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

FOREWORD FROM THE DEAN
FACULTY OF LAW UNIVERSITAS GADJAH MADA

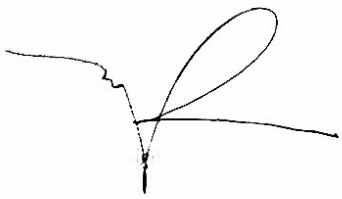
Legal publication has been influential in the development of law, as it communicates ideas about a particular legal issue, followed by possible solutions. In countries that adopt the common law system, legal reviews are frequently cited as a persuasive authority since it offers intriguing perspectives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

This is where the Juris Gentium Law Review **("JGLR")** steps in: it is the first medium in Indonesia – run solely by students – that encourages and provides an opportunity for law students from any institution to both enhance their legal research and writing skills and express their views through legal articles regarding issues on the topics of public international law, private international law and even comparative law.

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

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

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



Dean
Faculty of Law, Universitas Gadjah Mada

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

The Juris Gentium Law Review ("**JGLR**") is a student-run law journal under the Community of International Moot Court Universitas Gadjah Mada ("**CIMC**"). Recognizing the importance of legal writing and research, JGLR aims to cater the needs of law students from universities both within Indonesia and all over the world to practice and hone the aforementioned skills. Since its establishment in 2012, JGLR has showcased consistent improvements within each edition, and it is only a matter of time before the journal is recognized and accessible in an international scale.

As the President of CIMC, it is with great honor that we proudly present to you the second issue of this year's edition of JGLR. I wish to express my sincerest gratitude towards the Editor in Chief – Felicity Salina, and the rest of the Editorial Board and staff – Aldeenea Cristabel, Grady Ginting, Kukuh Herlangga, Balqis Fauziah, Rae Chalista, Michelle Chandra, Clarissa Intania, and Rabita Madina. I wish to also extend my gratitude to the contributors, expert reviewers, and Univeristas Gadjah Mada Faculty of Law, for this journal would not have been possible without their help.

This second issue comprises of topics ranging from international maritime law to international criminal law, and have been submitted by universities ranging from Maastricht University to Universitas Gadjah Mada itself. With that said, I sincerely hope that this issue will be beneficial to the readers, and inspire more people to write and contribute within future editions of JGLR.

Kusuma Raditya

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

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

It is my honor to present the second edition in the sixth volume of Juris Gentium Law Review to our readers. Over, the years of my involvement in JGLR, I have seen it grow to become increasingly recognized among law students all over Indonesia as well as those pursuing their education abroad as an accessible and resourceful publication platform. The hard work of our editors in maintaining the mission and visibility of the journal to contributors and readers alike has encouraged more prospective authors to submit their academic work to us more than ever.

Through careful selection, this edition features four articles covering a wide-range of subjects. First, I Gusti Agung Indiana Rai and Sabrina Nugrahani Salsabila discuss the problematic application of the *ne bis in idem* principle before the International Criminal Court and its eventual impact on the carriage of justice in their article titled "*The Exclusion of Ne Bis In Idem at the International Criminal Court: An Unbalanced Concept of Justice?*". Second, Ivan Gautama's analysis on how arbitrators can be challenged at ICSID is succinctly written under his article "*A Critical Look at the Mechanism for Challenge of Arbitrators Under ICSID Convention and Arbitration Rules*".

Third, in "*The Rights of the Wicked: The Hurdles of Protecting Witchcraft Accusation & Persecution Victims Within South Africa's Legal System*", Aicha Rebecca delves into the phenomenon of witchcraft persecution prevalent in Africa and assesses it together with the enforcement of international human rights law in and around South Africa. *Finally*, in "*Lien on Sub-Freight for Unpaid Freight: The Perspective of Singapore Law and its Applicability in Indonesia*", Johanna Devi compares the implementation of lien on sub-freight for unpaid freight in Singapore to the scheme available in Indonesia to protect shipowners under charter-party from the non-payment of freight.

I would like to express my utmost gratitude to the Editorial Board and staff for their dedication: Aldeenea Cristabel, Grady Ginting, Kukuh Dwi Herlangga Clarissa Intania, Michelle Chandra and Rabita Madina. The editorial piece in this issue is written by our very own Balqis Fauziah and Rae Chalista. Allow me to also take this opportunity to thank Universitas Gadjah Mada's Faculty of Law, the Authors and Executive Reviewers for making this edition possible.

Felicity Salina

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

JURIS GENTIUM LAW REVIEW

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EDITORIAL

THE REVIVAL OF INDIGENOUS IDENTITY IN INDONESIA

Balqis Fauziah and Rae Chalista

Indonesia's recognition, or lack thereof, of the status of indigenous peoples has led to the depiction of a nation of frequent repression and criminalization. Recognition of the status of indigenous people to have their rights be protected allows them to be able to have a standing when problems that the dominant sector of the state government in which they reside start making decisions that negatively affect them. However, due to the fact that Indonesia's entire population at the time of colonization remained the same, the government of Indonesia is of the view that the concept of indigenous peoples is not applicable in Indonesia as all Indonesians, with the exception of the ethnic Chinese, are indigenous and thus are entitled to the same rights. This raises a complex issue since there are more groups beyond those identified by the Ministry who self-identify themselves or are considered as indigenous people. Yet, with the absence of a clear definition, it prevented the clear understanding of the peoples to whom legal protection would apply to.

What frequently occurs is the violation of indigenous peoples' land rights. Because of the vague definition, very few indigenous peoples have gained official recognition. The lack of recognition of the status of indigenous peoples does not impose on the government the laws that they also must take into account when trekking into indigenous peoples' territories. It gives the government the liberty to arbitrarily declare any forest, for instance, as 'state forest' and do with it what they want, whether that is for infrastructure, or other things on their agenda. Lack of legal recognition denies respect and protection of indigenous peoples' rights to their land and natural resources, which is more often than not, is a link to their cultural, social and economic development.

In 2014, KOMNAS HAM launched the final report of a "*National inquiry on the Rights of Indigenous Peoples to their Territories in Forest Zone*." It shows 40 selected cases from across Indonesia, through data and information gathering, study and examination of cases, public hearings and dialogues with the Government and company officials, of individual and collective rights of indigenous peoples violated with women and children put in the most vulnerable conditions. The report includes a set of immediate actions and policy recommendations for the Indonesian President, House of Representatives, Ministry of Environment and Forestry and other concerned agencies, including a security force which was responded with lack of action taken for implementation of the recommendations. It only displays significant internal conflicts fostered by companies and governments in order to take advantage of community divisions.

Moreover, the Committee on the Elimination of Racial Discrimination (**'CERD'**) has repeatedly written to the government of Indonesia on four representative cases of violations of indigenous rights reported to the Committee between 2009 and 2015. These include violations of indigenous rights over their traditional lands, among others, for example is the implementation of Kalimantan Border Oil Palm Mega Project, the implementation of procedures for reducing emissions within the frame of UN Framework Convention for Climate Change (**'UNFCCC'**), and many other cases related to land. However, the Indonesian Government has not responded to any of these early warnings from the CERD. The violations to indigenous peoples' rights also arise out in the matter of National Human Rights Institution. The objectives of Indonesia's National Human Rights Institutions (**'Komnas HAM'**) and

Cooperation with Indigenous Peoples is to protect the rights of indigenous people. However, up until the year 2016, reports show that in 40 selected cases, individual and collective rights of indigenous peoples were violated, with indigenous women and children put in the most vulnerable conditions. The report noted that all cases also contain significant internal conflicts fostered by companies and governments in order to take advantage of community division.

National laws such as the Act No. 5/1960 on Basic Agrarian Regulation, Act No. 39/1999 on Human Rights, and Indonesia's Legislative MPR Decree No. X/2001 on Agrarian Reform referred to the indigenous people as *masyarakat adat*. The consequences of such referral are associated with only implicit recognition of rights that they have but could not be protected.

It is arguable that in light of the Constitutional Court Decision No. 35/PUU-X/2012 of May 2013, Indonesia has moved forward toward the affirmation of the constitutional right of indigenous peoples to their lands and territories. However, even after said Constitutional Court decision was issued, violations still ensued, causing the number of land disputes cases to continue to grow. The violations of indigenous peoples' rights are not limited to land disputes but also, in regards to KOMNAS HAM, discrimination, and protection. This fact identified the need for an independent institution with adequate mandate and resources to resolve land conflicts. Reports show that cases regarding indigenous peoples' protection and rights are often unresolved due to laws and regulations contrasting the 2013 Constitutional Court Decision.

It was only in December 2016 and October 2017 that marked the first implementation of the 2013 Constitutional ruling in which Current President Joko Widodo has granted *hutan adat* (customary forest) ownership certificates, removing customary forests from state control as well as the formalization of local peoples' ownership. This has set a becoming precedent as previous legal frameworks for indigenous people have not been responsive to the circumstances that the indigenous peoples have been left with at the hand of legal enforcements and other members of the civil society. It is not to be negated though, in spite of this development, the scope of land that the President has covered is still too little and it is thus, premature to call successful implementation.

In the international sphere, although problems still often arise, the indigenous community movement has come a long way. The Indigenous and Tribal Peoples Convention (**'ILO Convention 169'**) has placed greater emphasis on indigenous peoples and culture, moving from an assimilationist approach to placing greater emphasis for special measures in recognizing and respecting the relationship indigenous peoples have with their lands or territories. While acknowledging the fact that though Indonesia supports the promotion and protection of indigenous people worldwide, it does not support the application of indigenous people concept as defined in the UN Declaration on the Rights of Indigenous Peoples (**'UNDRIP'**) in the country. Indonesia has not taken into consideration the definition of indigenous and tribal peoples set out in ILO Convention 169 and does not envisage ratifying the instrument. Reports suggest lack of coordination among state institutions as one of the main problems for formal recognition of indigenous communities and their customary rights.

This indicates why positive laws are currently ineffective. Though Indonesia supported a number of recommendations, no action has been taken for implementation of these recommendations. One of the key recommendations in the Komnas HAM inquiry report is for the Indonesian President to create an independent institution, which could be the first step towards reconciliation of differences between the indigenous people and other members of civil society. However, the Government has been agonizingly slow in the formation of the Task Force, as set forth in the recommendation. The Bill on Recognition

and Protection of Indigenous Peoples' Rights, a key recommendation, include provisions on the protection of the rights of indigenous peoples in Indonesia, which covers the rights over land, territories and resources, rights to religion and belief, as well as other rights of protection and recognition of indigenous people. This process of implementation with specific dates for publication and discussion on the draft law is also yet to be certain. While the State failed to list the Bill as a legislative priority, reports show that indigenous peoples continue to face restrictions to exercise their rights until today. For instance, contrary to one of the guaranteed fundamental human rights in the Indonesian Constitution, the recommendation has not been implemented fully, if at all, to enforce the freedom of religion and equality. Indigenous peoples continue to face restrictions to exercise their indigenous religion and belief as laws and practices remain discriminatory against persons and families. This instance is exemplified in the *Sedulur Sikep* children facing discrimination during religion lesson in school by being forced to learn Islam.

Pursuant to the recommendation, Indonesia should take immediate steps to strengthen the mandate and functioning of KOMNAS HAM, including provisions of adequate resources for KOMNAS HAM to effectively deal with cases of Human Rights abuses and its engagement with civil society, law enforcement agencies, officers, and personnel.

Besides immediate ratification of the Bill on Recognition and Protection of Indigenous Peoples' Rights to create an independent institution to deal with the recognition, respect, protection and promotion of the rights of indigenous peoples, the government should also strengthen coordination among state institutions for formal recognition of indigenous communities and their customary rights.

Therefore, Indonesia should, without further delay, promote and facilitate the adoption of necessary local laws and guidelines in other relevant provinces to recognize and protect the rights of indigenous peoples through enhancement of coordination among relevant state institutions for recognition of indigenous peoples and their rights to be in line with UNDRIP and other international legal instruments. Not only should Indonesia be signatory to the treaties regarding Indigenous People, but also monitor the effective implementation of those laws in its territories. The Indonesian government has a lot to do to make up for what the UN Special Rapporteur on the Rights of Indigenous People Victoria Tauli-Corpuz described as its "[lack of] commitment to indigenous peoples."

THE EXCLUSION OF *NE BIS IN IDEM* AT THE INTERNATIONAL CRIMINAL COURT: AN UNBALANCED CONCEPT OF JUSTICE?*

I Gusti Agung Indiana Rai and Sabrina Nugrahani Salsabila*****

Abstract

Ne bis in idem has always been understood and implemented as a non-derogable principle that gives legal protection to Defendants in court proceedings. The International Criminal Court (**"ICC"**), however, allows *ne bis in idem* to be excluded by invoking Article 20(3) of the Rome Statute if certain conditions are met. Not only this rule could potentially threaten the concept of finality of a judgment, it also arguably drifts away from the whole understanding of *ne bis in idem* in the first place. Regardless, the exclusionary clause was finalised, leaving one unanswered question: *Is there an imbalance concept of justice from invoking Article 20(3)?* This Article therefore aims to provide two legal analysis relating to *ne bis in idem* in the context of ICC. *First*, on any potential harms to Defendants rights that could be violated. *Second,* on the justification laid out by the exclusionary clause if there are any rights being violated.

Intisari

Ne bis in idem *adalah sebuah prinsip yang dimengerti dan diimplementasikan sebagai 'non derogable principle' atau prinsip yang tidak dapat dikurang-kurangi, yang mana memberikan perlindungan hukum bagi pihak terdakwa di dalam proses persidangan.* International Criminal Court *(**"ICC"**), memberikan beberapa persyaratan untuk mengecualikan prinsip* "ne bis in idem" *melalui Pasal 20(3) Statuta Roma. Tidak hanya ketentuan ini berpotensi untuk mengurangi putusan yang tetap dan bersifat mengikat, namun ketentuan ini juga jauh dari pengertian* "ne bis in idem" *itu sendiri. Meskipun begitu, dengan ditetapkannya klausa pengecualian, hal ini menyisakan satu pertanyaan yang belum terjawab: Apakah dengan mengecualikan Pasal 20(3) menyebabkan ketidakseimbangan hukum? Artikel ini bertujuan untuk memberikan dua analisis sehubungan dengan pengertian ne bis in idem dalam konteks ICC. Pertama, mengenai potensi kerugian yang akan berpengaruh pada hak pihak terdakwa. Kedua, mengenai pembenaran yang diberikan oleh klausa pengecualian jika ada hak-hak yang dilanggar.*

Keywords: International Criminal Court, *ne bis in idem*, exclusion, Article 20(3) of the Rome Statute.

Kata Kunci: *Mahkamah Pidana Internasional,* ne bis in idem, *pengecualian, Pasal 20(3) Statuta Roma*

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A. Introduction

The development of criminal law has embarked the establishment of a principle that a person shall not be prosecuted twice for the same act, fact or offence. This principle is commonly known as *ne bis in idem,* or equivalently referred as 'against double jeopardy',[2] which is a cardinal rule that serves as one strong foundation in criminal law (*Cullen v. The King*, Supreme Court of Canada, 1949; Finlay, 2009, p. 223).

Ne bis in idem is also one of many fundamental principles of law adopted by the Rome Statute, explicitly enshrined in Article 20. The provision of *ne bis in idem* under Article 20(1) and (2) applies respectfully towards alleged Defendants in respect to fairness, individual human rights and the protection towards the integrity of the judicial system (Tallgren and Reisinger, 2008, pp. 902-903; Finlay, 2009, p. 223). Despite the means of protection is clearly regulated, this permanent international court also takes a different approach into the implementation of *ne bis in idem* by including an exclusionary clause within Article 20(3). The ICC has the ability to dismiss the importance of this principle only if the national proceedings were conducted based to 'shield' or the judge was 'not independent or impartial'. The exclusion itself could somewhat avert the whole concept of *ne bis in idem* in the premises of the ICC, and because Article 20(3) has never really contested in the Court, its implications are left uncertain.

B. *Ne Bis In Idem* as an Internationally Accepted Principle

a. Origins

Historically, the original sense of this principle can be traced back to the ancient Greek and Roman laws (van Bockel, 2010, p. 30), where it derives from the maxim *nemo debet bis vexari pro una et eadem causa,* that in a literal meaning translates to "no one should be twice troubled for the same cause".[3] The Roman procedural law was actually built with the basic understanding that a case, may be civil or criminal, could only be brought once to court (Lelieur, 2013, p. 199). The whole reason is reflected on the belief of legal certainty and final court decision known as *res judicata* (Theofanis, 2003; Conway, 2003, p. 217). Since then, the principle of *ne bis in idem* have continued to manoeuvre into the modern laws.

Nowadays, this principle is regarded as one amongst several firmly established principles in both domestic and international level. The objective is to protect individuals from being subjected to "*embarrassment, expense and ordeal, … anxiety also insecurity …*" (*Green v. United States*, U.S Supreme Court, 1957), also serves as method to defend individuals from abuses of state's right to punish (Wyngaert & Ongena, 2002, pp. 707-710; Rastan, 2017, p. 19; van Bockel, 2016, p. 13).

b. Universal Acceptance of *Ne Bis In Idem*

There are currently over fifty nationals that have codified the principle of *ne bis in idem* as their constitutional rights (Finlay, 2009, p. 224). The significance of such principle to international law is actually intertwined into at least two mechanisms: a) in regard to obligations burdened upon states in a treaty context; and b) on the binding power of a rule

[2] The doctrine of 'double jeopardy' can be found within the Fifth Amendment of the United States of America [**"US"**] Constitution, which states that "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb…"

[3] Translation is provided within 'Appendix B: Legal Maxims' in Garner (2009).

outside of treaty context, (Conway, 2003, p. 229) *vis-à-vis* customary international law and general principles of international law. The latter approach has actually created a debate among scholars whom deny this existing principle as neither a part of custom nor a general principle (Brownlie, 1998, pp. 52–54), [4] despite already being regulated in many national legal systems.

Reflection of *ne bis in idem* is also embodied in many international instruments, *i*.e. the Geneva Conventions III[5] and IV[6] in the context of humanitarian law, human rights conventions such as the ICCPR[7] and ECHR, [8] also in the statutes of international criminal tribunals, [9] including the Rome Statute of the ICC.[10]

The principle of *ne bis in idem* is now acknowledged as an internationally recognized human rights (Tallgren & Reisinger, 2008, p. 904). This is evident as seen from Article 14(7) of ICCPR, Article 8(4) of ACHR and Article 4(1) of Protocol 7 to the 1950 ECHR. As also confirmed by Justice Steward in *Crist v. Bretz,* where he mentioned about few factors that relates *ne bis in idem* with human rights in international context (U.S Supreme Court, 1978, pp. 30-31). The reasoning behind this recognition is that the principle gives the State an obligation to ensure its citizen free from double prosecutions and indefinite adjudication (Tallgren & Reisinger, 2008, p. 903).

There are two distinctions for the application of *ne bis in idem* that coat the issue of admissibility. *Firstly*, an *in concreto* application. This form of operation refers to the identity of a conduct, applying a fact-based approach. *Secondly*, *in abstracto* application, which focuses on the legal similarity of the conduct, allowing a retrial if pressed with different charges.[11] Regardless, the ICTY and ICTR Statutes have all establish that the principle shall apply both ways in conjunction of between the international and national courts.

C. *Ne Bis In Idem* According to Article 20 of the Rome Statute

The rule of *ne bis in idem* had raised several issues in the preparatory work of the Rome Statute, and therefore was omitted from the draft (Tallgren & Reisinger, 2008, p. 911; *Mathieu Ngudjolo Chui*, ICC, 2009, para. 48). Despite some suggestions made by delegations for the ICC to follow the footsteps of the ICTY (Report, ICC, 1995, para. 49), the idea was rejected due to the different nature between the two courts. The contrast distinction is shown from the ICC as a *last*

[4] See also Chorzów Factory Case (Interpretation of Judgments Nos. 7 and 8), PCIJ, 1927, p. 27 (as cited in B. Cheng, 1993, p. 336).

[5] Article 86 of the 1949 Geneva Convention III on Treatment of Prisoners of War provides that "No prisoner of war may be punished more than once for the same act, or on the same charge."

[6] Article 117(3) of the 1949 Geneva Convention IV on Protection of Civilian Persons in Time of War states that "No internee may be punished more than once for the same act, or on the same count."

[7] Article 14(7) of the 1966 International Covenant on Civil and Political Rights provides that "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

[8] See in ECHR, Article 4.

[9] See in ICTY Statute, Article 10; ICTR Statute, Article 9; SCSL Statute, Article 9.

[10] Rome Statute, Article 20 provides for *ne bis in idem* to apply both to prior proceedings by the ICC itself (Article 20(1) to (2)) and, somewhat more qualifiedly, to proceedings before national courts related to the same conduct (Article 20(3)).

[11] The case of *Paul Touvier* in France, on 22 November 1992, may be used as a reference where the Court of Appeal of Paris held that the accused could be tried for crimes against humanity, although he had previously been tried and sentenced to death in absentia for maintaining contacts with a foreign power or its agents for the purpose of assisting its undertakings against France.

resort court,[12] meaning that national jurisdiction still has priority in adjudicating cases before the ICC does (Tallgren & Reisinger, 2008, pp. 687-688; El-Zeidy, 2008, p. 171; Carter, 2010, p. 194), unlike its predecessor *ad hoc* international criminal tribunals that possessed primacy over the jurisdiction of national courts.[13] The drafters also concerned on the placement of the principle in the statute on whether it shall be included as general principle of criminal law or included as procedural matter or even jurisdictional problem of the Court itself (Tallgren & Reisinger, 2008, p. 912). Nevertheless, the principle was finally included under the premise of Jurisdiction, Admissibility and Applicable Law in the Zutphen Draft (Tallgren & Reisinger, 2008, p. 912).

The final product of this drafting process is embodied within the current Article 20 of the Rome Statute. As seen from its wordings, the first paragraph ensures that prosecution against the same person over the same case will not be held. Unfortunately, the Rome Statute gives no clear indication of whether a conviction or acquittal rendered by the first instance is regarded as a final decision or whether only a non-appealable judgment can establish *res judicata* (Tallgren & Reisinger, 2008, p. 914).

On the second paragraph, the Rome Statute directs the provision onto adjudication by another court of a case that has been acquitted by the ICC. The scope of 'another court' here refers to state parties to the Rome Statute (Tallgren & Reisinger, 2008, p. 916), which implements the theory of vertical relation to national jurisdiction, as explained by Judge Wyngaert and Ongena, that is divided into 'downward' and 'upward' restrictions, where it suppresses the possibility for the ICC to retry after state prosecution *vice versa* (Wyngaert & Ongena, 2002, p. 722).

Lastly, the third paragraph connotes that *ne bis in idem* applies differently in comparison to national courts –less strict, in a sense– due to a daunting decision made by the drafters in allowing cases from another court to be retried again by the ICC.[14] According to Article 20(3), an exception to the principle of *ne bis in idem* can apply when the national proceedings were conducted "for the purpose of shielding the person concerned from criminal liability" within the jurisdiction of ICC, or "otherwise were not conducted independently or impartially… [and] was inconsistent with an intent to bring the person concerned to justice".

'Shielding', as regulated in Article 17(2)(a), allows the Court to adjudicate a case that have been previously prosecuted in domestic proceedings, ergo waiving the principle of *ne bis in idem* by virtue of Article 20(3)(a) if the proceedings were meant to shield a person with the intention not to bring the Defendant to justice. On the other hand, the second limb of Article 20(3) is an alternative provision focuses on judges' failure in adjudicating cases. This article requires two elements to be fulfilled. *Firstly*, the question on whether the presiding judge in the national court was not independent or was not impartial, and *secondly*, on whether the proceedings were conducted inconsistently with the intent to bring justice.

[12] See Rome Statute, Preamble and Article 1.

[13] See ICTY Statute, Art. 9; ICTR Statute, Art. 8; SCSL Statute, Art. 8; STL Statute; Art. 5.

[14] The issue of complementarity upon the ICC and domestic authority in adjudicating international crimes in accordance to Article 5 of the Rome Statute is analysed comprehensively in Kleffner, J. K. (2008). Complementarity in the Rome Statute and National Criminal Jurisdictions. New York, NY: Oxford University Press.

D. <u>Potential Violation of Defendant's Rights Caused by the Exclusionary Clause</u>

The exclusion of *ne bis in idem* provides not only justice to the victims, but also results to a suffering felt by Defendants. As mentioned above, this principle was created to value the basic rights and respects the finality of a judgment. The relation between justice and the victims, as noted by the ICTY in *Nikolić* (ICTY, para. 86), is that "punishment must therefore reflect both the calls for justice from the persons who have –directly or indirectly– been victims of the crimes". Justice always leans towards the victim. While in fact, violation of Defendants' basic rights in court would only shift their position as *the* victim of the law itself.

In respect to the finality and conclusiveness of judgments, as seen in *Rola* Co. *v.* C*ommonwealth*, where it mentions that judgment of judicial tribunals is final and conclusive as opposed to administrative tribunals (High Court of Australia, 1944, p. 213). For an accused being acquitted from case removes the constant threat and anxiety. However, being in adjudication again would raise the concern again and it would constitute as a punishment for the defendant even though he is found innocent (Conway, 2003, p. 223). There is no certainty given to Defendants in court, where it should have been given through the *ne bis in idem* principle.

Moreover, repeated prosecutions will inevitably increase the probability of an innocent person being convicted (*Green v. United States*, U.S Supreme Court, 1957, pp. 30-31). Consequently, Defendants will be in weaker comparative position in any subsequent retrial following the disclosure of their defence and evidence at the first trial. This creates an unbalance scale, as there have been established weaknesses from each party. There is also concern that "in many cases an innocent person will not have the power or resources that is effective to fight a second charge" (Friedland, 1969, p. 3-5).

Thus, from Defendants' perspective, *ne bis in idem* should provide security in line with the purpose of the principle itself, that is to give protection from multiple prosecution (Friedland, 1969, p. 4). The exclusion itself act as boomerang, meaning that accused can be tried for over and over again without any guarantee of justice and fairness.

Both of the concerns are closely related to the right to fair trial. Fair trial has been considered as one of the fundamental human rights that aimed to ensure proper administration of justice (OHCHR, 2014, para. 9). The Rome Statute itself, under Article 67 who reflects from Article 14 of ICCPR, has set the minimum standard of human rights for criminals in court. Even though it is not explicitly stated, Defendants' rights to fair trial is impugned by the exclusionary clause. Being in trial for the exact same crime for the second time would clearly questions the legal certainty of law.

The high risk of second adjudication does not only potentially harm the accused, but also the public trust towards the Court. The principle reflects the importance of finality under criminal justice system and to protect the alleged perpetrator from inconsistent result. From this understanding, it proved that the principle holds a significant role in upholding public trust towards the justice system and to respect the judicial proceedings. This will also lead to the benefit of conserving judicial resources (Finlay, 2009, p. 223).

According to some scholars (Cuesta & Eser, 2001, p. 710; van Den Wyngaert & Stessens, 1999, p. 781; Friedland, 1969, pp. 3-5; Tallgren & Reisinger, 2008,

p. 903), a case that has been concluded shall not be reopened (*factum praeritum*) and that decision of a criminal court shall not prevail by other criminal court (*res iudicata pro veritate habetur*). The rationale is that in the first trial, all efforts should be given (Friedland, 1969, p. 4). Therefore, it will minimize the possibility of having second or more adjudication. Again, this will affect to ensure Defendants' rights while at the same time upholding the criminal justice system.

E. A New Concept of Fairness by the Rome Statute

Despite entailing many hurdles, the exclusion of *ne bis in idem* still exists to date within Article 20(3) of the Rome Statute. The concept of fairness to the accused is left to a vague corner, allowing the Court to levy multiple prosecutions if deemed to be needed. Besides, the impression of violating the nature of *ne bis in idem* can actually be alleviated through evaluating the balance it brings to justice. To this current moment, there exist two possible arguments to dodge the prolonged disagreements, those are on the issue of complementarity principle and on the elements of Article 20(3) itself.

a. Complementarity

The complementary nature of the ICC is often seen as a problem when applying exclusion to *ne bis in idem*. As stated by Roy S. Lee [15] during the preparatory work, the Court will be complementing, does not supersede national jurisdiction and can only perform when the State is 'unable or unwilling' to do so (2002). This concept of complementarity was made to ensure the Court to not interfere with national prosecutions, except for cases that falls within the ICC's jurisdiction (Holmes, 2002, p. 675). That being said, the Court comes second in adjudication (Conway, 2003, p. 352), and exemption to *ne bis in idem* is only applied to the matter of 'unwillingness' of States.[16] What concerns many is on how States have its prerogatives in performing legal actions when it comes hand-in-hand with the ICC's jurisdiction through Article 20(3). Since *ne bis in idem* is included under the premise of Jurisdiction, Admissibility and Applicable Law in the Zutphen Draft (Tallgren & Reisinger, 2008, p. 912), this first issue will also reflect to Article 17 on admissibility.

To answer briefly, the issue regarding complementarity would relate back to the concept of treaty obligation. The ICC was established through the consent of state parties, consequently, any ratification or accession will also mean accepting the Rome Statute wholly. States must have been well aware on the conditions that Article 20(3) demands. Furthermore, it is also important to look into the reason why *ne bis in idem* requires a comprehensive assessment prior adjudication by means of admissibility.

Since the wordings of Article 17(1)(c)[17] correlates to Article 20(3), it is understood that the ICC is, simply put, barred to process cases in respect of 'same conduct'. Without any explicit means of interpretation, the Court uses "same person, same case" test.[18] While 'same person' is

[15] Roy S. Lee served as secretary during the process of establishing the ICC in the Preparatory Committee.

[16] See Rome Statute, where the wordings of Article 17(2) on unwillingness is reflected in the conditions set out within Article 20(3)(a) and (b).

[17] Article 17(1)(c) serves inasmuch as a safeguard to preserve judicial integrity on domestic level (Schabas & El Zeidy, 2008, p. 786)

[18] This test was firstly used in the case of *Lubanga* (ICC, para. 24) by the ICC on the issue of admissibility that was submitted by the Defence Counsel due to adjudication that has been conducted by Democratic Republic of the Congo against Mr. Lubanga

self-explanatory, the Chambers in *Laurent Gbagbo* (ICC, para. 10), *Thomas Lubanga Dyilo* (ICC, para. 31) and *Ahmad Harun and Ali Kushayb* (ICC, para. 14) have consistently concluded that 'same case' shall means specific incidents where crimes that falls within ICC's jurisdiction have been committed by identified suspects. Thus, the approach here is that if the conduct or incident is the same, therefore *ne bis in idem* applied. It is to be noted that specific incidents provided in arrest warrant do not represent a manifestation of criminality (*Gaddafi*, ICC, 2014, paras. 82-83).

In any case *ne bis in idem* does apply, the exclusionary clause will be evaluated to dismiss this principle. Although precedence of Article 20(3) is still lacking, any assessment of this article shall be determined alongside with the issue of admissibility and determined in a case-per-case basis (*Gadaffi*, ICC, 2014; *Mathieu Ngudjolo Chui*, ICC, 2009) in the context of complementarity.

It is to be reminded that the ICC was designed specifically to prosecute those responsible for 'the most serious crimes to the international community as a whole'.[19] The underlying concept of ICC's complementarity solely lies upon the *ratione materiae* relating to Article 5 of the Rome Statute, that are Genocide, Crimes Against Humanity, War Crimes, and Aggression. Article 20(3) by no means establish any *primacy* to ICC's jurisdiction, especially since the exclusionary clause can only be invoked if other courts (including national court) have processed the accused, yet deficiency is found within it and hampers justice to be served.

b. The Elements in Article 20(3)

Here, the exclusionary clause itself have raises perception of outweighing the idea of *protecting Defendants rights*. In spite of the optimism set out about *ne bis in idem* throughout the statute, the exclusionary clause still exists to date – somewhat shows ICC's disbelief on national courts due to the tendency of protecting its own nationals (Cryer, 2006, p. 985). A new set of rules have then been introduced to qualify if a dismissal is deemed to be necessary, shown within Article 20(3) as well as Article 17(2) in relation to unwillingness.

i. Shielding

In the commentary of the Rome Statute, the phrase '*shielding*' is said to be one amongst the more difficult term to define (Tallgren & Reisinger, 2008, p. 926), it even received strong criticism for being too subjective to be defined. In the context of sub-paragraph (a) carried out by State, a trial can be regarded as 'shielding' if there is any intentional deficiency found throughout its adjudication, leading to a negative result of that trial (El-Zeidy, 2008, p. 175). The term negative does not necessarily refer to the verdict or the judgement substantially. Instead, it uses a process-oriented approach to determine whether justice has been achieved, despite the term 'justice' ought to be understood as prosecuting a person by arresting him and trying him in court (Fry, 2012, pp. 48-50). In this sense, the less accurate and thorough the proceedings are, the higher indication the intent of shielding a person from criminal responsibility would be (El-Zeidy, 2008, p. 175). Another indication that could meet the first limb of Article 20(3) is from imposing disproportionate charges. Example to this is if in a case where an atrocity amounting to a serious crime, say genocide, but is charged disproportionately only as an ordinary crime, such as an assault (Tallgren &

[19] See Rome Statute, Preamble

Reisinger, 2008, p. 926). Therefore, the ICC will have the power to render a national court's decision for a dismissal if the condition mentioned above is met.

As been perfectly laid out by Cryer, a broader goal of international criminal law aims for "prosecutions [to] engender a sense of justice having been done, or 'closure' for victims" (Cryer, 2011, p. 30). The notion of shielding is a legitimate concern to be raised, since improper proceedings would only hamper a *bona fide* prosecution, and to some certain extent results to impunity. That being said, the first element of shielding is a necessary input to the Court to manifest its objects and purpose of bringing justice over international crimes.

ii. Independence, Impartiality, and Inconsistency in Bringing Justice

For justice to be really blind, judges are required to have certain characteristics, regardless their judiciary level. Judicial independence, for example, is an essential trait that judges should have as administrator of justice. The ICC has its own interpretation of this terminology, where the Rome Statute strictly limits ICC judges in partaking into activities that would interfere or to affect their independence. [20] From its ordinary meaning, 'independent' is defined as someone who is not subject to a control of another (Garner, 2009, p. 838). Meanwhile the element of 'impartiality' is a judicial characteristic of disinterest towards parties and their causes (*Brdjanin*, ICTY, para. 13). If a verdict is based on a partial consideration, it would only create unjust and defeat the purpose of a court. Although a judge shall always be seen with the presumption of correctness (Wilkinson, 1989, p. 788), impartiality could be easily be invalidated from the existence of a bias or prejudice. For an example, the ECtHR has a set of tests in determining the existence of bias[21] that could be used in this regard: The subjective approach regarding the personal behaviour of a judge over a case; or the objective approach that rely on certain facts that could determine bias indeed exist.

The lack of independency or impartiality is to be read cumulatively (Tallgren & Reisinger, 2008, p. 927) with the rest of the element that determines on whether there is an intent in failing the objective to bring justice. This final clause requires a distinction to be made between a mere mistake in adjudication or such mistake is intended. This would require the previously mentioned elements of Article 20(3)(b) to be objectively analysed and evaluated with the concept of due process per required. Similarly, with the explanation provided above about 'shielding', the purpose of the Court is to end impunity.[22]

Though it may seem controversial to examine a judge's independence and impartiality, Article 20(3) does not automatically render a national court's practice relating to due process to be inevitable, since the scrutiny still needs to meet and adhere with the standards of the Rome Statute. That being said, if the Prosecutor finds the necessity to contest *ne bis in idem* on the basis of Article 20(3)(b), the importance of *res judicata* should be overlooked, especially when international crimes are committed, in order to maintain

[20] Rome Statute, Article 40

[21] The test is consistently used in the ECtHR proceedings, as seen in *Piersack v. Belgium*, para. 30; *De Cubber v. Belgium*, para. 24; *Hauschildt v. Denmark*, para. 46; *Bulut v. Austria*, para. 31; *Castillo Algar v. Spain*, para. 43; and *Incal v. Turkey*, para. 65.

[22] See Rome Statute, Preamble.

the objectives of the ICC in creating a just process of law.

F. Conclusion

This article began by establishing the concept of *ne bis in idem* in the scope of ICC according to Article 20 of the Rome Statute. While purposed to protect Defendants from being subjected to multiple prosecutions, the ICC is also allowed to exempt the final judgement of national courts, which consequently fails the whole understanding of *ne bis in idem*. The only exception to this principle can only be invoked if there was a defect or 'unwillingness' from the State that adjudicated the case beforehand.

The ICC is yet to perform, or at least give a definitive answer on how the objectives to the exclusionary clause could outweigh the whole understanding of *ne bis in idem* from the Defendant's perspective. With no cases to refer to, the Authors concluded that the object and purpose of the ICC and also the Rome Statute shall always be used as the main reference to respond the underlying problem regarding the vivid balance as introduced in the beginning.

Indeed, the current practice of *ne bis in idem* still contains loopholes. The issue covering any potential harm to Defendants' rights or the broad concept of fairness that the ICC implements should still be a subject of a further research. This leaves the ICC a task to provide a delicate balance to benefit the accused, the States, and the international community from the implementation of Article 20(3) of the Rome Statute in the future.

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A CRITICAL LOOK AT THE MECHANISM FOR CHALLENGE OF ARBITRATORS UNDER ICSID CONVENTION AND ARBITRATION RULES*

Ivan Gautama**

Abstract

Administered arbitrations under ICSID are amongst the most-utilized means to resolve investor-state disputes. Part of why it is so is because the ICSID as an institution is heavily affiliated with the World Bank. This affiliation serves as a double-edged sword in ICSID's hands: while on one side such affiliation lends ICSID the credibility any successful arbitral institutions need, on the other side ties between the two institutions are proving to become too close for comfort. This paper explores what could go and has gone wrong in the past within the current ICSID arbitration system with regards to the mechanism for challenging arbitrator(s), and whether such mechanism allows ICSID to effectively deliver what it is expected to provide.

Intisari

Proses arbitrase di hadapan ICSID adalah salah satu cara penyelesaian sengketa negara-penanam modal yang paling sering digunakan. Sebagian alasannya ialah karena ICSID sebagai sebuah institusi berafiliasi erat dengan Bank Dunia. Afiliasi ini menjadi pedang bermata dua di tangan ICSID: di satu sisi hal tersebut memberikan ICSID kredibilitas yang dibutuhkan institusi arbitrase sukses manapun, di sisi lain keterikatan antara kedua institusi tersebut terlihat terlalu erat dari sewajarnya. Artikel ini menelusuri apa yang dapat dan telah menjadi masalah di masa lampau dalam sistem arbitrase ICSID sehubungan dengan mekanisme penentangan arbiter, dan apakah mekanisme tersebut mengizinkan ICSID untuk secara efektif memberikan apa yang diharapkan darinya.

Keywords: ICSID, investor-state, World Bank, arbitration, challenge, arbitrator, conflict of interest

Kata Kunci: ICSID, negara-penanam modal, Bank Dunia, arbitrase, penentangan, arbiter, konflik kepentingan

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A. Introduction

It is not an exaggeration to say that international commercial arbitration is rapidly gaining traction in the past decades. One of the many reasons why arbitration is such a popular dispute resolution mechanism is because of its flexibility. What makes arbitrations appealing is the opportunity for the parties to determine the rules of the proceedings, depending on the strategy the parties wish to take. For example, a party could make life harder for its counterpart by prolonging the proceedings, to deplete the financial resource of their opponent. To quote Gary Born, a prominent jurist in such field, "Dispute resolution mechanisms must fulfill difficult, often thankless, tasks, particularly in international disputes: parties [who] are often bent upon (mis)using every available procedural and other opportunity to disadvantage one another…" (Born, 2014, p. 68).

An essential part of arbitration procedures that parties are "often bent upon (mis)using" is the mechanism of arbitral challenges. The process of challenging an arbitrator is an important safeguard in maintaining the integrity of the tribunal and the confidence of the parties in the tribunal. Furthermore, the composition of the tribunal is also important by extension to the enforceability of an arbitral award; although infrequent, it is possible to render an award unenforceable due to procedural issues under the 1958 New York Convention, which is the international instrument responsible for ensuring the enforceability of an arbitral award. Therefore, it is all the more important to ensure the correctness the ability to challenge the appointment of an arbitrator.

An interesting yet unresolved issue on the topic of arbitral challenge mechanism is about the allegations that such mechanism is still lacking under the International Centre for Settlement of Investment Disputes ("**ICSID**") Convention. As the leading arbitral institution in the field of investment disputes, ICSID is an institution under which a great number of disputes with far-reaching impacts are resolved. However, despite its achievements, ICSID has also seen major setbacks, such as the withdrawal of Bolivia's, Ecuador's, and Venezuela's memberships within 8 years; this is especially upsetting considering that such withdrawals are rare and are strong indicators for lack of faith in the institution (Grant, 2015, pp. 20-22). Such setback arises out of alleged issues in the system.

There are two alleged issues that this paper would particularly focus on: first, the perceived conflicts of interest of the ICSID Chair, who plays many significant roles in arbitration proceedings under the Convention and Rules, and second, how this conflict of interests affect ICSID's mechanism for challenged arbitrators. To find out where did the ICSID system go wrong in these alleged issues, the questions should be answered step-by-step: (i) *what* is generally expected from ICSID as an arbitral institution, (ii) *what* are the perceived conflicts of interests of the ICSID Chair, and (iii) *how* do these conflicts of interests affect ICSID's mechanism for challenged arbitrators, and what can be done about it? These questions will be the topic of each of the following sections in that respective order.

This paper will apply a more "internally-focused" legal methodology, to borrow the term used by Morris and Murphy (2011, pp. 30-31). This means that the research will mainly remain in the context of the legal field without giving too much consideration to the approach of other disciplines, if not at all. The analysis will employ a more comparative legal approach by taking into account other relevant rules concerning the same subject-matter, i.e., arbitrator challenge mechanism.

B. ICSID administered arbitration: what am I getting and what's the catch?

It is widely known that there are, in principle, two distinct forms of international commercial arbitration: institutional and *ad hoc*. According to Schroeter (2017, p. 185), the general distinction between the two distinguishes institutional arbitration as an arbitration in which the parties have

delegated to an arbitral institution "the power to make binding decisions on certain procedural matters", while any other arbitration that falls out of this definition should be classified as an *ad hoc* arbitration. With regard to "the power to make binding decisions on certain procedural matters", Schroeter noted that it is not the administrative services delivered by the arbitral institution that is determinative of whether an arbitration is institutional or *ad hoc*, but rather, the institution's decision-making power, or its "gatekeeper function". The question to be answered in determining an arbitration as an institutional or an *ad hoc* one is therefore not *which* administrative services the arbitral institution provides, but rather *how* an arbitral institution administers to the proceedings; while in both *ad hoc* and institutional arbitrations parties are obliged to respect the mandatory rules of the *lex arbitri*, institutional arbitrations goes a step further by obliging parties to respect the mandatory rules provided by the institution. Without question, the wider limitation of party autonomy through mandatory institutional rules in institutional arbitrations is an essential feature that distinguishes institutional from *ad hoc* arbitrations.

Why would then a party choose an arbitration which limits their autonomy, which presumably has always been a key reason of why a party chooses arbitration over other dispute resolution mechanism (Born, 2014, pp. 70-93)?

Institutional arbitrations are often regarded as having fewer risks of procedural breakdowns (such as impasses on the appointment of arbitrators or, as will be discussed further later, on a challenge of arbitrators), thanks to the involvement of professional staff. Institutional arbitrations also often contain more set provisions that provide for reliable and expeditious arbitral proceedings (Born, 2014, p. 171). Another less direct yet practical advantage of institutional arbitrations is also the degree of credibility it gives to the award that allows for more reassurance with regard to the enforcement of the arbitral awards; although it has been noted that it is not the institutional nature of the arbitration itself that lends this reassurance, but rather the reputation of the arbitral institution (Lew, Mistelis, and Kroll, 2003, pp. 36-37). Reasonably, the two are inextricably linked. The reputation of an arbitral institution of course largely depends on how good such institution is in doing their job; particularly, how reliable and expedient are they in administering a proceeding?

Having established what distinguish institutional arbitration from an *ad hoc* one and some key reasons why a party would choose the former over the latter, the trade-off is now clearer to see: in giving up a larger share of autonomy, parties expect to be less bothered by procedural matters and the enforceability of the award; the former is the price, and the latter is the goods.

So, what did parties 'pay' for when they chose arbitration under ICSID? Firstly, one must identify the mandatory rules that distinguishes ICSID's arbitrations as institutional.

There are two main bodies of rules in ICSID that should be consulted when it comes to arbitrations: the ICSID Convention and the ICSID Arbitration Rules. According to Article 44 of the Convention, mandatory rules are to be found under the Convention, while the nature of the Arbitration Rules is nonmandatory; parties are free to exclude and/or modify some or all of the Rules (Schreuer, Malintoppi, Reinisch, and Sinclair, 2009, pp. 676-677). Parties' discretion with regards to the Arbitration Rules is however limited if it comes to restatements of mandatory provisions of the Convention (Schreuer et al., 2009, p. 679). For instance, Rule 7 of the Arbitration Rules states that each party may replace any arbitrator appointed by it before the Tribunal is constituted; this corresponds with Article 56 of the Convention, which states that after "a Tribunal has been constituted and proceedings have begun, its composition shall remain unchanged…".

There are numbers of other mandatory provisions within the Convention. For instance, mandatory

provisions regarding the procedural matter would include Article 48, 49, 50, 51, 56, 57, and 58 (Schreuer et al., 2009, p. 676). Provisions in the Arbitration Rules that corresponds to these articles are therefore non-derogable.

As indicated in the title of this paper, it is in this essay's interest to pinpoint the mandatory provision relevant to the procedure of challenging an arbitrator (or more). That mandatory provision would be Article 58 of the Convention, which describes the decision-making procedure of an arbitral challenge. What this means for parties choosing ICSID administered arbitrations is that, by extension, parties *choose* to give up their autonomy in deciding how to resolve an arbitral challenge and entrusts ICSID with the task to resolve such issue in a reliable and expedited manner. Although it is now clear what is it that parties specifically expect from an ICSID administered arbitration in terms of the mechanism of the challenge of arbitrators and what they have to give up for it, the question of whether the parties receive what they are promised is yet to be discussed in the upcoming sections.

C. Institutional Conflicts of Interest

Numerous papers have been written on the topic of institutional conflicts of interest arising from the relationship between ICSID and the World Bank. For example, Julien Fouret opened his essay by quoting Shakespeare: "*The voice of parents is the voice of gods, for to their children they are heaven's lieutenants*" (Fouret, 2007, p. 121). Indeed, the Bretton Woods institution has been generally perceived as being the 'parent' of ICSID (Fouret, 2007, p. 121; Kantor, 2006, p. 213), which is unsurprising considering the fact that it was established by the World Bank (Blackaby, Partasides, Redfern, and Hunter, 2015, p. 54). And it still shares the same office building with the World Bank. This relationship is a double-edged sword: on the one hand, it does credit for ICSID to be closely affiliated with such an established institution (Tuck, 2007, p. 190). However, such affiliation may be too close for comfort for some and thus may end up diminishing the credibility of ICSID, which would prevent ICSID from providing an optimal service towards disputing parties (see the previous section). Although there are numbers of aspects of this issue that can be explored, this section will scrutinize the overlapping office of the ICSID Chair and the World Bank President, and the result of such towards the impartiality and independence of the ICSID.

On the matter of Article 5 of the ICSID Convention, it is clear from the outset that, as a rule, the President of the World Bank should be the ICSID Chair (i.e., Chair of the Administrative Council) *ex officio*. This alone is sufficient to give rise to doubts towards the impartiality of the ICSID Chair, especially in cases where for instance, the ICSID Chair, an advocate of certain restructuring policies in his/her position as the World Bank President, is involved as a conciliator in a dispute that concerns economic reforms (Fouret, 2007, p. 126). Furthermore, aside from being the ICSID Chair, the President of the World Bank is also the President of the International Financial Corporation (IFC), which functions to assist the progression of the private sector in developing countries through investments; Fouret (2007, p. 127) noted that this "interesting nebula of offices" may pose as a major issue should a company in which the IFC has invested in be engaged in an investment dispute against a government. In the working papers of the ICSID Convention, Pieter Lieftinck [1] expressed a similar concern by posing the same hypothetical case, which he regards as a case that "might certainly" happen (Origin and Formulation of the Convention, 1968, para. 68).

There are several cases that could illustrate these hypothetical risks. The first one is *Aguas del Tunari S.A. v. Bolivia*

[1] Pieter Lieftinck was an ICSID Executive Director serving from 1955-1971 and was a Professor of Political Economy at the Netherlands School of Economics in Rotterdam before the Second World War. He was also the Minister of Finance of the Netherlands immediately after the Second World War, see A Parra, *The History of ICSID* (OUP 2012), p. 38.

(2005). In that case, *Aguas del Tunari* is a consortium owned by, *inter alia*, International Water Ltd. In 1999, *Aguas del Tunari* successfully acquired a concession on the water and sewage services in Cochabamba, which is the third largest city in Bolivia, as part of the government's attempt to privatize the sector. This essentially makes *Aguas del Tunari*, a consortium controlled by a foreign party, in the position to manage the whole water system of the city for forty years. The conclusion of this contract greatly concerns many parties, including locals and NGOs, especially at the prospect of a private foreign party managing the city's water system for their own financial benefit while disregarding public service. At the beginning of 2000, riots were incited in the city against *Aguas del Tunari*'s attempt to raise the water rates. The disapproval of the public towards the consortium came to the point where the government terminated the concession contract. Thus began a heated case between a private investor and the local public.

In the ensuing arbitration, administered by ICSID, the parties failed to agree on the appointment of the President of the Tribunal, allowing *Aguas del Tunari* to request the ICSID Chair to designate an arbitrator as the President of the Tribunal in accordance with Article 38 of the ICSID Convention and Rule 4 of the ICSID Arbitration Rules. At this point, it is important to note that there is room here for an abuse of power; the ICSID Chair, i.e., the World Bank President, could for instance, appoint an arbitrator that favors World Bank policies or favors the protection of the interest of the investors. Fortunately, in this case, the ICSID Chair appointed an established scholar, Professor David Caron, as the President of the Tribunal. However, this reassurance is provided mostly by the reputation preceding the person chosen by the ICSID Chair. The concern for possible abuse of power due to the Convention and Rules still lingers. Although the *Aguas* case ended with a settlement between the parties, numbers of cases with similar stakes remain. For instance, there are six cases on the matter of privatization of fresh water systems in Argentina as a result of the World Bank's policy to promote the privatization of the sector (Fouret, 2007, p. 134).

Another case that illustrates the conflict of interests *in concreto* is the *Generation Ukraine v. Ukraine* (2003). On 21 July 2000, an investment dispute between a U.S. company, Generation Ukraine, and Ukraine began. The crux of the issue arose when the Claimant filed a request for disqualification of Dr. Jürgen Voss, the arbitrator nominated by Respondent. In attempting to decide whether Dr. Voss should or should not be disqualified, the tribunal reached a deadlock. As such, following the ICSID Convention and Rules, the ICSID Chair is called upon to decide.

The problem in the fact that it falls to the ICSID Chair to decide is that Dr. Voss has had extensive involvement with the World Bank; at one point, he was the Deputy General Counsel at MIGA, a member of the World Bank Group. Thus, a conflict of interests emerges. The ICSID Chair at the time acknowledged this, and wisely decided that the decision should not fall upon his office. Instead, the Chair delegated the question of Dr. Voss's disqualification to the PCA Secretary-General. Again, the positive outcome of this case is not due to the existing system under the ICSID Convention and Rules, but instead, due to the exceptional character of the ICSID Chair at the time. In *Siemens v. Argentina* (2007), similar circumstances arose in which the two remaining arbitrators submitted separate opinions and was solved with the same solution of delegating the decision to the PCA Secretary-General.

Therefore, there is still room for a case to arise; and if it does unfortunately arise, the parties will be unable to rely on the ICSID Convention and Rules, but rather on the character of the Chair.

D. Conflict of interests and challenging an arbitrator

In the previous section, the case *Generation Ukraine v. Ukraine* was briefly

discussed to illustrate the issue with the office of the ICSID Chair. It is imperative to note as well that the situation in that case would not have existed in the first place had the ICSID Convention and Arbitration Rules not left the question of an arbitral challenge to be answered by the remaining arbitrators; as is apparent in *Generation*, the deadlock between the remaining arbitrators due to the fact that there are two of them results in a prolonging of the procedure, which would not do ICSID credit. To discuss this issue, a three-member tribunal – which is a common sight (Born, 2014, p. 9; Lew et al., 2003, p. 229) – will be presumed.

The risk of deadlock in an ICSID arbitral challenge situation mainly arises from the general principle of *nemo iudex in causa sua*, or 'no one should judge in his own cause'. In a tribunal of three arbitrators, if one of them is challenged due to alleged partiality or dependence, this would mean that the challenged arbitrator should not by himself judge the accusations against him (Koch, 2003, p.333), as there is a perceived risk that the challenged arbitrator would be partial towards his own cause. Article 58 of the ICSID Convention and Rule 9(4) of the Arbitration Rules adhere to this principle, stating that the decision towards the challenge should be left to the remaining two arbitrators. Two-member tribunals are, however, generally perceived as being problematic as it gives room for the risk of unresolvable disagreement between two arbitrators (Waincymer, 2012, p. 273; Blackaby et al., 2015, p. 238). Such risk is great enough to prompt several countries to ban two-member tribunals (Dutch Code of Civil Procedure, art. 1026 (1); Belgian Judicial Code, art. 1681) or at least disallow it by default (English Arbitration Act 1996, s. 15(2)).

Fairness aside, the *Generation Ukraine* case has displayed the significant role of the ICSID Chair should the risk of deadlock materialize in deciding an arbitrator's challenge; such role also extends to situations where two arbitrators, or even the whole tribunal, are challenged at the same time. This is the case in *Sempra v. Argentina* (2007) and *Pey Casado v. Chile*, where the Respondents in both cases proposed to disqualify the whole tribunal and therefore it fell to the ICSID Chair to make the decision on the challenges; while in *Sempra* the ICSID Chair did take that decision and rejected all of the challenges, in *Pey Casado* the ICSID Chair once again delegated the decision to the PCA Secretary-General.

The risk of deadlock in the current system of challenging arbitrators is therefore supposed to be answered by the ICSID Chair, an official with many conflicts of interests as elaborated in the previous chapter. This is the problem; what is then the solution?

A comparative insight is in order. In the UNCITRAL Model Law,[2] the challenged arbitrator(s) is involved despite several objections (Yearbook of the UNCITRAL Vol. XVI, 1985, p. 433; Report of Secretary-General, 1985, p. 10), although as a safety measure it also provides that a party can appeal the decision to a national court after the conclusion of the proceedings.[3] The working papers of the UNCITRAL Model Law did not specify the reasoning behind this choice aside from implying that it is for the sake of effectiveness and efficacy (Yearbook of the UNCITRAL Vol. XIV, 1983, p. 53). On efficacy, it is certainly reasonable to have a three-member tribunal that will arrive sooner at an answer towards the challenge by mitigating the risk of a deadlock; however, it will not be as effective as a two-member tribunal in eliminating risks of partiality and could therefore, result in

[2] 2006 UNCITRAL Model Law is a set of arbitration procedures designed to assist States in implementing (in their national legislations) arbitration rules that are deemed to be required for the purposes of international arbitration. Thus far, 80 States have adopted national arbitration rules based on the Model Law, and therefore should be considered as one of the most authoritative arbitration rules. See https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

[3] This would however be unfavorable in general for both parties, as participants of arbitrations often tries to keep the publicity of their case as low as possible, if not to eliminate it entirely.

more controversy. Furthermore, a three-member tribunal does not remove the risk of a deadlock; in *Srpska v. Bosna & Herzegovina* and ICC Case no. 1703/1971, the tribunal reached a deadlock on deciding a challenge against an arbitrator. Although they are exceptional cases, another set of arbitration rules – the UNCITRAL Arbitration Rules – apparently deemed that this risk of deadlock in a three-member tribunal is significant enough to justify a revision in the revised UNCITRAL Arbitration Rules, which allows the presiding arbitrator to decide alone if there is no majority (Paulsson & Petrochilos, 2006, p. 128). Allowing the challenged arbitrator to participate in deciding the challenge is therefore a possibility, but with its own drawbacks on violating the principle of *nemo iudex* and still allowing a, albeit smaller, degree of deadlock risk.

Another possibility is to entirely delegate the decision of a challenge to a third party. The weighing of the *nemo iudex* principle and the risk of deadlock only occurs in arbitration rules that require the appointed tribunal to decide on the challenge; such arbitration rules are part of the minority: ICSID and UNCITRAL Model Law are the two prominent few, while ICC, LCIA, SCC, SIAC, PCA, and UNCITRAL Arbitration Rules all delegate the decision to a third party (Waincymer, 2012, pp. 321-323).[4] There is, therefore an established practice of letting a third party decide the challenge(s). The ICSID Chair plays the role of such third party in the current system, with the condition that the tribunal must first try to decide on the challenge. However, what could be done differently then, is to delegate the decision on the challenge to the third party right from the start, and designate a third party that does not, or at least possess a minimal degree of, conflict of interests.

Earlier, it was made clear that the ICSID Chair has in several cases come up with the solution of delegating the decision to the PCA Secretary-General. This is undesirable in terms of reputation, as it gives the impression that ICSID is dependent on the office of another institution. What ICSID can do, instead of sporadically delegating functions such as the mechanism of the challenge of arbitrators to other institutions, is to form entirely separate management from the World Bank, one that is exclusively committed to ICSID. By doing this, the issue of conflict of interests will be significantly solved, and the procedures of an arbitral challenge will be more predictable and therefore reliable. Scholars and practitioners have supported this (Fouret, 2007, p. 143; Tuck, 2007, pp. 910-911), especially considering that there is a growing necessity for a reliable arbitration system that possesses a minimum level of risk of impasses and procedural breakdowns, if none at all. It is time for ICSID to stop playing the sidekick; and on that note, perhaps the first step would be to move out of the World Bank's office and find their own place.

E. Conclusion

The previous sections set out to analyze whether the ICSID mechanism for the challenge of arbitrators sufficiently fulfills what is expected from it. To begin, the link between ICSID and the World Bank, and especially the overlapping offices of ICSID Chair and World Bank President, was scrutinized. Although being affiliated with the World Bank gives a degree of credibility, ICSID ultimately suffers in this regard; where the ICSID Chair is involved, the political interests of the World Bank president will be perceived. The *Generation* case serves as an important reminder for this. The *Generation* case is also where the inefficiency of the ICSID arbitral challenge mechanism is exhibited; a silver bullet was avoided not by virtue of the office, but the fortunately good character of the person in office. This not only highlights the unresolved issue of room for abuse of

[4] Abbreviations stands for (in order): International Chamber of Commerce, London Court of International Arbitration, Stockholm Chamber of Commerce, Singapore International Arbitration Centre, Permanent Court of Arbitration, and UNCITRAL Arbitration Rules.

power, but this also means a lengthier process; instead of a month at most, it took at least three months.

The final section discussed the effect of the ICSID Chair's conflict of interests on ICSID's mechanism for challenge of arbitrators. The conclusion that the current system is problematic due to the problem with the ICSID Chair's office and that allowing the challenged arbitrators to take part in the decision is a solution not without considerable compromise and drawbacks of its own, has led to the third alternative of having an administration that is structurally independent from the World Bank. Cutting off structural ties with the World Bank may take away a certain degree of reputation away from ICSID, however it will allow the institution to grow more. In the words of Kahlil Gibran: "[Parents] are the bows from which [the] children as living arrows are sent forth;" indeed the World Bank as a bow must 'send forth' ICSID as an independent, 'living', institution of its own.

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THE RIGHTS OF THE WICKED: THE HURDLES OF PROTECTING WITCHCRAFT ACCUSATION & PERSECUTION VICTIMS WITHIN SOUTH AFRICA'S LEGAL SYSTEM*

Aicha Grade Rebecca**

Abstract

In the 21st century, human race fail to realize that there are still problems emerging from ancient beliefs that have continued to be believed by various tribes in the world leading to persecution of children and other minorities who's associated with black magic and occult power. Cases like this often occur with no recognition by the wider community because of the "*vigilante*" culture with accusations that is related with black magic.

This article tries to give an idea of this phenomenon through various aspects (both social and legal) that hampered the State's ability to protect Accusation and Persecution (WAP) Victims. The discussion would be divided into parts that include 1) The beliefs of this concept held in Africa 2) The socio-economic factor that are believed to be stimulants for the occurrence of related phenomena and 3) Legal perspective (by using the example from South Africa) that include the conflict between customary law and codified laws that is both recognized within the South African Constitutions as well as the issue of cultural defense and extenuating circumstances in legal proceedings. Lastly, there's also a discussion of the role of African Court of Human Rights (ACHR) within this matter, and the writer hopes that this would enlighten the reader about the complexities of this particular human rights issue.

Intisari

Dalam abad ke 21, manusia gagal menyadari bahwa masih banyak permasalahan yang muncul dari kepercayaan kuno yang masih dipegang oleh berbagai suku bangsa di dunia yang memicu persekusi anak-anak serta kelompok minoritas lain yang berkaitan dengan ilmu hitam dan okultisme. Kasus semacam ini sering terjadi tanpa adanya kesadaran dari masyarakat luas akibat budaya "main hakim sendiri" atas tuduhan yang berhubungan dengan ilmu hitam.

Artikel ini mencoba untuk menjelaskan fenomena tersebut melalui beberapa aspek (baik sosial maupun legal) yang menghambat kemampuan Negara untuk melindungi Korban Tuduhan dan Persekusi (KTP). Pembahasan ini akan dibagi ke beberapa bagian termasuk 1) kepercayaan konsep tersebut di benua Afrika 2) Faktor sosio-ekonomi yang dipercaya menjadi stimulant terjadinya fenomena terkait dan 3) perspektif hukum (dengan menggunakan contoh dari Afrika Selatan) yang mencakup konflik antara hukum kebiasaan dan tertulis yang diakui dalam konstitusi Afrika Selatan serta masalah pembelaan budaya dan kondisi meringankan dalam proses peradilan yang harus ikut dipertimbangkan. Selain itu, ada pula diskusi mengenai peran Mahkamah Hak Asasi Manusia Africa (ACHR) atas hal ini, dan penulis berharap hal tersebut dapat menjelaskan kepada pembaca mengenai kompleksitas masalah HAM ini.

Keywords: Witchcraft accusations, Persecutions, ancient beliefs, tribes, black magic, human rights, Africa, African Court of Human Rights (ACHR), cultural defense

Kata Kunci: Tuduhan sihir, persekusi, kepercayaan kuno, suku, ilmu hitam, HAM, Afrika, Mahkamah HAM Afrika, pembelaan budaya

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A. Introduction

On the 10th March 2014, the UN Special Representative of the Secretary General, Martha Santos Pais includes a horrifying picture within her opening remarks in the Human Rights Council where she portrayed "*A drawing which pictured a little boy with albinism tied to a tree, very far away from the village, being attacked by a lion… it's an image I keep vividly in my mind*" (Remarks, 2014).

Four years later, the UNHRC held the WHRIN: *The United Nations Expert Workshop on Witchcraft and Human Rights*. This workshop is groundbreaking; it was held by the UNHC that was attended by numerous professionals and human rights professionals as a direct measure to create a platform to address the issue of Witchcraft Accusations and Persecutions ("**WAP**") as a violation to human rights. This conference also acted as a wakeup call for every stakeholder involved to finally acknowledge the reasoning and the structural factors that created the *raison d'etre* behind this ongoing phenomenon (WHRIN, 2016).

This case is an example out of an abundant unsolved question from the past that created questions and legal issues in the modern world. The lack of actions would create further human rights violations to a minority group, especially to the *albinism* children that was included within the foresaid opening remarks. The phenomena has already been reported to happen in many parts of the world that includes Nepal, India, Indonesia, Pakistan, Papua New Guinea, Thailand, Mexico, Saudi Arabia, Iran, Syria, Bolivia, Guatemala and Haiti (Alston, 2009; Foxcroft, 2009; Schnoebelen, 2009). However, the writer chose to limit the focus on the witchcraft accusations that happened in the African Sub – Saharan region due to the fact that these accusations are deeply rooted in African Culture and in African Countries (Alston, 2009; Foxcroft, 2009; Schnoebelen, 2009).

The previous statement was based upon the local belief of the African society where they believed in the *dualism* idea of the world where there is another world other than the one we live in. This world; is divided into the "*visible*" world (physical ones) and the "*invisible*" world of darkness. The latter is believed to be invasive of the former as they didn't co-exist with each other, and the accusations of witchcraft are proof of the latter world extending to the physical world and this would eventually disrupt the harmony of the world that we live in (De Boeck, 2000). The local communities believed that this is the reason why there are existences of plagues, sickness that leads into death and famine. Eventually, this "*logic*" creates an urgency for the community to identify the witch, where it is assumed that they have caused "harm" that is suffered by the possible victims, who usually comes to the "*vulnerable*" members of the society that includes women, elderly, children or those "who are somehow "different", feared or disliked (Alston, 2009).

The fact that based on WHRIN's data that was presented in the year 2016, a total of 398 reports were documented from 49 countries, where witchcraft beliefs and practices were reported in every continent and were associated with high levels of violence. The highest number of reports came from the African continent clustered in particular regions or states including Nigeria (67 Cases), Zimbabwe (29 Cases) and South Africa (28 Cases), affirms the applicability of the theory that has already been presented above, and creates more urgencies in regards to the solutions for this matter.[1]

B. Understanding the Motives

Other than the belief of the traditional community that has already been presented above, these polemics also has different reasons that can be explained through 1) **Social Factors** as

[1] Data gained from 2013 Global Report (A Report by Witchcraft and Human Rights Information Network (WHRIN) Presented at UN Human Rights Council Session 25 March 10 2014 (Accessed: https://www.whrin.org/wp-content/uploads/2014/03/WHRIN-UN-report_small-FINAL.pdf)

well as **2**) **Economic Factors**. The writer would like to suggest that these factors to be included within the discussion in order to analyze the background of the perpetuation of this human rights issue.

a. Social Factors

The reality is; the African society has experienced dramatic changes throughout the years. These changes include the urbanization of the rural population and the shift of traditional beliefs to *modernism*. These processes would eventually lead to one point; breakdown of traditional relationships. Flustered with political instability, civil wars and extreme poverty, it created layered problems/ multi-faceted conflict where these problems build up to a relatively tense social relations with no outlet to channel the tension and usually, this become a fertile breeding ground for witchcraft allegations (Foxcroft, 2009).

The aforesaid hotspot within Foxcroft theories is related to another concept: the concept of social capital where according to Robert Putnam (1993) witchcraft accusations and allegations are reserved as the "approved" outlet to channel the social tensions that are believed to have built a norm of reciprocity, trust and relates to elements that improve the efficiency of social organizations (Putnam, 2002). This is a pretty complex reality, where this belief is not only rooted within the locals' way of living of African citizen but this is also used as a short-term solution of the problems that have been going on within the African society.

The fact that Africans have a relatively conservative belief and low level of education also acted as a stimulant towards the existence of this phenomenon. Research has shown even though most children who are accused of witchcraft does not have one single criterion, but they are children "different" than regular children, that includes children with disabilities or albinos – or because they are "difficult" – undisciplined or rowdy children. Other targeted groups include children with psychological disabilities or epilepsy (Save the Children. 2006). This is the reason why Robert Putnam's *Social Capital* theory can be applied within this setting: since the issue of witchcraft can also be taken as the available outlet to channel social tensions since the local community are ignorant towards the fact that even though these victims are different, doesn't mean that they shall be associated with witchcraft practices.

Table 1- Signs of witchcraft in a child, according to pastors and families

Physical Signs	Strange appearance, ill-health, thinness, too small for their age, pot-bellied stomach or a mal- nourished look, scabies on their head, dirtiness, red lips or eyes, deafness, ugliness, young body but with an old face, epilepsy
Character	Aggressive, untidy, disobedient, sad, mentally retarded, impolite, full of hatred, mysterious, disrespectful, quick-tempered, unruly, liar, hypocrite, too nice, too wise, provocative, too open, courageous, jealous, too fearful, stubborn, incomprehensible, solitary, too clever, weak, naughty, violent, fearless, quiet, rude, mad, curious, incredulous, selfish, insensitive, lazy, inattentive, ruthless, wants to be superior, doesn't like visitors, creative and full of initiative, ungrateful.
Behaviour	Steal, never look people in the eyes, transform themselves or their toys, do not sleep at night or sleep badly, eat a lot, practice sexual abandon, do not hear or do not listen to what is being said to them, have epileptic fits, wet the bed, defecate in their clothes, talk to themselves, sleepwalk, collect rubbish,

	wander, don't study, go out even when they are ill.
Invisible Signs	They eat human flesh, they cast spells over their family, they have spiritual sex and this causes sterility, they are dangerous murderers and assassins at night, they go out at night to bewitch people, they have the power to go out even if they are shut in, they are behind natural disasters such as the destruction of roads and unemployment, no social life, cause road traffic accidents, epidemics.

The existence of "*revivalist*" church also acted as a factor that strengthens this belief on the local community, in a manner where there are religious beliefs that is included within this present matter. An assessment that is conducted in the year of 2016 documented case that shows there's an existence of "middlemen" who act as a conduit between those who carry out human rights violations and themselves, and they also use some form of belief in the supernatural to carry out the abuse (WHRIN, 2016).

The birth of Pastors, and "*revivalist*" churches is the main group who accuses children of witchcraft, and these actors have been preaching about child witchcraft and demonic possessions has led to a huge rise in accusations of witchcraft against children (Foxcroft, 2009). Following these accusations, the clueless victims parents would take their kids to these actors in order to "cleanse" their children by under an "exorcisms" phase where these children suffered from the most severe kinds of abuse that range from being confined the church grounds for months on end, often with little food and water; undergoing long, and sometimes violent, deliverance ceremonies; lack of access to basic sanitation; and being forced to drink dangerous substances in order to purge themselves of the perceived evil (WHRIN, 2016).

b. Economic Factors

Other than the myriads of Social factors that is believed to become the catalyst to the birth of WAP, lack of education and the resistance to understand Western medicine and health conditions is also proven to be one of the stimulants towards these kinds of accusations. The writer would like to opine that economic factor plays a huge role in this since an adequate fulfillment of economic rights would enable people to access adequate education, which later would enrich people's understanding of themselves and the world.

When being associated with the UNHRC data that has been presented in the previous part of this paper, the countries that have the highest number of reported cases of WAP suffers from the lack of education. In Nigeria, only 64% of the population has the ability to read while the rest are illiterate.[2] In Ghana, even though they have 84% enrollment rate, most of them do not benefit from quality education since based on UNICEF data, Only 16% of grade six students are proficient in mathematics and only 35% proficient in English.[3] The fact that South Africa spends a bigger share of its GDP at education[4] would only highlight the severity level of the present WAP issues that since it highlighted the fact that social reasons play a bigger role other than economic ones.

This is a barbaric phenomenon; that involved many actors within the process of accusations, executions and aftermath in which the victims are left in a devastating condition and unable to be reintegrated with the society due to the label that is embedded within their self. The validity of the main issues is not debated here due to the fact that the society already believe in

[2] Data gained from UNESCO Data in 2015 (can be accessed through: http://uis.unesco.org/country/NG)

[3] Data gained from 2011 National Education Assessment (Can be accessed through https://www.unicef.org/ghana/education.html)

[4] Data gained from UNICEF DATA (can be accessed through https://www.unicef.org/southafrica/education.html)

matter and these beliefs are being upheld by many individuals from various social strata; the wealthy, the poor, educated, old and also the young (Save the Children, 2006).

The sad reality also includes the fact the impact of these beliefs might resulted into violations of human rights standards, and that they don't have access to legal protections and adequate dispute settlement process due to legal vacuum within the African legal systems itself. This resulted in many alleged Witchcraft victims suffered from impunity within a society that operates with *centrifugal* logic and *vigilante* culture.

Therefore, this paper is not focused to analyze the long lists of factors on why this phenomenon keeps on happening in modern world civilizations, notwithstanding the aforementioned reasons that have been described above. However, this paper shall analyze the reason why is this phenomenon problematic, by using a legal perspective. The writer would like to opine that there needs to be a better solution in regards to the legalities aspects, in order to prevent future human rights violations and to protect these people from the suffering of cruel accusations.

C. Legality & Problems in Regards to Witchcraft Accusations & Persecutions (Analysis: South Africa Example)

Based on the research that has already been conducted by the writer, there are three crucial reasons as of to the human rights issue of WAP is very complex in terms of legalities. These factors are divided into three elements which consist of the **1) Conflict of Law that is used to adjudicate this matter** between the codified state law and the customary law since both of them are recognized under South African Law. Pursuant to the first argument, creates the rise to 2) the issue of **Cultural Defenses** that is often implemented to "protect" the perpetrators of WAP cases and it also creates the urgency to analyze 3) the role of the **African Court of Human Rights (ACHR)** on this matter.

a. The Conflict of Law within South Africa's Legal System

Africa, is a state which has legal systems that originates from customary law that regulates various tribal and ethnic communities, and this would later result into a multi-faceted legal system in which would combine modern codified laws and customary practices. This is a product of colonization and western influence introduces new common law legal systems within the region (*Bekker*, 2005).

However, this colonization left the region with challenges when it comes to choices of law. Even though the western legal systems that have already been adapted there has already been mixed with customary law influences, there have been a number of views that would favor Africa into restoring their customary law and African culture. (*Davies & Dagbanja,* 2011) On the other hand, Witchcraft is considered as one of the customary beliefs in Africa and often, the act of killing a witch is seen as a chivalrous act. Therefore, the process of eradicating witchcraft accusations and persecutions in Africa are often faced with a certain level of a dilemma due to the fact that there is a conflict between state legal norms and norms underlying popular beliefs.

Ever since the region was first inhabited with people, customary law has already been exercised and it plays a huge role at constructing both norms and religious beliefs among African people, and it binds a certain branch of law that includes family law and social relationship. Due to their *uncodified* and adaptable characteristics, this law lives with the people, and prioritized the collective rights of the people other than individual one. (Oisthuizen, 1991) The importance of this law is being highlighted within the constitution of some region in Africa, and in South Africa constitutions itself, and in return this would create a jurisprudential hierarchy. For example, the African Constitutions states that, under Section 12, they acknowledge the notions of both

"*traditional leaders*" and recognizing customary law as a domestic Source of Law in South Africa. Section 211 (3) of South African constitution states that:

> *The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.*

Hence, this part of the constitutions would further lead into the birth of two schools of thoughts when dealing with witchcraft related crime. First, it contends that witchcraft exists and deals with it accordingly. The second school contends to suppress beliefs and do not belief in the existence of this matter. *Traditional* courts belonged to the first one, while *formal* courts and legislators belong to the latter (Hund, 2003).

Both courts also have their own mechanism in dealing with this matter. Traditional courts resolved this problem in a time when misfortune happened through tribal courts and "*customary*" criminal law through a process of *dolosse* or "*throwing the bone*". At the end of this process, the leader of the tribal meetings will decide the fate of the accused and most of the time, this is where the human rights violations occur as the type of punishment that usually include them being banished from their community, their property being confiscated and death penalty (*Ralushai, 1996*).

On the other hand, formal courts are also proven to be ineffective as well when dealing with this kind of matter. The law that governs WAP cases is the law that originates from the colonial era that is the South Africa's Witchcraft Suppression Act No. 3 of 1957. However, after a study that involves 211 cases from court records, it showed that this law has been very ineffective since it shows that only a few people had been prosecuted in regards to this matter, and the sentencing was not strictly applied either. Therefore, this ineffective legislation remains in force and this vicious cycle remained until now. Despite the fact that there has been measure in order to reform the aforesaid acts, the act has not been repealed (Niehaus, 2010).

b. "Cultural Defenses" within WAP Related Cases

Based on the research that has already been conducted, there are existences of several cases that include the elements of WAP within it. The horrifying results is that, some cases judgment reflects the idea that Witchcraft can be taken *extenuating circumstance* mitigating a murder sentence where the defendant honestly believed the deceased intended to use witchcraft to harm the defendant or his relations, or where the defendant believed he was acting in the public interest. (State v. *Lukhwa,* 1994, State v. *Motsepa,* 1991). This is what is usually being called as "*Cultural Defence*" or as "act *by a member of minority culture that is approved or accepted as normal within his/her own cultural group.*" (Van Broeck, 2001).

In most WAP cases formal proceedings, the judges apply this reasoning in order to adjudicate as a legal strategy that will enable a court to consider the cultural background of the accused determined the way they acted. In the case of State V. *Dikgale* (1965) states that *"Where accused are convicted of murder, and the only probable reason why they had so treated the deceased and committed the crime was that they believed that he was a bad and dangerous witch, then his must be an extenuating circumstance, even if the witch did not affect the accused or their near relations*". After this case, the courts' decisions to apply witchcraft as an extenuating circumstance in murder follows, and the positions was confirmed by the cases of *Biyana* and *Fundakubi (R. V Fundakubi 1948, R V. Biyana 1938*).

In the later years, the court even comes up with the threshold of factors that should be used in WAP cases that would determine whether or not a belief in WAP is genuine in the case of *State V. Ndhlovu* (1971) thus could be used to mitigate the imposed sentences. These factors include 1)

the educations level of the accused and 2) whether or not this crime is conducted in a group. Further, in the case of *S V. Dikgale* (1965) the court also believed that mitigations could also be applied to a crime that one conducted in order not to protect another with family relations, but to "serve" the community with their actions that is aligned to African "*communal life*" perspective.

All of the examples above serve as an example that in the sense of criminal cases that have an element of culture, cultural defense is most likely to be exercised in order to prove that the accused are acting based on their beliefs. However, this "*utilitarian*" approach does not result into serving the best interests of the victim at hand. Therefore, this legal system needs to put a solution into this matter and turning cultural defense into a reason into not fulfilling the rights of the "*minority*" that is affected by the situations (Niehaus, 2010).

D. African Court of Human Rights: Ability to Provide Adequate Protection?

Therefore, after all of the part that has been written above, gives rise to a question on the positions of the African Court of Human Rights within this matter. The fact that African regions does have a regional human right court gives rise to an even bigger questions, since this court has jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and Peoples' Rights.

However, after realizing that the **ACHR** source of law is originated from the fact that they based their legal argument based on various African instruments on human and people's rights. Thus, it brings the discussion back to Section 15(1) of South African Constitution 1996:

> *Everyone has the rights to the freedom of conscience, religion, thought, belief and opinion.*

Thus, this created a complex situation where the belief in witchcraft is associated with the freedom of beliefs and conscience, and the attempt that can be taken would be against of this principle. However, direct and practical actions in regards to this action needs to be taken since based on the same documents, it is also stated that:

> *Everyone has the right to have any dispute that can be resolved through the application of the law decided in a fair public hearing or where appropriate, another independent and impartial tribunal or forum." (Section 24)*

The combinations of the two conflicting factors above creates another legal dilemma where on one hand, witchcraft is considered as a form of local beliefs and coming up with a precedent of restricting this belief would lead to a violation of Section 15 of the constitutions, where not doing anything will amounts to the violations of Section 24 of the same documents (Niehaus in Moore & Sanders, 2001).

Hence, a new and fresh approach must be implemented in order to effectively deal with this issue. Some legal scholars from Africa have been commenting to this issue needs to be tackled using the approach taking it as an "actual" and a non-absurd matter and at the same time, they also propose a change in policing, improving educations, counseling for victims, as well as community development as well as meditation procedures (Niehaus in Moore & Sanders, 2001).

E. Conclusion

Based on the thorough research that has already been conducted by combining an aspect of social and legal considerations in regards to WAP issue, the mixture between the strong customary belief and the flaw within the legal systems itself, creates a fertile breeding ground for this kind of issues to happen within African soil.

We cannot turn a blind eye to the fact that the issue of Witchcraft has been deeply rooted within Africa's way of live and thus, this created room for cultural defenses as well as negative consequences that includes *essentializing* culture, violating human rights and creating an impression that not everyone is equal before the law.

However, there are several important points of improvement that can be taken into considerations. First, the African government must acknowledge first the point that there are flaws within African legal systems. There need have to be measures by the country's judicative branch to come up with a unified standard that assimilates common and customary law standards in regards to WAP. This are done by cooperating with the relevant parties from the traditional community to evaluate the standards of what constituted as WAP when it comes to "traditional" standards. The writer is aware that this solution might be seen as a step that supports WAP but the writer would like to argue that, persecutions or informal trials would only resulted into the loss of the victims.

Furthermore, direct actions must be taken against perpetrators of persecutions based on the grounds of WAP. This measure usually includes public announcements and advocacy methods in regards to this matter, and many parties would eventually acts against accused witches are crimes. At the same time, relevant articles and HR treaties (ACRWC) as the basis to create campaigns, program and verdicts to WAP.

But all of the above, the effective measures are to pair local police and other relevant international and national organizations with local justice systems to promote and facilitate judicial and protective environments (e.g. police and courts) where victims feel comfortable and safe making statements against their perpetrators. Lastly, there needs to be a socialization that includes all stakeholders which consists of religious leaders, general community, academics and decision maker in order to acknowledge the notions that these persecutions, are against 21st century human rights standards and at the same time, providing the society with objective lesson in order to expand knowledge in regards to the issue above.

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LIEN ON SUB-FREIGHT FOR UNPAID FREIGHT: THE PERSPECTIVE OF SINGAPORE LAW AND ITS APPLICABILITY IN INDONESIA*

Johanna Devi**

Abstract

Charter party chains are prevalent in shipping practices of today. Unfortunately, non-payment of freight - which is harmful to ship owners - is also a common occurrence. To accommodate this, ship owners need a robust protection scheme under charter parties, especially in the charter party chains situation. The protection for ship-owners under a charter party is necessary to create a safe environment for the shipping industries.

In tackling this unresolved problem of unpaid freight, the current ship-owners protection scheme under Indonesian law is considered archaic in light of the evolution of international shipping practice. To this note, Singaporean law on the other hand extensively protects the ship-owner from unpaid freight in a more specific, definitive way by acutely following the development of shipping practices.

One of the most popular remedies a ship-owner can resort to in the case of unpaid freight under a charter party chain is the application of lien on sub-freight. Such modern approach has led Singapore to become the world's maritime hub. Therefore, the Author finds it to be of interest to compare Indonesian law with Singaporean law in the application of lien on sub-freight for unpaid freight in a charter party.

Intisari

Rantai carter partai sangat umum dalam praktek perkapalan saat ini. Sayangnya, kegagalan pembayaran uang angkut juga merupakan kejadian umum. Sementara itu, kegagalan pembayaran uang angkut berbahaya bagi pemilik kapal. Dengan demikian, pemilik kapal perlu skema perlindungan yang kuat dalam carter partai, terutama dalam situasi rantai carter partai. Perlindungan bagi pemilik kapal di bawah carter partai diperlukan untuk menciptakan lingkungan yang aman bagi pelaku bisnis perkapalan..

Untuk mengatasi masalah kegagalan pembayaran uang angkut, skema perlindungan pemilik kapal di bawah hukum Indonesia dianggap kuno jika dibandingkan dengan praktik pengiriman yang terus berkembang. Sementara itu, Singapura, melindungi pemilik kapal dari kegagalan pembayaran uang angkut dengan cara yang lebih spesifik sesuai dengan perkembangan praktik perkapalan.

Salah satu upaya hukum paling populer yang dapat digunakan oleh pemilik kapal dalam kasus kegagalan pembayaran uang angkut dalam rantai carterpartai adalah penerapan hak menahan uang sub-angkut. Pendekatan modern seperti itu telah membawa Singapura menjadi pusat maritim dunia. Oleh karena itu, Penulis tertarik untuk membandingkan hukum Indonesia dengan hukum Singapura dalam penerapan hak menahan sub-uang angkut untuk kegagalan pembayaran uang angkut dalam carter partai.

Keywords: lien, charter party, sub-freight, Singapore, unpaid, maritime, shipping, default
Kata Kunci: *gadai, carter partai, sub-angkutan, Singapura, terhutang, maritim, perkapalan, kelalaian*

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A. Introduction

Vessel-chartering holds a pivotal role in the realm of international business transaction. When the activity of export-import increases, so does the demand for vessel-chartering. Vessel-chartering is especially important to carry goods in bulk from one port to another (Sudjatmiko, p. 129). It is therefore imperative to ensure a well-protected business environment for shipping companies in the chartering business. Accordingly, the protection of shipowner's rights under charter party is crucial as it provides security for the shipowner in chartering business (The Merlin; The Astra; Szczepanik, pp. 12-20). The higher protection of shipowners' rights may increase the number of ship-owning businesses which enhances the competition in the shipping industry (Iheduru, pp. 238-40; Greve, pp. 9-12). The enhanced competition in the shipping industry is expected to result in lower shipping cost and improved quality of shipping (Tongzon, pp. 485-486).

The protection for shipowners includes the remedy that the shipowners can resort to in the case of unpaid freight, which is commonly occurring in charter parties (Sze Kee). Notably, under charter party chain situations, where a charterer sub-charters its vessel, the practice of lien on sub-freight for unpaid freight has recently gained popularity (Laut, K.P.; Diablo Fortune). Where the charterer fails to fulfill its obligation to pay freight to the shipowner, the shipowner possessing the right of lien on sub-freight is entitled to intercept the payment of sub-freight from the sub-charterer. In that case, the charterer is not entitled to receive the payment of sub-freight until it fulfills its obligation to pay freight to the shipowner. This is a very beneficial remedy for shipowner because it prevents the defaulting charterer from obtaining profit while letting the shipowner sustain loss caused by the charterer's breach. This research, therefore, aims to compare Singapore and Indonesian law concerning the application of lien on sub-freight for unpaid freight.

Singaporean law is an effective benchmark for comparison as Singaporean shipping law has accomodated well to the global shipping industry (Leading International Maritime Centre), as can be seen from the fact that Singapore is home for over 4,000 international shipping companies. Further, Singapore has become Asia's hub for maritime law and arbitration (Harding, pp.1-7; Singapore Chamber of Maritime Arbitration). On the other hand, the development of shipping regulations in Indonesia is rudimentary at best, and the necessity to develop shipping regulations has become growingly apparent. As the biggest archipelagic nation in the world, Indonesia aspires to become the world's maritime axis, with one of the focal points being the development of its shipping industry (Indonesia Sebagai Pos Maritim Dunia). However, in in achieving such goal, there has been no definitive blueprint nor a proper strategic work plan (Kuwado), including the lack of regulatory framework reconstruction on existing shipping law and its commercial aspects. Currently, the commercial aspect regarding charter party is regulated under the Indonesian Commercial Code which has been enacted since 1847, and remains unchanged despite the development of global shipping laws and practices. Therefore, an unfulfilled agenda exists to update the Indonesian shipping law in order to keep up with the growth of shipping industry (Sudjatmitko, p. 181-4).

Singapore law extensively regulates the availability of the right of lien on sub-freight for unpaid freight as well as how it is exercised. The exercise of such right is a form of security given to the shipowner to intercept the funds moving from the third party to the defaulting charterer. In contrast, Indonesian law does not recognize the concept of lien on sub-freight for unpaid freight. Although Indonesian law does not necessarily prohibit the practice of lien on sub-freight, the lack of specific regulations in general, amidst the increased likelihood of unpaid freight evokes potential jeopardy to the shipowner (Sze Kee). Therefore, more detailed regulation regarding such issue is

necessary. Based on the background mentioned above, a comparative study on the application of lien on sub-freight between Indonesian and Singapore law is conducted.

B. The Concept of Lien on Sub-freight for Unpaid Freight

Lien is one of the forms of security interest. The concept of lien itself is more popular in common law jurisdiction. In general, the right of lien is a right which entitles a party to hold on to assets in its possession pending payment of a debt owed. It is stated in Singapore Law of Credits and Security that (Singapore Law of Credits and Security, s. 4.17), "*When possession of goods are transferred to another for some work to be done upon the goods, and the fees for work done is outstanding, the workman in possession of the goods (lienee) obtains, by operation of the law, the right to exercise a lien over the goods. At common law, the rights of the lienee are merely to retain possession of the goods until full payment is made. Unless contractually agreed, no other remedy is available. The lien is extinguished upon relinquishing possession of the goods.*"

A right of lien may arise either contractually, where it arises consensually if expressly provided for by the contract. On the other hand, the right of lien may also be imposed by statute. For instance, under the Sale of Goods Act (Singapore Sale of Goods Act (Cap. 393, 1999 Revised Ed)), an unpaid seller of goods may retain possession of goods until full payment is made.

This concept of lien is similar to the concept of retention right under Indonesian law. However, the two are different in nature. On the one hand, the similarity lies on the right of the creditor to demand payment from the debtor. In the case of the debtor's default, retention right allows the aggrieved creditor to demand payment through retaining the debtor's property that is already under the creditor's possession until the sum due is paid (Indonesian Civil Code, Arts. 575(2), 1364(2), 1576, 1616, 1729, 1812; Vollmar, p. 367). This may seem to resemble the characteristics of pledge. However, in retention right, the aggrieved creditor may not obtain enjoyment from the property nor transferring the retained property to another party (Hasbullah, p. 34).

On the other hand, the difference between lien and retention right lies within its nature as a security interest. Retention right is not vested by agreement or by law in order to recover the sum due from the proceed of a sale of the debtor's property. Instead, retention right merely aims to pressure the debtor to pay off its debts (Vollmar, pp. 368-70).Thus, in contrast with the right of lien, retention right under Indonesian law is not a type of security interest.

In the context of unpaid freight, under common law practice, there are two kinds of lien that shipowners commonly resort to, namely, lien over cargo and lien on sub-freight. When exercising the right of lien over cargo, the shipowner retains the cargo under its possession as the security for the unpaid freight. In such a case, the shipowner would not discharge the cargo until the freight payment is made. If the shipowner discharges the cargo, then the shipowner loses possession over the cargo and extinguishes its right of lien over the cargo. Hence, it can be concluded that lien over cargo is possessory.

In contrast, a lien on sub-freight is not possessory in nature. In order to understand the nature of lien on sub-freight, it is important to first understand how is the mechanism of lien on sub-freight. Lien on sub-freight is only relevant in the case of charter party chain, in the case of charter party chain until the level of sub-charter party. In such case, the charterer is entitled to receive the payment of charter fees from the sub-charterer, while is also obliged to pay charter fees to the shipowner. If the charterer fails to pay freight to the shipowner, lien over sub-freight gives the right to shipowner to intercept funds that are moving from the sub-charterer to the defaulting charterer (The Cebu). Hence, lien over sub-freight provides the shipowner the right to

demand payment directly from the sub-charterer. As such, under common law, it is considered as an equitable assignment by the charterer to the shipowner by way of security (The Cebu; Tradigraid v. King Diamond). It means that the charterer transfers its right of payment to the shipowner and is recognized as a charge (The SpirosC). The significance of which will be further explained in the next section.

C. Application of Lien on Sub-Freight for Unpaid Freight in Singapore

Under Singapore law, a lien on sub-freight arises only by virtue of the contract (Oana, p. 17). In recent years, it is very prevalent for the shipowner to incorporate lien on sub-freight clause. This is due to the global financial crisis where insolvencies by a party in the contractual chain have become common (Liens on Sub-Freight). The clause pertaining lien on sub-freight clause can be formulated as the following example of clause 8 of GENCON 1994 standard charter party: "*The Owners shall have a lien on the cargo and on all sub-freights payable in respect of the cargo for freight, deadfreight, demurrage, claims for damages and for all other amounts due under this Charter Party including costs of recovering same*." Similar provision is also found in several standard charter parties such as clause 14 of BPTIME 3, clause 17 of BALTIME 1939, and clause 23 of NYPE 2015.

In exercising the right of lien on sub-freight, following the charterer's non-payment of freight, the exercise of lien on sub-freight for unpaid freight is simply through giving notice of lien to the charterer and sub-charterer (The Attika Hope). An example is the case of *Five Ocean Corporation v. Cingler Ship*, where the voyage commenced after the cargo loading was completed on 7 April 2015 at Samarinda, East Kalimantan. On 8 April 2015, the B/Ls were issued to CER as the shipper. Pursuant to the voyage charter party, Cingler was to pay freight to FOC in the amount of US$ 431,756 on 15 April 2015 and to nominate the discharge port. However, Cingler failed to do so on time. Consequently, on 29 April 2015, FOC sent notice of lien on sub-freight to Cingler and CER in order to intercept the payment from CER (The Cingler). As such, the lien on sub-freight is only discharged when the sub-charterer pays the freight to the shipowner and not to the charterer (The Attika Hope).

Unlike the right of lien over cargo, where the shipowner may retain the possession of something that is already in its possession, the nature of lien on sub-freight is a non-possessory one (The Cebu). In Singapore, it is considered as an equitable assignment by the charterer to the shipowner by way of security (ibid; The SpirosC). It means that the charterer transfers its right of payment to the shipowner and is recognized as a charge (ibid).

By default, a charge must be registered within thirty days after the creation of the charge, for it to be valid against third parties (Singapore Companies Act, s. 131). Otherwise, the charge is considered void against the liquidator or other creditors (The Ugland Trailer; The Annangel Glory; Diablo Fortune). Hence, in the event that the charterer company is liquidated, or a charge created on its assets, the lien over sub-freight will not be enforceable against the liquidator or secured creditor of the company.

In the recent development, the Singapore Parliament passes an amendment bill of this provision, that lien over sub-freight is no longer subject to registration under s. 131 of Singapore Companies Act (Singapore Companies (Amendment) Bill, No. 27/ 2018, Cl. 2). This is intended to answer the practical difficulty faced by the shipowner in the enforcement of lien over sub-freight. The difficulty in the registration of such lien is based on the practice that vessels are typically subject to continuous series of charter parties; each entered to as quickly as possible to ensure the vessel is employed maximally. The charter period itself can be as short as a few weeks or even days. It means that the charter party would be completed even before the thirty-day-registration period is up. Given the large number of charter parties

concluded every day, imposing a registration requirement means significant administrative costs for shipping companies. For that reason, it is common for shipowners in the industry not to register liens over sub-freight pursuant to s. 131 of Singapore Companies Act (Diablo Fortune; Rajah).

In the bill of amendment, despite the lien over sub-freight is exempted from registration, such lien remains a security in nature, yet will take priority over unsecured creditors and other secured creditors whose security was created after the relevant shipowner's lien was created (Singapore Companies (Amendment) Bill, Cl. 2). This amendment gives a significant impact for shipowners in enforcing their lien as security.

D. Applicability of Lien on Sub-freight for Unpaid Freight in Indonesia

Vessel sub-chartering is a common practice in Indonesia. The regulation pertaining to vessel sub-chartering already exists under the Indonesian Commercial Code (Indonesian Commercial Code, Art. 518). In order to protect shipowners' right for payment in such circumstance, the adoption of lien on sub-freight is deemed accommodative.

As mentioned, a lien on sub-freight gives shipowner the right to intercept the funds that are moving from a third party to the defaulting charterer. The Indonesian Civil Code recognizes this concept of assignment of accounts receivable known as *cessie* (Indonesian Commercial Code, Art. 613). A *cessie* is a transfer of legal title of account proceeds from an old creditor (*cedent*) to a new creditor (*cessionaris*) (Satrio, pp. 4-6). This is an *accessoir* agreement that arises out of a principal legal relationship between the *cedent* and *cessionaris (ibid, p. 24-8)*. *Cessie* is exercised through a deed or notice and acknowledgement by the account debtor (ibid, p. 29-31). In that case, the *cedent* transfers its claim rights to the *cessionaris* (Indonesian Civil Code, Art. 613). When the *cedent* breached its obligation to the *cessionaris*, the *cessionaris* then has the right to claim the accounts receivable from the main debtor.

Accordingly, the adoption of lien on sub-freight into Indonesian regulatory framework is possible through the implementation of *cessie*. The shipowner and the charterer may agree that in the case of the charterer's failure to pay charter fees, the charterer will transfer the accounts receivable that it has over the sub-charterer. In which, the accounts receivable in question is the sub-freight itself. This transfer of right over sub-freight requires notice and acknowledgement by the sub-charterer in order to protect the sub-charterer from double-payment. Subsequently, the sub-charterer knows that it has payment obligation to the shipowner which terminates its payment obligation to the charterer.

Therefore, the outcome of lien on sub-freight and *cessie* resemble each other. However, the difference between the two lies within the security characteristic in lien on sub-freight. As discussed above, lien on sub-freight under Singapore Companies Act is a type of security that, by default, should be registered as a charge (Singapore Companies Act, s. 131). Although in its development, a bill was passed to amend this regulation into allowing the exercise of lien on sub-freight without registration of lien as a charge (Singapore Companies (Amendment) Bill, Cl. 2).

In contrast, under Indonesian law, *cessie* indeed gives rise to propriety right on intangible property (Indonesian Civil Code, Art. 613 jo. 584). Despite the similar characteristics with pledge, it is improper to regard *cessie* as a pledge over the account receivables (Darrel, p. 4). This is because under Art. 1154 of Indonesian Civil Code, the creditor may not claim ownership over the pledged property (Indonesian Civil Code, Art. 1154). However, in the case of *cessie*, the account receivables already have certain value and price that the *cessionaris* can obtain enjoyment from. Therefore, the cessionaris may directly have title on the account receivables and execute the account proceeds without necessarily violating Art.

1154 of Indonesian Civil Code (Darrel, p. 4). Thus, a *cessie*, when put in the context of lien on sub-freight or sub-hire under charter party, cannot be considered as a security interest.

Regardless, the doctrine of *cessie* is sufficient to introduce the concept of lien on sub-freight or sub-hire under Indonesian regulatory framework (Hong Kong Companies Ordinance, Cap. 622, 2014, s. 334(4)). The adoption of such can be conducted through creating a provision complementing the "lien over cargo" provision, as both remedies share the same legal cause.

The provision can be formulated in a way where the legal cause being the event where carriage fees, general average contribution, demurrage, and/or other expenses are not paid to the carrier. Then, the legal consequence being where the charterer accepts to transfer the title over sub-freight or sub-hire to the shipowner.

Further, the formulation of such provision should guarantee that the transfer of right over sub-freight or sub-hire is exercised in a way that protects the sub-charterer from double payment (Subekti, pp. 59-60). For instance, the transfer should require notice to all sub-charterer that the accounts receivable is transferred to the shipowner (The Attika Hope). Therefore, the sub-charterer is aware that its payment obligation is addressed to the shipowner and is no longer required to pay the sub-freight or sub-hire to the charterer. This provision is expected to provide clarity in carrying out vessel-chartering businesses in Indonesia, especially to protect shipowners in charter party chain situations.

E. Conclusion

Lien on sub-freight is an exceedingly beneficial remedy for shipowners in the case of charterer's non-payment of freight under charter party chain as it allows the shipowner to intercept the funds that move from the sub-charterer to the charterer.

Singapore law highly regulates the exercise of lien on sub-freight for unpaid freight. It regards lien on sub-freight as an equitable assignment which arises under contractual obligation. In its development, Singapore law makes the implementation of lien on sub-freight more effective through exempting it from registration requirement.

Whilst Indonesian law does not prohibit the parties under charter party to agree on lien on sub-freight, Indonesian law does not specifically regulate such matter. Nevertheless, the practice of lien on sub-freight for unpaid freight is applicable in Indonesia through implementation of the doctrine of *cessie* as a legal basis, by way of incorporating the assignment of sub-freight clause into the charter party. Further, as the practice of lien on sub-freight is not incompatible with Indonesian law, it is advised that Indonesian law further regulate the specific implementation of lien on sub-freight for unpaid freight in its future regulatory framework.

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