cambridge University Press, New York.

Brink, David, 2007, "Mill's Moral and Policial Philosophy", *Stanford Encyclopedia of Philosophy (Fall 2008 Edition)*, Edward N. Zalta (ed.), <http://plato.stanford.edu/

archives/fall2008/entries/mill-moral-political/> accessed on April 19, 2012.

Cooter, Robert and Thomas Ulen, 2000, *Law and Economics* (Third Edition), Addison Wesley Longman, Massachusetts.

DiMasi, J.A. et al., 2003, "The Price of Innovation: New Estimates of Drug Development Cost", *Journal of Health Economics* < http://www.journals.elsevier.com/>, accessed on April 19, 2012.

European Commission Development DG, 2008, *Pharmaceutical Sector Inquiry Preliminary Report*, <http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/preliminary_report.pdf>, accessed on October 20, 2011.

European Federation of Pharmaceutical Industries and Association, 2008, *Intellectual Property and Pharmaceuticals*. <http://www.efpia.org/content default.asp? PageID=559&DocID=4901>, accessed on October 20, 2011.

Farrar, John H. and Anthony M. Dugdale, 1990, *Introduction to Legal Method* (Third Edition), Sweet&Maxwell, London.

Finger, J. Michael, 2000, "The WTO's Special Burden on Less Developed Countries", *Cato Journal* Vol. 19 No. 3, Cato Institute, < http://www.cato.org/pubs/journal/cj19n3/cj19n3-9.pdf>, accessed on April 19, 2012.

Fisher III, William W. and Cyrill P. Rigamonti, 2005, *The South Africa AIDS Controversy: A Case Study in Patent Law and Policy*, Harvard Law School. <http://cyber.law.harvard.edu/people/tfisher/South%20Africa.pdf>, accessed on October 20, 2011.

Gautama, Sudargo, 1990, *Segi-Segi Hukum Hak Milik Intelektual*, PT. ERESCO, Bandung.

Gewirth, Alan, 1982, *Human Rights: Essays On Justification and Application*, University of Chicago Press, Chicago.

Henry, Claude and Joseph E. Stiglitz, 2010, "Intellectual Property, Dissemination of Innovation and Sustainable Development," *Global Policy,* Volume 1, Issue 3 < http://www.globalpolicyjournal.com/articles/science-and-technology/intellectual-property-dissemination-innovation-and-sustainable-devel> accessed on April 19, 2012.

International Intellectual Property Institute, 2000, *Patent Protection and Access to HIV/AIDS Pharmaceuticals in Sub-Sahara Africa*, IIPI, Washington.

Mayer, Christopher S., 1998, *The Brazilian Pharmaceutical Industry Goes Walking From Ipanema to Prosperity: Will the New Intellectual Property Law Spur Domestic Investment*, Temple International & Comparative Law Journal. < http://www.temple.edu/law/ticlj/archives-vol12.htm>, accessed on April 19, 2012.

Merges, Robert P. and Richard R. Nelson, 1990, "On The Complex Economics of Patent Scope", *Columbia Law Review*, Volume 90, No. 4, Columbia Law Review Association, Inc., New York.

Mertokusumo, Sudikno, 1995, *Mengenal Hukum*, Liberty, Yogyakarta.

MSNBC, 2007, "Brazil to Break Merck AIDS Drug Patent". MSNBC.com, <http://www.msnbc.msn.com/id/18490388/ns/health-aids/t/brazil-break-merck-aids-drug-patent/> accessed on 20 October 2011

Rousseau, Jean-Jacques, 1990, *The Collected Writings of Rousseau*, Darthmouth, Hannover, C. Kelley and R. Masters Rousseau (ed.).

Scherer, Frederic M., 2003, "Global Welfare in Pharmaceutical Patenting," Research Department of the Federal Reserve Bank of Philadelphia, Philadelphia.

Skoko, Hazbo and Krivokapic-Skoko, Branka, 2005, *Theory and Practice of Parallel Imports: An Essay*, <http://www.fm-kp.si/zalozba/ISBN/961-6573-03-9/skoko.pdf>

UNAIDS, 2004, 2004 Report on The Global AIDS Epidemic, UNAIDS.org, < http://data.unaids.org/Global-Reports/Bangkok-2004/unaids-bangkokpress/gar2004-html/gar2004_00_en.htm>, accessed on April 19, 2012.

World International Property Organization, 1967, *Convention Establishing the World Intellectual Property Organization,* Stockholm, < http://www.wipo.int/export/sites/www/treaties/en/convention/pdf/trtdocs_wo029.pdf > accessed on April 19, 2012.

-------, *Understanding Industrial Property*, WIPO.int, WIPO Publication No. 895(E), <http://www.wipo.int/freepublications/en/intproperty/895/wipo_pub_895.pdf> accessed on October 20, 2011.

World Trade Organization, 1994, The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

------, 2001, *Doha Declaration on the TRIPS Agreement and Public Health*, Doha.

------, 2008, "Understanding the WTO: Members and Observers", WTO.org, <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed on October 20, 2011

1886, The Paris Convention for the Protection of Industrial Property, Paris. < http://www.wipo.int/treaties/en/ip/paris/index.html> accessed on April 19, 2012.

THE REFUGEES OF SYRIA: BETWEEN POLITICS AND VIOLATION OF HUMAN RIGHTS*

Gading Gumilang Putra and Yulida Nuraini Santoso***

Abstract

In the midst of the crisis, Syria brought the military to force, face to face with their people, including refugees. Many proposals have been presented, both regional and internationally-scoped, along with the rise of victims of crisis. Yet, the absence of an adequate response was implemented instead. In addition to this, military supremacy is also among the action taken upon the refugees that fled. This article will analyze the absence from the point of view of political preservation, as their political justification. This stance shows the world that legitimacy of the government is still relevant through the existence of the military forces in dealing with refugees. However, field observa-

Abstrak

Di tengah krisis yang terjadi, Suriah menggunakan militer dalam menghadapi rakyatnya dimana pengungsi adalah salah satunya. Berbagai tawaran solusi regional dan internasional ditawarkan seiring korban yang terus berjatuhan. Namun Suriah tak memberikan respon apapun dan justru menggunakan metode militernya dalam menghadapi para pengungsi yang mencoba pergi dari Suriah. Artikel ini melihat Preservasi Kekuasaan sebagai landasan politik Suriah yang membuatnya tetap mempertahankan pola tersebut. Posisi ini diambil untuk menunjukan kepada dunia bahwa legitimasi pemerintah terhadap negara masih hadir melalui militer. Namun, melihat

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tions show that violation of human rights is indicated in Syria during the exercise of concept. In this article, violation will be reflected based on the instruments of human rights law ratified by Syria themselves. This article will then conclude with the position of the refugee in between the political stances of Syria and the violation of human rights conducted during the course of the crises.[**]

kondisi yang ada Suriah telah mengindikasikan hadirnya pelanggaran hak asasi manusia. Hal ini didasarkan pada beberapa istrumen hukum internasional di bidang hak asasi manusia yang telah diratifikasi oleh Suriah. Artikel ini mencoba mengurai posisi pengungsi Suriah diantara kebijakan politik internasional yang diambil dan pelanggaran hak asasi manusia yang terjadi.

Keywords: *refugees, human rights law, Syria.*

A. Introduction

The wave of Arab unrest that began with the Tunisian revolution reached Syria on March 15, 2011, when residents of a small southern city took to the streets to protest the torture of students who had put up anti-government graffiti. The government responded with heavy-handed force, and demonstrations quickly spread across much of the country (France24, 2012). The impact of domestic political unrest is the emergence of refugees that flee the country in mass and seek for shelter to the nearest borders. This becomes a problem when the unrest doesn't come to a halt, as the containing countries of these refugees must work harder to assure their safety.

Jordan, Turkey and Lebanon are three of several nations that have received thousands of refugees (HRC, 2011). Some wait after passing the borders, others set tents as close as they can get to the borders but as far as possible from military assaults. Reuters report there are 24, 564 refugees in Turkey, 20,000 in Lebanon, another 20,000 in Libya, and around 5000 refugees in Iraq, most of which are not registered by UNCHCR (Reuters, 2012). According to UNHCR, the registered population is 50,377 individuals: 23,343 in Turkey, 12,761 in Lebanon, 12,034 in

Jordan, and 2329 in Iraq (UNHCR, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Syrian Arab Republic, 2012). Before the up rise Syria was also a receiving nation to the many refugees that sought shelter from Palestine and Iraq (HRC, 2011).

The Arab League has responded by initiating a joint mission with the United Nations (UN, 2012). The European Union (EU), in consideration to the attacks to their people and no sight of cease fire, imposed a ban on the import of oil (Bakri & Erlanger, 2011). This has lead Syria to a devastating economic state. The United Nations has initiated three actions as follows: GA resolution earlier vetoed by Russia and China (Harris et al., 2012), the Joint Mission to report back the condition in Syria and last but not least the United Nations Supervision Mission in Syria (UNSMIS) operation.

In April the Syrian government had agreed to a six-point peace plan, which laid out a framework for a cease-fire that does not involve the president leaving power. This plan was initiated by United Nations-Arab League envoy, Kofi Annan. But, only a week after the plan was put into effect, the Secretary General of the United Nations, said that Syria had failed to implement almost every aspect of the peace plan (S/2012/238, 2012, pp. 1-5). Still, without a better alternative, the United Nations proposed sending 300 cease-fire observers to Syria (NY Times, 2012).

This ignorance of international response kept continuing until this very day. In late May, there was a massacre that left at least 108 villagers dead in central Syria, most of them women or children (NY Times, 2012). This event led more than 4000 Syrian to become a refugee in Iraq (Haddadi, 2012). This ignorance proves that to all international actions, Syria has not presented any form of cease fire against their oppositions, therefore dismissing demands of the international world to stop the violence.

Political Preservation will be considered as a theoretical framework used by Syria to describe their choice of ignorance, in this article. This theory will also be seen as an international political justification for the Syrian government

to maintain their position. The position of Syria, based on this theory, was taken by government to show the international community that their control over the country is still present through military forces, thus justifying their ignorance to the world.

In the other hand, the military force used by the government has indicated violation of human rights, especially for the refugee. The political crisis is deemed present in Syria. This crisis has spread fear to many turning them in to refugee. Apparently, military forces were not only used for those who protest against the government but also those who try to leave the country.

The ignorance of Syria government on international action causing their absence in maintaining a peaceful condition is the main problem which this article will highlight. However, this article will not answer the main problem *per se*. The concern of human rights violation and how far intact it is with political matters is what this article wishes to answer. In consideration to the condition of refugees of Syria, what political interest is causing their absence in maintaining a peaceful condition? Not stopping there, is violation of human rights present? If so, how is it violated? The article will be divided into three fractions to answer the aforementioned questions: (a) Power Preservation: A political justification of Syria repression (b) The legal Framework for Refugee Law and Human Rights Law in Syria and (c) The implementation of the Refugee Law in Syria. And at the end of the paper there will conclusion that describes the refugees of Syria, positioned between politics and violation of human rights.

B. Power Preservation: Political Justification of Syria Repression

Morgenthau & Thompson (2010) reveals that the concept of power preservation is a rational, coming from an incumbent government wishing to prolong its regime. There are two ways of bringing it into form. Other than a diplomatic ceremonial it has been customary for a demonstration of military force. This demonstration of military force wished to convey a message of peace and strength, but to other extremes it is also an effective conveyance of the message of im-

perialism, in this case to the people of Syria (pp. 99-101).

The concept of power preservation stems from the state of international anarchy, a sphere where the world is in no hierarchical positioning, hence no nation or entity is superior enough to rule the other. In regards to this, a nation is prone to the effect of others due to the need to self-suffice their domestic demands. The state of preserving the nation creates the balance of power where one nation struggles to preserve over the other so as not to be defeated. Rooting to its definition, balance of power is the distribution and opposition of forces among nations such that no single nation is strong enough to assert its will or dominate all the others (The American Heritage Dictionary, 2012). Power preservation is needed to preserve the state and carry out international politics accordingly. This pattern is also seen in political corruption. In the eyes of Inge Amundsen (2011) power preservation takes place at the formulation end of politics, where decisions on the distribution of the nation's wealth and the rules of the game are made. The corrupt use of political power for power preservation may take the form of buying political support through favoritism, clientelism, co-optation, patronage politics and vote buying. Given the fact that power preservation is a need than a choice, military actions are exercised in the state of conflict to maintain national order and preserve the nation as a whole. This is seen in the case of Syria and the postponed act to cease fire against the regime's opponent. To be able to grasp how this is reflected internationally, it is important to highlight other actions of nations (pp. 13-15).

1. Arab League and International Actions

Arab states are divided over how to handle the crisis in Syria. Egypt, Algeria and Tunisia are convinced that the assault against Syria is necessary. Others worry that weakening the government could tip Syria, with its potent mix of religious and ethnic allegiances, into a deeper conflict that would destabilize the entire region. Some may fear the threat from their own populations if the government, in this case President Bashar were toppled (The Telegraph, 2012).

This inability to come to a unanimous stance is of the advantage to Syria's. It provides them more time to lay out better strategies in the area of self-defense and offensive actions if needed. The political support of Russia and China in putting a foot down through the recent veto has given them someone to watch their back as they go through the rough phase (Harris et al., 2012). The combination of both has leaded to the *status quo* as is witnessed by the world.

As a suspended member of the Arab League they are now neither standing alone nor stronger than ever. Until a final and absolute decision is placed on the table with unanimous decision, Syria is free to act as they wish. Their largest fear at the moment is one of foreign actions. At the time being, the only force able to bring Syria to a halt in fire is further international sanctions, whereas this can only be done if Arab League soon comes to an absolute decision.

2. Nations of receiving refugees

The impact towards receiving nations of refugees from Syria is severe. The fleeing of hundreds and thousands by the day to neighboring nations has caused great instability to bordering cities. Health care is to be provided in great amount, possible social frictions that may take place and places to shelter are also at the utmost priority. At this stage all receiving countries are in attempt to balance their Open Door policies but at the same time, ensuring domestic instability is hampered to all measures. If violence in Syria increases and starts to affect Jordanian citizens, attitudes toward Syrians may quickly sour.

With President Bashar still preserving his seat in office, Turkey's patience is coming to a halt. If Syria fails to respond adequately through the agreement of cease fire proposed by Kofi Anan representing the United Nations, the worst will fall upon these refuges instead and once again they will be forced into a restless danger-zone. The relationship between Syria and Turkey can soon come into a very thin line, and be lost for good.

Jordan is running out of room for more, yet the refugees continue to flood in. The condition of the temporary housings is quickly getting worse. Despite the burden of the growing numbers of Syrian

refugees, which officials place at over 100,000, authorities continue to avoid opening official refugee camps out of fear that the move will impact Amman's policy of neutrality towards the Syrian crisis (Luck, 2012).

Though both Jordan and Turkey are overwhelmed by the amount of people entering the borders illegally every day and they are still providing health care, education and other basic services such as water supplies as much as they can. Until this day, none of the officials are able to answer the impact of the mass fleeing, as this all depends on how much longer they are going to stay.

Sita Bali (2001) states that if a hosting country is reluctant to have refugees stay for too long they will take all possible actions to make sure that their stay is temporary. The fact that Jordan is reluctant of setting up camps that can hold even more refuges for the long run proves this point. Though they are not reluctant to welcome them due to their open border policy, they are certainly not willing to have them stay for good and have them return very soon (p. 33).

Power preservation here is reflected in the fact that the regime is calling refugees to return home despite the nation's poor shelter and the rejected proposal of the UN to cease fire. Amnesty is promised for those who decide to obey and return home, ignoring the international propaganda (Vancouverdasi, 2012).

3. Syria and their Economic Ties

90% of Syrian oil export is sent off to EU countries of Germany, Italy and France. This has resulted in a 20% sum of the Syrian GDP, hence then ban posed in February 2011 has brought a tremendous drop to their cash flow. EU has imposed travel bans and asset freezes on more than 120 individuals and 40 companies. These include President Assad and most of his close family, the Syrian Central Bank and senior officials, including seven ministers. Last year, the EU banned crude oil imports from Syria and in February it expanded sanctions to block trade in gold, precious metals and diamonds with Syrian public bodies and the central bank (BBC, 2012, pp. 3-4).

Though they were certain that others would come looking for

them in Asia, their prediction failed, causing even more loss. This is so as it appears that the European Union is their largest trade partner summing an impressive 22,5% alone, followed by Iraq with half of the amount (13,5%). Certainly this is no good sign for Syria's economic wheels, losing to EU, Asian market and US at the same time within a year, they only have Iraq to turn to. Syria's only chance of survival is through Russian defense equipment. According to the Moscow-based Centre for Analysis of Strategies and Technologies, current contracts for sales of arms and military equipment from Russia to Syria are worth at least $2.5 billion (BBC, 2012, p. 5).

Given the above, it is important to ask where the United Nation positions itself in this utter social and economic fiasco. Siti Muti'ah Setiawati (2004) gives her reasoning to UN's failure highlights the fault of structure. She mentions that United Nations role to maintain peace is equipped with the right to take action through economic sanctions, military embargo, and force of weapons and placement of Peace keeping Operations, as is stated in the United Nations Charter Chapter VII. Yet in practically it is not accomplished. This is so as the exercise of veto rights of the Five Permanent (P5) members' hand over tremendous power to rule out or bring effective a resolution, most of the decision's made are poled to their interest (pp. 41-45). This is seen in the use of veto right by China and Russia hampering the pass of the resolution responding to Syria's up rise early in the year of 2012 (Harris et al., 2012). Arm trade of Syria and Russia has proven that the exercised veto right can make a tremendous difference.

Power preservation in this argument lies in the fact that Syria has the full support of not only one but two Security Council members. This will assure that no international intervention will take place as long as Syria has Russia and China to watch their back. The issue of refugees highlights economic issues of the contemporary world politics because of the close association between economic pressures and the motivation or responses to refugee issues (Bali, 2001, p. 73). The case of Syria reflects that in fact the posed sanctions have slowed them

down, but it has not brought them to a standstill, or to surrender.

The above directs our attention to the extreme gap that is formed between Europe and Syria. The gap is extremely wide allowing Syria to enjoy the justification as they are worse off. Ending economic ties with Europe may have brought them to a significant decrease but they are already on the verge of falling apart, compromising at the very last moment is certainly not on their agenda. The further apart their economic ties are, the less likely they are to back down.

Power preservation is seen here in the fact that despite lack of economic boosts to the economy of Syria undergoing an extreme political crisis, Syria remains firm on its stance of rejecting all international intervention to the nation. Furthermore the influence of the international world is referred to as propaganda.

It is important to note that along with political justification, the human rights issues gravity also takes place. Not only does it rotate alongside, it brings tremendous impact towards the end of the conflict.

C. Legal Framework of Refugees

Syria has never ratified, accessed, or signed international treaties regarding refugee matters. However, the refugee's treaties are basically rooted to the protection of human rights (Hathaway, 1991, pp. 121-122). Regarding the human rights treaty, Syria voted in favor for Universal Declaration of Human Rights and also ratified four of international legal instruments on Human Rights. Those instruments are: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant of Economic, Social and Cultural Human Rights (ICESCHR); the Convention on the Rights of the Child; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Syrian Arab Republic is not a party to the International Convention for the Protection of All Persons from Enforced Disappearance, although it is bound by the provisions of the International Covenant on Civil and Political Rights that also prohibit enforced disappearances (A/HRC/S-17/2/Add.1, 2011, p. 11). These treaties are strongly uphold

the value of human rights and also protect the refugees.

Article 13 The Universal Declaration of Human Rights stated: (1) Everyone has the right to freedom of movement and residence within the borders of each State. (2) Everyone has the right to leave any country, including his own, and to return to his country. In the next article, it states: (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations. In the other hand ICCPR also include refugee's protection on article 12 and 13. These rules are basically the legal framework to protect the basic rights of Syrian refugees.

D. Implementation of the Refugee Law in Syria

As mentioned before, Syria has never ratified, accessed, or signed treaties regarding refugee maters. This is to bring into highlight the convention relating to the Status of Refugees 1951, Convention relating to the Status of Stateless Persons New York 1954, nor Protocol relating to the Status of Refugees New York 1967. However those rules on human rights that Syria had been ratified implicitly states that everyone basically has the right to apply to become refugee and this right is unlimited, but not all of the application will be proceed directly and the status of refugee is not directly given. Furthermore the neighboring countries are the partner of UNHCR and using both the national rules and international refugee instrument to protect the refugee of Syria (United Nations, 2012, pp. 3-15). This neighboring countries are Jordan, Lebanon, Turkey and Iraq. Even though Syria offered amnesty for those refugees who come back, these neighboring countries still continue to protect them and practicing the non-*refoulement* principle.

Outlining the case of a refugee, a Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, identifies a few points: (a) well-founded fear

of being persecuted; (b) for reasons of race, religion, nationality, membership of a particular social group or political opinion;(c) is outside the country of his nationality; (d) and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; and (e) or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it (UNHCR, 1992).

Until now, more than 40.000 have fled from the Syria and becoming refugee. Those refugees consist of the registered refugee of citizens of Syria, internal displaced persons, and third country nationals (TCNs). These TCN are migrant workers in Syria and some refugees from Palestine and Iraq (UNHCR, 2012). At the moment the neighboring countries are having open door policy and those citizens are all defined as refugee (United Nations, 2012).

The cause of refugee in many cases is the presence of violation of human rights. In this case, the violation on Syrian refugees' rights is well found. Since the uprising, in March 2011, General Assembly Resolution (2011) noted that Syrian authorities have been doing systemic human right violation such as arbitrary executions, excessive use of force and the persecution and killing of protesters and human rights defenders, arbitrary detention, enforced disappearances, torture and ill-treatment of detainees, including children (pp. 25-27). A year after, General Assembly placed another variant of the violation on its condemned resolution. Those new violations are killing of journalists, interference with access to medical treatment, torture, and sexual violence. Worse, this resolution indicates that crimes against humanity might occur in Syria (A/RES/66/253, 2012, p. 2).

On March, Syrian forces burry mines near the border of Turkey in an attempt to block the mass of refugees fleeing the country. Heavy bombardments of strategic villages or towns on the border with Turkey are also brought into force. There was a week when four people were shot and one sixteen year old boy was drowned when they tried to cross the river and go outside the border (Reuters, 2012).

As additional record, Syria also signed the Rome Statute of the International Criminal Court in 2000, but has yet not ratified it. The Rome Statute establishes four categories of international crimes: war crimes; crimes against humanity; genocide; and the crime of aggression. In the present context, crimes against humanity are particularly relevant to the events in the country since March 2011, in particular the provisions referring to murder, torture, enforced disappearances, persecution, imprisonment or other severe deprivation of physical liberty, and other inhumane acts. Despite non-ratification, the Syrian Arab Republic is still obliged to refrain from acts that would "defeat the objects and purpose of treaty" according to Article 18 the Vienna Convention on the Law of Treaties to which the State acceded in 1970.

These series of violation clearly showed that the government of Syria failed to implement the legal framework of human rights. And this failure goes directly to the life of the refugee. It is worsened by the implementation of Emergency Law as their domestic law. The State of Emergency Law provided for the detention of suspects for crimes that are not defined by this or other laws, including "*crimes committed against State security and public order*" and "*crimes committed against public authorities*". The Law permitted Government agencies to "*monitor all types of letters, phone calls, newspapers...and all forms of expression", to "impose restrictions on the freedom of persons...(to hold) meetings*", to "*evacuate or isolate certain areas*" and to "*seize any property or real estate*". It also allowed the security forces to hold suspects in preventive detention without judicial oversight for indefinite periods (HRC, 2011, pp. 2-6). On the April 2011, the Syrian authorities lifted the State of Emergency Law and abolished the Supreme State Security Court, even though the law itself remains in force (Aljazeera, 2011).

E. Conclusion

The absence of sanctions from the Arab League, political support from two countries owning veto rights in the Security Council and the economic sanction from EU are the convenient conditions for Syria to exercise their concept of power preservation. The balance

of power, an ideal situation where power preservation is relevant, is reflected in the event as not only does Syria have an international community that condemns its position but also parties that supports their national cause. This situation has led Syria to take actions that reflects the concept of power preservation. And these actions are: (1) presenting their military forces to response the crisis, (2) calling refugee home and giving out amnesty, even though decent and safe places to stay lack tremendously, and (3) ignoring international sanctions and solutions to maintain peace in Syria.

In this situation, refugee has been put as the object of the country's political policy in order to show its legitimation of power in Syria. Unfortunately, they're not only the object of politics in writing *per se*, but also objects of military targets on the field. Refugees, were found, threatened and violated in a lot of aspect of their basic rights. They were not only attacked by gun fires, but also hidden mines as they tried to leave the country and seek for refuge. This concept of power preservation, with its military presence, has systematically violated the human rights of refugees in Syria. Ironically they are violations measured by Syria incapability's to implement international human rights instrument they ratified.

The article showed that there is a direct connection between power preservation as political stances by the Syria and the violation of human rights. The presence of military as consequences of power preserving has led Syria to violate their citizen. Refugees, in this case, were pushed to a corner leaving no options. It is an imminent warning for all nations to uphold human rights above state sovereignty. Refugees are almost always victims of any political friction and a toppling over a regime. These refugees and the way they are treated are indicators of human rights violation as their emergence anywhere is due to instability, lack of security and most of all shelter. Now, neighboring countries are their only options. Humanitarian Relief through United Nations has set plans for Syrian Refugees neighboring countries. But, it doesn't guarantee the solving of refugees' problem as their number is still increasing until this very day.

BIBLIOGRAPHY

A. Books & Journals

Amundsen, I. (2011). Revenue Management Corruption Challenges and Redistribution. *International Policy Conference on Competitiveness and Diversification: Strategy Challenges in a Petroleuum-rich Econom*, 13-15.

Bali, S. (2001). *Migration and Refugees*. Great Britain: Palgrave.

Hathaway, J. C. (1991). Reconceiving Refugee Law as Human Rights Protection. *Journal of Refugee Studies, Oxford Journals, 4*(2), 121-122.

Morgenthau, H., & Thompson, K. W. (2010). *Politik Antarbangsa*. Jakarta: Yayasan Pustaka Obor Indonesia.

Setiawati, S. M. (2004). *Irak di Bawah Kekuasaan Amerika*. Yogyakarta: PPMTT HI FISIPOL UGM.

UNHCR. (1992). *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. United Nations: UNHCR.

B. Reports

A/66/462/Add.3. (2011). *Promotion and protection of human rights: human rights situations and reports of special rapporteurs and representatives*. United Nations: General Assembly.

A/HRC/S-17/2/Add.1. (2011). *Report of the independent international commission of inquiry on the Syrian Arab Republic*. United Nations: Human Right Council, General Assembly.

A/RES/66/253. (2012). *General Assembly Resolution* (p. 2). United Nations.

HRC. (2011). *Report of the UN High Commissioner for Human Rights on the situation of human rights in the Syrian Arab Republic*. General Assembly, United Nations: Human Rights Council.

S/2012/238. (2012, April 19). *Letter dated 19 April 2012 from the Secretary-General addressed to the President of the Security Council*. Retrieved April 22, 2012, from United Nations Security Council : http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/300/22/PDF/N1230022.pdf?OpenElement

UNHCR. (2012). *Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Syrian Arab Republic*. General Assembly A/HRC/18/53.

United Nations. (2012). *Syria Regional Response Plan*. United Nations.

C. Internet Sources

Aljazeera. (2011, April 19). *Syria to lift decades-old emergency law* . Retrieved June 1, 2012, from http://www.aljazeera.com/news/middleeast/2011/04/201141913503646380 4.html

Bakri, N., & Erlanger, S. (2011, September 2). *nytimes.com*. Retrieved March 31, 2012, from http://www.nytimes.com/2011/09/03/world/middleeast/03syria.html?_r=1

BBC. (2012, March 1). *Q&A: Syria Sanctions*. Retrieved April 28, 2012, from BBC News: http://www.bbc.co.uk/news/world-middle-east-15753975

France24. (2012, February 1). Retrieved April 28, 2012, from http://www.france24.com/s/page/2

Haddadi, A. (2012, June 1). *More Syrian Kurds crossing border into Iraqi Kurdistan*. Retrieved June 25, 2012, from Kurd Net: http://www.ekurd.net/mismas/articles/misc2012/6/state6257.htm

Harris et al. (2012, February 4). *Syria resolution vetoed by Russia and China at United*

Nations. Retrieved April 15, 2012, from guardian.co.uk: http://www.guardian.co.uk/world/2012/feb/04/assad-obama-resign-un-resolution

Luck, T. (2012, January 1). *Ceasefire fails to slow Syrian Refugee 'exodus' to Jordan*. Retrieved April 28, 2012, from The Jordan Times: http://jordantimes.com/Ceasefire+fails+to+slow+Syrian+refugee+%E2%80%98exodus%E2%80%99+to+Jordan++-47034

NY Times. (2012, May 1). *Syria*. Retrieved May 5, 2012, from nytimes.com: http://topics.nytimes.com/top/news/international/countriesandterritories/syria/index.html

Reuters. (2012, March 31). *Syria Refugees Brave Mines, Machineguns to Reach Turkish Sanctuary*. Retrieved April 28, 2012, from Reuters: http://www.reuters.com/article/2012/04/06

The American Heritage Dictionary. (2012, June 25). *Balance of Power*. Retrieved June 25, 2012, from thefreedictionary.com: www.thefreedictionary.com/_/asp.word:balance+of+power

The Telegraph. (2012, January 22). *Arab League 'to extend Syria mission'* . Retrieved April 20, 2012, from http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9030979/Arab-League-to-extend-Syria-mission.html

UN. (2012, February 23). *Secretary General Latest Statements*. Retrieved April 27, 2012, from http://www.un.org/sg/statements/index.asp?nid=5880

Vancouverdasi. (2012, February 1). Retrieved April 30, 2012, from http://vancouverdesi.com/news/syria-calls-on-refugees-to-return-home/

THE WTO PROTECTION OF TRADITIONAL KNOWLEDGE AND INDONESIA'S TRADITIONAL KNOWLEDGE BILL*

Rizky Wirastomo **

Abstract

As a developing country, it is the interest of Indonesia to ensure that the superimposition of WTO TRIPs provisions on traditional knowledge would not harm national interest. The author notes that traditionalism, which favours harmony between man and nature, has been widely known to be the way of life of many Indonesians. On this matter, the WTO's set of rules concerning intellectual property rights must be greeted with caution as it may contain western or industrialistic values. This article attempts to explain the WTO rules on traditional knowledge and the Indonesia's traditional knowledge bill.

Abstrak

Sebagai negara berkembang, Indonesia harus memastikan bahwa penerapan aturan TRIPs WTO tidak melukai kepentingan nasional. Penulis melihat bahwa konsep tradisionalisme yang menjunjung hubungan yang harmonis antara manusia dengan alam telah menjadi suatu prinsip hidup bagi banyak orang Indonesia. Oleh karena itu, aturan WTO yang berkenaan dengan hak kekayaan intelektual harus diawasi karena aturan-aturan tersebut mungkin mengandung nilai-nilai barat atau industrialis. Tulisan ini bermaksud untuk menjabarkan aturan WTO tentang pengetahuan tradisional dan rancangan undang-undang pengetahuan tradisional di Indonesia.

Keywords: *traditional knowledge, WTO TRIP, Indonesia's traditional knowledge bill.*

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A. Introduction

Herbal medicines have been rapidly growing in popularity in many developed western nations as well as their developing brothers. Tedlock presents that in Australia, nearly 70% of all patients used some form of complementary medicine (Tedlock, 2006, p. 256). Similar trend is identified in Indonesia, where the consumption of traditional herbal medicine (the *jamu*) increased by 5.4% per year in the beginning of this millennium(Musanif, Darusman, & Bermawie, 2008, p. 33).

People's demands for herbal medicines grab industries' attention. Kate and Laird, quoting the study of Farnsworth *et al.*, mentions that 75% of the approximately 120 pharmaceutical products derived from plants in 1985 were discovered through the study of their traditional medical use (Kate & Laird, 2004, pp. 133-158).Furthermore, it has been reported that the market value of Indian herbal drugs in the European Union, Australia, Canada, and the US amounts to US$70 billions (Schuler, 2004, pp. 159-181).

This trend has to be greeted with caution. Because all businesses are typically profit-oriented, the presence of industrial interests in the realm of herbal medicines usages could bring adverse consequences. The most cited impact is the possibility of undue appropriation of local community's medicinal knowledge. Pharmaceutical industries access knowledge such as 'Consuming a lot of papaya fruits would help one's gastrointestinal complaints' and use that piece of knowledge as the basis of identification of potential new products development, in safety and efficacy studies, and in formulation (Kate & Laird, 1999). However, when a patented an clinically-tested pharmaceutical product finally comes out to the market, the local community from which the knowledge was retrieved only gains negligible returns — or in some cases, nothing at all.

While some industries might be generous enough to give something back to the local community as an exchange for the information, these gifts are often minuscule (Tedlock, 2006, p. 257), compared to the potential economic value that the shared information has. Dedeurwaerdere (2005, p. 477) posits that the bilateral contracting between the bioprospector and the

local community is flawed because most bioprospecting contracts offer low financial return.

On this issue, the WTO springs as a regulatory body. The WTO, with the Trade-related Aspects of Intellectual Property Rights Agreement (TRIPs) as one of its pillar agreements, tries to impose standards for intellectual property protection on all WTO member states.

This issue on TRIPs is what this article would dwell on in the following paragraphs. How is the perspective of the WTO on traditional knowledge issues? How does Indonesia's traditional knowledge bill accommodate traditionalism values? These two questions would direct our discussion.

B. The WTO and Traditional Knowledge

The TRIPs Agreement began life in the GATT in 1978 as a response toward the call for an "anti-counterfeiting code". Over the next 15 years, it has developed into "the closest thing the world has yet seen to a comprehensive international intellectual property settlement" (Wadlow, 2007, pp. 350-402).

According to Gervais (2003a, pp. 5-9), in the GATT context, intellectual property was basically considered as an 'acceptable obstacle' to free trade. However, during the Tokyo Round in 1973-1979, trade in counterfeit trademarked goods started to emerge as a serious issue. Efforts to include a specific discipline within the GATT framework to stop trade in counterfeit goods were encouraged. In 1982, a Ministerial Declaration instructed the GATT Council to determine the appropriateness of joint action in the GATT framework on the trade aspects of commercial counterfeiting. In 1987, a proposal was raised by the United States that the fullest possible range of intellectual property issues should be immediately addressed in the Uruguay Round.[1] In 1990, the first detailed drafts of the TRIPs Agreement were submitted and in 1994, the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiation was done in Marrakesh, which encapsulates the TRIPs Agreement.

[1] Statement by United States at Meeting of 25 March 1987, MTN.GNG/NG11/W/2 of 3 April 1987.

The TRIPs Agreement is actually silent on traditional knowledge issue. However, following the continuous lobbying of developing countries, the Doha Declaration eventually mandates the Council for TRIPs in pursuing its work programme [...] under [...] Art. 27.3(b), [...] to examine [...] the protection of **traditional knowledge and folklore**".[2] The examination has begun as early as 2003 and controversies were reported to be numerous.

Article 27.3(b) addresses one of the most controversial issues covered in TRIPs: the biotechnological inventions, genetic resources, plant variety protection, and traditional knowledge.[3] It allows for the *sui generis* approach for the member countries of the WTO to protect their traditional knowledge in their own domestic legal system. *Sui generis*is a term used to denote alternative legal régimes for the protection of local community innovations that might not be protectable under conventional intellectual property systems (Ombella, 2007, p. 6).

From the summaries of issues raised and points made on the WTO Paper IP/C/W/370/Rev.1, it is apparent that the world is still arguing over the best way to protect traditional knowledge. Some countries insist on having the issue of traditional knowledge be regulated under WIPO administration instead of WTO, and some other wish to adjust the existing IPR régime rather than creating a *sui generis* protection system.[4] Prof. Sard-

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[2] Ministerial Declaration, WT/MIN(01)/DEC/1 dated 20 November 2001, ¶19 (emphasis added).

[3] Article 27: Patentable Subject Matter: "Members may also exclude from patentability: (a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals; (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. **The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.**

[4] The main clashes between intellectual property system and traditional knowledge are: 1) IPRs protect individual property rights whereas traditional knowledge is by and large collective;2) traditional knowledge is developed over a period of time and is intergenerational and, therefore, may not meet the criteria of novelty or originality or inventive step required by IPRs; 3) communities often hold this knowledge in parallel which makes it difficult to determine title holders; 4) communities lack adequate education, awareness and

jono's book *Hak Kekayaan Intelektual dan Pengetahuan Tradisional*even dedicates 86 pages to show that there is an incompatibility between intellectual property rights and traditional knowledge. Firstly, he contends that intellectual property system strives to protect capital owner since it is treats intellectual works as a commercial commodity. Secondly, he shows that patenting does not have a scintilla of relevance with traditional knowledge protection due to its complexity. Thirdly, he argues that any traditional knowledge-related right is a collective right and therefore is not compatible with intellectual property's concept of individual right (Sardjono, 2006, pp. 147-233).

The stipulation of a universally-recognised system to protect traditional knowledge remains in a very distant future. Therefore, states are free to draft their own *sui generis* law to protect traditional knowledge, provided that conformity with WTO general rules is still ensured.

There is no one singular and exclusive definition of traditional knowledge that has been internationally adopted (Daulay, 2011, pp. 25-26; Dutfield, 2001; Gervais, 2003b, pp. 403-419). However, for the sake of our discussion, let us indulge in the WIPO Fact-finding Mission's[5] fomulation of traditional knowledge:

> "Tradition-based" refers to knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are constantly evolving in response to a changing environment. [...] Excluded from this description of TK would be items not resulting from intellectual activity in the industrial, scientific, literary or artistic fields, such as human remains, languages in general, and other similar elements of "heritage" in the

resources to take advantage of IPRs; and5) communities do not use scientific methods but trial and error over time.

[5] The Fact-finding Missions were designed to enable WIPO to identify, as far as possible, the intellectual property needs and expectations of traditional knowledge holder.

broad sense(World Intellectual Property Organization, 2001, p. 25).

C. Indonesian Traditional Principles

How is our cultural environment surrounding traditional knowledge issues? To answer the question, we would have to revisit *adat* law principles. The present author argues that *adat* law frowns upon individualism and therefore our national legislation must stand on the principle of communalism. According to Hooker, *adat* law describes the relationship between man and nature, including non-empirical natural forces (Hooker, 1978, pp. 53-55). Van Vollenhoven showed that there were common elements in the existing customary law in the various regions of Indonesia, which *inter alia* are "preponderance of communal over individual interests"and a "strongly family-oriented atmosphere" (Li, 2005, p. 101).

In such behaviour, individualistic and liberalistic views cannot live in the minds of Indonesians, as fiercely contended by Djojodigoeno:

We are socio- and traditiobound people [...] an individualistic pattern of behaviour and action will arouse opposition, disapproval, and condemnation. Freedom of contracting and competition is out of place, as are definite actions in law, containing definite claims (Djojodigoeno, 1952, p. 13).

The rejection of individualism is apparent from the lack of institutions in *adat* law which provide for the possibility of an individual exercising a right against any other individual (Hooker, 1978, p. 63). Ownership, especially to land resources, is communally-based. The purpose of *adat* law is not to establish an individual right, but to re-establish peace and harmony in the community.

The communal nature of Indonesia's culture may be found in a number of *adat* law, to mention a few:

1. Karo of Bukit Bangun and Kuta Mbaru have a customary rule that prohibits the sales or utilisation of village land to residents of other villages.
2. *Glebagan* is a rotation of communal land among villagers to ensure equality of land access to the best-irrigated parcels.

3. The Minangkabau people have a *hak ulayat* institution, where property rights are **regarded as a communal** right; (Li, 2005, pp. 93, 221, 292)
4. Javanese people are said to have a social system that is very family-based, as proven from its concept of acquiescence, sincerity, sacrifice, and ungrudging or unreserved acceptance[6] to achieve common benefits and inner happiness.

D. Traditional Knowledge Bill and the Importation of Traditionalism Values

Since a uniformed legal framework governing traditional medicinal knowledge under intellectual property régime is yet to be realized, this discussion would be confined to the Traditional Knowledge Bill which is currently under consideration at the House of Representatives. According to Indonesia's position paper in Seminar on Genetic Resources and Protection of Traditional Knowledge, there have been some "significant efforts" that the Government of Indonesia takes in order to protect genetic resources and traditional knowledge (Government of Indonesia, 2008, p. 1).

Has the Draft Bill on the Protection and Development of Traditional Knowledge and Traditional Cultural Expressions recognized Indonesia's traditionalismvalue?

The present author argues that there are two philosophical considerations that the drafter of the Bill use to justify the protection of traditional knowledge, i.e. 'personality' consideration and 'common welfare' consideration.

Personality Consideration. The academic draft for the TK Bill provides meticulous details of the bill's philosophical, juridical, and sociological foundations, lengthy literature review, cost-benefit analysis, enforcement mechanism, and related legal provisions. The main reason featured by the academic drafter (page 2-3) why traditional knowledge deserves a specific protection measure is that "traditional heritage is an important aspect for

[6] in Bahasa Indonesia: *konsep kerukunan, kerelaan,* and *kesediaan untuk melepaskan kepentingan pribadi*.

a nation or an ethnic group". Heritage is the 'markings' or 'identity' of a culture or a nation. By this reason, the academic drafter seems to follow Hegel's personhood theory.

Hegelian rationale provides that when a person pours his personality into an intellectual work, he would be injecting the *substance of his being* into the work, thereby personifying the work with his personality. The more creative and expressive an author's intellectual work is, the greater the embodiment of his personality in that particular work and the more important the need for granting ownership rights to safeguard the moral integrity of his work (Spinello & Bottis, 2009, p. 164).

Traditional knowledge almost always absorbs the cultural identity of the ethnic group who develops the knowledge. Take as an example the *jamu*-making art of Javanese people. *Jamu* is often regarded as a media to get blessings from the ancestors and as a means of protection against evil spirits. The author takes this belief as an indication that Javanese people pour down their personality, their most intimate divine experience to *jamu*, thereby making *jamu* imbued with Javanese identity.[7]

The identity of Javanese people must forever be attached to Javanese as an ethnic group. Unsupervised exploitation or commercialization of traditional knowledge may compromise its dignity and position as the identity of a nation.

Common Welfare. In the preambulatory section of the Bill, the drafters consider that there has been "commercial interests to exploit Indonesia's ethnic diversity". Therefore, the state should regulate any exploitation activities to ensure the finest quality of society's common welfare.

This argument makes use of Lockean philosophy of natural rights. Locke justifies intellectual property system by pointing out that labor is the instrument of individuation of common property. In this context, 'labor' is the creative or innovative activities of the creator or inventor of traditional knowledge while 'common property' is understood as

[7] because studies show that Javanese people maintain a very close relationship between God and man as reflected from Javanese proverb *sangkan paraning dumati* (God is the ultimate origin and destination of being) (Purwadi, 2010)/

ideas, theories, or raw materials. To avert the emergence of absolutism interpretation of this Lockean justification, a proviso is in place: that "the right of property is conditional upon a person leaving in the commons enough and as good for the other commoners" (Locke, 1690).

The author agrees with Gathegi's argument that when a pharmaceutical company leverages traditional knowledge to patent a drug, it is unclear that there is enough and as good left in common for the others. Patented drugs would bar the community's access to the results of leverage (Gathegi, 2007). Even though what is left in the world after extraction may be enough, it is not as good because it is no longer a common good, but a 'devalued common good' (Gordon, 1993).

The present author praises the drafter of TK Bill for having identified that a devalued common good is not 'as good'. It is important to be aware that individualistic business interests have to be strictly regulated to the effect that protection of the general welfare of the common society can always be ensured.

Table 1
Indonesia's Endeavours to Protect Genetic Resources and Traditional Knowledge

Nr.	Year	Endeavour	Remarks
1	2002	Establishing a National Working Group on Genetic Resources, Traditional Knowledge, and Expression of Folklore (WG-GRTKF)	Pursuant to the Decree of Minister of Justice and Human Rights Nr. M.54.PR.09.03 of 2002 *juncto* M.HH-01.PR.01.04 of 2008.
2	2005	Hosting Asian African Summit, which eventually adopted a Joint Ministerial Statement on the Plan of Action	The Plan stresses the need to take concrete and practical measures to maximise the benefits arising from the protection of intellectual property rights.
3	2011	Drafting Bill on the Protection and Development of Traditional Knowledge and Traditional Cultural Expressions	Last revision: 7 April 2011.

Furthermore, the definition of traditional knowledge seems to have been inline with the WIPO Fact-finding Mission's formulation of traditional knowledge (see our discussion, *supra*).

Under this Bill, traditional knowledge is defined as any intellectual works in the field of science and technology, which hold characteristics of traditional heritage that a local community or a traditional society creates, develops, and nurtures (*vide* Art. 1.1). The Bill further limits the scope of tradition to cultural heritage which has been transmitted from generation to generation.

The Government of Indonesia (2008) explains that traditional knowledge shall be traditionally and communally preserved and developed by local community or traditional society, coined as the 'Traditional Knowledge Custodian'. Traditional Knowledge is defined as the community living in a particular territory with similar values and social cohesion, who traditionally and communally preserves and develops their traditional knowledge or traditional cultural expression. Custodian must be members of the community from which the knowledge was retrieved or must be acting for and on behalf of the owner of traditional medicinal knowledge.

The author believes that this shows a tendency in the part of the drafters to maintain the spirit of community and common ownership of traditional medicinal knowledge.

On another point of view, the Bill's support to spirit of community is strengthened byits discouragement to foreign commercial exploitation. Hawin (2011) explains that this Bill discriminates between the conditions for commercial exploitation by foreigners or foreign legal entities and those by Indonesian nationals or Indonesian legal entities. The foreign needs to obtain a license in order to utilise traditional knowledge, while the locals only need to enter into an agreement with the owner or the custodian of the traditional knowledge.

E. Conclusion

The aim of this article was to study the regulation on traditional medicinal knowledge, both from the WTO TRIPs perspective and from Indonesia's traditionalism principle. This study allows us to conclude that

the WTO is yet to draft a comprehensive internationally-binding treaty on traditional knowledge and that Indonesia's legislation on traditional medicinal knowledge is heavily influenced by its *adat* and traditionalism values.

The TRIPs never regulates traditional knowledge in an explicit manner. Only in Art. 27.3(b) we can find a scintilla of reference to traditional knowledge. The states have ample room too draft a traditional knowledge protection system: whether to have it protected under existing intellectual property laws or to draft a *sui generis* law.

Literature studies have pointed out that Indonesia seems to favour a *sui generis* protection of traditional medicinal knowledge. The author believes that this

preference to *sui generis* protection is based on the belief that intellectual property law does not share similar values with Indonesian *adat* law. One is individual in nature, the other is communal. Our Traditional Knowledge Bill, fortunately, has properly accommodated Indonesia's disapproval of 'individual ownership' over common goods.

The most important thing now is to ensure that the Bill would be able to accommodate the interests of grass-root society (the *jamu* maker or the *dukun*).This question will be the subject of our further studies.

BIBLIOGRAPHY

Daulay, Z. (2011). *Pengetahuan Tradisional: Konsep, Dasar Hukum, dan Praktiknya*. Jakarta: Rajawali Press.

Dedeurwaerdere, T. (2005). From Bioprospecting to Reflexive Governance. *Ecological Economics, 53*, 473-491.

Djojodigoeno, M. M. (1952). *Adat Law in Indonesia*. Jakarta: Jajasan Pembangunan.

Dutfield, G. (2001). TRIPs-Related Aspects of Traditional Knowledge. *Case Western Reserve Journal of International Law, 33*(Spring issue).

Gathegi, J. N. (2007). Intellectual Property, Traditional Resources Rights, and Natural Law: A Clash of Cultures. *International Review of Information Ethics, 7*.

Gervais, D. (2003a). *The TRIPS Agreement: Drafting History and Analysis* (2 ed.). London: Sweet & Maxwell.

Gervais, D. (2003b). TRIPs, Doha and Traditional Knowledge. *The Journal of World Intellectual Property, 6*(3), 403-419.

Gordon, W. J. A. (1993). A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property. *Yale Law Journal, 102*.

Government of Indonesia. (2008). *The Protection of Traditional Knowledge and Genetic Resources in Indonesia*. Paper presented at the Seminar on Raising Awareness and Providing Policy Insights on Promoting Appropriate Access and Protection of Genetic Resources and Traditional Knowledge in APEC Economies, Lima, Peru.

Hawin, M. (2011). New Issues in Intellectual Property Law in Indonesia. *Jurnal Mimbar Hukum*(Special Issue, November 2011), 1-26.

Hooker, M. B. (1978). *Adat Law in Modern Indonesia*. Kuala Lumpur: Oxford University Press.

Kate, K. t., & Laird, S. A. (1999). *The Commercial Use of Biodiversity: Access to Genetic Resources and Benefit-Sharing*. London: Earthscan.

Kate, K. t., & Laird, S. A. (2004). Bioprospecting Agreements and Benefit Sharing with Local Communities. In J. M. Finger & P. Schuler (Eds.), *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (pp. 133-158). Washington, DC: World Bank and Oxford University Press.

Li, T. M. (2005). *Transforming the Indonesian Uplands: Marginality, Power and Production*. Singapore: Taylor & Francis e-Library.

Locke, J. (1690). Two Treatises of Government. In the Former,

The False Principles and Foundation of Sir Robert Filmer, and His Followers, are Detected and Overthrown. The Latter is an Essay Concerning the True, Original, Extent, and End of Civil Government *The Works of John Locke, Esq*. (Vol. II). London.

Musanif, J., Darusman, L. K., & Bermawie, N. (2008). *The Indonesian Heritage: Jamu for Health and Beauty*. Jakarta: Director of Agriculture Product Processing.

Ombella, J. S. (2007). *Benefit Sharing from Traditional Knowledge and Intellectual Property Rights in Africa: An Analysis of International Regulations*. LL.M. Mini Thesis submitted in partial fulfillment of the requirements for the LL.M. degree, University of the Western Cape, South Africa.

Purwadi. (2010). The Islamic Morality in Serat Dewaruci. *Millah: Jurnal Studi Agama, 10*(1), 127-142.

Sardjono, A. (2006). *Hak Kekayaan Intelektual dan Pengetahuan Tradisional*. Bandung: PT Alumni.

Schuler, P. (2004). Biopiracy and Commercialization of Ethnobotanical Knowledge. In J. M. Finger & P. Schuler (Eds.), *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (pp. 159-181). Washington, DC: World Bank and Oxford University Press.

Spinello, R. A., & Bottis, M. (2009). *A Defense of Intellectual Property Rights*. Massachusetts: Edward Elgar Publishing, Inc.

Tedlock, B. (2006). Indigenous Heritage and Biopiracy in the Age of Intellectual Property Rights. *Explore: The Journal of Science and Healing, 2*(no. 3, May), 256-259.

Wadlow, C. (2007). "Including Trade in Counterfeit Goods": The Origins of TRIPs as a GATT Anti-counterfeiting Code. *Intellectual Property Quarterly*, 350-402.

World Intellectual Property Organization. (2001). *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*. Geneva: WIPO.

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