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Faculty of Law
Universitas Gadjah Mada
Indonesia

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

FOREWORD FROM THE DEAN
FACULTY OF LAW UNIVERSITAS GADJAH MADA

Nowadays, legal publications on all matters of law are abundant and serve well as a media by which to expand and share one's knowledge of the law. Almost all law faculties in Indonesia have law journals. Between those faculties, many publications are of high quality; several are excellent in their own rights. However, a journal written by students, with an eye on international affairs, on their very own initiative, I have only found at the Faculty of Law of Universitas Gadjah Mada.

Thus, allow me in this opportunity, as the Dean of the Faculty to express my proudness and appreciation, to all those who have initiated, contributed, reviewed and become stakeholders in the publication of this exceptional journal. Without these individuals, this publication would not have been possible.

From the very first edition it is clear that Juris Gentium Law Review is not merely an English journal, written in the distinctive and straightforward style of students, but is also strongly imbued with a sense of internationalism. Contributions by foreign students and academics have truly expanded the scope of this publication.

It is my hope for the future, that Juris Gentium Law Review will soon receive accreditation as the best student journal in Indonesia and will be read by all students in the faculties of law of Indonesia and the world over.

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

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

The world is relentlessly changing. Such dynamic consequently, gives rise to myriad challenges within the field of international law in particular as the world is getting more connected and interdependent. Young generations are in an exceptional stance as to whether remain silent over this inevitable fact or respond it through constructive means where ideas are positionedas the premieremphasis.

Initiated by the Community of International Moot Court ("CIMC"), Juris Gentium Law Review ("JGLR") is an altar of knowledge where perspectives and legal understanding from students all over the world converge and offer a unique elucidation for various legal issues. JGLR also serves to enhance legal aptitude in the field of international and comparative law among students. On my capacity as the President of CIMC, I am honored to welcome the publication of the second edition of JGLR online and hopefully, in a printed version real soon.

Within the given opportunity, I would like to convey my deepest gratitude to the Head of JGLR Editorial Board, Ms. Diva Indraswari, along with her staff Ms. Shita Pina Saphira, and also two dedicated individuals, Mr. Ibrahim Hanif and Mr. Rizky Wirastomo wherein all of them have tirelessly strived against all odds to make this publication came true and to enliven the spirit of critical thinking of students from all over the world.

My appreciation also extends to Faculty of Law Universitas Gadjah Mada Deaneries for its continuous support to JGLR publication, and also expert reviewers for having spared their time to ensure the maintenance of JGLR's articles high standard. Lastly, I would like to thank all the contributors which comprise of students from various universities both in Indonesia and abroad for having expressed their thoughts and presented it in outstandingly well-written articles.

Hence, on behalf of CIMC, I present to the readers, the manifestation of brilliant minds from six distinguished undergraduate students. May it be a light on our endless pathway to make a better world.

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

FOREWORD FROM THE EDITORIAL BOARD
JURIS GENTIUM LAW REVIEW

Welcome to the second edition of Juris Gentium Law Review: the very first scientific law journal written and managed by undergraduate students. With its broad scope ranging from international public law, international private law to comparative Law, Juris Gentium Law Review is designed to be a medium for students to foster their skills in doing research, analyzing and particularly applying the law. Ultimately, this journal challenges the students to convey their idea and solution towards factual issues in writing. Starting from this edition, Juris Gentium Law Review will be published only in English.

In this edition, I am pleased to receive six articles from students in various universities. The first article is *Economic Development in the Establishment of International Centre for Settlement of Investment Dispute* by Aryasena Satria Ajie from Universitas Padjadjaran. It discusses the link of the concept of economic development to the practice of ICSID as an institution to settle foreign investment disputes. Next, Billy Esratian from Universitas Gadjah Mada observes the contradiction between the principle of non-intervention and *erga omnes* obligation toward international human rights in *Humanitarian Intervention: Challenging the Principle of Non-intervention, Upholding Humanity*. *Legal Aspect of the Fisheries Dispute on the South China Sea: Boundaries and Fishing Activities* by Afghania Dwiesta from Universitas Indonesia looks at the management and conservation of marine living resources in the disputing area, the South China Sea, under the concept of Exclusive Economic Zone provided by the 1982 United Nations Convention in the Law of the Sea. Yordan Nugraha from University of Groningen then follows by examining the applicability of the right of external self-determination outside the setting of colonization in *The Right of External Self-determination and the Validity of Kosovar Unilateral Declaration of Independence*.

Next, in *The Senkaku/Diaoyu Islands Dispute Drawn Out: Quo Vadis?*, Diva Indraswari and Rudi Yudho Sartono from Universitas Gadjah Mada try to seek for solution for the drawn out disputes concerning overlapping claims between Japan, China and Taiwan. The final article of this edition is *Unauthorized Airspace Infringements and Use of Weapons against Civilian Aircrafts from an International Law Perspective* by Cindy Nur Fitri from Universitas Gadjah Mada in which the author examines the use of weapons against civilian aircrafts and unauthorized airspace infringements towards the principle of self-defense and human rights.
Using this as an occasion, I would like to express my gratitude to all people who made this edition happen. The list includes all current Editorial Board of Juris Gentium Law Review, as well as the board of Executive Reviewers. On behalf of the Editorial Board of Juris Gentium Law Review, I hope you find this edition both enlightening and informative.

Diva Indraswari
Chief Editor of Juris Gentium Law Review
Faculty of Law Universitas Gadjah Mada

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ECONOMIC DEVELOPMENT IN THE ESTABLISHMENT OF INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTE*

Aryasena Satria Ajie**

Abstract

The development of today's economy demands a favourable legal mechanism, one that is able to facilitate all matters in its development. In relation to economic cooperation between countries, especially in the field of investment to help developing countries, a suitable legal mechanism is required to settle disputes. For this reason, the World Bank established a special institution that handles foreign investment disputes, known as ICSID (the International Centre for Settlement of Investment Disputes) through its convention. However, a problem that arises from the convention is the refusal of ICSID jurisdiction due to certain issues, such as a vacuum of law. To resolve this issue, attention must be returned to the foundation of the convention, which aims to create 'Economic Development' for states. The concept of Economic Development has a profound impact to the contents of the convention and to the standing of ICSID itself. The writer would like to clarify the link between the concept of Economic Development to the practice of the application of the Convention regarding ICSID jurisdiction.

Intisari

Perkembangan ekonomi dewasa ini menuntut adanya suatu mekanisme hukum yang baik dan mampu memfasilitasi segala hal dalam perkembangannya. Berkenaan dengan hubungan kerjasama ekonomi antar negara khususnya dalam bidang investasi, dalam rangka membantu negara-negara berkembang diperlukan sekali suatu mekanisme hukum yang baik manakala terjadi sengketa in untuk diselesaikan. Atas dasar itulah Bank Dunia membentuk suatu badan yang khusus menangani sengketa penanaman modal asing yang dikenal dengan ICSID (International Centre for Settlement of Investment Disputes) beserta dengan konvensinya. Namun, masalah yang banyak muncul dari konvensi tersebut adalah penolakan jurisdiksi ICSID itu sendiri dikarenakan beberapa masalah, seperti kekosongan hukum di dalamnya. Akhirnya, jawabannya kembali kepada landasan konvensi tersebut, yang bertujuan untuk Perkembangan Ekonomi negara yang diinvestasikan. Konsep Perkembangan Ekonomi ini ternyata berdampak sangat besar terhadap isi dari konvensi tersebut dan status ICSID sendiri. Penulis ingin menjelaskan hubungan konsep Perkembangan Ekonomi tersebut dengan praktek pemberlakuan konvensi tersebut ditinjau dari masalah-masalah jurisdiksi ICSID.

Keywords: ICSID, investment, economic development, dispute settlement.

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** 2008; Business Law; Faculty of Law, Universitas Padjadjaran; Bandung, Indonesia.

A. Introduction

Foreign Direct Investment (FDI) is an important and reliable method in developing the economy and productivity of countries as it plays an extraordinary role in the growth of global business. However, conflicts of interest between parties and the conditions in the host State, particularly for developing countries, continuously raise problems in this particular area (Sornarajah, 2004). Thus, to develop a more favorable climate for international investment and to protect the host States' interest, it is necessary to foster their economic situation and provide a suitable legal system and settlement mechanism. Without a proper legal system, other aspects of a State such as its political and social factors would disrupt the process of investment in the host State.

The International Centre for Settlement of Investments Disputes ("the Centre") provides arbitration and conciliation as preferable means of dispute resolution through its convention. As in any international business dispute settlement, arbitration has always been the best alternative dispute resolution for its assured advantages such as confidentiality, flexibility and impartiality of the arbitrators (Margaret L. Moses, 2008).

However, parties often challenge the Centre's jurisdiction. In fact, as shown in many cases submitted before the court, the Centre still struggles to define its jurisdiction specifically in regards with its jurisdiction *ratione materiae,* where considerable ambiguity is present within its terms. Previous case law have shown frequent objections towards the Centre's jurisdiction by arguing from the description of the facts, unclear condition of the investment's existence, the position of the parties towards the case, and the holding of the Tribunal (Sule Akyuz, 2001). In this paper, the problem that will be discussed relates to a ground for jurisdiction *ratione materiae* of the Convention, which is the investment's existence, which according to ICSID's purpose should espouse a requirement for Economic Development. Such purpose is argued to be the primary background of the Centre, and this concept has a greater influence in interpretation than the mere words of the preamble (Zachary Douglas, 2009).

B. ICSID and The Convention: An Overview on Jurisdiction and Challenges

In disputes between host States and investors, cases would have been previously submitted to the domestic court of the host State. Obviously, it is a disadvantage for the investors as the court's decisions could potentially be partial to the homeland. Nevertheless, diplomatic protection is used as shelter for the investor. Unfortunately, diplomatic protection also has several disadvantages, as the investor must have exhausted all local remedies in the host country first. Moreover, diplomatic protection is discretionary and the investor has no right to invoke it on its own accord.

Considering such circumstances, and also following the growth of FDI disputes, it was necessary to have a suitable mechanism that enables the accommodation of settlements in international investment disputes. In 1950, the Organization for European Economic Cooperation made several agreements to create a framework to support and protect investments worldwide. This was then followed by proposals from the General Counsel of the International Bank for Reconstruction and Development ("the World Bank") to make a multilateral agreement in order to settle investment disputes on the basis of arbitration and conciliation. The Board of Directors of the World Bank then approved the final draft of the agreement, titled the Convention on

the Settlement of Investment Disputes between States and Nationals of Other States ("the Convention"). Following this event, on October 1966, the Convention came into force.

After the Convention came into force, a large number of signatory states followed suit and became members of ICSID. Those members are also members of the World Bank as the latter finances the ICSID Secretariat's expenses and all its establishment cost. The Centre was established to provide facilities for the arbitration and conciliation of investment disputes and to promote the flow of foreign investment between developed and developing countries. What is important to consider is that all of those transactions were made to create economic development.

There are differences between ICSID as an arbitration institution with other arbitration institutions:

1) unlike other arbitration institution, ICSID is an international organization established by the Washington Convention;
2) ICSID has a completely indistinguishable relationship with the World Bank;
3) ICSID proceedings could be performed in international law as implemented in the Convention. It is an independent mechanism;
4) the role of national litigation is to confirm and enforce the recognition of awards from ICSID tribunal; and
5) ICSID arbitration aims to maintain the balance of interest between investors and host states. It is a unique arbitration facility with a purpose that goes beyond the resolution of disputes between investors and states (Dolzer, 2008).

ICSID consists of two bodies, the Administrative Council and the Secretariat. The Administrative Council is the governing body of the Centre and its function consists of various administrative tasks such as approving ICSID's annual report and its administrative budget. The Secretary General meanwhile, heading the secretariat, appoints and dismisses staff members, registers requests for arbitration and conciliation, authenticates and certifies final arbitral awards, appoints a secretary for each arbitral tribunal, and various other tasks. ICSID maintains a panel of arbitrators and conciliators from which parties may select individuals to resolve the submitted dispute. Each of the Contracting States may designate 4 arbitrators and 4 conciliators of any nationality with the appropriate expertise (the Convention, Art. 13). Persons designated to serve on the panels shall be of high moral character and have recognized competence in the fields of law, commerce, industry or finance and may be relied upon to exercise independent judgment (the Convention, Art. 14). Compared to *ad hoc* arbitrations, the Convention offers considerable advantages; it offers a system for dispute settlement that contains not only standard clauses and rules of procedure, but also institutional support for the conduct of proceedings (ICSID 2.1. Overview, 2002).

In the Convention, Art. 25(1) regulates the Centre's jurisdiction by stating that:

> "the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the

> dispute have given their consent, no party may withdraw its consent unilaterally"

Thus, the requisite elements for the competence of a tribunal under the Centre are: 1) the requirement of a legal dispute; 2) the requirement that the dispute arises directly out of underlying transaction; and 3) that such underlying transaction qualifies as an investment. Unfortunately the Convention has not clearly defined the terms 'legal dispute' and 'investment'. Thus jurisdiction *rationae materiae* became one of the distinctive points of contentions in ICSID. An example thereof is the meaning of the phrase 'out of an investment'. The vagueness of this term has led to jurisdiction *rationae materiae* becoming an issue in ICSID. To prove whether or not ICSID has jurisdiction, it is very important to seek jurisdiction *rationae materiae*.

It is found that case laws from the Tribunal have frequently displayed complications in defining the term 'investment', which would eventually lead towards objections to the Centre's jurisdiction. In the case of *Fedax v. Venezuela*, the Respondent challenged the Centre's jurisdiction by contending that the promissory notes given by the Claimant as the investor, is not a form of investment. Also in *CSOB v. Slovakia*, the Respondent also pleaded that the consolidation agreement made by both parties is also not a form of investment. The Respondent in the above cases argued that the arbitration proceedings were not legitimate as it does not arise from an investment and thus contrary to Art 25(1) of the Convention. In most cases, including the two cases above, the Tribunal rejected the Respondent States' challenge to jurisdiction. However the Commentary on the Convention expressly states that the requirement of directness requires a dispute to be reasonably closely connected to an investment (Schreuer, 2001). What happened in both cases was that the relevant legal documents between the parties were argued by respondents to be non-investment documents and thus not considered to be valid forms of investment carried out in the host state.

Fedax and *CSOB* were cases where a state party was dragged to an incompetent tribunal, which should have had no jurisdiction *rationae materiae*. Besides, the distressing fact that mere documents without concrete investment following them up could lead to grounds for arbitration, there are also several disadvantages for the host state. Investor-state arbitration initiated by investors solely to pursue commercial interests often conflict with the policy goals of states. Investment arbitration, not subject to restraining considerations that apply to state to state dispute settlement; could expose parties to potentially costly international arbitration and awards. Furthermore, problems of regulatory chills associated with risk of claim being brought; the lack of accountability of investors; legitimacy and democracy concerns; and lack of familiarity of arbitrators with non-investment issues also riddles ICSID arbitration (Schill, 2009).

C. Economic Development as the Core Concept of ICSID

The term Economic Development refers to the deliberate effort to improve the economy of a specified geographic area, which can be as large as an entire nation-State or as limited as a city neighborhood (Centre for Community Enterprise, 2012). A general definition of this would be the process of raising the level of prosperity and material living in a society through increasing the productivity and efficiency of its economy. The Convention's primary aim is the promotion of Economic Development. The Convention is designed to facilitate private international investment through the creation

of favorable investment climate (Harahap, 2006), furthermore the World Bank's purpose of creating this convention is to reduce poverty in middle-income country by promoting sustainable development (World Bank, 2012). These purposes are intrinsic to the concept of investment in the Convention.

The Convention was born with the goal to pursue economic development as proven by its preamble which reads:

> "[the Contracting States] considering the need for international cooperation for economic development, [and the role of private international investment therein]..."

Moreover, the link between an orderly settlement of disputes, the stimulation of private international investments and economic development is explained in the Report of the Executive Directors on the Convention in the following term:

> "in submitting the attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development"

That is one of the reasons why the tribunal in *Amco v. Indonesia* explained that ICSID tribunal is in the interest of not only investors, but also of host States (Amco 1983). There is also clear link between ICSID and the World Bank, which has strong developmental goals in its lending practices. For example the purpose of the World Bank according to the Article of Agreement in IBRD is, among others, to facilitate and encourage international investment for; a) productive purposes; b) for the development of the productive resources of countries to increase productivity, standards of living and conditions of labor.

Thus in regards to the problem of ambiguity of the term 'investment' in the Convention, it can only be fulfilled by the manifestation of the investment itself. No matter the definition given by the parties in the term "investment" it must always embody some sort of development for the host State. The objective meaning of every single word in the Convention is already present in the basis of the Convention. As Economic Development becomes the element that must be fulfilled, thus for acts or businesses to be considered as investments under the Convention, significant development for the host state must be effected. This issue of jurisdiction *ratione materiae* in the Convention of defining the term of investment becomes a one of the significant objection towards ICSID competency.

D. Economic Development Concept in its Impact to the Convention's Dynamic Changes

Most international investment law cases, when determining the existence of an investment, have been made in accordance with the concept of Economic Development. As the Convention does not define the term 'investment', tribunals have considered whether there are certain criteria that can be incorporated into its provision to determine when an investment has been made for the purpose of the Convention. However, the divergence of opinion on the extent to which contribution to Economic Development is determinative of an investment's entitlement seems to stem from the difficulties associated with how to define and measure economic development and ascertaining what constitutes relevant contribution towards it.

This absence of proper definition of 'investment' has given rise to issues where they have to determine the word 'investment' so that parties involved could prove jurisdiction *ratione materiae* to the Convention.The importance of economic

development for an ICSID protected investment cannot be underestimated. In the case of *Malaysia Historical Salvor v. Malaysia*, sole arbitrator Michael Hwang found that a positive and significant contribution to the economic development of the host state is a requirement for the investment to be ICSID protected (Bolivar, 2010). However,it is not easy, and sometimes impossible, to ascertain the existence of economic development. Furthermore in *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*, the case established a test known as *the Salini test*, which proposed a combination of criteria in determining contributions towards economic development, these are namely: a) be made for public interest; b) to transfer know-how; c) enhance the Gross Domestic Product of the host state; d) make a positive impact on the host States development. The *Salini* testhas been followed by tribunals in many subsequent disputes, some in whole, some in part, and some with subtle changes.

In the *Salini* test, the term investment implies a contribution towards the Host State's development, this judgment is followed by other tribunals, such as in *Saipem v. Bangladesh*, where it upheld the relevance of economic development as a prominent requirement for the existence of investment, and further implied that the contribution to the Host State development should be significant. Heavy reliance on the existence of economic development as a defining characteristic could be seen as ignorance towards the legal terms consented by both parties, which might not require development. To cover that ignorance, the Tribunal in *Bayindir v. Pakistan* had adjusted that determination would depend on the circumstances of each case, even though *the Salini test* has been applied in the first place.

However, ICSID Tribunals are currently minimizing the relevance of economic development as the prominent element and often dismiss host State's objection to jurisdiction that the so called 'investments' brought to arbitration have not contributed to their development. This condition is also supported by the decision of several tribunals. In *LESI S.p.A. v. Algeria* for example, the Tribunal overruled *the Salini* test by dismissing the need for Economic Development as primary objective of the Convention's terms. Though the Tribunal held that the *Salini* test is only applicable in a given context, it held that it cannot be applied as a general rule, but on a case-by-case basis. The Tribunal found that specific elements in the concept of investment, i.e. duration of the investment, assets contribution, a certain risk, and a significant contribution to the economic development, would prevail over Economic Development because those elements are objective in nature and provide certainty, unlike the term 'Economic Development' which is hard to be determined.

Further, in *PSEG v. Turkey*, the Tribunal did not even consider the issue of development at all because the existence of an investment was so real to it that it was not even worth going through the *Salini* test. Regarding the connection between economic development and its contribution to the definition of investment, the arbitrator in *Malaysian Historical Salvors* found a yardstick to such object. The arbitrator highlighted the element of "significance" of the contribution to the host State's development and based his decision to decline jurisdiction (Mortenson, 2010). Sole arbitrator Hwang found that a positive and significant contribution to the economic development of the host State was a requirement for the investment to come under the protection of the Convention. Significantly, the Tribunal held that enhancing the Gross Domestic Product of the local economy was the factor that

determined the criterion of economic development.

E. Closing

Economic development as a fundamental legal requirement indeed is far too wide and subjective to offer solid ground to argue lack of jurisdiction before an ICSID Tribunal. What is extracted from both doctrine and case law is that the law does not allow too much hope for a Host State to argue thus. However, it should be noted that the main purpose of ICSID is still to foster Economic Development. Its absence would turn the Convention inapplicable and the Tribunals incompetent.

ICSID does not recognize *stare decisis* (Waldron, 2011),as international investment law does not incorporate such concept (Schill, 2009),hence Tribunals are not bound by precedents such as those rejecting the proposed argument. This makes the defense technically possible for an attempt by Host States if the facts of the case so allow. Nevertheless, taking into account the ambiguity of the concept of economic development together with the international community's investor friendly position, means an almost certain refusal by an ICSID Tribunal of such an argument.

Consequently, it would be advisable for a Host State raising an objection to the jurisdiction of the Centre based on the absence of economic development in its territory to prove, however difficult, that not even a hint of development arouse out of the claimant's investment. The Host State could also argue, even if there had indeed been some contribution to its development by the claimant, if none of the other elements of *the Salini test* had been met, that the contribution to its development had not been significant enough to sustain itself. These objections would result in a matter of a soft proof. For this reason a party relying on them should set up the most complete and convincing plea as possible.

In simple conclusive term, the concept of Economic Development is expressly stated both in the Preamble to the Convention and in the Report of the Executive Directors. Based on those facts and supporting arguments from case to case, if the investment does not encourage the Host State's development, then it would fall outside the scope of the Convention. Unfortunately, ICSID cases are not that simple since ICSID Tribunals are not bound by *stare decisis*, thus, it should be feasible for a state to challenge to the jurisdiction of the Centre on that basis.

Seeing that parties always have the freedom to choose the forum, it is advisable for the investor not to choose ICSID as the exclusive forum, but to set it as an option among other institutions or courts.

Economic development is certainly a concept that can be very broad and can encompass many disparate elements. However, through a review of the relevant documents and cases, several factors have emerged that point to certain criteria which are not exclusive, for determining when an investment has made a contribution to the economic development of the host state.

Although it is still very much a controversial and debatable area of international investment law, it is clear that several factors need to be satisfied under the test of whether an 'investment' has contributed to the economic development of the host state. If an investment is contrary to the public interest, has not transferred any knowledge to the host state, has not developed the economy, it almost certainly not made a proper contribution as required by the Convention.

BIBLIOGRAPHY

A. Books

Dolzer, Rudofl. (1995). Bilateral Investment Treaties. Netherland: Martinus Nijhoff Publishers.

Douglas, Zachary. (2009). The International Law of Investment Claims. UK: Cambridge University Press.

Harahap, M. Yahya. (2006). Arbitrase Ditinjau Dari Reglemen Acara Perdata, Peraturan Prosedur Bani, Icsid, Uncitral Arbitration. Indonesia: Sinar Grafika.

Moses, Margaret L. (2008), The Principle and Practice of international Commercial Arbitration. UK: Cambridge University Press.

Schill, Stephan W. (2009). The Multilaterization for International Investment Law. UK: Cambridge University Press.

Schreuer. (2001). The ICSID Convention: A Commentary. UK: Cambridge University Press.

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

B. Convention

Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965): Retrieved from www.worldbank.org/icsid.

International Bank Reconstruction and Development Article of Agreement, Retrieved from http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf.

C. Cases

Amco v. Indonesia, ICSID Case No. ARB/81/1 (1983).

Bayindir v. Pakistan, ICSID Case No. ARB/03/29 (2005).

CSOB v. The Slovak Republic, ICSID Case no. ARB/97/4 (1999).

Fedax v. Venezuela, ICSID Case No. ARB/96/3 (1998).

LESI, S.p.A. and Astaldi, *S.p.A. v. Algeria*, ICSID Case No. ARB/05/3 (2006).

Malaysia Historical Salvor v. Malaysia, Case No. ARB/05/10 (2006).

PSEG v. Turkey, ICSID Case No. ARB/02/5 (2007).

Saipem v. Bangladesh, ICSID Case No. ARB/05/7 (2009).

Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco, ICSID Case No. ARB/00/4 (2001).

D. Other

Aykuz, Sule, (2001). THE JURISDICTION OF ICSID: The Application of the Article 25 of Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, C.52.Sa.3.

Bolvar, Omar E. (2010). Protected Investments and Protected Investors: The Outer Limits of ICSID's Reach, Trade, Law and Development Vol.2. Retrieved October 18, 2012, from (ttp://www.tradelawdevelopment.com/index.php/tld/article/view/2(1)%20TL%26D%20145%20(2010)/45.

Centre for Community Enterprise. Retrieved October 18, 2012, from www.ccednet-redec.ca.

Mortenson, Julian Davis. 2010 - The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law, Harvard International Law Journal, 51(1). United Nations Conference on Trade and Development, Course on Dispute settlement: ICSID 2.1. Geneva: UN, 2002.

United Nations Conference on Trade and Development, Course on Dispute settlement: ICSID 2.1. Overview, UN, Geneva, 2002.

Waldron, Jeremy, (2011). Obligation to honor past precedent: Stare Decisis and the Rule of Law: A Layered Approach. Retrived October 16, 2012, from http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website__academics__colloquia__legal_political_and_social_philosophy/documents/documents/ecm_pro_069736.pdf.

HUMANITARIAN INTERVENTION: CHALLENGING THE PRINCIPLE OF NON-INTERVENTION, UPHOLDING HUMANITY*

Billy Esratian**

Abstract

The United Nations (UN) was established under the notion of equality among member States. Such notion is exercised and crystallized through the principle of non-intervention. Over decades the principle of non-intervention has been the root of international relations in which it embodies a stringent rule that a state cannot intervene in another state's affairs. On the other hand, international law recognizes human rights as part of *jus cogens* and in several cases giving rise to *erga omnes* obligations. In cases where violations of human rights occurwithin a state,conflict ascends on which interests of the international community should be upheld since the principle of non-intervention and human rights are contradictory one to another. It is true that such conflict may be anticipated through Security Council (SC) action, but, is the SC on its ownreally effective? Several cases have indicated the failures owed by the SCand have left a shattering tragedy in the civilized history. This article will observe the newly emerging customary law of humanitarian intervention and argue the necessity in recognizing such intervention in contemporary international law despite the existence of the old established rule of non-intervention.

Intisari

Perserikatan Bangsa-Bangsa (PBB) didirikan atas dasar kesetaraan terhadap negara-negara anggotanya. Kesetaraan ini dilaksanakan dan telah dikristalisasikan melalui prinsip non-intervensi. Prinsip tersebut telah menjadi akar dari hubungan internasional dimana di dalamnya diatur aturan yang ketat bahwa suatu negara tidak dapat melakukan intervensi terhadap urusan negara lain. Dalam lain hal, hukum internasional mengakui hak asasi manusia (HAM) sebagai bagian dari jus cogens, *bahkan dalam beberapa kasus menimbulkan kewajiban*erga omnes. *Dalam kasus pelanggaran HAM di suatu negara, suatu konflik muncul terkait kepentingan mana yang harus dipertahankan oleh dunia internasional karena prinsip non-intervensi dan HAM tersebut bertentangan antara satu dengan yang lainnya. Memang benar bahwa konflik tersebut dapat diantisipasi melalui tindakan Dewan Keamanan (DK) PBB, tapi apakah DK sendiri sudah efektif? Beberapa kasus menandakan kegagalan dari DK, yang mana menjadi tragedi bagi sejarah manusia yang beradab. Artikel ini akan mengamati lebih lanjut hukum kebiasaan tentang intervensi humaniter yang mulai muncul dan menelaahkebutuhan untuk mengakui bentuk intervensi tersebut dalam hukum internasional kontemporer meskipun telah ada aturan tentang non-intervensi yang sudah lama terbentuk.*

Keywords: Non-intervention, violation of human rigths, and humanitarian intervention.

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

A. INTRODUCTION

1. The Principle of Non-Intervention

The principle of non-intervention has been the core of international relations for over decades. The United Nations (UN) as an international organization possessing a universal character,[1]has acknowledged non-intervention as one of the core principles under its Charter by affirming the importance of States in refraining from any threat or use of force against other States.[2] The principle of non-intervention bestows States with absolute discretion in governing its own territory without any occasion to be disrupted by other States.

The General Assembly of the United Nations (GA) had also successfully adopted resolutions which acknowledge the principle of non-intervention. This is reflected in its resolutions such as GA Resolution 2131 (XX) of 21 December 1965 and Resolution 2625 (XXV) of 24 October 1970. A General Assembly resolution, although non-binding in character, could at times possess a normative value whereby in several circumstances can be a determining indication to assess the existence of a rule or the emergence of an *opinio juris* (Legality of the Threat or Use of Nuclear Weapons, 1996). According to Shaw, *opinio juris* is the factor that turns a practice into a custom and renders it part of the rules of international law (Shaw, 2008).The applicability of the principle of non-intervention is thus universally valid. In this regard, it extends its application even to States who are not members of the United Nations (Malanczuk, 1997). The International Court of Justice (ICJ) reaffirms practices pertaining to the binding scope of the principle of non-intervention and further affirmed it to be a part of customary international law.[3]

In the Corfu Channel case, the judges of the ICJ opined that the alleged right of intervention as the manifestation of a policy of force, gives rise to most serious abuses and cannot, whatever be the present defects in international organization, find a place in international law. This notion is also supported as interventions would generally be conducted only by the most powerful States, and might easily lead to perverting the administration of international justice itself (Corfu Channel case, 1949).Their subsequent judgment in *Nicaragua* also reaffirms the existence of such customary law whereby the court ruled that the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States (Nicaragua v. United States of America, 1986).

The principle of non-intervention in its development has unfortunately been used as a shield for State actors to legitimize violations of human rights in which the international community cannot intervene.

2. Human Rights as a Part of *Jus Cogens* and the Rising of *Erga Omnes* Obligations

Pursuant to Article 53 of Vienna Convention on the Law of Treaties, *jus cogens* is a peremptory norm of general international law accepted and recognized by the international community of States.

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[1] See Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

[2] This principle is codified within Article 2(4), United Nations Charter, hence, it could also be argued that this codification gives rise to a treaty obligation towards UN Member State to respect such principle.

[3] See *Corfu Channel case*, Judgment of April 9th, 1949: I.C.J. Reports 1949, p.4. (*Corfu Channel*), *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14 (*Nicaragua*).

Jus cogens as a norm, does not permit any derogation and can be modified only by a subsequent norm of general international law having the same character. In relation to this, human rightsis increasingly perceived as part of *jus cogens*, one prime example of this matter is taken from the practice of the United Nations. In regards to human rights, the United Nations made a clear reference towards the universal respect of human rights as a State's purpose and that the all its members shall pledge to take joint or separate actions in order to achieve such purpose. This is implemented in various legal instruments adopted to accord the protection towards human rights, namely:

a. Universal Declaration of Human Rights (1948);

b. the Convention on the Prevention and Punishment of the Crime of Genocide (1948);

c. the International Convention on the Elimination of All Forms of Racial Discrimination (1965);

d. the International Covenant on Economic, Social and Cultural Rights (1966); the International Covenant on Civil and Political Rights (1966);

e. the Convention on the Elimination of All Forms of Discrimination Against Women (1979); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); and

f. the Convention on the Rights of the Child (1989).

The International Covenant on Civil and Political Rights (ICCPR) as one of the binding instruments governing the protection of human rights explicitly expressed that several rights cannot be derogated even during times of emergency. Pursuant to Article 4.2 of the ICCPR, such rights are:

a. the right to life,

b. the right of not being subjected to torture or to cruel, inhuman or degrading treatment or punishment, and without his free consent to medical or scientific experimentation,

c. the right of not being held in slavery;

d. the right of not being imprisoned merely on the ground of inability to fulfill a contractual obligation.

e. the right of not being held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed;

f. the right to recognition everywhere as a person before the law;

g. the right to freedom of thought, conscience and religion.

Hence, such rights are transformed into part of jus cogens due to their non-derogable character.

The *Barcelona Traction* case before the ICJ ruled that *erga omnes* obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human

person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character. (Barcelona Traction, Light and Power Company, Limited, 1970). Thus, the violation of *jus cogens* rights will give rise to the *erga omnes* obligations.

A former Judge of the ICJ, Bruno Simma, also notes that when human rights are violated, there simply exists no directly injured State because international human rights law does not protect States but rather human beings or groups directly. Consequently, the substantive obligations stemming from international human rights laws are to be performed above all by the State bound by it, and not *vis-à-vis* other States. In such instances to adhere to the traditional bilateral paradigm and not to give other States or the organized international community the capacity to react to violations would lead to the result that these obligations remain unenforceable under general international law (Bruno Simma in Karl Zemanek, 2000).

However, the established status quo indicates that despite the *erga omnes* obligation owed to the international community to end violence and violation of human rights in a particular state, the principle of non-intervention still prevails. As the ICJ has noted in *Nicaragua*, "in any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect" (Nicaragua v. United States of America, 1986). Hence, such obligation is conferred solely to the United Nations Security Council.

B. DISCUSSION

1. Flaws within the United Nations Security Council

Bestowed by the competence to adopt a binding decision as stipulated under Article 25 of the UN Charter, the Security Council of the United Nations holds primary responsibility in the maintenance of peace and security. The Security Council may also authorize member States to resort to the use of force in situations that threaten international peace and security as seen from the practices in the authorizations to take all necessary measures in Iraq through Resolution 678 and Libya through Resolution 1973.

The execution of this enormous power however is not constantly in accordance with the purposes and objectives of the UN itself. As noted by Forsythe, the Security Council is primarily a political body, and its actions on human rights depend heavily on political will and political consensus, especially among the permanent members (Forsythe, 2012). An appalling example on how the Security Council had confused politics and humanity could be inferred during the 1994 genocide in Rwanda. In order to stop the ongoing violence in Rwanda, the Security Council initially established United Nations Assistance Mission for Rwanda (UNAMIR) which was mandated only to contribute to the security of the city of Kigali through Resolution 872. During the period of genocide, the Security Council reduced the number of UNAMIR to about 270 and changed UNAMIR's mandate.[4] However, such change still did

[4] See UN Security Council, *Resolution 912 (1994) Adopted by the Security Council at its 3368th meeting, on 21 April 1994*, 21 April 1994, S/RES/912 (1994) and Report of the Independent Inquiry into the Actions of the United Nations during the 1994 genocide in Rwanda (1999) available at http://daccess-dds

not grant UNAMIR the power to take effective action to halt the continuing massacres (Letter to the President of the Security Council, 1994). Countries such as Brazil, China and United Kingdom are reportedly against to the idea of intervention by the UN (Independent Inquiry Report, 1999). Such failure to take necessary measures eventually led to the death of approximately 800,000 people (Independent Inquiry Report, 1999). Hence, it would be difficult to solely rely on the Security Council since its political character could possibly lead to failure to act despite an urging predicament occurs.

Another flaw within the Security Council also could be perceived from the way it adopts a resolution. Pursuant to Article 27 of the UN Charter, the Security Council, in passing a resolution on substantive matter requires concurring votes of the permanent members, such rule indirectly establishes what is known as the veto power of the 5 permanent members of the Security Council (Köchler, 1991). Such veto power however, could be a defect at the same time as in several emergency situations, the Security Council failed to reach consensus due to vetos by its permanent members. The most recent case in relation to this is the 2012 conflict in Syria, where due to negative votes from two permanent members, the Security Council failed to adopt a resolution that would have extended the mandate of the United Nations Supervision Mission in Syria (UNSMIS) and which would have threatened sanctions on the country if demands to end the spiraling violence were not met (United Nations Department of Public Information, 2012).

Thus, several flaws within the Security Council should be an opportunity for the international community to contemplate and find another appropriate method in the event that international peace and security is grossly disturbed through violations of human rights. One of the possible solutions to end the predicament could be derived from the new emerging custom of humanitarian intervention.

2. Humanitarian Intervention: Effective Solution?

It is undoubtedly acknowledged that violation of human rights disturbs every individual's sense of humanity and leaves scars in the history of mankind. Recent developments have shown that the international community is getting more aware of the *erga omnes* obligation to stop human rights violation due to the failure to act by the Security Council. As noted also in the *Tadić* case, the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach (Prosecutor v. Duško Tadić, 1995).

Consequently, the obligation to end the violation of human rights is increasingly exercised through humanitarian intervention, which is defined as the threat or use of force across state borders by a state (or group of States) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied (Holzgrefe, 2003). The General Assembly also took the same view whereby it is stressed to continue consideration of the responsibility to protect populations from

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ny.un.org/doc/UNDOC/GEN/N99/395/47/IMG/N9939547.pdf?OpenElement.

genocide, war crimes, ethnic cleansing and crimes against humanity and its implications (General Assembly, 2005). The Constitutive Act of the African Union also adopts the same position, whereby Article 4(h) stipulates that, "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity [...]." These instruments indicate the sense of legal obligation owed by the international community in exercising the notion of humanitarian intervention.

Several practices reflects the implementation of humanitarian intervention in addressing gross human-rights violation that occurred within a state, such as in Kosovo in 1999 and Uganda in1979whereby intervention took place without the authorization from the Security Council and with the purpose of ending the violation of human rights. In Kosovo, it is largely assumed that NATO air intervention against Yugoslavia falls within the ambit of the doctrine of humanitarian intervention, as the Alliance itself declared to have intervened on the basis of overriding humanitarian purposes (Kumbaro, 2001). The former Secretary-General, Kofi Annan, has blessed the outcome of such intervention as it referred that it is, "emerging slowly, but [...] surely, is an international norm against the violent repression of minorities that will and must take precedence over concerns of state sovereignty" (Annan, SG/SM/6949 HR/CN/898, 1999).

While in Uganda, Idi Amin's regime engaged in extreme, widespread human rights abuses in Uganda from 1971-1979. During his regime, it is estimated that 300,000 Ugandans were executed and thousands more were expelled. The horror however, stopped after Tanzania invaded Uganda and overthrew Amin's government in 1979. Amin fled into exile in Malawi and Tanzania (Nowrot & W.Schabacker). Hence, it could be argued that Tanzania's intervention in Uganda was because, by overthrowing the Amin dictatorship, it saved more lives than it cost (Holzgrefe, 2003).

Former Secretary-General of the United Nations, Kofi Annan, once questioned the prevalence of principle of non-intervention towards violation of human rights. He stated, "If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?" (Annan, 2000).

Responding to Annan's question, the Government of Canada established the International Commission on Intervention and State Sovereignty (ICISS). ICISS then launched a codification on the concept of Responsibility to Protect (R2P). Such concept provides a threshold on what kind of violations of human rights could render a just cause in launching a military intervention. The justifications are sets of circumstances, namely in order to halt or avert (International Commission on Intervention and State Sovereignty, 2001):

a. large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
b. large scale "ethnic cleansing," actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.

Although R2P is considered as a different concept than humanitarian intervention, the rationale in which it was created was entrenched on the practices of

humanitarian intervention. Thus, R2P provides an even clearer understanding on the grounds and conducts where humanitarian intervention could be justified. Finally, as noted by the ICJ, it is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States (Continental Shelf, 1985). Several *opinio juris* accompanied by the practices as elaborated above indicate that the notion of humanitarian intervention deserves the status of customary international law. Thus, this rule of humanitarian intervention is a clear proof that human rights violation can be effectively stopped and at the same time fulfilling the *erga omnes* obligations to protect and preserve human rights.

C. CONCLUSION

In order to establish an equal world where there is no subordinate relationship between States, the principle of non-intervention has been recognized and upheld by the international community to be the leading norm to protect and preserve the notion of equality. Thus, a state is given absolute jurisdiction to govern its own territory.

However, the price for applying strict interpretation of such principle is overwhelming. The world has seen horrors as millions of people had been deliberately killed as a result of the failure of the international community to respond towards violation of human rights due to the prevalence of non-interventionism.

The international community can no longer be silent on this issue. A new paradigm is urgently needed to address human rights violation. Such paradigm can be derived from the rule of humanitarian intervention. This rule of humanitarian intervention allows States to intervene in another state's territory with the purpose of ending the ongoing violations of human rights. Several practices of intervention conducted on behalf of upholding humanity were proven to be effective in terminating the predicament of human rights violations. In addition, the rule of humanitarian intervention is also in accordance with the *erga omnes* obligation to respect human rights as noted in several international legal instruments and various publicists. Hence, the rule of humanitarian intervention should be acknowledged as part of international customary law providing that such rule is sustained through various *opinio juris* and practices.

To sum up this article, the author would like to quote the words of Gareth Evans, President of the International Crisis Group,

> "It has taken the world an insanely long time, centuries in fact, to come to terms conceptually with the idea that state sovereignty is not a license to kill - that there is something fundamentally and intolerably wrong about States murdering or forcibly displacing large numbers of their own citizens, or standing by when others do so." (Gareth Evans in Brian Barbout &Brian Gorlick, 2008)

BIBLIOGRAPHY

A. Books and Journals

Barbout, Brian & Gorlick, Brian. (2008). Embracing the 'responsibility to protect': a repertoire of measures including asylum for potential victims,

Int J Refugee Law 20 (4): 533-566. doi: 10.1093/ijrl/een035.

Frowein J.A. & Wolfrum R. (2000). Max Plack Yearbook of United Nations Law, Kluwer Law International: Netherlands.

Holzgrefe, J.L. (2003). Humanitarian Intervention: Ethical, Legal, and political dilemmas, University Press: Cambridge.

Malanczuk, Peter. (1997). Akehurst's Modern Introduction to International Law 7th Revised Edition, Routledge: New York.

Nowrot, Karste and Emily W. Schabacker., (1998). The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone. American University International Law Review 14, no. 2: 312-412.

Shaw, Malcolm. (2008). International Law 6th Edition, Cambridge University Press: New York.

B. Conventions and Resolutions

Charter of the United Nations (1945).

International Covenant on Civil and Political Rights (1966).

Protocol on the Amendments to the Constitutive Act of the African Union, (2003).

United Nations General Assembly, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, (1965).

United Nations General Assembly, Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, (1970).

United Nations General Assembly, 2005 World Summit Outcome, (2005).

United Nations Security Council Resolution 678 (1991).

United Nations Security Council Resolution 872 (1993).

United Nations Security Council Resolution 912 (1994).

United Nations Security Council Resolution 1973 (2011).

Vienna Convention on the Law of Treaties (1969).

Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (1975).

C. Cases

Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 3.

Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I. C.J. Reports 1985, p. 13.

Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949, p.4.

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14.

Prosecutor v. Duško Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (Appeals Chamber decision, 2 October 1995).

D. Reports

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

Final Report for North Atlantic Treaty Organization, The Kosovo Crisis in an International Law Perspective: Self-Determination, Territorial Integrity and the NATO Intervention, (2001).

Report of the Independent Inquiry into the Actions of the United Nations during the 1994 genocide in Rwanda (1999) available at http://daccess-dds ny.un.org/doc/UNDOC/GEN/N99/395/47/IMG/N9939547.pdf?OpenElement.

Secretary-General Kofi Annan, We the Peoples: The Role of the United Nations in the Twenty-First Century, UN Doc. No. A/54/2000, (2000).

Secretary-General Kofi Annan, Secretary-General Calls For Renewed Commitment In New Century To Protect Rights Of Man, Woman, Child -- Regardless Of Ethnic, National Belonging, SG/SM/6949 HR/CN/898 (1999).

E. Others

Forsythe, David P. (2012). The UN Security Council and Human Rights, Friedrich-Ebert-Stiftung Global Policy and Development, available at http://library.fes.de/pdf-files/iez/09069.pdf.

Köchler, Hans. (1991). The Voting Procedure in the United Nations Security Council: Examining a Normative Contradiction in the UN Charter and its Consequences on International Relations, available at http://i-p-o.org/Koechler-Voting_Procedure-UN_Security_Council.pdf.

Letter dated 29 April 1994 from the Secretary-General addressed to the President of the Security Council, S/1994/518 (1994).

United Nations Department of Public Information, Security Council Fails to Adopt Draft Resolution on Syria That Would Have Threatened Sanctions, Due to Negative Votes of China, Russian Federation (2012), available at http://www.un.org/News/Press/docs/2012/sc10714.doc.htm.

LEGAL ASPECT OF THE FISHERIES DISPUTE ON THE SOUTH CHINA SEA: BOUNDARIES AND FISHING ACTIVITIES*

Afghania Dwiesta**

Abstract

After centuries of extensive high seas freedom of fishing, the introduction of the Exclusive Economic Zone (EEZ) and the adoption of the 1982 United Nations Convention on the Law of the Sea sought to provide a more effective framework for the management and conservation of marine living resources. The main focus of this article is the legal and environmental perspective of the sea, especially withinthe EEZ of a State. The EEZ is a reflection of the aspiration of developing countries towardseconomic development and their desire to gain greater control over the economic resources off their coasts, particularly their fish stocks, which in many cases were legally exploited by distant water-fleets of developed States(Lowe, 1999). Although States have already claimed their EEZ, fishing activities are still raised as issues from time to time. This article will discuss three points.First,it will outline the early development of fisheries and Coastal States' rights and duties based on jurisdiction over their exclusive zones; second, it will discuss the current maritime dispute in the South China Sea; and third, it will consider dispute resolution enforcement measures in resolvingtheconflict of maritime boundaries and fishing activities.

Abstrak

Selama beberapa abad, penangkapan ikan di laut lepas merupakan kebebasan yang dipraktikkan secara luas. Akan tetapi, dewasa ini konsep Zona Ekonomi Eksklusif (ZEE) dan Konvensi Hukum Laut PBB, dianggap dapat memberikan wadah yang lebih efektif untuk usaha manajemen dan konservasi terhadap sumber daya kelautan. Fokus utama dalam artikel ini adalah tinjauan hukum dan lingkungan terhadap laut, khususnya pada Zona Ekonomi Ekslusif (ZEE). ZEE adalah sebuah refleksi dari aspirasi negara-negara berkembang untuk mencapai pertumbuhan ekonomi dan untuk menguasai sumberdaya ekonomi mereka sendiri, khususnya sumberdaya perikanan yang pada praktiknya telah dieksploitasi secara ilegal oleh negara-negara lain yang mampu menggunakan armada jarak jauh untuk menangkap ikan (Lowe, 1999). Meskipun banyak negara yang telah mengklaim wilayah ZEE mereka, praktik perikanan merupakan suatu wacana yang masih menjadi perbincangan dari waktu ke waktu. Artikel ini akan membahas tiga hal terkait dengan isu-isu tersebut, pertama, perkembangan awal aktivitas perikanan dan kewajiban serta hak-hak dari negara-negara pantai, kedua, masalah kelautan yang timbul di Laut Cina Selatan, dan ketiga, penerapan penyelesaian sengketa maritim yang timbul mengenai perbatasan wilayah maritime dan kegiatan perikanan.

***Keywords**: fisheries, fishing, maritime fisheries, South China Sea dispute, Boundaries dispute.*

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** 2010; International Law; Faculty of Law, Universitas Indonesia; Depok, Indonesia.

A. Early Development of Fisheries and States' Rights and Duties

The nature of marine fisheries has affected the regulation of the international law of fisheries. Fishery law was derived from the assumption that fisheries are common property natural resources, since free-swimming fish in the sea are not owned by anyone. Thus, property rights only arise when the fish are caught and thereby reduced into the possession of an individual fisherman.

In time, there arose a tendency for fish stocks to be fished above biologically optimum levels. This led to over-fishing as was the case with the Antarctic Whales and the California Sardine. Because there is an absence of regulation in marine fisheries, individual fishermen have no incentive to restrain their activities in order to prevent over-fishing. As a result, there is no guarantee that other fishermen will follow the example of an environmentally conscious peer. Consequently, an unregulated fishery will normally lead to over-fishing.

Prior to the Exclusive Economic Zone (EEZ) regime, around the year 1958 an Exclusive Fishing Zone (EFZ) regime of 200-miles was claimed by several coastal Latin American states. However, the claims were challenged by the US and disputes arose due to the failure of UNCLOS I and II to agree on the breadth of the territorial sea or to accord Coastal States any special rights of access to fish stocks beyond the territorial sea. This failure led to a wave of unilateral claims by Coastal States to twelve-mile EFZs, within which Coastal States had exclusive or priority access to the resources of the zone (Lowe, 1999).In the 1974 *Fisheries Jurisdiction Case* (*United Kingdom v. Iceland*), such practices led the International Court of Justice to find no hesitation in pronouncing that the twelve-mile EFZ had become established as a rule of customary international law.

In 1973, documents presented at the meetings of the United Nations Committee on the Peaceful Uses of the Seabed and Ocean Floor proclaimed the right to establish 'an exclusive economic zone' with limits not exceeding 200 miles (Brownlie, 2003). Within the EEZ, rights and duties of Coastal State sare regulated in Art.56(1) of the United Nations Convention on the Law of the Sea (UNCLOS). Art. 56(1) of UNCLOS stipulates that Coastal States have sovereign rights for the purpose of exploring and exploiting, conserving and managing the fish stocks within the zone. In Art.61(3), Coastal States must take into account fishing patterns, the interdependence of stocks and any generally recommended sub-regional, regional or global minimum standards. Art. 62(1) further governs that Coastal States are required to promote the objective of optimum utilization of the living resources of its EEZ. Finally, they must also establish the allowable catch for each fish stock within its EEZ as regulated in Art.61 (1).

In the *Fisheries Jurisdiction Case,* the International Court of Justice upheld the concept of preferential rights. As stated in its reports, "preferential rights of fishing in adjacent waters in favour of the Coastal State in a situation special dependence on its coastal fisheries, this preference operating in regard to other States concerned in the exploitation of the same fisheries. "This concept has survived in customary law in spite of the absence of any reference to it in

the Law of the Sea Convention of 1982 (Brownlie, 2003).

The sovereign right of States to exploit their own resources pursuant to their own environmental policies, expressed in Principle 21 of the 1972 Declaration of the United Nations Conference on the Human Environment, Principle 2 of the 1992 Rio Declaration on Environmental and Development ('Rio Declaration'), and Art.193 of UNCLOS, has long been established as a rule of international custom (Sands, 2003). However, the sovereignty of States over their natural resources is not absolute (Winter, 2009). It is qualified by treaties and customary international law relating to the conservation of natural resources and environmental protection (Boyle, 2002). Art.2 (3) UNCLOS states accordingly that "[t]he sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law". Similarly, in exercising its rights and duties within the EEZ, the Coastal State must have "due regard" to the rights and duties of other States and act in a manner compatible with the provisions of UNCLOS.

The conservation and management of fishery resources in the EEZ is the subject of Part V of UNCLOS. Furthermore, offshore fisheries management is also affected by the 1995 Agreement for the implementation of the Provisions of the UNCLOS of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks ('UN Fish Stocks Agreement'). In addition to specific treaty provisions, environmental standards for national fisheries management may emanate from other sources of international law, such as international custom or general principles of the law (Sands, 2003).

Regarding Coastal States' jurisdiction over their exclusive zones in exploiting their own natural resources, Art.73 of UNCLOS expressly rules that the they have the power to take reasonable measures of enforcement of their rights and jurisdiction within the zone in accordance with both the standards of general international law and, where applicable, the provisions of the Convention of 1982.

B. Maritime Fisheries Disputes in the South China Sea

The South China Sea is surrounded by Asia's most populous and fastest growing countries. For them, the sea is not only a vital source of food but is a major component of the economy and foundation for employment for the major component of their economy and foundation for employment for the majority of the population living along the coast of the South China Sea (Schlick, 2009).

Over 90 % of commercially important fish stocks are found within EEZs (Barnes, 2006). However, exclusive Coastal State jurisdiction has not subsequently put an end to the decline of fish stocks. In fact, it has been suggested that even the most developed States have failed in managing and conserving fisheries in their EEZs effectively (Christie, 2004).

The most direct threat to fish stocks in the South China Sea is related to unsustainable fishing operations. In recent years, fish catch has rapidly increased and the fishing resources of the South China Sea have reached a critical stage. Although basically fisheries are categorized as renewable resources, every fish stock underlies a maximum sustainable yield and any increase in fishing efforts above this level will impair the self-regenerating capacity of the species.

While less developed countries with limited naval capacity mainly rely on extensive use of resources in their coastal waters, distant fishing countries like China conduct their fishing operations in the EEZ of other countries leading to the phenomena of illegal, unreported, and unregulated fishing.

Based on one of China's claims as written in China Papers, the environmental interdependence between the States and the ecosystem of the South China Sea has long been ignored. The conversation regarding the region's fishing resources are of common interest, but given the overlapping claims and the highly political nature of the conflict, has long been placed in a minor light. The unavailability of reliable information and uncertainty regarding the sea's resources is due to ongoing disputes over sovereignty in the South China Sea, with several countries claiming sovereignty over parts of these waters for several decades (Novicio, 2003). Being the largest fishing state in the world, China has long been criticised for its unsustainable, illegal fishing practices within and outside its territorial waters (Schlick, 2009).

C. Legal Enforcement of Dispute Resolution in Fishery Conflicts and the Concept of Sustainable Fisheries Law on the South ChinaSea

The UNCLOS has not yet resolved ownership disputes in the South China Sea, however, multilateral, informal meetings have taken place annually since 1990 and through these, an attempt has been made by the littoral countries of the region to establish an environmental action programme for the South China Sea (Schlick, 2009).

There are several possible methods of settlements to be taken into consideration is negotiation, especially to settle the boundary disputes that led to fisheries conflict in the South China Sea. The negotiation process should be guided by its principles and other relevant principles of international law which provides guidelines for an agreement accepted by the parties. It is emphasized that good faith must guide all phases of negotiation and those negotiations must be conducted in a spirit of fairness and effectiveness. Apart from other internationally relevant instruments, the General Assembly of the UN adopted a resolution containing the principles of international negotiation as described below (Jamine, 2007):

a. Negotiations should be conducted in good faith;
b. States should take due account of the importance of engaging, in an appropriate manner, in international negotiations, the States whose vital interests are directly affected by the matter in questions;
c. The purpose and object of all negotiations must be fully compatible with the principles and norms of international law, including the provisions of the [United Nations] Charter;
d. States should adhere to a mutually agreed framework for conducting negotiations;
e. States should endeavour to maintain a constructive atmosphere during negotiations and to refrain from any conduct which might undermine the negotiations and their process;
f. States should facilitate the pursuit of conclusion of negotiations by remaining focused throughout on the

main objectives of the negotiations; and

g. States should use their best endeavours to continue to work towards a mutually acceptable and just solution in the event of an impasse in negotiations (General Assembly, 1999).

Based on the UN General Assembly Resolution 53/101 in 1999, it is clear that the principles of maritime boundary negotiation are not different from other kinds of negotiation in diplomacy. Good faith, in particular, is regarded as the main principle and feature of any international negotiation. Maritime boundary delimitation negotiations are extremely complex and require a variety of specialized skills. The core requirements for a successful negotiation team are the presence of political, legal, and technical components (Jamine, 2007).

Once the desire for delimitation has been established, the relevant legislation put in place, and the political decision taken by the parties to seek a delimitation agreement, preparations for negotiation may get under way. It is worth pointing out that this phase is often crucial to a successful delimitation negotiation, and should not be underestimated, rushed or curtailed. The proper groundwork for negotiation of the maritime boundaries delimitation agreement must include a report, prepared on the hydrographical and technical factors likely to affect the delimitation process by a component expert (Jamine, 2007).

The delimitation agreement is the final product of boundary delimitation negotiation and the form of the final agreement must be in accordance with international rules. In this regard, the 1969 Vienna Convention on the Law of Treaties is the framework instrument which codifies the rules on the conclusion and effects of treaties. Apart from the 1969 Vienna Convention on the Law of Treaties, parties to a negotiation should consider any effects of their own constitutional rules on treaties. In the South China Sea dispute, it is necessary for the six States who raised claims on the Spratly Islands to set up a delimitation agreement.

In the South China Sea dispute, in the view of bilateral negotiations between China and the Philippines, the role of Taiwan for any kind of successful conciliation cannot be undermined. Though there is not direct agreement on joint fishery management between China and the Philippines, a current trend towards shelving territorial disputes and cooperating in the development of fishery resources can be interpreted into other agreement of resource development (Schlick, 2009).

In situations where an agreement cannot be reached by the parties, dispute must be resolved through peaceful means. If a dispute or other related problems arise, States are required to apply Part XV of UNCLOS ("Settlement of Disputes"). In particular Art.279, which stipulates that "State Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Art.2(3), of the Charter of United Nations and to this end, shall seek a solution by the means indicated in Art.33(1), of the Charter. Then, where no settlement has been reached, Art.286 states that the dispute shall be submitted at the request of any party to the dispute to a court or tribunal having jurisdiction under the section.Art.287 defines tribunals as follows:

a. The International Tribunal for the Law of the Sea (ITLOS) established in accordance with Annex VI;
b. The ICJ;
c. An arbitral tribunal constituted in accordance with Annex VII; and
d. A special arbitral tribunal constituted in accordance with Annex VII for one or more of the categories disputes specified therein.

States are free to choose one or more these means by a written declaration to be made under Art.287 of UNCLOS and deposited with the UN Secretary General. This legal framework has been subsequently reaffirmed, and expanded upon, through several declarations and resolutions of the UN General Assembly (Jamine, 2007). This means that States are free to choose the method of dispute resolution in good faith. If they can settle disputes directly through negotiations or conciliation, whether bilaterally or regionally, they have right to do so. But if there is no such solution, they are obliged to choose one of the four possible forums outlined above. Not surprisingly, among the dispute settlement mechanisms available to States, diplomatic negotiation is the most frequently used. It is the simplest and the most common procedure, and it is successful more often than not. States not party to UNCLOS, but who are members of the UN are also covered subject to the UN Charter which also calls for the settlement of disputes through peaceful means.

Several agreements regarding conservation of fisheries resources have been made, but the concept of sustainable use of fisheries resources have developed. Older agreements refer to the conservation of living resources or maximum sustainable yield. Later agreement speaks also of sustainable utilization or sustainable use. The idea of sustainable use is common to all of these terms. Although sustainable use represents one element of the notion of sustainable development, it is first and foremost an independent concept, whose legal status and implications must be considered separately (Boyle, 2002).

The concept of sustainable use is derived from the primary obligation of Coastal States contained in Art.61(2) UNCLOS, which sets out their obligation to the conservation of the living resources in their EEZs and has been developed to the determination of total allowable catch level as one measure in the concept. 'Proper' conservation and management measures can be understood as measures appropriate within the overall context of fishery in question, for example, as environmentally sound and consistent with international law (Donahue, 1999). The establishment of the determination of Total Allowable Catch (TAC) based on Art.61 (1) UNCLOS implicitly states that the determination of the actual TAC level in each individual case is subject to the discretion of the Coastal State. But in setting TAC levels, the Coastal State remains bound by the primary obligations to ensure that the living resources in the EEZ are not endangered by over exploitation, and to maintain populations of target species at, or restore them to sustainable levels (Christie, 2004).

D. CONCLUSION

Besides mineral and oil, another natural resource that plays an important economical aspect of a state is fisheries. UNCLOS have already set out the fisheries zone within the Exclusive Economic Zone (EEZ). The EEZ is a

reflection of the aspiration of developing countries for economic development and their desire to gain greater control over the economic resources off their coasts, particularly their fish stocks, which in many cases were legally exploited by distant water-fleets of developed States. The South China Sea dispute is one of the cases that constitute a borders dispute; it involved claims over the Spratly Island on the South China Sea which led to the maritime fisheries conflicts between China and four other ASEAN States. Based on the reports of fisheries activities, the occurrence of illegal fishing on the South China Sea has increased. These incidents were deemed to be caused by increasing demand and depleting stocks. As a consequence, fishing disputes are likely to increase in the South China Sea. A possible method of settlement involves negotiation, especially to settle the boundary disputes that led to the fisheries conflict in the South China Sea. Once the desire for delimitation has been established, the relevant legislation put in place, the political decision must be taken by the parties to seek a delimitation agreement. This agreement is the final product of boundary delimitation negotiation. In cases where an agreement cannot be reached by the parties, dispute must be resolved through peaceful means as stated in Part XV of UNCLOS ("Settlement of Disputes"), in particular, Art.279. Regarding depleting fish stocks, some agreements regarding conservation of fisheries resources have been made, but the new concept of sustainable use of fisheries resources have developed. The concept of sustainable use is derived from the primary obligation of Coastal States contained in Art.61 (2) UNCLOS, which sets out the obligation of Coastal States with regard to the conservation of the living resources in their EEZs and has been developed to the determination of total allowable catch level as one measure in the concept to maintain populations of target species at, or restore them to sustainable levels.

BIBLIOGRAPHY

A. Books

Barnes, R. (2006). *The Convention on the Law of the Sea: An Effective Framework for Domestic Fisheries Conservation?* Oxford: Oxford University Press.

Boyle, P. B. (2002). *International Law and the Environement*. Oxford: Oxford University Press

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

Lowe, C. & Churchill. (1999). *The Law of the Sea*. Manchester: Manchester University Press.

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

B. Journals

Boonpriwan, L. (2012). The South China Sea Dispute: Evolution, Conflict Management and Resolutions. *ICIRD*.

Christie, D. (2004). It Don't come EEZ: The Failure and Future Coastal State FIsheries Management. *Journal of Transnational Law and Policy*.

Schlick, K. (2009). Fishery Agreements in view of the South China Sea Conflict: A regional cooperative approach to maritime resource conflicts and territorial disputes. *China Papers*.

C. Convention and Conference

UN Convention on the Law of the Sea 10 December 1982

UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, (1995).

UN General Assembly *on Principles and Guidelines for International Negotiations,* (1999).

D. Reports

Winter, G. (2009). Towards Sustainable Fisheries Law. *International Union for Conservation of Nature and Natural Resources*.

E. Others

Buszynski, L. (2012). The South China Sea: Oil, Maritime Claims, and U.S.-China Strategic Rivalry. *The Washington Quarterly*.

Donahue, B. A. (1999). The Role of Regional Fisheries Management Organization.

Jamine, E. S. (2007). Maritime Boundaries Delimitation, Management and Dispute Resolution. *Division for Ocean Affairs and the Law of the Sea*.

Novicio, N. M. (2003). Introduction in the South China Sea and Sea Dispute in Philippine Foreign Policy: Problem . *Institute of Defence and Strategic Studies* , 2-5.

THE RIGHT OF EXTERNAL SELF-DETERMINATION AND THE VALIDITY OF KOSOVAR UNILATERAL DECLARATION OF INDEPENDENCE*

Yordan Nugraha[***]

Abstract

On 17th February 2008, the Republic of Kosovo unilaterally declared its independence from Serbia. This sparked the debate on whether the right of external self-determination can be invoked as a justification for Kosovar independence. Many scholars maintain that the right of external self-determination applies exclusively only to people under colonial domination and as a result cannot be granted to the people of Kosovo since it is outside the context of decolonization. On the other hand, many scholars argue that it can be extended to people subjected to continuous persecution. As the debate continues, conflicts related to the claim of the right of external self-determination lingers. Thus, it is the purpose of this paper to assess objectively the question on whether the right of external self-determination can be applied outside the setting of colonization, and consequently whether it can be applied to the Kosovar case.

Intisari

Pada 17 Februari 2008, Republik Kosovo secara sepihak menyatakan kemerdekaannya dari Serbia. Hal ini memicu perdebatan mengenai apakah hak untuk menentukan nasib sendiri (the right of self-determination) dapat digunakan untuk menjustifikasi kemerdekaan Kosovo. Banyak ahli yang menyatakan bahwa hak untuk menentukan nasib sendiri hanya dapat diterapkan untuk konteks penjajahan, sehingga tidak dapat diterapkan untuk kasus Kosovo karena kasus tersebut berada di luar konteks dekolonialisasi. Di sisi lain, banyak ahli berpendapat bahwa hak tersebut dapat diberikan untuk bangsa yang mengalami penekanan terus-menerus. Sementara perdebatan mengenai hal ini berlanjut, konflik yang terkait dengan hak untuk menentukan nasib sendiri juga tetap berlangsung. Tujuan tulisan ini adalah untuk melihat secara objektif apakah hak untuk menentukan nasib sendiri dapat diterapkan di luar konteks penjajahan, dan apakah hak tersebut dapat diterapkan untuk orang Kosovo.

Key words: Self-determination, Kosovo, independence, secession, decolonization.

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** 2011; International and European Law; Faculty of Law, University of Groningen;Groningen, the Netherlands.

A. Introduction

Historically, within the structure of the Socialist Federal Republic of Yugoslavia, Kosovo was an autonomous province of the Republic of Serbia. Slobodan Milošević abruptly terminated this special autonomy in 1989, and even initiated a cultural repression against the Kosovar-Albanian population (Rogel, 2003). The Kosovar-Albanian initially responded with a non-violent movement (Clark, 2000).This shortly changed. In 1992, Kosovo declared its independence and the armed resistance from the Kosovo Liberation Army started in 1996 (Rama, 1998). Ethnic tension lingered, which culminated with the start of Kosovo War in 1998. The war was characterized by human rights violations and massacres by the Serbian authority that triggered the intervention by the North Atlantic Treaty Organization (Kirgis, 1999). The Kosovo War ended in 9 June 1999 with the signing of the Kumanovo Treaty, and subsequently the Security Council adopted the Resolution 1244, which authorized the international civil and military presence in Kosovo, and established United Nations Interim Administration Mission in Kosovo (UNMIK), which would establish a general framework to resolve the final political status of Kosovo. Nine years passed, and the negotiations on the status were inconclusive; the Ahtisaari Plan, which conceived an independent Kosovo after international supervision, had failed in 2007 (Borgen, 2008).Ultimately, in 17 February 2008, members of the Assembly of Kosovo unanimously and unilaterally adopted the declaration of independence of the Republic of Kosovo from Serbia, which was followed by recognition from approximately 92 countries.

This declaration is highly controversial and stirs debate on its validity, in particular under the context of the right of external self-determination, which is often invoked as a justification for the Kosovar independence. The International Court of Justice on its non-binding advisory opinion in 2010 determined that the declaration is not in violation of international law. However, it has to be noted that the court did not analyze further the influence of the right of external self-determination on the validity since, as the Court has considered, the question brought to the court only relates to whether the unilateral declaration violates international law (International Court of Justice, 2010). Several scholars argue that the right of external self-determination cannot be vested to the people of Kosovo, as it originally only applies to people under colonial subjugation. Meanwhile, on the other side of the dichotomy, it is claimed that the right of external self-determination might also be granted in another special circumstances. The issue remains unclear, and therefore, in order to resolve the resounding debate on whether the right of external self-determination can be granted outside the context of decolonization, it is exigent to analyze the valid international set of rules objectively from the legal perspective.

B. The Right of Self-Determination

While the Merriam Webster dictionary defined the right of self-determination as "determination by the people of a territorial unit of their own future political status", Senese (1989) argued that according to current interpretation, the right can be defined as "the right of people to free themselves from foreign, colonial, or racist discrimination."This right can be traced back

to the Atlantic Charter signed in 1941, which mentions that "[...] they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them then became one of the eight cardinal principal points of the Charter all people had a right to self-determination." The right has also been enshrined in numerous treaties and international documents, such as Article 1(2), which reveals that one of the purpose of the United Nations is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace", and Article 55 of the United Nations Charter, whichStates that the UN shall promote goals "[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". Moreover, in 14 December 1960, the General Assembly adopted Resolution 1514 or the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, which declares that "all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". Article 1 of the International Covenant on Civil and Political Rights, Article 1 of the International Covenant on Economic, Social, and Cultural Rights, and Vienna Declaration and Program of Action also provide an identical clause. Furthermore, on the 24th of October 1970, the General Assembly adopted Resolution 2625 or the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which declares that, "[...] the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality [...]", and that "[b]y virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter."

In essence, the right of self-determination is in conflict with the principle of the territorial integrity of States, which is well-established in the international legal sphere, such as in article 2(4) of the United Nations Charter, which elucidates that, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state." During the Nigerian Civil War, for example, Article 3(3) of the Charter of the Organization of African Unity, which declares the adherence of its Members to respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence, was invoked to reject the claim of Biafran self-determination (Ijalaye, 1971).The practices of the United Nations also indicate the

upholding these principles, such as demonstrated in the case of Katangan secession during the Congo crisis (Miller, 1967). Former UN Secretary General at that time, U Thant, maintained that "the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession as a part of its Member State" (UN Monthly Chronicle, 1970).Therefore, the right of self-determination is usually considered as an exception for these rules (Emerson, 1971).

A distinction is often drawn between internal and external self-determination. The principle of internal self-determination, such as enshrined in the 2007 United Nations Declaration on the Rights of Indigenous People, in essence protects the rights of minority within a State by allowing it to determine its own political, economic, and social system and not forced to assimilate (Senese, 1989).As a result, this internal right is irrelevant with the current analysis as it only applies within a State, and does not prescribe the right of secession, or the right to withdraw from a political entity. What is relevant is the right of external self-determination, which is defined by the 1970 Friendly Relations Declaration as a mode of implementation through "the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people." The definition of the "State" refers to the definition laid down in the Montevideo Convention, which must have "a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States."

The question that will be addressed is whether the right of external self-determination can be granted to the people of Kosovo. Many authors such as Emerson (1971) and Brownlie, Crawford, and Lowe (1998) interpret the right as referring only to the inhabitants of non-independent territories under the context of decolonization. Van Dyke (1970) also reasoned that the United Nations is reluctant to apply the right of external self-determination outside the colonial context as it would be, "in an extremely difficult position if it were to interpret the right of self-determination in such a way as to invite or justify attacks on the territorial integrity of its own members." However, it has been argued that under special circumstances, the right of external self-determination might be granted to a certain people, especially one involving gross human rights violation or persecution.

C. The Right of External Self-Determination Outside Colonial Context?

Various authors have argued that state practices indicate the applicability of the right of self-determination outside the setting of colonialism. In 1971, East Pakistan, or now referred to as Bangladesh, seceded from Pakistan. This is indeed outside the context of decolonization. The case of Bangladesh is even somewhat parallel to the case of Kosovo. There is a flagrant difference between ethnic Bengali and Pakistani. Most importantly, although East Pakistan has a larger population than West Pakistan, the Bengali people in Eastern Pakistan were neglected culturally, economically and politically, and the effort of Bengali people to claim more rights were met with brutal suppression (Choudhury, 1973).Professor Nanda observed several factors that make the right of self-determination applicable to East Pakistan, which are the presence of

"physical separation, deprivation of human rights, economic exploitation, a majority determination by vote of the political direction, and ethnic, linguistic, and cultural difference" that places the right of self-determination above territorial integrity (Nanda, 1972).

Additionally, the Canadian Supreme Court in the *Reference Re Secession of Quebec* case maintained that the right to unilateral secession is not only limited to decolonization and may arise under the most extreme cases, such as, *inter alia*, "being subject to extreme and unremitting persecution coupled with the lack of any reasonable prospect for reasonable challenge" (Supreme Court of Canada, 1998),while the League of Nations in the Aaland island case voiced the criteria of "a manifest and continued abuse of sovereign power to the detriment of a section of population" (League of Nations, 1920).

Meanwhile, Professor Jonathan Charney, based on state practice in East Timor, Chechnya, and Kosovo itself, argued that the criteria for a people to gain the right of external self-determination outside the decolonization context are:

> 1) A *bona fide* exhaustion of peaceful methods of resolving the dispute between the government and the minority group claiming an unjust denial of internal self-determination;
> 2) A demonstration that the person making the group's self-determination claim represent the will of the majority of that group; and
> 3) A resort to use the use of force and a claim to independence is taken only as a means of last resort (Charney, 2001).

The criteria laid down by Nanda, the Supreme Court of Canada, and the League of Nations mostly concur that the right of external self-determination can be applied if the people are being unjustly persecuted, or situated under gross and sustaining human rights abuse, as long as the strict criteria are achieved. While Charney's criteria requires an unjust denial of internal self-determination.

Based on Nanda's criteria, Kosovo fulfills almost all of the criteria. There has been an unremitting violation of human rights and persecution of the people of Kosovo by the Serbs, which led to the NATO intervention (Malcolm, 1999). Ethnic, linguistic, and cultural differences between the Albanian Kosovo and Serbians are also apparent, and there has been a referendum in which 99% of Kosovar supported independence in 1991 (Mertus, 1999). Unfortunately, the territory of Kosovo is not physically separated in the sense of Bangladesh being separated from Pakistan and the criteria of economic exploitation still requires further evidence.

On the other hand, under the Supreme Court of Canada and League of Nations criteria, as has been emphasized before, the Kosovar-Albanians are subject to extreme and unremitting persecution to the detriment of a section of population, and the effort to challenge peacefully has been met with brutal force (Borgen, 2008).

Moving on to Charney's criteria, Kosovo indeed satisfies its requirements. As has been explained in the introduction, Slobodan Milošević abruptly ended Kosovar autonomy, and the peaceful effort to regain it has been unjustly denied. A government which represents these people is present (Malcolm,

1999), with the 1991 referendum as a reinforcing evidence, and this government has tried negotiations until it finally resorted to the declaration of independence as its final solution (Malcolm, 1999).

D. Customary International Law

Kosovo has satisfied all the criteria for tests of self-determination except of the Nanda criteria. However, the problem with these criteria is that from the perspective of customary international law, they have not secured *diuturnus usus* or general and widespread practice. There are very few instances such as in East Timor where after a group of people is persecuted, and all diplomatic effort fails, the right of self-determination is granted (Charney, 2001).Furthermore, the application has not been consistent and widespread in many cases. As an illustration that these criteria do not constitute a customary international law, the Biafran case will be considered. Following the independence of Nigeria in 1960, the country was divided ethnically, with the ethnic Igbo residing mostly in the southeastern part of the nation. In January 1966, a group which consists mostly of people of eastern Igbo origin staged a c*oup d'etat*. Five month later, a counter coup was launched, and in retaliation approximately 30.000 Igbo people were killed in the north (Ijalaye, 1971). As a response, the Republic of Biafra was declared, citing the killing as a justification.This was followed by recognition from five States, such as Tanzania, which stated that the Biafran people has suffered the same fate as the Jews in Germany, and therefore felt obliged to recognize the country (Ijalaye, 1971). Gabon also recognized the state and the Gabon cabinet declared that,

> when one thinks that in an absolutely unequal fight, hundreds of thousands of innocent civilian, women, old men and children, are condemned to buy, with their lives, the right to existence to which all men are entitled, the Government and the people of Gabon could not without hypocrisy take refuge behind the principle of the so-called no-interference in the internal affairs of another country (Ijalaye, 1971).

With the presence of such unremitting violence, the Biafran case fulfills the criteria laid down by the Supreme Court of Canada and the League of Nations. Unfortunately, the United Nations did not even address the problem, and the Organization of African Unity strongly objected the secession of Biafra (Nanda, 1972).

Another example was the case of Iraqi Kurdistan. Since the era of the First World War, the Kurds had tried to achieve a greater autonomy from Iraq. In March 1970, after years of fighting, an autonomy agreement was reached between the Kurds and the Iraqi government. However, eventually, the Iraqi authorities suppressed Kurdish political rights, militarized Kurdish regions, banned nationalist political parties, destroyed Kurdish villages, and forcibly imposed resettlement (Short & McDermott, 1981). Ultimately, during the Iran-Iraq War and the Gulf War, a genocidal campaign was waged against the Kurd population. The Anfal campaign alone in 1988 killed approximately 182.000 Kurdish people(McDowall, 2004). The gas poison attack on the Kurdish city of Halabja caused the death of more than 15,000 people (Hiltermann, 2007). This case also fulfills the criteria laid down by the Supreme Court of

Canada and League of Nations. Nevertheless, state practice at that time did not indicate the presence of a *diuturnus usus* on the application of the right of self-determination outside decolonization. As a result, the criteria formulated by both institutions have not fulfilled the criteria of *diuturnus usus,* and consequently is not part of customary international law.

The Nanda and Charney criteria, on the other hand, are not only still far from securing widespread practice, since they are based only from a very few examples, but also, in the case of the Nanda criteria, the presence of *opinio juris* or the conviction that the practice amounts to a legal obligation can be questioned, especially considering the heavy Cold War political motives involved in the secession of Bangladesh.

Therefore, as general practice has not yet been secured, the rules above have not yet fulfilled the criteria of customary law, which means that the right of self-determination cannot be applied outside the context of decolonization, and the unilateral declaration of Kosovo cannot be justified under the light of the right of external self-determination.

E. Conclusion

In conclusion, there has not been a sufficient proof that the right of external self-determination can be applied outside the context of decolonization, or that Kosovo has been granted such right. Although several authors tried to derive some criteria from historical examples, these criteria are not yet customary international law since the criteria, especially since *diuturnus usus*, have not yet been fulfilled. As a result, the current rule is that the right of external self-determination cannot be awarded arbitrarily, as secession violates the principle of territorial integrity, with the granting of the right on the people subjugated under colonial oppression as the only exception which has amounted to customary international law. Since the case of Kosovo is outside the setting of colonialism, the right of external self-determination cannot be invoked as a rationalization for the declaration of independence of Kosovo.

It might be argued that Kosovo has fulfilled the definition of a State, and that 92 other nations have recognized it. However, hitherto, from the perspective of customary international law, secession is accepted only either through the justification of external self-determination or if it is accepted by the nation subject to territorial fragmentation such as in the case of South Sudan. As a result, strictly speaking, from the perspective of international law, since there is no justification applicable for Kosovo to secede, the consequence is that the effect of the declaration of Kosovar independence is invalid despite the fact that it fulfills the criteria of Montevideo Convention. In other words, under customary law, the right of external self-determination has become decisive criterion of a State, and, as has been shown, Kosovo has failed to fulfill this criterion.

One might be tempted to invoke the concept of Responsibility to Protect (R2P) as a justification. However, this concept is irrelevant to the current discourse on external self-determination, since its three pillars address the responsibility of the state and the international community to protect its citizens, and does not address the issue of secession. As a result, there is no link between the two concepts. Nevertheless, this does not imply that in the future such strict

rule might not change; an instant custom that extends the context of the right of external self-determination might materialize as long as the criteria of customary law are fulfilled (Langille, 2003). As the International Court of Justice has noted in the North Sea Continental Shelf case, "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary law" (International Court of Justice, 1969).In fact, a precise rule on the granting of the right of external self-determination to nations or people under continuous persecution is exigently required and should be drafted internationally, as the current vacuum of precise international rules on it has caused predicament over the legality of the declaration of independence in many new states, such as in the case of Abkhazia, South Ossetia, and Kosovo itself, and such drafting would reduce the potential conflict that might arise.

BIBLIOGRAPHY

A. BOOKS

Brownlie, I., Crawford, J., Lowe, V. (1998) *The British Year Book of International Law 1999Vol 70*. OUP UK.

Buchheit, L.C. (1978). Secession: The Legitimacy of Self-Determination. Yale University Press.

Clark, H. (2000). Civil Resistance in Kosovo. London: Pluto Press.

Dyke, Van. (1970). Human Rights, the United States, and World Community. New York: Oxford University Press.

Hiltermann, J.R. (2007). A Poisonous Affair: America, Iraq, and the Gassing of Halabja. New York: Cambridge University Press.

Malcolm, N. (1999). Kosovo: A Short History. United States of America: Harper Perennial.

McDowall, D. (2004). A Modern History of the Kurds. I.B. Tauris.

Mertus, J.A. (1999) Kosovo: How Myths and Truths Started a War. United States of America:University of California Press.

Miller, L. (1967) World Order and Local Disorder: The United Nations and Armed Conflict. Princeton University Press.

United Nations. (1970). 7 UN Monthly Chronicle. United Nations, Office of Public Information

B. CASES

International Court of Justice. (2010). Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, I.C.J. Reports.

International Court of Justice. (1969). North Sea Continental Shelf Cases, I.C.J. Reports.

Supreme Court of Canada. (1998). Reference re Secession of Quebec.

C. DOCUMENTS

United Nations General Assembly. (1960). Declaration on the Granting of Independence to Colonial Countries and Peoples.

United Nations General Assembly. (1970). Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations

D. JOURNALS

Borgen, C.J. (2008). Kosovo's Declaration of Independence: Self-Determination, Secession, and Recognition. The American Society of International Law, 12.

Charney, J.I. (2001) Self-Determination: Chechnya, Kosovo, and East Timor. Vanderbilt Journal of Transnational Law, 34.

Choudhury, G.W. (1973). Bangladesh: Why It Happened. International Affairs, 48(2), 242-249.

Emerson, R. (1971). Self-Determination. The American Journal of International Law, 65(3), 459-475.

Ijalaye, D.A. (1971). Was Biafra at Any Time a State in International Law?. American Journal of International Law, 65, 553-554.

Kirgis, F.L. (1999). The Kosovo Situation and NATO Military Action. The American Society of International Law.

League of Nations. (1920). Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Questions. Official Journal of the League of Nations, 3, 5-10.

Nanda, v.P. (1972). Self Determination in International Law The Tragic Tale of Two Cities. The American Journal of International Law, 66, 321-336.

Orentlicher, D.F. (1998). Separation Anxiety: International Responses to Ethno-Separatist Claims. The Yale Journal of International Law, 23, 1-78.

Rama, Shinasi A. (1998). The Serb-Albanian War, and the International Community's Miscalculations. The International Journal of Albanian Studies, 1, 15–19

Rogel, C. (2003) Kosovo: Where It All Began. International Journal of Politics, Culture, and Society, 17(1), 167–182.

Senese, S. (1989) Human Rights & People's Rights: Views from North & South. Social Justice, 16, 19-25.

THE SENKAKU/DIAOYU ISLANDS DISPUTE DRAWN OUT: *QUO VADIS?*[*]

Diva Indraswari[**] and Rudi Yudho Sartono[***]

Abstract

The United Nations Convention on the Law of the Sea (UNCLOS) 1982 regulate matters and disputes on maritime boundaries and its sovereignty. Although it is integrated with a compulsory dispute settlement mechanism, UNCLOS 1982 faces difficulties in resolving the disputes between Japan, China and Taiwan over Senkaku/Diaoyu Islands in the East China Sea. Not only is itsubject to legal matters, the disputes is also ripewith economical issues and strong nationalistsentiments, drawing out the problem since 1372 until the present day. This article will discuss the dispute with regards to its history and the possibility of the peaceful dispute settlement which could provide a win-win solution for the disputing parties in particular, and for the international society in general.

Intisari

Konvensi Hukum Laut PBB 1982 (UNCLOS 1982) mengatur tentang hal-hal dan sengketa terkait batas maritim berserta kedaulatannya. Meskipun telah mencakup mekanisme penyelesaian sengketa yang bersifat compulsory, konvensi ini tidak bisa dengan mudah menyelesaikan sengketa antara Jepang, China dan Taiwan atas Kepulauan Senkaku/Diaoyu di Laut China Timur. Tidak hanya berkaitan dengan permasalahan hukum, sengketa tersebut juga diliputi isu-isu ekonomi dan kuatnya rasa nasionalisme masing-masing pihak. Hal ini membuat sengketa menjadi berlarut-larut sejak tahun 1372 hinggaz sekarang. Artikel ini akan membahas lebih jauh tentang sengketa Kepulauan Senkaku/Diaoyu, dihubungkan dengan sejarahnya dan kemungkinan penyelesaian sengketa dengan jalan damai yang dapat memberikan win-win solution bagi para pihak yang bersengketa pada khususnya, serta bagi masyarakat internasional pada umumnya.

Keywords:overlapping claims, East China Sea dispute, joint-agreement.

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[**] 2009; International Law; Faculty of Law, Universitas Gadjah Mada; Yogyakarta, Indonesia.

[***] 2009; Business Law; Faculty of Law, Universitas Gadjah Mada; Yogyakarta, Indonesia.

A. INTRODUCTION

In the East China Sea, there are 5 (five) islets between Taiwan and Okinawa. Both the Japanese and Chinese Government claim to possess those islets. They even have their own name for the rocky islands. The Japanese call it '*Senkaku Gunto*' while for the Chinese it is well-known as '*Diaoyu Tai*'.

At first glance, there is nothing special about the islands. The islands of Senkaku/Diaoyu merely consist of two coral reefs and five inhabited islets. There are only herds of goats, seafowls and several kinds of moles there. However, three economic giants in Asia, namely Japan, China and Taiwan, are fiercely fighting over it. The Senkaku/Diaoyu Islands are supposedly rich with oil and gas. This is very important for the three greatest economic players in Asia since they are all countries with great energy consumption. Each government argues that they have authority upon the islands, to secure their claims to future energy resources. Furthermore, the islands also lie in a strategic navigation route while the waters around it are rich in fishery resources.

The territorial dispute in Senkaku/Diaoyu Islands has been relatively calm to date. Taiwanese traditional fishermen normally fish unimpeded, albeit with occasional inconvenience. This changed on 11 September 2012 when the Japanese announced that they have bought 3 (three) out of 5 (five) islets in the area. Such action raised resentment both from the Chinese and Taiwanese authorities.

B. DISCUSSION

1. History of the Dispute and Claims of Parties

The dispute over the Islands of Senkaku/Diaoyu has been going on for ages. Historical records stated that the dispute first arose in1372 when China and Japan were ruled under the command of the Ming Dynasty and the Tokugawa *shogunate* respectively. In its claim, China argues that they have the legitimate authority of *Diaoyu-tai*.[6] This argument is supported by historical records and several treaties. China believes that their nation had first discovered the existence of the islands, and that China had made use and owned the islands long before Japan. When China was ruled under the Ming Dynasty, Diaoyu Islands were documented in the map of the dynasty and included in the Ming Dynasty's maritime defense document. Furthermore, during the Qing Dynasty era, Diaoyu Islands were under the jurisdiction of Taiwan which was part of the dynasty (State Council Information Office, 2012).

For a long time, China had utilized Diaoyu Islands for navigational purposes to Ryukyu Islands and Okinawa, in Japan. In addition, Diaoyu Islands were also explored for its rare herbal medicine called *shi cong yong* since 1893 when the Chinese Queen, Ci Xi, gave permission to Sheng Xuanhei, the head executive of the dynasty, to pick the herbal medicines in the islands (Upton, Peter N., 1971).

China also claims that Japan has both implicitly and explicitly acknowledged China's sovereignty over Diaoyu Islands. The implicit acknowledgement can be seen through the maps published by Japan at that time.[7] Explicitly, Japan is believed to

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[6] In Chinese, the islands are called *Diaoyu-tai* (Diaoyu Islands). This name is used when the discussion deals only with China's claims to the islands.

[7] In 1785, Japan published a map which used the same color for Diaoyu Islands and China, while a different color for Okinawa Empire. China used this fact to support their arguments that Japan has implicitly acknowledged that Diaoyu Islands were part of China's sovereignty. Further, in 1874 and 1877, Japan published

agree to China's sovereignty as proven by treaties entered after the Sino-Japanese War. When China was defeated in the Sino-Japanese War, China was forced to relinquish Diaoyu Islands to Japan as per the Shimanoseki Act of April 1895,[8] they further argue that Japan was obliged to return and waive their rights over the islands pursuant to the Cairo Conference of1943 and the Postdam Conference of1945. This argument is supported with the provision in the 1951 San Francisco Peace Treaty which stipulates that "[a]ll treaties, special accords, agreements concluded prior to this treaty as consequences of the conclusions of the war, are hereby null and void", thus the possession of Diaoyu Islands should be returned to China.

On the other hand, Japan claim that they are the ones who have the authority of Senkaku Islands[9] for they legitimately own the islands. In 1885, a Japanese agency from the Okinawa Perfecture conducted surveys and ensured that Senkaku Islands were uninhabited. The result of the surveys also showed that there were no traces of Chinese occupation.[10] Japan hence decided to erect a marker in Senkaku Islands in1895.

Moreover, Japan argues that Senkaku Islands were neither part of Formosa Islands, nor Pescadores Islands. Consequently, they did not have any obligation to return it back to China under the San Francisco Peace Treaty of1951. Since then, the Senkaku Islands were integrated to Nansei Island which was part of Japan's sovereignty in accordance to Japan and United States' treaty signed in 1971 concerning Ryukyu Islands (Okinawa) and Daito Islands (MOFA, 2012).

In order to convey their authority over Senkaku Islands, in a peaceful and continuous manner, Japan exercised its sovereignty by monitoring the area around Senkaku Islands through Japanese patrol.[11] Japan has also erected a lighthouse in 1978 and a helicopter port in 1979 in the Senkaku Islands (Lohmeyer, 2008). Another argument for Japan's claim is that China has acquiesced by not making any attempt to control and to take over Senkaku Islands post World War II.

Today, the sovereignty of Senkaku/Diaoyu Islands remain undecided and in dispute. Each government of the disputing parties still holds on their own claims. Japan has registered Senkaku Islands as part of Ishigaki, Okinawa Prefecture and as part of Nansei Island; while China strongly believes that Diaoyu Islands are part of Daxi, Taiwan Province (Dzurek, 1996). The dispute is indeed difficult to solve for it is not only subject to aspects of territorial sovereignty, but also extends to economic, nationalist and security concerns.

official maps of the Ryukyu Island and the Note on History of Okinawa without including Diaoyu Islands as part of Japan's territory (Heflin, 2009).

8 Article 2 (a) of Shimanoseki Act stipulated, "China cedes to Japan in perpetuity and full sovereignty the following territories, together with all fortifications, arsenals and public property thereon: (b) the island of Formosa, together with all islands appertaining or belonging to the said island of Formosa."China argued that Diaoyu Islands were part of Formosa Islands (Taiwan) which were Chinese's sovereignty.

9 The name of *Senkaku Gunto* (Senkaku Islands) is used when the discussion deals only with Japan's claims to the islands.

10 Japan argued that Senkaku Islands were *terra nullius*, namely a free or unclaimed territory.

11 Pursuant to the decision of *the Islands of Palmas Case*, one of the requirements to proof the States' sovereignty over a territory was by exercising sovereignty by peaceful and continuous means.

2. East China Sea Crisis: Economy, Nationalism and Future Energy Security

As energy prices rise, conflicts regarding the issue of economy will be inevitable. The dispute of Senkaku/Diaoyu Islands concerns overlapping sovereignty as its background. However, other aspects such as the economical aspect, energy resources and nationalism play important roles in miring the problem for hundreds of years.

As explained earlier, the dispute in Senkaku/Diaoyu Islands has taken place over a long period of time. China has once again raised the issue after the *United Nation Economic Commission for Asia and the Far East (ECAFE)* conducted academicals surveys indicating the probability of rich resources of hydrocarbon energy, i.e. oil and gas, in the East China Sea, or precisely at 200.000 km^2 near Senkaku/Diaoyu Islands in 1969 (Li, 1975). This result was also supported by Indonesian discovery of the great gas reserves in Natuna, southern East China Sea. According to Kurtubi, Executive Director of Center for Petroleum and Energy Economic Studies, geologically, based on theory of correlation, the existence of hydrocarbon energy correlates to the pattern of the Pacific Ring of Fire. If the pattern of this Ring of Fire is drawn farther from Natuna to the north, it will go through Senkaku/Diaoyu Islands and about and farther onto Siberia (Sanjoyo, 2012). As one of the biggest energy consumer in the world, China would not hold peace and certainly would take such actions as it deems necessary regarding this discovery to safeguard its energy security in the future.

On the other hand, Japan is in an awful condition after the 2011 earthquake. Japan was forced to shut down all their nuclear power plants, making the falling of their economy up to 5%. Furthermore, Japan still has to import their oil and food from other countries (Amadeo, 2012). These facts impose big demands on Japan to find its own energy resources, which could be answered by claiming Senkaku/Diaoyu Islands.

The rich fishery resources around Senkaku/Diaoyu Islands also becomes the background of the disputing parties' claims. Fishery plays a major role in the economies of Japan, China and Taiwan. This is shown by statistical data released by the Food and Agriculture Organization (FAO) in Rome, Italy, in 2012. The data demonstrates that fishery production in China within the year of 2010 reached up to 14.8 million tons with the cultivation of up to 32.7 tons or 62.3% of world fishery production and cultivation. Whereas, the fishery consumption attained 42.8 million tons or 81% from the production and cultivation (Suhartono, 2012). Although fishery activity is not the main issue in this dispute, Chinese fishing activities around the islands have been invoked several times by China as grounds for claims over Senkaku/Diaoyu Islands.

Nationalist sentiment of Japan and China also has significance in this dispute. Due to the different interpretation of the history of both countries, neither China nor Japan are willing to give in and sacrifice or share the uninhabited islands. China believes that Japan has occupied Senkaku/Diaoyu Islands illegally pursuant acts from the Sino-Japanese War. The Japanese action was considered as a humiliation to China. This situation was exacerbated when Japan announced that they had bought islets in the Senkaku/Diaoyu Islands early September 2012. The wave of anti-Japanese demonstrations in China was no longer avoidable. The demonstrators have attacked stores and manufacturers owned

by Japanese citizens. Even big manufacturers such as Panasonic, Canon, Honda, Nissan and Toyota were forced to shut down their factories in China and halted their production for several days (Nance, 2012).

3. United Nations Convention on the Law of the Sea (UNCLOS) 1982 Regulation on Senkaku/Diaoyu Islands Dispute

In spite of nationalist and economic issues in the Senkaku/Diaoyu Islands dispute, this article will try to analyze the problem from an international law of the sea point of view about overlapping claims through the *United Nations Convention on the Law of the Sea (UNCLOS)* 1982as its instrument.

After a long process of negotiations, the final result of international law making was impressive. UNCLOS 1982 is not only a codification of the international law of the sea that has progressively developed, forming a constitution for the oceans, but it also shaped an integral normative system, complete with compulsory dispute settlement mechanism with its own judicial forum (Gavouneli, 2007).

Disputes regarding overlapping claims over maritime territory are governed under UNCLOS 1982. This international convention is applicable in Senkaku/Diaoyu Islands disputes as both Japan and China have ratified the convention.[12]

Senkaku/Diaoyu Islands are located 120 nautical miles from Taiwan, 200 nautical miles from China and 240 nautical miles from Okinawa, Japan (Mrosovsky, 2008). With this, UNCLOS 1982 recognizes a regime called *Exclusive Economic Zone* (EEZ) which bestows the sovereign right for the Coastal States upon natural resources and other economical activities, as well as jurisdiction concerning any kind of installation, marine scientific research and the protection and the preservation of the marine environment. Moreover, pursuant to Article 121 (II) UNCLOS 1982, islands might be furnished with State right of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf. Even a remote islet can be used to determine the exclusive economic zone of a State.

Further, the sovereign rights regulated under the exclusive economic zone regime, is also regulated under Part VI of UNCLOS 1982 concerning the continental shelf. If the concept of the exclusive economic zone and the continental shelf are in one unity, hence problems upon determination of the exclusive economic zones relevant to the continental shelves will emerge (Anwar, 1995). This complicates cases of maritime jurisdictional delimitation where the coasts of States are opposite or adjacent to each other.

Basically, there are two methods of maritime zone delimitation. The first method is median line or equidistance method. In this method, an imaginary line is drawn congruently with the same length from the nearest points of the baselines from which the breadth of the territorial sea of each of the States is measured thus constructing an equidistance line (Kusumaatmadja, 1986). This principle applies on the delimitation of the territorial sea, the contiguous zone, the continental shelf or the border of neighboring States.

The second method is delimitation based on equity. This method looks holistically at the various needed factors to settle a dispute in a fair and satisfying manner (Anwar, 1995).

[12] On the chronological list of ratification of the *United Nations Convention on the Law of the Sea* (UNCLOS) 1982, Japan and China had ratified the convention in 1996.

In the case of maritime boundary claims, Article 83 (I) of UNCLOS 1982 stipulates how "[t]he delimitation of the continental shelf between States with adjacent or opposite coasts shall be effected by agreement on the basis of international law, as referred to in Art. 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution." In line with the given article, Article 74 (I) of UNCLOS 1982 rule that "[t]he delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be affected by agreement on the basis of international law. As referred to in Art. 38 of the Statute of International Court of Justice, in order to achieve an equitable solution." Meaning, in order to settle the claims over Senkaku/Diaoyu Islands, Japan, China and Taiwan must first discuss and negotiate amongst themselves, under the terms of 'equity' and 'efficiency' pursuant to UNCLOS 1982, to accomplish the aim of the construction of the law of the sea in its relation with the exploration of natural resources (Anwar, 1995).

In the absence of an agreement, as is the case between Japan, China and Taiwan, the use of equidistance method or median line is obligatory. Unfortunately, in practice, this method is not always as easy as its theory. Often, this method delivers inequity for one of the parties.

4. Seeking for Peaceful and Effective Solution for the Disputes over Senkaku/Diaoyu Islands

In line with the spirit indulged by the United Nations, disputes settlements through war and by force are not recommended.[13] This shall apply too in the Senkaku/Diaoyu Islands disputes.

One of the legal means that the parties in disputes might consider is third-party dispute settlement such as arbitration or adjudication through the International Court of Justice. This was done by the United States and the Netherlands in 1931 in *the Islands of Palma Case*, by France and Mexico in 1932 in *the Clipperton Island Case* and by El Salvador and Honduras in *the Minquiers and Ecrehos Case* which were similar to the Senkaku/Diaoyu Islands disputes.

If the disputing parties have agreed to settle the dispute with the help of third party, then each party must be ready to prepare all the data and arguments to support their claims. This preparation might appear complicated as Senkaku/Diaoyu Islands are uninhabited. Consequently, both parties could not provide testimony or witness to the *effectivitée* principle, as was the case in *Sipadan-Ligitan* (Malaysia v Indonesia). Such principle however, could be proven by learning the cultures developed within the inhabitants.

Nevertheless, the precedence from the mentioned cases shows how the claims could be supported by proofing the parties' practices in exercising its sovereignty in peaceful means continuously. Additionally, acquiescence by the other parties could also determine the sovereignty. Based on the history, China was the first one to discover the Diaoyu Islands. However, Japan peacefully and continuously exercised its sovereignty over the Senkaku Islands. Since 1895, Japan had erected a marker in the islands and routinely patrolled the islands. Japan also erected a lighthouse and built a helicopter port. This might allow Japan to prove its

[13] The recommendation to settle the disputes peacefully is ruled under Article (2) (3) of the United Nations Charter which stipulate, "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

claims, since as a matter of fact, China had never demonstrated its protests against Japan's actions in the islands and hence could be considered to have acquiesced to Japan's sovereignty over Senkaku/Diaoyu Islands.

Furthermore, although the disputes of the Senkaku/Diaoyu Islands are of legal disputes, in its settlement, other non-juridical aspects are decisive as well, as stated in the Resolution No. 1105 (XI) (Kusumaatmadja, 1986). As discussed above, the Senkaku/Diaoyu Islands dispute is burdened with economic, political and nationalist issues from each party. Such non-juridical aspects should be considered, discussed and examined factually in settling the disputes.[14]

The dispute settlement through the International Court of Justice or arbitration seems unpopular with the parties. The win-lose solution might cause further problem in their economical and social relations. The most concrete means to be suggested is by inviting Japan, China and Taiwan to sit in a table and formulate a *joint-agreement*.

Learning from the United Kingdom and Argentine, the formulation of a joint-agreement between Japan, China and Taiwan is not unfeasible. In 1995, the United Kingdom and Argentina consented to the *Joint Declaration on Co-operation over Offshore Activities in the South West Atlantic*. This agreement enabled the creation of a special area for the exploration and exploitation of hydrocarbon resources by offshore industry. Both parties agreed to conduct the exploration and exploitation with the commercial principle of good faith.[15] This agreement offered a more equitable and profitable solution for all parties.

In fact, in 2008, Japan and China did come to a joint agreement to explore four areas rich in gas energy resources in East China Sea. Furthermore, they have also agreed to halt any development in the disputed area. Both parties had even consented to conduct a cooperative survey with balanced investment in the northern Chunxiao/Shirakaba and southern Logjing/Asunaro, East China Sea. Unfortunately, China started to explore the oil-rich area in Tianwaitan/Kashi unilaterally. This has provoked protests on behalf of Japan during January 2009 until early 2010 (US Department of Energy, 2012).

China's action was truly regrettable. If only China had acted as per the agreement, the joint agreement on the management of natural resources in Senkaku/Diaoyu Islands might have been accomplished today. The peaceful means through joint agreement surely will give a win-win solution particularly for the disputing parties, and generally for other parties who either directly or indirectly get the impact of the disputes.

Albeit the disputes are still drawn-out until today, the authors do hope that a peaceful solution will be realized in the near future. The Japanese Ministry of Foreign Affairs (2012) once documented Deng Xiaoping's comment on the disputes in Senkaku/Diaoyu Islands on 25 October 1978,

> "[c]ertainly there are differences of opinion between us on this issue, but when we normalized diplomatic relations between our two countries, both parties promised to leave the issue aside. Even if this means the issue is temporarily shelved, I don't think I mind. I don't mind if it's shelved for ten years. The

[14] See Mochtar Kusumaatmadja, *Hukum Laut Internasional*, Bina Cipta Publisher: Bandung, 1986, on page 115.

[15] See Article 2 *Joint Declaration on Co-operation over Offshore Activities in the South West Atlantic*, 27 September 1995. Available at http://www.falklands.info/history/95agree.html

> people of our generation don't have sufficient wisdom to settle this discussion, but the people of the next generation will probably be wiser than us. At that time, a solution that everyone can agree on will probably be found."(MOFA).

C. CONCLUSION

The disputes between Japan, China and Taiwan in the East China Sea is a dispute of maritime boundaries and overlapping sovereignty. The *United Nations Convention on the Law of the Sea* (UNCLOS) 1982 is one of international law of the sea's instrument which accommodates such disputes. However, because other non-juridical aspects such as economic and nationalism factors has mired the dispute, there has been no solution or settlement for the parties until today.

One of the most concrete and peaceful solution feasible for the disputing parties is to formulate a joint agreement on the management of natural resources in Senkaku/Diaoyu Islands. If such agreement were accomplished, it would be beneficial not only for the disputing parties but also other parties related to East China Sea.

BIBLIOGRAPHY

A. Books and Journals

Anwar, Chairul. (1995) Zona Ekonomi Eksklusif di dalam Hukum Internasional, Sinar Grafika: Jakarta.

Heflin, William B. (2000). Diaoyu/Senkaku Islands Dispute: Japan and China, Oceans Apart, Asian-Pacific Law& Policy Journal. Available at http://www.hawai.edu/aplpj

Koers, Albert W. (1994). Konvensi Perserikatan Bangsa-Bangsa Tentang Hukum Laut, Suatu Ringkasan, Gajah Mada University Press.

Kusumaatmadja, Mochtar. (1986), Hukum Laut Internasional. Bina Cipta :Bandung.

Lohmeyer, Martin. (2008). The Diaoyu/Senkaku Islands Dispute: Questions of Sovereignty and Suggestions for Resolving the Dispute, University of Canterbury. Available at http://ir.canterbury.ac.nz/bitstream/10092/4085/1/thesis_fulltext.pdf

Maria Gavouneli. (2007). Functional Jurisdiction in the Law of the Sea, Martinus Nijhoff Publishers:Leiden.

Mrosovsky, Ramos. (2008). International Law's Unhelpful Role in the Senkaku Islands. Available at https://www.law.upenn.edu/journals/jil/articles/volume29/issue4/RamosMrosovsky29U.Pa.J.Int'lL.903(2008).pdf

Sohn, Louis B., Kristen Gustafon Juras, John E. Noyes, Erik Franckx. (2010). Law of The Sea: In a Nutshell, West Publishing Co.

Upton, Peter N. (1972). International Law and the Sino-Japanese Controversy over the Territorial Soverignty of the Senkaku Islands, Boston University Law Review, Fall 1972: 767.

Victor H. Li. (1975). China and Offshore Oil: The Diaoyu Tai Dispute, Vol. 10 Stanford Journal of International Studies.

B. Conventions and Agreements

Charter of United Nations (1945)

United Nations Convention on Law of the Sea (1982)

Joint Declaration on Co-operation over Offshore Activities in the South West Atlantic (1995)

C. Cases

The Islands of Palmas Case (United States of America. v. Netherland) .Permanent Court Arbitration. (1928).

The Clipperton Island Case (France. v. Mexico.) (1931).

TheMinquiers and Ecrehos Case (France v. United Kingdom). ICJ 47. (1953)

D. Others

Amadeo, Kimberly. US Economy: Impact of Japan's Earthquake on the Economy. (2012). Available art http://useconomy.about.com/od/criticalssues/a/Japan-Earthquake.htm

Amadeo, Kimberly. "Japan's Economy: How the Fourth Largest Economy Affects the U.S. and the World". (2012). Available at http://useconomy.about.com/od/grossdomesticproduct/a/Japan_Recession.htm

United States Energy Information Administration, Analysis Briefs: East China Sea. (2012). Available at http://www.eia.gov/countries/regions-topics.cfm?fips=ECS

Dzurek, Daniel. "The Senkaku/Diaoyu Islands Disputes". (1996). Available at http://www-ibru.dur.ac.uk/resources/docs/senkaku.html

Japanese Ministry of Foreign Affairs. "Q&A on the Senkaku Islands". (2012). Available at www.mofa.go.jp/region/asia-paci/senkaku/QA_1010.html.

Japanese Ministry of Foreign Affairs: Settlement Procedure. Pdf. Available at www.mofa.go.jp/region/asia.../senkaku/pdfs/postwar_settlement.pdf

Japanese Ministry of Foreign Affairs: Three Truths about the Senkaku Islands. Available at www.mofa.go.jp/region/asia-paci/senkaku/three_truths_1.html

Japanese Ministry of Foreign Affairs: The Relations between Japan-China Postwar Settlement and the Senkaku Islands. Available at www.mofa.go.jp/region/asia-paci/senkaku/.../postwar_settlement.pdf

Nance, Greg. "Op-ed: Senkaku Islands dispute could paralyze Asian economy", available at http://seattletimes.com/html/opinion/2019281476_guestgregnancexml.html

Rowan, Joshua P. (2005). "UNCLOS and Sovereignty Claims in the South China Sea". Asian Survey, Vol.XLV, No.3 - http://www.nguyenthaihocfoundation.org/lichsuVN/UNCLOS-sovereignty.pdf

Sanjoyo, Anton. "Demi Minyak, Gas Alam, dan Keamanan Energi Masa Depan". Harian Kompas, 5 Oktober 2012. Page 34.

Suhartono. "Berebut Wilayah demi Isi Perut." Harian Kompas, 5 Oktober 2012. Page 34.

State Council Information Office, The People's republic of China, White

Paper on Diaoyu Dao, anlnherent territory of China. (2012). Available at http://english .people.com.cn/90785/7960320.ht ml.

State Council Information Office, the People's Republic of China, White Paper on Diaoyu Dao, an Inherent territory of China. (2012). Available at http://news.xinhuanet.com/english/c hina/2012-09/25/c_131872152.htm.

United Nations Oceans & Law of the Sea. Chronological lists of ratifications of, accessions and successions to the Convention. (2012). Available at http://www.un.org/Depts/los/refere nce_files/chronological_lists_of_ratifi cations.htm.

UNAUTHORIZED AIRSPACE INFRINGEMENTS AND USE OF WEAPONS AGAINST CIVILIAN AIRCRAFTS FROM AN INTERNATIONAL LAW PERSPECTIVE*

Cindy Nur Fitri**

Abstract

The immense growth of the air transport business has attracted the highest level of scrutiny for safety on airspace traffic. Despite the fact that the sky is a vast place with limitless loft and borderless horizon, still, there is an imaginary border line where the concept of jurisdiction applies and is recognized in the legal framework of international airspace law. In the state's perspective, to use force in self-defense in order to protect its national safety, security and sovereignty is an inherent right, as confirmed by Article 51 of the UN Charter. However, the prohibition on using force is expressed to be without prejudice to the rights and obligations of States set out in the Charter. Thus, in truly exceptional circumstances, a state would be entitled to shoot down a civil aircraft if that is the only way to avoid an anticipated greater loss of life. This paper aims to analyze the use of weapons against civilian aircrafts on the context of unauthorized airspace infringements from an international law perspective, in particular towards the principle of self-defense and human rights.

Intisari

Pesatnya perkembangan industri transportasi udara dewasa ini berimplikasi pada kebutuhan akan tingkat keselamatan yang tinggi, terutama dalam mengatur lalu lintas udara. Meskipun ruang udara memiliki luas dan ketinggian yang tak dapat ditentukan ukuran pastinya, terdapat sebuah garis pembatas imajiner yang menjadi tempat bernaungnya konsep jurisdiksi negara sebagaimana tercantum dalam aturan hukum udara internasional. Dalam perspektif suatu Negara, penggunaan senjata untuk membela diri dalam usaha mempertahankan keamanan dan kedaulatan nasional telah dimain sebagai sebuah hak yang tercantum dalam Pasal 51 Piagam PBB. Namun, larangan penggunaan senjata yang ada dalam Piagam PBB cenderung belum dirasa jelas dan memenuhi rasa keadilan dalam menentukan hak dan kewajiban suatu negara. Dalam suatu keadaan yang memaksa, suatu Negara diperbolehkan untuk menembak pesawat sipil apabila hal tersebut menjadi satu-satunya pilihan untuk menjaga keamanan dan menghindari jatuhnya korban jiwa yang lebih banyak. Makalah ini mencoba untuk menganalisis penggunaan senjata terhadap pesawat sipil yang melakukan pelanggaran wilayah udara dalam perspektif hukum internasional, terutama terkait dengan prinsip pertahanan diri (principle of self-defence) *dan aspek hak azasi manusia.*

Keywords: airspace infringements, use of force, civil aircraft.

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** 2008; Civil Law; Faculty of Law, Universitas Gadjah Mada; Yogyakarta, Indonesia.

A. INTRODUCTION

The immense growth of the air transport business has attracted the highest level of scrutiny for safety on airspace traffic. Despite the fact that the sky is a vast place with limitless loft and borderless horizon, still, there is an imaginary borderline where the concept of jurisdiction applies and is recognized in the legal framework of international airspace law. Shaw (2003) stated that there existed a variety of theories prior to the First World War concerning the status of the airspace above States and their territorial waters.[16]

As aviation technology advanced, several theories on airspace territory denied the right of innocent passage as it no longer fits the factual condition in civil aviation as the fear of threat to national safety, security and sovereignty of a State arises. The mother of airspace law, the 1910 Paris Convention, acknowledged complete and exclusive sovereignty over airspace territory and denied rights of innocent passage of any kind to foreign aircrafts of non-contracting States in a state's airspace territory. The convention granted rights of innocent passage only to civil aircraft of its Contracting States.

There is no acknowledgement of the right of innocent passage in the 1944 Chicago Convention. Moreover, in response to the *usque ad coelum principle*,[17] Article 9c of the Chicago Convention stated that a State possesses the right to require a civil aircraft to land if it flies over its territory without permission. However, the use of weapons against civil aircraft is prohibited, as the lives of persons on board and the safety of aircraft must not be endangered.[18] Shaw (2003) had also stated that such unauthorized over flight would justify interception and a demand to land.

Martono and Sudiro (2012) noted that a number of incidents have occurred since the 1950s destruction of foreign airspace intruders. In 1955, an Israeli civil airliner namely EL AL Constellation was shot down while cruising from London to Israel. This aircraft entered Bulgarian airspace and was shot by Bulgarian MIG-15 military planes. A similar tragedy also occurred to Korean Airlines flight number KL007 in September 1983. The plane had strayed several hundred miles into sensitive Soviet airspace, resulting in the death of 269 persons. Richard, as quoted by Matte (1984), also noted that there were at least 12 cases of downing of civilian aircrafts in the period of 21 years, including but not limited to DC-7 Red Cross in 1969, DC-8 Alitalia in 1978, Boeing 727 Libya in 1973 and some other cases situated in Congo, Cuba, Angola, Vietnam, Cambodia, Mozambique and Chad.

Huskisson (2005) discussed one recent incident occurring on the 20th of April 2001, when Peru shot down a light aircraft as part of an anti-drug-smuggling campaign assisted by the Government of the United States of America (USA). The shooting down of suspected drug aircraft by countries such as Columbia and Peru is not new, and the success of such operations have relied upon airborne tracking devices which the USA provides. This joint-operation fired two salvos of machine gun

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[16] One view was that the airspace was entirely free, another that there was, upon an analogy with the territorial sea, a band of 'territorial air' appertaining to the state followed by a higher free zone, a third approach was that all the airspace above a state was entirely within its sovereignty, while a fourth view modified the third approach by positing a right of innocent passage through the air space for foreign civil aircraft. See Shaw (2003) p. 463

[17] Air rights concept which encoded in Latin phrase '*cuius est solum, eius est usque ad caelum et ad inferos*' means 'for whoever owns the soil, it is theirs up to heaven and down to hell'.

[18] Generally reckoned as principle of 'safety first'. See Article 44a Convention of International Civil Aviation 1944.

fire into a small Cessna floatplane. Unfortunately, the aircraft was not ferrying drugs but rather carried members of American Baptist Missionary Group. An American missionary and her infant daughter were killed by gunfire.

Aside from air force combatant, the use of Man-Portable Air Defense System or MANPADS has also been widely reported in bringing a catastrophic effect. MANPADS, often used by terrorists, criminals, and other non-state actors, are shoulder-fired anti-aircraft missiles. The use of such weapon has posed serious threat to civil aircrafts around the world. The US Bureau of Political-Military Affairs (2011) reported that more than 40 civilian aircraft have been hit by MANPADS's missiles since 1970s which resulted to 28 incidents of crashes and the death of 800 people.[19] The latest MANPADS attack on civil aircraft happened on March 23, 2007 when Trans Avia Export Ilyushin 76TD cargo plane was shot down over Mogadishu, Somalia, killing theentire crew of 11.

In the State's perspective, to use force in self-defense in order to protect its national safety, security and sovereignty is an inherent right, as confirmed by Article 51 of the United Nations (UN) Charter. Aust (2005) noted that it is very difficult for a State to force an uncooperative pilot to land without putting the aircraft or its occupants in danger. However, the prohibition on using force is expressed to be without prejudice to the rights and obligations of States set out in the Charter. Thus, in truly exceptional circumstances, a state would be entitled to shoot down a civil aircraft if that is the only way to avoid an anticipated greater loss of life.

In the recent era of sophistication, the United Kingdom Civil Aviation Authority with its project named "On Track" (2003), reported that during the 18 month data collection period, there were 165 reports of airspace infringements. The project found that of the 165 reports, 144 were 'infringements' and 21 were 'almost infringements'. Infringements often occur in areas where the amount of free airspace available to general aviation aircraft is restricted. Airspace constrictions or "choke points" are particularly prone to airspace infringements. It is important to note the dangerous position of civil aircrafts in situation of airspace infringements, as some countries have started to apply laws enabling them to use weapon in these situations.[20]

Status quo has shown that current airspace regulations allowing the use of weapon towards civilian airliners have put civil aviation security into risk. Most airspace infringements happen unintentionally and are usually caused by technical problems or miscommunication between pilots and Air Traffic Controller (ATC) staffs. According to the UK CAA On Track report (2003), pilots reported difficulty in understanding why zone crossing clearances were so often refused without explanation. Here, not only is there a perceived attitude of mistrust between General Aviation pilots and controllers, but airspace policy and procedures are also not well understood by General Aviation pilots who would definitely benefit from a focused education program and improved publicity.

One example of a 'peacefully resolved' case of airspace infringement is the case of Partemavia P-68, an aircraft owned by Cape Air Transport, Australia which landed on Mopah Airport, Merauke,

[19] See MANPADS: Combating the Threat to Global Aviation from Man Portable Air Defense System at www.state.gov/t/pm/rls/fs/169139.htm.

[20] In October 2004, Brazil announced that a domestic law had now come into effect to enable it to shoot down suspected drug trafficking aircraft. See Aust (2005) p. 353.

Indonesia without the possession of diplomatic clearance, security clearance, nor flight approval on September 2008. The infringement occurred due to a misunderstanding between Captain William Henry Scott-Bloxam, the pilot-in-command for the aircraft, and an ATC staff from Mopah Airport where the Captain misinterpreted assistance from the staff as flight approval. It should be known that an ATC staff is not in the position to give flight approval[21] as the Ministry of Transportation issues official flight approval in Indonesia.

B. DISCUSSION

1. State's Self-Defense Principle

Article 2(4) of the UN Charter stated that its Members shall refrain in their international relations from threat or use of force against the territorial integrity or political independence of any state. However, Article 51 of the Charter acknowledges the right of self-defense if an armed attack occurs against a Member. This article gives justifications on the use of force based on self-defense principle.

In regards to the particular issue, the application of the self-defense principle to justify the use of weapons against civilian aircrafts has often been conducted heavy-handedly. Firstly, from various incidents of airspace infringements done by civilian aircrafts, there had been no strong evidence that particular States had forcibly conducted such measures of using arms to shoot down the aircraft. From various reports of civilian aircraft shoot downs, it was found that it was not a terrorist attack as the majority of victims are innocent civilians. Conversely, as Aust (2005) had stated, "if these measures had been taken by the US Government, or had good grounds for believing that it knew, the real intentions of the hijackers of the four US airliners on 11 September 2001, it could have authorized their shooting-down over less populated areas." However, Foont (2007) noted that the aircraft involved were all US flag carrying aircraft operating on domestic routes, which gave a real example to test the criteria and left a question whether it is appropriate to shoot down those aircrafts.[22]

Second, there is no strong evidence that the aircrafts were about to launch an attack. Using the self-defense principle to justify the shooting of the aircrafts would breach of the principles of necessity and proportionality. Various scholars, however, has understood the definition of the term 'proportionality' differently. Shaw (2005) questioned whether the term proportionally 'would relate to the damage that might be caused or rather to the scope of the threat to which the response in self-defense is proposed', while Martono and Sudiro (2012) stated that principle the of self-defense shall be in accordance with principle of proportionality, which means that any measure of defense shall not be greater than threat of the attackers.

Moreover, the High-level Panel on Threats, Challenges, and Change on the UN General Assembly Report (2004) noted that Article 51 of the Charter of the United Nations should be neither rewritten nor reinterpreted, either to extend its long-established scope or to restrict it. This is as to allow preventive measures to non-imminent threats and allow its application

[21] According to Indonesian air law legislation, diplomatic clearance for flight shall be issued by Ministry of Foreign Affairs, while security clearance shall be issued by Ministry of Defense. ATC's assistance shall not be considered as flight approval, but, a part of efforts on safeguarding aviation safety, notwithstanding status of flight approval of the aircraft. See Martono & Sudiro (2012) p. 262.

[22] See Foont (2007) p. 722.

only to actual attacks. In considering whether to authorize or endorse the use of military force, the Panel suggested to the Security Council to consider at least five of the following criteria of legitimacy:

a. Seriousness of threat, by means, whether the threat harms the State or human security of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force. In the case of internal threats, the Security Council shall consider whether it should involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended or not.
b. Proper purpose, by means, whether it is clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved.
c. Last resort, by means, whether every non-military option for meeting the threat in question has been explored, with reasonable grounds for believing that other measures will not succeed.
d. Proportional means, including the scale, duration and intensity of the proposed military action, whether it is necessary to meet the threat in question.
e. Balance of consequences, by means, whether there is a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction.

The Panel (2004) also noted that no State, no matter how powerful, can by its efforts alone make itself invulnerable to today's threats. Every State requires the cooperation of other States to make itself secure. It is in every State's interest, accordingly, to cooperate with other States to address their most pressing threats. This measure, in particular, will maximize the chances of reciprocal cooperation to address its own threat priorities and hopefully, will avoid the use of force in peacekeeping attempts and the promotion of civilian aircrafts safety.

2. Human Rights Aspects

The use of weapon against civil aircraft could be determined as a violation of human rights. This is as the measure of endangering a civilian's life has breached the inherent right to live as promulgated on the Article 6 of the International Covenant on Civil and Political Rights (ICCPR). This right shall be protected by law and no one shall be arbitrarily deprived of one's life. Even though Article 4 of the Covenant stipulated that there is a justification to derogate several kinds of rights in time of public or national emergency, still, the right to live has no derogation.

According to Shaw (2005), quoting the 1973's Libyan Airline incident, the Council of the International Civil Aviation Organization (ICAO) condemned Israel's action for the downing of the aircraft after straying several score miles into an Israeli-occupied Sinai territory after it refused to land. The Council also declared that 'such actions constitute a serious danger against the safety of international civil aviation'. Israel's attitude was criticized as a 'flagrant violation of the principles enshrined in the Chicago Convention'.

Quoting the Israeli Memorials submitted to the International Court of Justice (ICJ) on the matters of EL AL Constellation, Israeli emphasized that a State faced with an unauthorized aerial intrusion may deal with it in one or both of two ways. First, by informing the intruder that it is performing an unauthorized act and this may include compelling it to land, and secondly, by taking diplomatic action. This statement is actually very concise and viable as there must be many measures to escort intruding aircraft to land rather than shooting it down. The Court, however, dismissed the case on the ground of lack of jurisdiction.

With regards to the Korean Airlines K007 incident, just two weeks after the tragedy, ICAO assembly for an emergency meeting and adopted a resolution to express its deepest sympathy for the tragedy and reaffirmed prohibited use of weapons against civil aircraft.[23] On May 10 of the following year, still in response to the downing of the aircraft, ICAO Assembly unanimously adopted Article 3 *bis* to the Chicago Convention. Security Council also drafted a resolution, which reaffirmed the rules of international law prohibiting acts of violence against the safety of international civil aviation which, regrettably, was vetoed by the Soviet Union.

In 1996, the Security Council finally passed a resolution in regards to the downing of two planes by Cuba. UN Security Council Resolution 1067 noted that the shooting down of the two planes which were part of the Brothers to the Rescue, an organization run by Cuban Exiles, was a violation of the principle that no weapon were to be used against civil aircrafts and that, when intercepting such aircrafts, the lives of those on board should not be jeopardized. China and Russia abstained from voting on this resolution. From this, we can see that there is a lack of good faith and willingness from States and international institutions to take this matter seriously.

Even though, there is no definitive international law that restricts firing on civilian aircraft (Foont, 2007), the issue of the implementation of humanitarian law and human rights as a universally acknowledged international norm should be able to abolish the State's desire to fire on civil aircrafts.

C. CONCLUSION

As previously explained, measures in safeguarding one's life has been universally acknowledged in the practice of airspace law. Thus, there should be no justification towards endangering one's life unless there is an actual attack that is strongly believed will threaten and result in a greater loss of life. Even if there is, sacrificing one's life should be taken as the last resort.

Having further considered Article 2(4) UN Charter and Chicago Convention 1944, as well as realizing the importance and dependency of the global society on airline transport, its safety and security should become a significant point for the international society to start to create policies in regards to the prohibition of the use of weapons against civilian aircraft. It is essential that besides this, the international community should start to recognize that any acts of violence against the safety of international civil aviation as a violation towards Article 2(4) UN Charter and Chicago Convention 1944. Furthermore, the international community should also condemn any kind of acts in the future that would endanger civil aviation security and deprive basic human rights.

[23] See ICAO Consideration 22 I.L.M 1149, 1150 (1983) at Foont (2007) p. 8.

The use of multilateralism as a common platform for developing countries, international NGOs and developed countries is very important in developing efforts as a policy option. As Oduntan (2003) has stated, 'developing countries, the international community and developed countries are the three pillars in which the future security of both earth and outer space will heavily depend on tidal relationship between the three'. This also applies on the matters of this issue.

International organizations also play a large role in solving this problem. Organizations such as the ICAO havethe purpose of facilitating discussions and negotiations involving legal and technical aspects of aviation safety and security.Thus it is undeniable that this organization holds an important position to resolvethis issue. The ICAO should engage with UN Bodies, most likely to be the Security Council, and position itself to discuss this issue in the context of human rights implementation and international security in order to create preventive actions and solutions regarding the issue to further reduce political and economical interest from particular States. Moreover, there is an urgent need to rethink a clear rule and criteria of an 'emergency situation' which justifies the use of weapon against civil aircraft, if any.

There also needs to be some clarity in the issue of legal jurisdictions, formulation of effective sanctions and compensation of loss to the human rights violator so as to prevent future harm acted as part of collective self-defense.

All nations should also remain technologically and scientifically alert, agile and robust so as to anticipate and respond to new and emerging threats arising from the ongoing technological revolution. Regional and international cooperation to maintain airspace safety should be promoted to ensure security and protection towards civilian aircrafts. This cooperation should also includebut not be limited to a harmonization in national laws and regulations for this particular issue which, of course, requires leap of faith and willingness to put down individual and collective interest for the sake of safety and security.

BIBLIOGRAPHY

A. Books

Aust. A. (2005). Handbook of International Law. Cambridge, England: Cambridge University Press

Martono, K. & Sudiro, A. (2012). Hukum Udara Nasional dan Internasional Publik (Public International and National Air Law). Jakarta, Indonesia: RajaGrafindo Persada

Matte, N. M. (1984). Annuals of Air and Space Law Vol.IX-194, Toronto, Canada: Carswell Company Limited

Shaw, M. N. (2003). International Law (5th ed). Cambridge, England: Cambridge University Press

B. Journals

Foont, B. E. (2007). Shooting Down Civilian Aircraft: Is There an International Law?. Journal of Air Law and Commerce 72 (4), 696-711

Huskisson. D.C. (2005). The Air Bridge Denial Program and the Shootdown of Civil Aircraft Under International Law. The Air Force Law Review

Oduntan. G. (2003). The Never Ending Dispute: Legal Theories on the Spatial Demarcation Boundary Plane between Airspace and Outer Space. Hertfordshire Law Journal, 1(2), 64-84

C. Internet

Bureau of Political-Military Affairs of the US. (2011). MANPADS: Combating the Threat to Global Aviation from Man Portable Air Defense System. Retrieved from www.state.gov/t/pm/rls/fs/169139.htm

Civil Aviation Authority. (2003). A Confidential Airspace Infringement Project. (CAA PAPER 2003/5). Retrieved from www.caa.co.uk/docs/33/CAPAP2003_5.PDF

United Nations General Assembly. (2004). A more secure world: our shared responsibility: Report of the High-level Panel on Threats, Challenges and Change. (Publication Number A/59/565). Retrieved from www2.ohcr.org.english/bodies/hrcouncil/docs/gaA.59.565_En.pdf

D. Treaties and Conventions

Convention Relating to the Regulation of Aerial Navigation, signed at Paris on 13 October 1919

Convention on International Civil Aviation, signed in Chicago on 7 December 1944.

Charter of the United Nations, signed in San Francisco on 26 June 1945.

International Covenant on Civil and Political Rights, signed in New York on 16 December 1966

E. Resolutions

United Nations Security Council Resolution 1067, adopted at New York on 26 July 1996

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