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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

Law journals act as one of the most practical method to disseminate information and knowledge on legal issues. These journals are incentives for students to continue researching, writing and analyzing theoretical implementations towards real-life instances. With the exciting new publication of the 2015 Juris Gentium Law Review, not only are new topics present within the edition, new writers from different faculties and universities have also shown their interest to participate in this journal. What remains to be a distinctive characteristic of this journal is that it encompasses articles made by undergraduates. This doesn't mean that the articles published are any less qualified, it just comes to show that students, especially undergraduates, are generally fascinated with examining contemporary matters and providing the most appropriate solutions.

This country needs more opportunities for students to explore their educational curiosity and be able to publish the result of their findings. With the initiation of Juris Gentium Law Review, these expectations are slowly met. This student-initiated law journal has continuously shown to grow with its exceptional list of reviewers and its extensively wide discussion concerning new legal topics.

Thus, I would like to congratulate CIMC and the Juris Gentium Law Review Editorial Board for managing to publish yet another profound edition. Hopefully, with the ongoing developments the board has made, it can lead to the national recognition of rendering this journal one of the most influential and prominent law journals in the country.

Best Regards,

Prof. M. Hawin, S.H., LL.M., Ph.D.
Dean
Faculty of Law
Universitas Gadjah Mada

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

Either write something worth reading or read something worth writing. This is what Juris Gentium Law Review (JGLR) is all about. Students, academics, or simply a reader are the major shifter of the way the world spins. As such, JGLR comes to serve this phenomenon by providing a media for people to write and eventually publish it for them to read. For the last 3 years, JGLR had set 3 editions behind which covered vast-ranging area of academic topics, precisely in legal, economy, social and political background. Such topics predominantly subsume public and private international law.

This year, we are more than delighted to present the fourth edition of JGLR. Needless to say, this edition is devised to concede more diverse and thought-provoking issues at hand. Albeit the already well-settled laws, these writings go outwit the mere regulation in place to cover critical and divine analysis on each particular issue. Inasmuch as it pertains to the previous edition style, this year edition incorporates some of the interesting subject matters which will never wear off from mankind attention, *inter alia* Refugee Law, Business Law, Human Rights Law, Investment Law, and International Criminal Law.

It is my greater hope that all the readers who come from distinctive background avails in its most. As of young generations' utmost priority, knowledge has been well-recognized to equate to human power that it is the source of opportunity and advancement. Yet, simply by possessing without practicing it will worth none. Accordingly, JGLR is believed to act at its very least as the point of departure to commence your maiden voyage in discovering the world of academics. May this serve the best interest of you.

Rizky Kenawas
President of Community of International Moot Court
Faculty of Law Universitas Gadjah Mada

FOREWORD FROM THE EDITORIAL BOARD
JURIS GENTIUM LAW REVIEW

On behalf of the 2015 Juris Gentium Law Review Editorial Board, I proudly present the new edition of this year's law journal. The editorial board initially sought to attract writers from various faculties and universities to further broaden a general understanding of legal issues from students coming from different backgrounds. This was achieved by the submission of articles from students in the faculty of international affairs and Australian National University. In this edition, graduate students are now eligible to submit their articles for publication.

We've also managed to recruit new executive reviewers from different institutions. This was purposed to develop the students' manuscripts not merely from the perspective of academics, but from practitioners as well. The seven manuscripts presented within this edition are chosen articles discussing the most contemporary and debated legal issues we have today. Kay Jessica and Devita Kartika Putri in *The Challenges of U.N Security Council in the Enforcement of State Cooperation at the ICC* have questioned States' willingness to adhere to international decisions and the role of the Security Council to further manifest such enforcement. Within Dio Herdiawan Tobing's *The Legitimacy Of U.S.-Led Intervention Against ISIL*, he analyzes legal frameworks applicable to justify the US' intervention against the newly established extremist group, Islamic State of Iraq and the Levant. The importance of due diligence in indicating human rights violations within corporations have been extensively discussed in Matilda Stickles' *Human Rights Due Diligence By Multinational Corporations: Should It Become A Legal Requirement Or Remain As Good Corporate Social Responsibility?*

Erwin Prasetyo in *Questioning Indonesia's Ban on Export of Ore Policy under International Investment and Trade Law* has examined the flaws and predicted international legal disputes that Indonesia may encounter as a result of its Ore Export Ban policy. Devita Kartika Putri and Agam Subarkah's article on *Charlie Hebdo Case Study: Public Order as Limit to Freedom Of Expression* has analyzed the threshold of freedom of expression and applies such standard on the Charlie Hebdo incident. In Yustia Rahma's *Plight of "Environmental Refugees"*, she has discussed the legal implications and protection needed for refugees fleeing due to climate changes. Also concerning refugee law, Thara Wahab has discussed the role of human traffickers in aiding refugees seeking legal protection in *Helping Refugees Should Not Be illegal: Correlation Between Human Trafficking/Smuggling and Asylum Seekers.*

I personally couldn't have published this edition without the hard work and help of the editorial board staff Felix Timotius, Aldio Primadi and Wyncent Halim. I send my greatest gratitude for these individuals who were involved and very patient in the making of this edition. I would also like to thank the Faculty of Law, Universitas Gadjah Mada, exceptional executive reviewers, and fellow seniors of the past editorial board who have supported the publication.

Students are encouraged to keep writing in order to develop and strengthen their legal knowledge and legal interests. Thus, we hope that future editions would diversify in the legal topics discussed and expand to accommodate more writers not only within Indonesia.

Thara Kunarti Wahab
Chief Editor of Juris Gentium Law Review
Faculty of Law Universitas Gadjah Mada

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THE CHALLENGES OF U.N. SECURITY COUNCIL IN THE ENFORCEMENT OF STATE COOPERATION AT THE ICC*

Kay Jessica and Devita Kartika Putri*****

Abstract

The success of the International Criminal Court is highly determined by cooperation from States. The Court lacks an enforcement mechanism and has to rely on the cooperation of State and non State-Party in the arrest and surrender of the perpetrators of crimes under its jurisdiction. It is undeniable that without State Cooperation, the Court will encounter great difficulty to conduct its proceedings. United Nations Security Council possesses specific role in the enforcement of State Cooperation, however, such role is very limited — and even ineffective, since the Court is a treaty-based International Criminal Tribunal, meaning that it is independent, and it shall not bound third State without its consent.

Finally, this article will highlight both the implementation of the responsibilities to cooperate under international law, as well as State willingness to cooperate with the Court in practice thus far, and also the power of Security Council in the enforcement of State Cooperation in the International Criminal Court.

Intisari

Keberhasilan Mahkamah Pidana Internasional bergantung pada kerjasama para Negara. Mahkamah Pidana Internasional tidak memiliki mekanisme pelaksanaan dan harus bergantung pada kerjasama para Negara dan pihak-pihak non-Negara dalam melakukan penangkapan pelaku-pelaku kejahatan di bawah yurisdiksinya. Tidak bisa disangkal bahwa tanpa kerjasama para Negara, Mahkamah Pidana Internasional akan sulit dalam menjalankan proses hukumnya. Akan tetapi, Dewan Keamanan PBB memiliki suatu fungsi spesifik dalam menjalankan kerjasama para Negara tersebut, walaupun fungsi tersebut sangat terbatas—dan bahkan tidak efektif, dikarenakan Mahkamah Pidana Internasional adalah sebuah Pengadilan Pidana Internasional yang dibangun melalui perjanjian, yang membuatnya independen dan tidak dapat mengikat negara-negara tanpa persetujuan mereka.

Pada akhirnya, artikel ini akan membahas implementasi kewajiban-kewajiban untuk bekerjasama dalam hokum internasional, dan kesudian para Negara untuk bekerjasama dengan Mahkamah Pidana Internasional pada praktiknya, dan juga peran Dewan Keamanan PBB dalam menjalankan kerjasama dengan para Negara di Mahkamah Pidana Internasional.

Keywords: ICC, international criminal law, Security Council, state cooperation.
Kata Kunci: *ICC, hukum pidana internasional, Dewan Keamanan, kerjasama negara.*

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** 2012; International Law, Faculty of Law, Universitas Gadjah Mada; Yogyakarta, Indonesia.
*** 2011; International Law, Faculty of Law, Universitas Gadjah Mada; Yogyakarta, Indonesia.

A. Introduction

The International Criminal Court ("ICC") is a treaty-based International Criminal Tribunal that was established by the Rome Statute. It began its function in July 2002, when the Rome Statute entered into force. In enforcing its jurisdiction, the ICC has to rely on the cooperation of State Parties and non-StateParty of the Rome Statute in the arrest and surrender of accused persons who commit crimes within the ICC jurisdiction, without enforcement mechanism of its own to apprehend those individuals (Mutyaba, 2012). Due to the lack of enforcement mechanism, the ICC has not been quite successful in cooperating with States, in regards to the execution of arrest warrant and surrender of the accused persons (Katz, 2003).

The basis for the obligation of States to cooperate with the ICC is a normal treaty obligation under the Rome Statute. Treaties are binding in principle only on State Parties (VCLT, 1969). For non State-Party, there is neither harm nor benefit in them (*pacta tertiis nec nocent nec prosunt*) (Zhu, 2006). ICC differs from International Criminal Tribunal for Rwanda ("ICTR") and International Criminal Tribunal for the Former Yugoslavia ("ICTY"), where States are obliged to cooperate as it is elevated from United Nations ("UN") Charter (Stroh, 2001). This, in facts, makes ICC less mobile than ICTR and ICTY that were established by UN Security Council ("SC") Resolution under Chapter VII of UN Charter.

As crucial organ of UN that is empowered to maintain international peace and security (UN Charter), SC also possesses vital role and power within the ICC. The SC may make a referral of the situation to the ICC (Rome Statute, 1998), request for cooperation from State (Rome Statute, 1998), and even handle the non-compliance for the referred situation (Rome Statute, 1998). However, the SC has not yet done any of the action above, while it is expected that they will actively participate in assisting ICC in order to attain its object and purpose, which is to ensure that the most serious crimes do not go unpunished (Rome Statute, Preamble).

In the *Situation in Darfur,* despite the issuance of the arrest warrants against Sudanese President, Omar Al-Bashir, he remains free until now. Although the SC, through Resolutions 1593/2005 imposes a mandatory obligation on Sudan to cooperate with ICC, Sudan has not cooperated fully with the Court. Similar situation can also be found in another *Situation in Darfur* (Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman, 2010)*, Situation in the Republic of Kenya* (Prosecutor v. Uhuru Kenyatta, 2013)*,* and the *Situation in Libya* (Prosecutor v. Saif Al Islam Gaddafi, 2014)*,* where States did not cooperate with the ICC, and the SC did not conduct any measure to enforce State cooperation with the ICC. In this relation, this article will examine to what extent the SC may play a role in enforcing State cooperation in the ICC and analyze the challenges that it often faces.

B. ICC: The Issue with State Cooperation

As a treaty based tribunal, only States ratifying the Rome Statute can be bound by provisions in that Statute. In the Rome Statute, the provisions on the obligation to cooperate differ for State Parties and non State Party, but both are problematic. This is why the role of the SC is crucial in executing these cooperations.

As a starting point, the cooperation demanded by the ICC is broad in nature. It is written in Article 86 of the Rome Statute that only State Parties are obligated to fully cooperate with the ICC in its investigation and prosecution of crimes

(Rome Statute, 1998), and it is accompanied by Article 89, which emphasized the surrender of persons to the ICC (Rome Statute, 1998). Under Article 89 (1), the ICC may transmit a request for the arrest and surrender of a person, together with material supporting that request (Rome Statute, 1998), to a State on the territory of which that person may be found. The Rome Statute is clear in conveying the obligation of State Parties upon receiving such request–they must comply (Rome Statute, 1998; Oosterveld *et. al.*, 2001).

However, the issue with State cooperation is that (1) it does not bind third states, (2) some State parties are reluctant to cooperate. As for the first point, Article 34 of Vienna Convention on Law of Treaties ("VCLT") provides that "*a treaty does not create either obligations or rights for a third state without its consent.*" (VCLT, 1969). Therefore, non State-Party to the Rome Statute, shall not be bound by any provisions stipulated by this latter unless the parties to the treaty intend the provision to bind a third state and that third State expressly accepts that obligation in writing (VCLT, 1969). This is supported by the SC in its resolution, expressly recognizing that non State-parties have no obligation under the Statute, therefore only encourage them to cooperate (UNSC Doc. 1593, 2005). The rationale behind this is simply political—where as some of the permanent members of the SC are not parties to the ICC. This raised concerns that the Court has become a policy tool to advance the political interests of those States represented on the Security Council (Mistry *et. al.*, 2012).

Unlike the SC itself, who has the power under Chapter VII of the UN Charter to issue resolutions binding to *all* members of UN (UN Charter). In contrast to the ICTY and ICTR that was established by the SC Resolutions (UNSC Res. 827, 955) consequently, its Statutes were also adopted and amended by the SC, and these Resolutions did not differentiate between the obligations of different States, implying that *all* member states of UN are obliged to cooperate with both *ad hoc* tribunals. An example would be when Germany made domestic legislation to affirm their cooperation with the Tribunals, and proved to have cooperated in the arrest of Tadic in Germany.

However, when we try to view it in the light of other general principles of international criminal law in particular, cooperation with the ICC is no longer voluntary in nature, but it is instead obligatory. In legal commentary, it has been suggested that a duty to prosecute or extradite the perpetrator of international crimes nevertheless exists in customary international law; the duty would bind States regardless of whether they are parties to the relevant treaty (Cryer *et. al.*, 2010) because the duty to prosecute all international crimes in all circumstances is absolute. Therefore, while a State may not have ratified the Rome Statute, it may still be subjected to an obligation to cooperate with the ICC (Zhu, 2006). This is affirmed by scholars' opinion (Scharf, 1996; Broomhall, 2003; Cryer, 2010), various case laws throughout the world ("The Application of the Convention on the Prevention and Punishment of the Crime of Genocide", 2007) and instruments of international law (ILC Draft Code of Crime Against the Peace and Security of Mankind, 1996).

As for the second point, States that are parties to the ICC do not give the Court guarantee that they will cooperate in executing the arrest warrants. As shown by the practice of US, who has been seeking bilateral non – surrender agreements or "Article 98" Agreements with States

around the world (regardless of whether those States are parties to the Rome Statute). The basic idea of such agreement is to shield US citizens from the jurisdiction of ICC which receives much critics from international law experts ("US Bilateral Immunity Agreements or So-Called Article 989 Agreements"). The highlight of this phenomenon is the amount of state parties that are willing to sign such agreements. Albania, became party to the Rome Statute on 1st of May 2003, only signed an Article 98 agreement *one day* later. Similar patterns are found between the US and other states such as Congo, East Timor, Sierra Leone, Uganda ("International Criminal Court – Article 98 Agreement Research Guide").

Another recent example would be the South African government that has threatened to quit ICC, amid controversy over Pretoria's refusal to enforce an ICC arrest warrant against visiting Sudanese president on last June 2015 (PressReader.com, 2015). South Africa, as a party to the Rome Statute was consequently under an obligation to arrest Bashir and surrender him to the ICC (Rome Statute, 1998). The Pretoria High Court even declared that the government of South African has ignored the principles of the rule of law and its constitutional obligations by not surrendering Bashir to the ICC. However, the South African government argued that Bashir was attending a summit of the African Union, so he had immunity from arrest. Thus, it can be concluded that although States are parties to the ICC, it does not give any guarantee that they will cooperate with the ICC in executing the arrest.

C. Role of the Security Council in relation to State cooperation

To complement the third states and non-State parties, the ICC provided a portion of power to the SC as well in the exercise of the Court's jurisdiction. The role of the Security Council at the ICC is limited to the jurisdictional and cooperation scope that are based on the Rome Statute and the Agreement between the UN and ICC ("the Agreement") ("Negotiated Relationship Agreement between the International Criminal Court and the United Nations"). Under the Rome Statute, the SC is empowered to refer situations in which crimes appears to have been committed to the ICC. Such referrals extend for those situations found within the territories of non-State Parties (Rome Statute, 1998). The referral in this sense, would bind the State to the Rome Statute for that particular case only. (*Prosecutor v. Bashir*, 2009). In terms of the enforcement for cooperation, the referrals to the SC is a procedure that is specifically designed for situations that were referred by the SC (Rome Statute, 1998). In this context, the Agreement provided that the Court may transmit its written decision to the SC together with relevant information regarding the case in question. At this point, the SC, through the Secretary – General, shall inform the ICC of any action taken by it under the circumstances ("Negotiated Relationship Agreement between the International Criminal Court and the United Nations").

D. ICC: Mechanism for non-compliance and why it's weak

Article 87 (7) of the Rome Statute states:

> *"State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of*

> *States Parties ("ASP") or, where the SC referred the matter to the Court, to the Security Council*." (Rome Statute, 1998)

Therefore, if there is a State that refuses to cooperate with the ICC, the ICC will make a judicial finding to that non-cooperation (Rome Statute, 1998). If it is evident that such non-cooperation prevents the ICC from exercising its functions and powers, the ICC may refer that non-compliance conducted by disobedient State to the ASP or to the SC. Afterwards, the ASP and the SC can take "*any measure they deem appropriate*."

A concrete example is Sudan—a non State Party to the ICC, but bound by the Statute in virtue of SC Resolution 1593, which refers the situation in Darfur to the ICC (UNSC 1593, 2005). The situation in Darfur involves the Sudanese President, Omar Al – Bashir, alleged to have committed crimes against humanity and war crimes in the region of Darfur. As consequence to the Resolution, Sudan would have to comply with the Court's cooperation requests. But after ten years since the Council makes such referral, Sudan has not yet complied with any of the Court's cooperation requests. Perpetrators of international crimes are still at large, and Bashir is still walking freely from State to State without fear of being arrested and handed to the ICC.

Until today, the ICC has made several judicial findings of non-cooperation, and referrals to the ASP and the SC. These include Chad (2010, 2011, and 2013), Congo (2014), Djibouti (2011), Kenya (2010), Malawi (2011), and Nigeria (2013). All these referrals are related to the arrest and surrender of the Sudanese President Omar Al Bashir (Ellis, 2014). After such referrals, the President of the ASP often approaches the diplomatic agents of the disobedient State, such as its Foreign Minister, as well as its representatives, in order to informally discuss the non-cooperation and to encourage them to fully cooperate ("Report of Bureau on non-cooperation, 2013). Yet, even judicial findings of non-cooperation triggering a formal response procedure have resulted in only a fairly timid response from the Assembly (*Prosecutor v. Bashir*, 2013). Practically speaking, the ASP did not take the non-compliance any further.

Another example of State non-cooperation can also be found in the *Situation in Libya* (Prosecutor v. Saif Al Islam Gaddafi, 2014). In that particular situation, the Chamber considers that Libya, while not being a State party to the Rome Statute, is under a duty to cooperate with the Court in accordance with Resolution 1970 (UNSC Res 1970, 2011), whereby the SC acting under Chapter VII of the UN Charter has explicitly decided that "*Libya shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor*" (Prosecutor v. Saif Al Islam Gaddafi, 2014). The Appeals Chamber in that case also confirmed that Libya has an obligation to cooperate with ICC that originates from the SC Resolution referring the situation to the ICC ("Decision on the request for suspensive effect and the request to file a consolidated reply", 2013). Eventually, this decision leads nowhere since the SC did not do any action to urge States to cooperate with the ICC. Similar situation can be discovered in *Situation in the Republic of Kenya* when ICC issued arrest warrant for Uhuru Kenyatta (Prosecutor v. Uhuru Kenyatta, 2013), another *Situation in Darfur* in respect of the arrest and surrender of Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman, 2010).

The ICC had in the past forwarded their non-cooperation decisions one of which are the *Malawi* and *Chad Decision* to the SC, in which the Court requested the Council to take action in enforcing the two States to cooperate with the ICC in the arrest and surrender of Bashir. But no respond was issued from the UN's powerful organ. The latest request made by the Court to the SC, was for Sudan itself—a request which had not yet received a concrete response from the SC. This goes against the action of the SC itself when it issued Resolution 1593 urging Sudan to cooperate with the Court. Such absence of response from SC would also weaken the ICC in the term of bringing people to justice. It would encourage perpetrators of most serious crimes even more that they can walk freely without having to fear of being arrested and surrendered to the ICC.

It is based on this fact that the authors opine that the SC enforcement mechanism has not yet live up to its expectation, considering the fact that such approaches—through diplomatic channels or referrals to the ASP are not binding, therefore, the SC was the last chance the ICC can seek to enforce cooperation. Even though neither does the Statute or the Agreement elaborated on the types of response that may be taken by the Council. However, as the Council's role at the ICC is in virtue of acting under Chapter VII of the UN Charter as affirmed by both the Statute and Agreement, therefore the response that would be available would be those provided under Article 41 of the Charter.

E. Sanctioning by the Security Council?

The authors believe that there should be concrete provisions setting up a standard of sanctions that can be imposed by the Council and those sanctions should come in conformity with the provisions under the UN Charter. For example, the SC may only impose sanctions under Article 41 if the Council decides that there exist a threat or breach of peace or act of aggression pursuant to Article 39—a pre requisite for Article 41. The noncompliance of Sudan to arrest and surrender Bashir may be considered as a threat to peace. According to the Black Law Dictionary, 'threat' is defined as "a communicated intent to inflict harm or loss of another or on another's property" or as "*an indication of an approaching menace.*" (Garner, 2014). While 'peace' is referred to as "*a state of public tranquility; freedom from civil disturbance or hostility*" (Garner, 2014). Therefore, threat to peace can be defined as the intention to injury, damage or endanger the freedom from public disturbance or tranquility.

The SC has also adopted Resolution 731 where SC considered that international crimes have "*a deleterious effect on international relations and jeopardize the security of States*", and therefore it constitutes as threats to international peace and security. (UNSC Res 731, 1992). This is also affirmed in *Lockerbie* case where a refusal to surrender or extradite the suspect of international crimes could pose an imminent threat to international peace (McGinley, 1992). ICC's jurisdictions *ratione materiae* are all classified as international crimes that rise to the level of jus cogens (Bassiouni, 1996) and therefore not prosecuting or not cooperating with international tribunal to punish the perpetrator of such crime would be constituted as threat to peace.

The terms of threat to peace can be interpreted into various kinds of situations, from military threat (Cryer, 1996) to civil wars (UNSC Res 733, 1992), lack of democracy (UNSC Res 841, 1993), anti-terrorist interventions (UNSC Res 748,

1992), and serious violations of human rights (UNSC Res 688, 1991). However it is not limited to those events. In this sense, it depends on whether a delay of justice—by way of non-cooperation by States can be regarded as threat to peace. The absence of the definition to threat of peace in Article 39 indicates that the Council is empowered with the discretion to determine which situations fall under the said article. Nevertheless, to avoid *legibus solutus*, there is a general consensus that the scope of discretion is limited by Article 24 (2) of the UN Charter in which requires the Council to act in accordance with the purposes and principles of the UN and the provisions within the Charter.

Imposing sanctions for Sudan would not be the first time for the SC. In the case of *Lockerbie*, the Council was forced to pass sanctions against Libya for its lack of cooperation. Similar resolutions were adopted when the Council obliged Sudan to extradite suspects who were allegedly involved in the assassination attempt, to Ethiopia (UNSC Res 1044, 1996). Even in the case of *Taylor*, the SC went far as to apply the use of force to execute warrants. Such application of force was after the Council determines that the use of force is needed to effectuate arrest and was considered as a last resort. In which a resolution was passed and given to the authorities to apprehend and detain Taylor to be transferred to Sierra Leone for the prosecution before the special court (UNSC Res 1638, 2005).

F. Conclusion

Finally, the authors found that the lack of an effective enforcement of cooperation in the ICC bars the Court from executing its main purpose of existence—to end impunity and uphold justice. Its principles and commitment would only be a mere vision without the aid from the SC since the Court does not possess its own police force. The SC—being the only universal organ that is authorized to make binding decisions, has the role in "ICC's enforcement mechanism", however Bashir is a living proof that even the Council cannot be a decisive side to ensure the ICC's full exercise of mandate.

An in depth authority for the SC can be sought by the Court by way of amendment of the Rome Statute, giving explicit power in terms of enforcing state cooperation. However, it must still be in line with Article 39 and 41 of the UN Charter in order for such power to be uncontested by mostly political debates.

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CHARLIE HEBDO CASE STUDY: PUBLIC ORDER AS LIMIT TO FREEDOM OF EXPRESSION*

Devita Kartika Putri and Agam Subarkah*****

Abstract

The freedom of expression is not an absolute right. It comes with limited limitations set out in the ICCPR and ECHR— applicable to France, taking into account public order, ensuring the rights of others, and it needs to be prescribed by law. A state may give its full support to the freedom of expression, but when its exercise is no longer harmless, one must question the extent of such freedom; how it must be compatible and in respect with other rights that are as important as the freedom of expression. This article seeks to see how the limitation to freedom of expression can be applied in relation to post Charlie Hebdo event.

Intisari

Kebebasan berekspresi bukan merupakan hak mutlak. Terdapat keterbatasan dari ICCPR dan ECHR— yang *berlaku kepada Prancis, dengan mempertimbangkan ketertiban umum, menjamin hak-hak orang lain, dan perlu ditentukan oleh hukum. Sebuah negara dapat memberikan dukungan penuh terhadap kebebasan berekspresi, tetapi ketika implementasinya tidak lagi berbahaya, harus dipertanyakan sejauh mana kebebasan tersebut; bagaimana kebebasannya kompatibel dan sehubungan dengan hak-hak lain yang sama pentingnya dengan kebebasan berekspresi. Naskah ini berusaha untuk melihat bagaimana pembatasan kebebasan berekspresi dapat diterapkan dalam kaitannya dengan kasus Charlie Hebdo.*

Keywords: *Charlie Hebdo, freedom of expression, public order, respect for religion, responsibility to protect, human rights.*
Kata Kunci: *Charlie Hebdo, kebebasan berekspresi, ketertiban umum, menghormati agama, tanggung jawab untuk melindungi, hak asasi manusia.*

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** 2011; International Law, Faculty of Law, Universitas Gadjah Mada; Yogyakarta, Indonesia.
*** 2012; International Law, Faculty of Law, Universitas Gadjah Mada; Yogyakarta, Indonesia.

"Two wrongs do not make one right" – Unknown

A. Introduction

Charlie Hebdo is a French weekly magazine that features cartoons and articles on various topics of politics, culture, religion etc. The magazine had recently came into international attention following the latest terrorist attack which killed 12 people and commenced society to stand and defend the freedom of expression.

The attack was following controversies which arose over the publication's multiple editions since 2006, featuring the Prophet Muhammad. Some parts of the French society especially those that were associated with Islam, has claimed that the publications included inappropriate depiction of Muhammad such as racist and naked cartoons.[1] This eventually triggered lawsuits, debates, and demonstrations. The 2015 attacks in particular, has received mixed reaction from the international community, those in support of the freedom of expression—and those in favor of limiting such freedom.

This article attempts to emphasize that the devastating terrorist attacks should not only encourage the support for freedom of expression, but it should also trigger awareness—for the people at large, that freedom of expression should be in respect for other rights, and for the government, that maybe it is time to consider public order and safety as a limit of this freedom. This article will therefore discuss the extent of freedom of expression, its limitation, and when it may be regarded as abusing its own right.

B. Freedom of expression and Public Order

Freedom of expression is one of the rights that is highly protected and promoted under international law.[2] It is basically the right to hold opinions without interference. This means all forms of opinions are protected, including opinions of political, moral or religious nature. To criminalize the holding of an opinion would only violate Article 19.[3] The protection also extends to the requirement that the State shall avoid having or seeking to have monopoly control over the media.[4] Article 19(2) of ICCPR seeks to set out the scope of freedom of speech—giving protection to the right to seek, receive, and impart information and ideas of all kinds—including artistic expression,[5] journalism[6] and religious discourse.[7] The freedom of expression can take form in many ways by spoken or written expression in images and publications of book and newspapers,[8] or

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1 *Magazine's nude Mohammad cartoons prompt France to shut embassies, schools in 20 countries*, available at http://news.nationalpost.com/news/magazines-nude-mohammad-cartoons-prompt-france-to-shut-embassies-schools-in-20-countries.

2 Universal Declaration of Human Rights, Article 19; International Covenant on Civil and Political Rights, Article 19; European Convention on Human Rights, Article 10; American Convention on Human Rights, Article 13; African Charter on Human and People's Rights, Article 9.

3 *Faurisson v. France,* Communication No. 550/93, Report of the Human Rights Committee; *Mpaku-Nsusu v. Zaire,* Communication No. 157/1983, Report of the Human Rights Committee; *Primo Jose Essono Mika Miha v. Equatorial Guinea*, Communication No. 414/1990, Report of the Human Rights Committee.

4 Concluding observations on Guyana (CCPR/CO/79/Add.121); Concluding observations on the Russian Federation (CCPR/CO/79/RUS); Concluding observations on Vietnam (CCPR/CO/75/VNM); Concluding observations on Italy (CCPR/CO/Add.37).

5 *Hak-Chul Sin v. Republic of Korea*, Communication No. 926/2000, Report of the Human Rights Committee.

6 *Mavlonov et.al. v. Uzbekistan*, Communication No. 1334/2004, Report of the Human Rights Committee.

7 *Ross v. Canada*, Communication No. 736/97, Report of the Human Rights Committee.

8 *Ahmad et. Al. v. Denmark*, Communication No. 1487/2006, Report of the Human Rights Committee.

the media.[9] The publications of Charlie Hebdo are subject to protection under the provisions of Article 19. Its expressions of religious opinions—even if it had been deemed as offensive, are considered in line with the scope under Article 19(2).[10]

However, such freedom is not absolute in nature. Freedom of expression can only be limited by virtue of Article 19(3) of ICCPR—stating that the freedom of expression carries with it, special duties and responsibilities. In this sense, it may be subject to certain restrictions provided by law and is necessary for the protection of public order. Public order refers to the rules purposed to ensure the peaceful and effective functioning of society.[11] For instance, in order for a State to maintain public order, it may in certain circumstances to regulate speech – making in a particular public place. It is a condition characterized by the absence of widespread criminal and political violence such as murder, riots, intimidation against groups or individuals.[12]

In *Otto-Preminger-Institut*,[13] provocative portrayals of objects of religious venerations could be regarded as a malicious violation of the spirit of tolerance. Further, to avoid violence against targeted groups—as demonstrated in *Kokkinakis* judgment,[14] a State could legitimately consider it necessary to take measures aimed at repressing certain forms of conduct, including the imparting of information and ideas, judged incompatible with the respect for the freedom of thought, conscience and religion of others.

Comparable to the Charlie Hebdo case, the cartoons of Muhammad may be found to be incompatible with the respect for religion of others and may therefore call for limitation. This is in virtue to the fact that in democratic societies, in which religions coexist within the same population, it may be necessary to place restrictions to ensure that everyone's beliefs are respected[15] —especially when considering the fact that the Muslim population in France has reached the percentage of 7.5% of the total population—making France the country with the most Muslims in the Western Europe.[16] Such understanding is even strengthen by the past events relating to Charlie Hebdo where aside from the 2015 shooting, the publication was faced with lawsuits,[17] other attacks,[18] and demonstrations.[19] These events indicate that the publications were not harmless and have raised negative impacts—involving death of innocent lives.

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9 *Gauthier v. Canada*, Communication No. 633/95, Report of the Human Rights Committee.

10 *Ross v. Canada*, Communication No. 736/97, Report of the Human Rights Committee.

11 Siracusa Principles, *Coleman v. Australia*, Communication No. 1157/2003, Report of the Human Rights Committee.

12 Colette Rausch, Combating Serious Crime in Post – Conflict Societies: A Handbook for Policymakers and Practitioners, U.S Institute of Peace Press: Washington D.C., 2006.

13 Otto-Preminger-Institut v. Austria, 20 September 1994, Series A no. 295.

14 *Kokkinakis v. Greece*, 25 May 1993, Series A no. 260-A.

15 Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary,* Cambridge University Press: NY, 2010, p. 333; *Leyla Sahin v. Turkey*, No. 44774/98, ECtHR judgment, 10 November 2005, ¶ 106.

16 '*Map: France's growing Muslim population*', available at http://www.washingtonpost.com/blogs/worldviews/wp/2015/01/09/map-frances-growing-muslim-population/ (accessed on April 7, 2015).

17 Mosque of Paris v. Val.

18 *Charlie Hebdo attack: 2011 firebomb over Prophet Mohammed issue*, available at http://www.telegraph.co.uk/news/worldnews/europe/france/11330145/Charlie-Hebdo-attack-2011-firebomb-over-Prophet-Mohammed-issue.html.

19 *Protests break out around the world against Charlie Hebdo*, available at http://www.cbsnews.com/pictures/protests-break-out-around-the-world-against-charlie-hebdo/

Moreover, a limitation is of course shall be proportional and the least intrusive to achieve its protective function.[20] In order to satisfy the principle of proportionality, such limitation must be a direct and immediate connection between the expression and the threat. In the present situation, a restriction may be imposed by the French government at least, to ban provocative portrayals of objects of *any* religious veneration as demonstrated in *Otto-Preminger-Institut*. Naked cartoons of Muhammad for instance may be interpreted as provocative portrayals by some groups especially when taking into account that depiction of the Prophet is prohibited according to the religion.

Imposing a limitation such as this would not be the first time for a European State. In *Murphy v. Ireland*,[21] the ECtHR accepted that a restriction of advertising religious events by Irish laws is aimed to protect public order and safety together with the protection of the rights and freedoms of others. Further, the Court acknowledges that religion has been a divisive issue and that religious advertising might be considered as offensive and open to interpretation. By these considerations, the Court was of the opinion that the restriction was not irrelevant nor a disproportionate limitation on the applicant's freedom of expression. Similar to that found in *Murphy v. Ireland*, depictions of Muhammad by Charlie Hebdo—even when the publications claimed that it was aimed against extremists, may lead to misinterpretations by the people at large, which may and did opened doors to multiple violence, hence, a public disorder. Therefore, states should take in careful consideration of protecting the order and safety of the public. However, limitations must also be made firm by domestic law—something that is insufficient in French laws.

C. France's responsibility to respect, protect, fulfill human rights

As States parties of ICCPR,[22] France have obligation to respect, protect and fulfill the Civil and Political Rights ["CPR"] of their people, including the rights of freedom of expression and opinion.[23]

The obligation to respect freedoms of opinion and expression is binding on every State party as a whole.[24] The obligation also requires States parties to ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression.[25] This obligation also manifest on the obligation of State parties to adapt a legal system on their domestic law to protect and fulfill freedoms of opinion and expression.

The current France's Constitution which is called Constitution of the Fifth Republic[26] does not contain a bill of rights, but in its preamble mentions that France should follow the principles on the Declaration of the Rights of Man and of the Citizen ["The Declaration"].[27] There are several fundamental principles according to the Declaration, such as (a) equality before the law, (b) presumption of innocence, and (c)

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20 Human Rights Committee, *General Comment No. 34*, CCPR/C/GC/34, 12 September 2011, ¶ 34.

21 *Murphy v. Ireland*, No. 44179/98, ECHR 2003-IX.

22 France ratified ICCPR on 4 November 1980.

23 Article 19 ICCPR; Human Rights Committee, *General Comment No. 34*, CCPR/C/GC/34, 12 September 2011, ¶¶ 7,8.

24 Human Rights Committee, *General Comment No. 34*, CCPR/C/GC/34, 12 September 2011, ¶ 7.

25 Committee's general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, ¶8; Communication No. 633/1995, *Gauthier v. Canada*, Views adopted on 7 April 1999.

26 Constitution of France was adopted on 4 October 1958.

27 Declaration of the Rights of Man and Citizen from the Constitution of Year I (1793).

freedom of thoughts and of opinion including freedom of religion. Therefore, it is clear that France legal system acknowledged the concept of the freedom of expression through its recognition of freedom of thoughts and opinion including freedom of religion. Therefore, France's obligation to respect freedom of opinion and expression under ICCPR had been fulfilled.

In French Law, although it does not explicitly recognized religion law, the their law acknowledge that any interference to freedom of opinion including freedom of religion –which is effected a disruption of public order and damage of reputation of other- will constitute as an offence.[28] It was also extended on the application of the freedom of press,[29]which is affirmed under section 29 of the Freedom of Press Act, provide that the direct publication or reproduction of a statement or allegation,- which damages the honor or reputation of the person or body of whom the fact is alleged-, shall be an offence.[30]

Pursuant to the Article 10 (2) of European Convention on Human Rights ["ECHR"], freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man. [31] It is applicable not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.[32] The tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. This principle may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance.[33]

When dealing with cases concerning incitement to hatred and freedom of expression, the European Court of Human Rights ["ECtHR"] uses two approaches which are provided for by the ECHR:

(a) The approach of exclusion from the protection of the Convention, provided for by Article 17 (prohibition of abuse of rights), where the comments in question amount to hate speech and negate the fundamental values of the Convention; and
(b) The approach of setting restrictions on protection, provided for by Article 10, paragraph 2, of the Convention (this approach is adopted where the speech in question, although it is hate speech, is not apt to destroy the fundamental values of the Convention).[34]

Such as in the case of *I.A v. Turkey*, ECtHR found that Turkey had not violated the article 10 of the Convention in the applicant's conviction and sentence –which is insulting religion through the publication –, due to the fact that the applicant's "provocative" opinion constitutes as an abusive attack towards the Prophet of Islam.[35] Therefore, the assessment of the obligation to protect and to fulfill of CPR lies on the ability of state to provide an

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28 Article 11 of La Déclaration des droits de l'homme et du citoyen of 1789.
29 Freedom of Press Act of 29 July 1881.
30 Section 29 of Freedom of Press Act of 29 July 1881.
31 Article 10 (2) ECHR.
32 ECtHR, *Handyside v. the United Kingdom*, judgment of 7 December 1976, ¶ 49.
33 ECtHR, *Erbakan v. Turkey*, judgment of 6 July 2006, ¶ 56.
34 ECtHR, Factsheet-Hate speech, November 2014, p.1.
35 ECtHR, *İ.A. v. Turkey,* (no. 42571/98) 13 September 2005.

adjudication system, including investigation and prosecution any violation of CPR.[36]

As opinion by Roy, the Islamic population in France lacks the political and social organization that could enable it to express dissatisfaction and act in the interests of the Muslims they represent.[37] In the '*Charlie Hebdo*', several Muslim organizations had initiated proceedings seeking to prohibit a magazine depicting the prophet Mohammed. However, the request was annulled because it did not meet the strict requirements of Freedom of Press Act of 29 July 1881.[38] The fact that there were debates on Charlie Hebdo's action and lawsuits, France still could not protect and respond to the Charlie Hebdo's incident. Therefore the obligation to protect and fulfill freedom of expression and opinion had not been fulfilled.

D. Conclusion

The event of Charlie Hebdo serves as a wakeup call for limitation of freedom of expression. As important as that freedom may be, however when it causes violence and deaths of civilians, a state is expected to respond as there is an obligation to protect the rights of others. The Charlie Hebdo case indicates disturbance towards public order and harm of the rights of others. Consequently, France's obligation to protect human rights must be reviewed and should set a limitation in order to protect and ensure the fulfillment of the rights of others.

A limitation may follow one of the approaches set out by the ECHR. Further, such limitation should be written in domestic law, and at least intrusive to achieve its protective function. In the context of freedom of expression, the point of issue is the disapproval of the inappropriate depiction or cartoon of religious veneration. Therefore the limitation should be strictly to prohibiting just that. And it should be applied to any religion or beliefs that coexist in France.

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36 Committee's general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant.

37 O. Roy, *La laïcité face à l'islam*, Paris, France: Editions Stock 2005.

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HELPING REFUGEES SHOULD NOT BE ILLEGAL: CORRELATION BETWEEN HUMAN TRAFFICKING/SMUGGLING AND ASYLUM SEEKERS*

Thara Kunarti Wahab**

Abstract

Refugees are constantly being persecuted not only within the State's origin, but also within the State they seek refuge from. These asylum seekers have taken numerous measures in their attempt to flee from hostile situations. Thus, it would be reasonable that these people acquire assistance from humanitarian workers or even human traffickers/smugglers as a resort when faced with impediments to enter into another State's border. Although such conducts would amount to illegal actions, with the inability for States to lower its immigration demands and amend its policy, refugees are without any other options. This paper intends to elaborate the relation between refugees, human traffickers/smugglers and international obligations. The practices that will be assessed are from States which have a more developed and systematic refugee system, Australia and States under the European Union. By analyzing these two systems, States have still shown reluctance to fully adhere to international obligations under refugee law. These causes, impacts and solutions are further discussed within the article.

Intisari

Pengungsi terus-menerus dianiaya tidak hanya dalam asal negaranya, tetapi juga di dalam negara yang mereka mencari perlindungan. "Asylum seekers" tersebut telah mengambil banyak langkah dalam upaya mereka untuk melarikan diri dari situasi berbahaya. Dengan demikian, orang-orang tersebut memperoleh bantuan dari pekerja humaniter beserta pedagang/penyelundup manusia sebagai tindakan ketika dihadapkan dengan hambatan untuk masuk ke negara lain. Meskipun perilaku tersebut merupakan tindakan ilegal, dengan ketidakingin negara untuk mengurangi peraturan imigrasi dan mengubah kebijakannya, pengungsi tidak mempunyai pilihan lain. Tulisan ini bermaksud untuk menguraikan hubungan antara pengungsi, pedagang/penyelundup manusia dan kewajiban internasional. Praktek yang akan dibahas adalah dari negara yang memiliki sistem pengungsi yang lebih maju dan sistematis, yaitu Australia dan negara-negara di bawah Uni Eropa. Dengan menganalisis kedua sistem ini, negara-negara masih menunjukkan keengganan untuk sepenuhnya mematuhi kewajiban internasional dalam hukum pengungsi. Penyebab, dampak dan solusi akan dibahas lebih lanjut dalam artikel ini.

Keywords: refugee, human trafficking, human smuggling.
Kata Kunci: *pengungsi, perdagangan manusia, penyundupan manusia.*

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A. Introduction

In September 2007, Janet Hinshaw-Thomas, an American humanitarian aid worker, was arrested for aiding 12 Haitian refugees flee from persecution in hopes to enter the Quebec border. Hinshaw-Thomas has been charged with human smuggling under Canada's Immigration and Refugee Protection Act. Section 117 of the Act states that, *no person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act*. Undocumented refugees would fall under the latter provision hindering them to seek refuge in Canada and other States with similar laws. Even though the charges were later dropped by the Canadian government, States have continuously showed lack of appropriate and effective measures or empathy in dealing with refugees, thus, failing to comply with their international obligations.

B. Obligation to Protect Refugees Under International Law

Assisting asylum-seekers and refugees shall remain one the most fundamental obligations of States under international law. Pursuant to Article 14 of the 1948 Universal Declaration of Human Rights, *everyone has the right to seek and enjoy in other countries asylum from persecution*. Although the declaration enumerates the right to seek asylum, such right has yet to be recognized in a legally binding instrument. This is mainly due to States' concern that the existence of such right would manifest a higher obligation of States to unquestionably accept asylum seekers. The closest this right has been implemented within legal conventions is within its implicit application on the enforcement of the 1951 United Nations Convention relating to the Status of Refugees (hereinafter referred to as "Refugee Convention"). There are currently 145 State Parties to the Refugee Convention and the right of asylum has been implicitly stipulated through the principle of non-refoulement. The prohibition of refoulement is laid under Article 33(1) of the Refugee Convention in which,

> "*no Contracting State shall expel or return […] a refugee […] to […] territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*"

However, with the existence of rights and obligations provided under the Refugee Convention, international or regional bodies are still limited in their authority to interfere with the adjudication of asylum claims in the event States have failed to abide with international norms. Pursuant to Article 1(a)(2) of the Refugee Convention, the term 'refugee' shall apply to any person who,

> "*[…] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*"

Regardless of a widely accepted definition of the term 'refugee', States have full discretion in deciding which asylum seekers would be granted refugee status depending on their respective national laws. Thus, States would implement different immigration policies and the

granting of these statuses would be on a case-by-case basis.

C. Relation Between Refugees and Human Trafficking/Smuggling

Until today, asylum seekers fleeing from persecution are still incurring difficulties in seeking refuge and fulfillment of refugee rights. The difficulty to be granted the status of refugee is as difficult and complicated as the initial entry to the State itself. Asylum seekers have been able to enter into foreign States through the help or aid of humanitarian workers or other non-authorized citizens. These entries are most often rendered illegal due to the similar nature and characteristics it has with human trafficking or smuggling. Protection under the Refugee Convention has been interpreted to not apply to asylum seekers benefiting from the help of a smuggler (*Bayerisches Oberstes Landesgericht* Decision No. 230/99, 2000) The main reason why refugees consent to employ a smuggler derives from the restrictive immigration policies enacted by the States and the lack of legal opportunities present to enter these States.

The terms human trafficking and human smuggling have been commonly used interchangeably. However, both terms obtain a different scope. Under Article 3(a) of the Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women, and Children, "trafficking" is defined as,

> "*the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.*"

On the other hand, smuggling merely requires the procurement to obtain financial or other material benefits of the illegal entry of a person into a State Party of which the person is not a national or permanent resident.[39] While trafficking victims have not agreed to be moved, smuggling victims have consented to be taken to one place to another. Furthermore, trafficking schemes include exploitation of the victims which consist of prostitution, sexual exploitation, forced labor and slavery, while smuggling usually ends at the chosen destination.

Regardless of the difference in terminology, both illegal acts amount to irregular migration which takes advantage of desperate asylum seekers attempting to flee their nation. Smuggling refugees imposes numerous policy challenges including the necessity for the destination States to revise their border policies and simultaneously combat irregular migration, but also to comply with international commitments relating to the right of asylum and the protection of refugees (Koser, 2013). The European Union and Australia's refugee legal framework and its enforcement shall be assessed, seeing that both States acquire a relatively developed legal system and were most requested to accept refugees compared to other nations. The following elaboration is intended to analyze the refugee legal mechanisms and provide the most appropriate solution in dealing with the correlation of irregular migration and asylum seekers.

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[39] Article 3 of Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime.

a. Developments in the European Union

Within EU law, the Union guarantees the right of asylum and recognizes the right of asylum. The law provides that,

> *"the right to asylum shall be guaranteed with due respect for the rules […] relating to the status of refugees and in accordance with the Treaty establishing the European Community."*[40]

Furthermore, the EU obtains a uniform asylum system in order to adjudicate and process claims of asylum, referred to as EU's Common European Asylum System established under the Dublin Regulation or Council Regulation European Council No. 343/2003 and currently amended to No. 604/2013. The regulation sets criteria and mechanisms for EU States to examine an application for refugee status and requires that each asylum claim should be processed in the first EU country the asylum seeker had reached.[41]

Although Europe has a common asylum system of its own, bilateral arrangements between African and European countries are common in *promising to take measures to readmit individuals who have crossed illegally in exchange for aid and development, as well as financial and material support for their joint border controls*. However, not all EU States have made bilateral agreements for the interest of refugee protection. For example, the Italian-Libyan agreement allows the surveillance of boats and ships in the shared waters to intercept vessels attempting to arrive in Europe.[42] As a result, these vessels have taken detours further east to try and reach Europe. These alternative routes, which are usually led by smugglers, would be more complicated to pass with the low-quality boats provided, causing more risk towards the migrants and refugees. At some cases, these boats were ordered to return back to their State of origin. Initially, the cooperation between the two States were purposed to *fight terrorism, organized crime, drug trafficking and illegal immigration*. But, by increasing patrol stations and sending back migrants entering their borders without a formal processing, their actions are closely in contrary the principle of non-refoulement.

A number of asylum seekers coming from Africa continue to flee from war, poverty and persecution in their homelands. EU governments, especially Germany, Sweden, and France have been able to shelter approximately 185,000 refugees in 2014 which accounts to 50% more than the previous year. However, there continues to be reports of increase in trafficking and smuggling of asylum seekers due to Europe's strict border enforcement policy.

By erecting border control which would hinder the asylum seekers access to international protection, they would take recourse to the services of smugglers in hopes to escape persecution and arrive safely in the destination State (Doomernik, 2004). Studies have shown that the traffickers recruit their clients in refugee camps and reception centers, as evinced in Sangatte (France), Somalia, Albania, and the former Yugoslav Republic of Macedonia in the midst of the Kosovo crisis (Heckmann et. al., 2000). Asylum seekers who have consented to be smuggled would have to not only be concerned about their safety during their migration, however, in the event they are 'proven' to be smuggled would lower their chance to proceed with

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40 Article 18 of European Union Charter for Fundamental Rights.

41 Article 25 and 26 of Asylum Procedures Directive 2005/85/EC.

42 Treaty of Friendship, Partnership and Cooperation between the Italian Republic and Great Socialist People's Libyan Arab Jamahiriya.

the asylum application (Koser, 2013). In the UK, rejection over asylum applications have been reported due to the failure to provide necessary documents, especially because it was a specific outcome of smuggling. In 2012, it had been reported that even with EU's uniform asylum system, nearly three out of four asylum applications in EU States were rejected. This comes to show that even without the assistance of human traffickers and smugglers, the EU's system had substantially restricted and set higher thresholds prior to accepting asylum seekers requests.

Europe has dealt with an increase case of illegal human trafficking and smuggling. However, most of the victims trafficked are persons seeking refuge and have been manipulatively deceived by traffickers to be able to legally enter the designated State. Understanding that States have complete sovereignty to determine the amount of refugees they would take in, by imposing higher standards, it would increase opportunities for traffickers and smugglers to recruit asylum seekers with the minimum possibility of being rejected of its application.

b. Australia's Policy

Australia has been internationally criticized for failing to comply with the international refugee regime due to its tendency to reject asylum seekers entering its borders. This includes the frequent maritime arrivals from African and Asian States without authorization. The right of asylum is recognized in Australia's 1958 Migration Act, however, if the asylum seekers are waiting for their visa or a removal, they are subject to immigration detention. The Act states that,

> "*(1) If an officer knows or reasonably suspects that a person in the migration zone […] is an unlawful non-citizen, the officer must detain the person.*
> *(2) If an officer reasonably suspects that a person in Australia but outside the migration zone*
> *(a) is seeking to enter the migration zone [...]; and*
> *(b) would, if in the migration zone, be an unlawful non-citizen;*
> *the officer may detain the person."*[43]

A flaw that remains to be disputed under this provision is the lack of time limitation of such detention. Furthermore, Australia had amended the mechanism of offshore processing system within its Migration Act. This means that if the asylum seeker arrives in Australia and is transferred to a third State, the processing shall be subject to that State's laws. This would mean the turning back of vessels after offshore processing and sending asylum seekers to camps in Nauru and Papua New Guinea where they would most likely be detained.

Similar to the situation in Europe, Australia has been reported to incur a high increase in asylum seekers with a total of 4589 asylum applications received in the first six months of 2014 (UNHCR, 2014). However, rejection towards these applications is also increasing. The main reasons to declining status of refugee are essentially because of the asylum seeker's unfounded claims. Meaning that the asylum seekers are not facing any fear of persecution and they are able to be sent home safely. Facilitation of smugglers is also used in order to assist the asylum seekers to reach the Australian borders. However, there were unexpected reports that the Australian government was allegedly reported to also support these illegal schemes by paying smugglers to turn back boats transporting migrants attempting to enter Australian territory.

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[43] Section 189 of Australia's 1958 Migration Act.

Similar to Canada's legislation, Section 233A of Australia's Migration Act; Anti-People Smuggling and Other Measures Bill 2010 recognizes the act of organizing and facilitating persons to enter Australia illegal would amount to smuggling. The acts of smuggling offence shall be punished through imprisonment or fine. However, in the event the person suspected of illegal migration corresponds with the characteristic of an asylum seeker, the asylum seeker should not be punished as he/she does not constitute as a 'regular migrant.' Australia similar to other countries is mainly focusing on measures to implement to reduce illegal migrations. However, these migrations are closely related to the entry of asylum seekers. Thus, most national laws regarding the prohibition of smuggling and trafficking may overlap on the asylum seeker's intent to request an application as refugees.

D. Possible Recommendations

There should be a distinction of legal consequences between aiding refugees and smuggling illegal migrants. These asylum seekers require the assistance of smugglers or human traffickers due to the strict and infeasibility of the State's enforcement border measures to accept and grant refugee status. States must develop appropriate and effective anti-smuggling laws *however*, the laws must also tolerate and allow asylum seekers to enter the State's border subject to further processing. Fundamentally, the definition of smuggling within national laws must be narrowed in order to exclude people motivated solely to aid refugees. Further, tackling the issue of smuggling illegal migrants shall be conducted through the root of the problem. This means taking necessary measures to prevent traffickers from operating and obtaining vehicles or vessels to transport the migrants. Taking into example the European Union in its attempt to combat smugglers from increasing, the EU has offered to provide warships to patrol the coasts of the conflicted country. Thus, it should be an obligation of the States to distinguish migrant smugglers and not prosecute those who are solely acting under humanitarian motives.

Additionally, States should provide more feasible methods to granting asylum seekers a refugee status. Adhering to the Refugee Convention, States shall provide refuge and protect refugees. However, with the rigidness and complexity of the State's administrative law to process asylum seekers, such aim has yet to be fulfilled. State's border enforcement policies are understandable due to the issue of sovereignty and to prevent arbitrary claims of asylum as justifications for entry. Nevertheless, Article 31(1) of the Refugee Convention provides that entering a foreign State illegally (without the necessary documents eg. visa) shall not be illegal when the person is seeking asylum. Thus, States must increase legal migration opportunities and essentially lessen requirements for refugees to enter the territory (Koser, 2013). Strengthening anti-smuggling laws and revising refugee status determination standards to be less restrictive would contribute to achieving the Convention's goals.

Another probable solution includes the increase in refugee camps or posting of migration officers to process people overseas (Maley, 2000). Such would decrease logistical expenses, prevent casualties caused by boat accidents, and lessen the demand of smugglers. However, this would require more funding as well as the consent and cooperation with the refugee-producing State. Nevertheless, it is for the sake of humanitarian values that the principle of right of asylum shall be

upheld. Hence, such international principle must prevail over administrative laws hindering refugees to seek asylum.

E. Conclusion

By virtue of the increase in border control under national laws, it would increase the probabilities of asylum seekers and refugees to be vulnerable targets for smugglers. In minimizing and eliminating these illegal acts, States would need to reconsider and revise their migration laws. By restricting and limiting the chances for asylum seekers to be provided refugee protection, traffickers and smugglers would use this opportunity to gain interest for people seeking to successfully migrate to the destination State.

However, understanding that States are reluctant to ease their border control, it would be difficult to address the issue of human trafficking without firstly dealing with the State's migration policy. Taking into account the systems within the EU and Australia clearly shows the increase of these irregular migrations as an impact of the inability for refugees to access legal protection. As a result, States are able to circumvent from its international obligation by depending on its sovereign right to regulate their internal laws. This would provide an immense leeway for traffickers to profit from using these asylum seekers.

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HUMAN RIGHTS DUE DILIGENCE BY MULTINATIONAL CORPORATIONS: SHOULD IT BECOME A LEGAL REQUIREMENT OR REMAIN AS GOOD CORPORATE SOCIAL RESPONSIBILITY?*

Matilda Stickels**

Abstract

Human rights due diligence can be conducted by multinational corporations to prevent and mitigate human rights risks. States have had the responsibility to implement human rights standards into their national laws however due to the focus on international corporate social responsibility, conducting human rights due diligence is now extending to also be a responsibility for corporations. This article explores the relationship between the states and corporations with regard to the available international law/guidelines and human rights due diligence. Should it be developed into a legal requirement or is maintaining international corporate responsibility through guidelines and recommendations sufficient? It is concluded that corporations may not be held liable for failure to undertake due diligence when breaching human rights. This provides a wide opportunity for the states to implement legislation to enforce corporations to undertake human rights due diligence and discharge the responsibility to corporations who breach international human rights laws.

Intisari

Pemeriksaan Hak Asasi Manusia (HAM) dapat dilakukan oleh perusahaan multinasional guna mencegah and mengurangi resiko pelanggaran HAM. Negara-negara telah memegang tanggung jawab untuk mengimplementasikan standarisasi HAM dalam hukum nasionalnya namun berdasarkan atas fokus terhadap tanggung jawab sosial perusahaan internasional, pelaksanaan pemeriksaan HAM kini meluas hingga menjadi sebuah tanggung jawab terhadap perusahaan. Artikel ini mengeksplorasi hubungan antara Negara dan perusahaan atas ketersediaan pedoman atau hukum internasional mengenai pemeriksaan HAM. Haruskah itu dikembangkan menjadi sebuah persyaratan hukum atau apakah dengan menjunjung tanggung jawab sosial perusahaan internasional melalui pedoman-pedoman dan rekomendasi saja telah cukup? Disimpulkan bahwa perusahaan-perusahaan tidak dapat diminta pertanggungjawaban atas kegagalan melakukan pemeriksaan dalam hal pelanggaran HAM. Hal ini menyediakan peluang lebar bagi Negara untuk mengimplementasikan legislasi yang menegakkan kewajiban pemeriksaan HAM bagi perusahaan-perusahaan serta meminta pertanggung jawaban bagi perusahaan yang melakukan pelanggaran.

Keywords: human rights, due diligence, corporate social responsibility.
Kata Kunci: *hak asasi manusia, uji tuntas, tanggung jawab sosial perusahaan.*

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In recent years, multinational corporations (MNCs) [44] have increasing demands placed upon them when operating in countries, other than their host country of business, over the standard of human rights especially where national legislation might differ, albeit to a lower standard in a foreign country. MNCs have also encountered a reputation for not doing enough for their host communities in developing countries and there have been an increasing responsibility on MNCs to provide community development programs and assistance to the communities where they operate. This concept of Corporate Social Responsibility (CSR) is then raised within the business and legal sectors as it provides the notion that corporations have an international economic, social and environmental responsibility extending beyond its own walls in countries of operation. This responsibility also encompasses maintaining and protecting human rights.

In the international community, protection of human rights is fundamentally important to ensure that every country[45] has a standard of basic rights for humans. Prior to the development of international human rights laws and conventions starting in 1948, these human rights were solely the responsibility of the state to implement and ensure basic human rights standards. An example is the Triangle shirtwaist factory in New York, United States, where the state responded to the death of 146 workers in 1911 by implementing national laws to raise standards and protect the rights of workers. International laws and conventions have placed the responsibility onto states to ratify and implement these laws into their national systems to ensure compliance with the international standards. However due to continued human rights breaches by MNCs, the question is raised as to whether the responsibility of maintaining human rights has been legally extended to MNCs under international law to hold them liable when operating in another country.

If MNCs are found to have the responsibility to maintain and protect human rights within their scope, is there, or should there be, a legal duty to conduct human rights due diligence, or whether it should remain merely good corporate practice. This article will also explore the concept of human rights due diligence and the importance of why MNCs should conduct such processes through examining the relevant guidelines and international codes of practice. It will determine whether undertaking human rights due diligence to mitigate human rights risks should be mandatory for all MNCs through enacting either national or international laws.

A. What is Human Rights Due Diligence?

The term 'due diligence' was first coined in the US Securities Act of 1933 legislation as a defence to avoid liability for fraud if an investor had knowledge of such fraud. This concept has been developed into a general definition (Oxford, 2015) of due diligence being 'reasonable steps taken by a person to avoid committing a tort or defence', [46] based upon a duty of conduct rather than assuring a specified result (French & Stephens, 2014, p.17). The United Nations have furthered this definition to include exercising standards of behaviour based upon individual circumstances[47] and which

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[44] Also referred to as 'multinational enterprise' and 'transnational corporation' depending on the international guidelines.

[45] Also referred to as 'state' according to international law.

[46] 'A comprehensive appraisal of a business undertaken by a prospective buyer, especially to establish its assets and liabilities and evaluate its commercial potential'.

[47] 'Such a measure of prudence, activity or assiduity, as is properly to be expected from,

later included corporations focusing on the term 'human rights due diligence'. Schutter, Ramasastry, Taylor and Thomson (2012 p.1) define human rights due diligence as a

> means by which business enterprises can identify, prevent, mitigate and account for the harms they may cause, and through which judicial and regulatory bodies can access an enterprise's respect for human rights.[48]

B. Human Rights

In order to determine what 'human rights due diligence' is, one must consider the overall concept of human rights and especially its relationship to corporations. Human rights are the minimum standards for the treatment of humans and governed by international treaties and policies which require member states to ratify into their national laws. Originating from the Universal Declaration on Human Rights (UDHR) these distinguished guidelines (United Nations, 1948, art 1-2) include that it is the freedom of all humans to be entitled to live without discrimination and that all humans are automatically granted the minimum human rights.[49] The treaties and conventions regulating human rights at an international level are quite broad and also include the UN International Covenant on Economic, Social and Cultural Rights (ICESCR) which include that all humans are entitled to have an adequate standard of living and have safe working conditions. Protection of human rights can be a very emotive issue within the international community, and with easy access to information these days, any breaches by MNCs are generally made publicly known which can include serious ramifications, both for reputation and in a legal sense.

As human rights are directly related to the social, economic and environmental aspects of corporate activities, there is a strong emphasis placed on maintaining human rights in corporations (Australian Human Rights Commission, 2008).[50] This could be described as a core reason as to why corporations should be legally required to conduct human rights due diligence.

C. International Conventions

The applicable international laws and conventions on human rights in corporations and due diligence mainly originate from the United Nations, the International Labour Organisation (ILO) and the Organization for Economic Co-Operation and Development (OECD) according to the Australian Human Rights Commission (2015).[51]

The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration, p.11-12) highlights the importance of MNCs respecting both local social responsibility through labour and

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and ordinarily exercised by, a reasonable and prudent [person] under the particular circumstances; not measured by any absolute standard but depending on the relative facts of the special case'.

48 Schutter, O., Ramasastry, A., Taylor, M. & Thomson, R. (2012) *Human Rights Due Diligence: The Role of States*: International Corporate Accountability Roundtable.

49 United Nations (1948) *Universal Declaration of Human Rights* retrieved from http://www.un.org/en/documents/udhr/index.shtml.

50 'Economic, social and environmental aspects of corporate activity where Corporate Social Responsibility (CSR) *is* a management concept whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders'; Australian Human Rights Commission (2008) *Corporate Social Responsibility & Human Rights* retrieved at https://www.humanrights.gov.au/publications/corporate-social-responsibility-human-rights.

51 Australian Human Rights Commission (2015) *Making a Difference on Human Rights in Business* retrieved from https://www.humanrights.gov.au/education/business-and-human-rights.

employment laws and with regard to international laws. This policy, along with other ILO conventions demonstrate that through adhering to relevant laws, social development will generally occur.[52]

The UN Global Compact, the largest international corporate sustainability initiative, was launched in 2000 and encourages private-sector companies to take action on advancing sustainability goals by providing a policy framework for commitment to decision-making and business activities. [53] The UN Global Compact (2014) has over 12,000 participants including 8000 corporations in 140 countries reporting minimum human rights standards in the workplace and within the social environment (United Nations Global Compact, 2015).[54]

The United Nations Global Compact (2000): Ten Core Principles

Human Rights

1. Businesses should support and respect the protection of internationally proclaimed human rights, and
2. Make sure they are not compliant in human rights abuses

Labour

3. Businesses should uphold the freedom of association and the effective recognition of the right of collecting bargaining,
4. Elimination of all forms of forced and compulsory labour
5. Effective abolition of child labour, and
6. Elimination of discrimination in respect of employment and occupation

Environment

7. Businesses should support a precautionary approach to environmental changes
8. Undertake initiatives to promote greater environmental responsibility, and
9. Encourage the development and diffusion of environmentally friendly technologies

Anti-corruption

10. Businesses should work against corruption in all its forms, including extortion and bribery

[52] International Labour Organisation (2006) *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,* ILO Publishing (MNE Declaration).

[53] United Nations Global Compact (2015) *Business Participation* retrieved at https://www.unglobalcompact.org/HowToParticipate/Business_Participation/index.html.

[54] United Nations Global Compact (2014) *UN Global Compact Participants* retrieved at https://www.unglobalcompact.org/ParticipantsandStakeholders/index.html; United Nations Global Compact (2015) *Business Participation* retrieved at https://www.unglobalcompact.org/HowToParticipate/Business_Participation/index.html.

As outlined above, human rights are also reflected in the social, economic and environmental responsibilities of a corporation so they are reflected both directly and indirectly in all the principles within the UN Global Compact in assessing human rights due diligence.

The United Nations Guiding Principles on Business and Human Rights (UN Guiding Principles, 2011), proposed by UN Special Representative on business & human rights John Ruggie and endorsed by the UN Human Rights Council in 2011, outlines three pillars – responsibility of the state; responsibility of the business enterprise; and access to remedy for victims of human rights abuses.[55] The United Nations have defined human rights due diligence in the Guiding Principles (UN Officer of the High Commissioner for Human Rights, 2012, p.4; French & Stephens, 2014)[56] as

> an ongoing management process that a reasonable and prudent enterprise needs to undertake, in light of the circumstances (including sector, operating context, size, and similar factors) to meet its responsibility to respect human rights.

These Guiding Principles are voluntary for corporations and outline standards for corporate responsibility and include materials for undertaking human rights due diligence.[57]

The OECD Guidelines on Multinational Corporations (OECD Guidelines), created after the Guiding Principles, and forming part of the Declaration on International Investment and Multinational Enterprises, is a widely used set of guidelines which governments can voluntarily adopt and apply to MNCs for principles and standards of responsible business operations. These guidelines (OECD, 2008, p.14), of which 45 states currently adhere to, [58] outline the relationship between government policies and MNCs through highlighting best practices for economic, social and environmental development in corporate sustainability and human rights. The OECD Guidelines specifies that MNCS need to 'respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments' through policies such as labour and industrial relations, environment, combatting bribery and consumer interests.[59]

It places the responsibility of human rights on the states however the OECD Guidelines (2008, p.39) also highlight that at the intersection between corporate conduct and human rights, MNCs 'are encouraged to respect human rights' both within their own corporate environment and with society around them.[60] Since the OECD Guidelines merely recommend MNCs to

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55 Special Representative on Business and Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, unanimously adopted by the United Nations Human Rights Council, U.N. Doc. A/HRC17/31 (June 2011) (by John Ruggie).

56 UN Office of the High Commissioner for Human Rights (2012), *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide* § 3.6 HR/PUB/12/02; French, D., Stephens, T., (2014) *ILA Study Group on Due Diligence in International Law First Report*, International Law Association.

57 Identify and clarify standards of corporate responsibility and accountability for businesses and human rights; clarify the implications for businesses of concepts such as "complicity" and "sphere of influence" and develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises.

58 OECD (2013) *Annual Report on the OECD Guidelines for Multinational Enterprises 2013,* OECD Publishing retrieved at *http://*mneguidelines.oecd.org/MNE-Annual-Report-2013-Summary.pdf.

59 OECD (2008) *OECD Guidelines for Multinational Enterprises*, OECD Publishing.

60 OECD (2008) *OECD Guidelines for Multinational Enterprises*, OECD Publishing.

practice good corporate responsibility through respecting human rights, it is not compulsory and can therefore pose an issue where the state has not ratified international human rights treaties or does not enforce the Guidelines. The OECD Guidelines do not explicitly outline that MNCs should conduct human rights due diligence as the responsibility stems from the governments.

D. Responsibility on States to Protect Human Rights

According to ICCPR (1976, art. 2.1) the states have a responsibility to protect and respect individuals within their jurisdiction and must also take appropriate steps to prevent and mitigate human rights abuse by individuals and corporations (UN Guiding Principles, 2011, p.1) [61] . This responsibility was first outlined in the landmark case of *Velasquez Rodriguez v Honduras* in 1988 regarding disappearances in Honduras from 1981 to 1984, where the Inter-American Court of Human Rights said that:

> 'An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the [American Convention on Human Rights] Convention'.

Following from the OECD Guidelines, although the conduct of individuals or MNCs is not solely the responsibility of the state, if conduct amounts to an abuse on human rights, the state may be liable of breaching human rights law through not undertaking human rights due diligence. This was explained in the UN Guiding Principles (2011, p. 1) in that states have a duty of conduct which directly relates to the original definition of due diligence.[62] This provides that States have an interest to ensure corporations are adhering to human rights law by encouraging them to prevent and mitigate human rights abuses however it does not place the ultimate responsibility on MNCs.

As an example, the Alien Tort Statute in the United States allows the courts to hear allegations of human rights violations committed outside of the United States which affect US citizens, however even US-based MNCs who have had allegations raised against them for conduct in other countries, such as allegedly assisting the South African government commit human rights violations during the Apartheid, have not been found liable in the US courts due to the courts finding they do not have jurisdiction to rule upon the allegations. This demonstrates that if MNCs are able to breach human rights laws outside of the US, they may be unlikely to be held accountable by any state that has a lower standard of human rights legislation.

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61 UN Office of the High Commissioner for Human Rights (1976) *International Covenant on Civil and Political Rights*, United Nations Publishing; Special Representative on Business and Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, unanimously adopted by the United Nations Human Rights Council, U.N. Doc. A/HRC17/31 (June 2011) (by John Ruggie).

62 Special Representative on Business and Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, unanimously adopted by the United Nations Human Rights Council, U.N. Doc. A/HRC17/31 (June 2011) (by John Ruggie).

E. Emergence of Corporate Social Responsibility

In analyzing the historical development of corporations, which largely arose out of the US after the industrial revolution, there has been a current and growing conscious on MNCs to perform CSR in order to conduct themselves in a manner to encourage growth and a positive social reputation. There is also an expectation placed on corporations by society to have minimum standards of conduct.

Companies receiving a negative reputation through bad corporate management or even ceasing to exist through financial failure can be attributed to any breach of the UN Global Compact principles. Bad corporate management can include human rights abuses though inadequate treatment of staff or knowingly contributing to environmental breaches, which follows-on to affect the people in local communities. A strong reason to undertake due diligence is to ensure that no component of the corporation contributes to a breach in human rights but it can be more challenging to control when corporations manufacture or have offices in locations where human rights abuses are more common, or where there can be a lack of communication on any human rights risks identified.

Even though human rights standards vary in each country, most corporations would prefer to maintain a positive corporate social reputation and not be identified with either direct or indirect breaches of international human rights. A direct breach example is sweatshop workers (Thomson, 2013) where work and pay conditions breach human rights to which a corporation would be found liable.[63] An indirect breach can be an environmental issue where the town water supply becomes contaminated and polluted so that people become ill from ingesting the water causing long-term impacts. Conducting human rights due diligence and amending labour conditions or using environmental assessment reports would enable a corporation to mitigate any errors to ensure they are preventing human rights violations. Although these examples can arise from poor management, a corporation can still be found liable from the lack of identifying any potential risks and inadvertently breaching human rights laws.

F. Corporate Responsibility on Conducting Human Rights Due Diligence

The UN Guiding Principles outline that corporations should respect human rights which renders it independent of the state's duty to implement and monitor human rights risks within corporations. Principle 15 states that

> In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:
>
> A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights.

The UN Framework and Global Compact (2014) also outline steps which should be undertaken for a due diligence process which include firstly identifying and assessing human rights impacts; taking upon those findings; tracking and auditing

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[63] Thomson, J. (2013, April 30) Sweatshops Violate Human Rights; American Companies at Fault. *The Collegian*. Retrieved from http://www.kstatecollegian.com/2013/04/30/sweatshops-violate-human-rights-american-companies-at-fault/

the response and communicating how the human right risk was mitigated [64]. Each process will be different for MNCs, as varying human rights risks will be identified, however this process is only a guideline and thus not enforceable in ensuring MNCs identify and mitigate human rights risks.

A significant number of MNCs are now required to report their CSR from internal policies and codes of practice. These policies can also encapsulate human rights due diligence even if the policy itself does not explicitly state the phrase. There have been several codes of practice on human rights due diligence published specifically for industry sectors, such as mining (OECD, 2011) and environmental, which can supply a framework which MNCs can apply and adopt within their own operations. One publication by OECD (2011) provides a due diligence guideline for supply chains and sourcing minerals from high risk areas however it focuses on one industry sector. These policies are also connected to employment and labour law to ensure that MNCs have the same policies regarding human rights due diligence across all their jurisdictions. This is to ensure they can uphold the same standards and regulations to protect their employees as employment and labour laws can also vary from state to state. Some MNCs, such as Coca-Cola (2014) and Adidas Group (2013) also publish their human rights due diligence to demonstrate transparency to the public and show the reputational importance of undertaking such a process within the international field.[65]

G. Conclusion

The codes of practice and international guidelines, including the UN Guiding Principles, highlight that MNCs have a duty to, and therefore should, conduct human rights due diligence. As MNCs need to consider best practices for CSR through their operations, undertaking human rights due diligence would ensure adherence to a standard of corporate behaviour in every country of operation, especially in relation to international human rights laws. The absence of legislation conclude that the states do have the ultimate responsibility however this responsibility placed on states for maintaining human rights should act as a motivation to implement national laws on corporate human rights due diligence in order to shift the probability that states may be found liable for breaching human rights on behalf of corporations.

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64 UN Framework and Global Compact (2014) *Guiding Principles on Human Rights* retrieved at https://www.unglobalcompact.org/issues/human_rights/the_un_srsg_and_the_un_global_compact.html.

65 Coca-Cola (2014) *Human Rights Due Diligence Checklists* retrieved at http://assets.coca-colacompany.com/ae/0b/a56c2d2646f88a09b749da959d5e/human-rights-self-assessment-checklists.10.2014.pdf; Adidas Group (2013) *Human Rights and Responsible Business Practices* retrieved at http://www.adidas-group.com/media/filer_public/2013/11/14/human_rights_responsible_business_practices_qa_july_2011_en.pdf.

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THE LEGITIMACY OF U.S.-LED INTERVENTION AGAINST ISIL*

Dio Herdiawan Tobing**

Abstract

Since the significant rise of the Islamic State of Iraq and the Levant (ISIL) in 2014, the extremist group has disrupted the regional stability within Middle Eastern countries. Indeed, the organization posed threat towards international peace and security regionally and internationally. Ever since its emergence, the U.S. has played an important role in leading the military intervention towards the terrorist group. However, such intervention is not being legally justified because there is no particular United Nations Security Council (UNSC) resolution that was passed regarding the intervention. This research provides an analysis of the logic in justifying the intervention based on the current international legal frameworks and norms. The overall argument is that U.S. action in conducting intervention is illegal yet it is legitimate because it runs under the framework of the international law as well as the international norms.

Intisari

Sejak naiknya Negara Islam Irak dan Syam secara signifikan pada tahun 2014, grup ekstremis tersebut telah mengacaukan stabilitas regional Timur Tengah. Tidak dapat disangkal bahwa organisasi tersebut merupakan sebuah ancaman perdamaian dan kedamaian internasional dan regional. Sejak munculnya Negara Islam Irak dan Syam, Amerika Serikat telah memegang peranan penting dalam menjalankan intervensi militer terhadap grup terorisme tersebut. Akan tetapi, intervensi tersebut tidak dapat dibenarkan secara hokum karena tidak adanya resolusi Dewan Keamanan PBB yang menyetujui intervensi tersebut. Riset ini menganalisis logika-logika dalam membenarkan intervensi tersebut berdasarkan kerangka-kerangka hukum dan norma internasional. Secara keseluruhannya, tindakan Amerika Serikat dalam melakukan intervensi dapat dianggap illegal, tetapi dapat dibernarkan karena tindakan tersebut dijalankan berdasarkan kerangka-kerangka hukum dan norma internasional.

Keywords: international law, military intervention, United Nations, Security Council, terrorism, anti-terrorism.

Kata Kunci: *hukum internasional, intervensi militer, Perserikatan Bangsa-Bangsa, Dewan Keamanan, terorisme, anti-terorisme.*

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A. Introduction

The rise of ISIL in Iraq and Syria can be traced back into the year of 2004 when they significantly emerged as an umbrella network for several jihadi organizations that continued waging a terrorist-guerilla campaign against the United States, its allies and the Shi'ite population in the region (ITIC, 2014). The establishment of ISIL was actually originated from the branch of Al-Qaeda in Iraq, led by Abu Musab al-Zarqawi by calling their group as the Al-Qaeda in Mesopotamia (Malm, 2015). ISIL is the richest terrorists group ever formed with total more than $1 billion assets. Its financial revenue mainly comes from black market oil trading, illegal drugs, and taxes (RT, 2014). In this research, I indicate that the military intervention done by the U.S. government is legitimate due to that fact that it mostly upholds the value of the UN charter. Nonetheless, international humanitarian law is fully applicable in this matter because the war against ISIL, which occurred in Iraq and Syria, may be categorized as International Armed Conflict (IAC), which involves two different ownership of sovereign territory. Furthermore, this armed conflict also involves the U.S. government, on how U.S. is trying to take into force its order of War on Terrorism, by strongly condemning the act of terrorism and conducting intervention against ISIL in the middle east. In order to support the research's stance in this paper, the research adds two additional supporting arguments. Firstly, this research argues that the intervention made by the U.S. is legitimate because apart from the intervention itself upholds the value of UN charter recognizing and upholding the value of human rights, the U.S. acts beneath the International Humanitarian Law's moral obligation of R2P. And secondly, this research argues that U.S. intervention is legitimately justified because it has fully implemented the key provision of the International Humanitarian Law, based on the Geneva Conventions.

B. The Evolving Concept of Legitimacy

The word "Legitimacy" has a very broad context in international community of whether or not some actions that might be considered as legitimate or not. Currently, there are two perspectives of the word "legitimacy", domestic and international legitimacy. At one point, domestic legitimacy comes from the idea that its legitimacy comes from the acknowledgement of its people towards the government product of both national and foreign policy (Clark, 2005:185). Yet, the international legitimacy, see that there should be a consensus within the international community to conduct such action or produce such policy. It is impossible for us to "mix match" these two understandings of legitimacy, and of course there was a huge debate between these two contexts of legitimacy. A huge debate arrived when military intervention can only be done if there is a resolution coming from the United Nations Security Council (UNSC), as only Security Council was the only body that could provide the unique legitimacy that one needs to act over Iraq (Annan, 2002:1) similar idea also applies in the case of U.S. intervention against ISIL. Kofi Annan mentioned about "unique legitimacy", but it is unclear about what a unique legitimacy is. Question may rose that, "is unique legitimacy is a form of legitimacy coming from the support only of Permanent-5 UNSC members and a little of 'rotating' representation of the non-permanent members of UNSC?" Even currently there is a big debate whether or not the UNSC should be reformed due to its small number of representations if we would like to recognize of what so called

consensus building on international legitimacy.

In the case of U.S. military intervention, such action that has been done by the government of U.S. cannot be perceived from the perspective of pure international legitimate consensus building. As we see that there is only a little possibility to hold an international legitimacy, even the UNSC cannot make this dream come true. U.S. military intervention is a combination of domestic legitimacy, that American people that legitimize and consent U.S.' action and international legitimacy where U.S.-led coalition also supported U.S.' action in leading the intervention and as they have been doing similar actions. The concept of international legitimacy argues that such military action might enjoy its legitimacy, if supported by a democratic coalition of the willing, even though it has been authorized by the UNSC or not (Clark, 2005:187). Furthermore, if a humanitarian crisis creates *consequences significantly disruptive of international order* that would likely soon create an *imminent threat* to the acting nations then states are most likely rising to an urgent need to act in individual and collective self-defense (Koh, 2013:1). In this case, US-led coalition military intervention against ISIL is not launching pre-emptive attack, but self-defense.

There is only one problem pointing out towards the government of U.S. when there is no resolution produced by the UNSC regarding its authorization of military intervention against ISIL and that has been a long problem even since U.S. intervention in Kosovo. But let us think realistically, even if there is a proposal to the UNSC regarding the military intervention, most likely the proposal would be vetoed by China and Russia, learning from the experience that Russia was supporting Al-Assad's regime. Yet, are we going to wait for an impossible or most likely to be vetoed resolution of the UNSC regarding the authorization of military intervention for a legal intervention and how many more lives of innocent civilians are going to be sacrificed? If the UNSC fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, it is unrealistic to expect concerned states may rule out other means to meet the gravity and urgency of that situation (ICISS, 2001: XIII).

C. The Responsibility to Protect and Intervention

The doctrine of Responsibility to Protect (R2P) has brought a new perspective in current international order. Dilemma has risen between state sovereignty and human rights value. The current global order has recognized that R2P can be applied in the conditions where state is unwilling or unable to protect its citizens from actual or apprehended large scale loss of life (with or without genocidal intent) or large scale 'ethnic cleansing', the principle of non-intervention in the internal affairs of other states yields to the international R2P (Massingham, 2009:804). Based on this condition in most cases where the R2P is applied, it is on the condition where state is unwilling or failing to fulfill its human rights provision towards the population and there for international intervention under the R2P came to replace or assist the role of the state. In this sense in ISIL case study, the usage of R2P is differently perceived because ISIL is not a state and it is an outer organization that poses a threat towards state. In this condition, this research brings a new concept where U.S.-led coalition military intervention against ISIL is another form of R2P, yet, with a different concept.

Furthermore, there is a gap between military intervention and the norm of R2P.

Many arguments address that military intervention cannot be justified under R2P because it is not being covered under the framework. Military intervention is argued as biased towards political will and interest of any particular country; yet, the doctrine of R2P is an obligation of the international community. R2P in post-2015 is more about good governance rather than military intervention (Chandler, 2009:35). What good governance means is that the purpose of R2P is to assist state to achieve the standard of good governance with purpose that if state is failing to protect its people, the international community must be prepared to take collective action to assist state to protect the populations (Old concept of R2P). However, this argument is not always rights. The International Commission on Intervention and State Sovereignty allowed a broader spectrum of actions that will permit military intervention such as serious and irreparable harm related to human beings, or imminently likely to occur, and large scale loss of life or large scale of ethnic cleansing (McCormick, 2011: 571). And in 2005, the World Summit has approved military intervention in limited circumstances of genocide, war crimes, ethnic cleansing and crimes against humanity and as it has been stated before, ISIS posed a threat against humanity and also has been accused of crimes against humanity.

In this matter the R2P is certainly applicable, because the government of Syria can be defined as a 'failed state' with the fact that Syrian government has failed to maintain its responsibility and obligation towards its citizen in security matter. A question might be raised after the assumption in defining how and why simply the matter of security of a country can create a view over a state as a failed state. Currently, ISIS is making full use of the civil war in Syria to search for support of its emergence. Borrowing the realist's perspective in international relations, on how security of a state is paramount, this leads to the perception that state acknowledged the behavior of 'self-help', defined as a state's dependency on its own capacities and resources rather than external support, in order to ensure security and survival (Heywood, 2011:60). In this case, Syrian government has failed to maintain one most crucial part of statecraft, and this is why it can be argued that, to some extent, it may be considered as a failed state. As the New York Times argues, failed states might that have lost chunks of territory to warlords, and that can no longer track or control their borders send an invitation to terrorists (NY Times, 2005) Moreover, what justified American airstrikes in Syria might relate to Ambassador Samantha Power's letter to Ban Ki-moon in regards to the Article 51 of UN Charter (Lederman, 2014). As she emphasized;

> *"States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defense, as reflected in Article 51 if the UN Charter, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks."*

With this letter being sent to the UN Secretary-General, he replied with no opposing statement at all. Ban Ki-Moon responded to this letter by replying that;

> *"I am aware that today's strikes were not carried out at the direct request of the Syrian Government, but I note that the Government was informed beforehand. I also note that the strikes took place in areas no longer under the effective control of that Government."*

Seeing that that Syria is not fully aware upon the rise and effort in fighting ISIL and departing from the fact that Syrian government has met its failure to maintain domestic peace and security towards its citizen, it is different in comparison towards Iraq case, which called for the troops to help them in fighting ISIL (Botelho et al., 2014). When an official party of state declared consent upon intervention, there is no problem with legality or legitimacy of intervention. As noted by the International Court of Justice in the case of Nicaragua (ICJ, 1986), that emphasized;

> '*would certainly lose its effectiveness as a principle of law if intervention were to be justified by a mere request for assistance made by an opposition group in another State - supposing such a request to have actually been made by an opposition to the régime in Nicaragua in this instance. Indeed. it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition. This would permit any State to intervene at any moment in the interna1 affairs of another State, whether at the request of the government or at the request of its opposition. Such a situation does not in the Court's view correspond to the present state of international law.*'

However, when there is a state that does not call for intervention or allow or oppose intervention, then the status of intervention is being questioned.

In the case of Syria, the responsibility of protecting Syrian citizens has moved away one step further, which now, international community may do actions based on moral responsibility of the people, and in this case, the U.S. government has upheld the value of moral responsibility by taking into implementation the UN charter, under the preamble, article 1 verse 3, and article 55 (c). By recognizing and upholding the value of the UN stated under its charter, the U.S.-led intervention cannot be easily justified illegitimate and a violation towards international law. Other than that, the action of humanitarian intervention, which taken by the U.S. government is also hardly concluded as baseless action because in 2005, the United Nations Security Council has adopted a resolution 1618, with emphasis on (1) condemning without any reservation and in the strongest terms the terrorist attacks taking place in Iraq, and regards any act of terrorism as a threat to peace and security, (2) preventing the transit of terrorist group to and from Iraq, arms for terrorists, and financial support to terrorists, and (3) strengthening regional cooperation of regional countries in preventing the act of terrorism (Khatteeb, 2014). In this sense, based on the resolution, the action taken by the government of the U.S. is fully justified and in line with the resolution made by the UN Security Council. Apart from the resolution of 1618, the UN Security Council has also adopted resolution in 2014, which directly emphasizing to the case of ISIL emergence in Iraq and Syria. Focusing on clause 1 and 5 of UN Security Council resolution 2170, it states on clause 1 that they strongly condemn the act of terrorism by ISIL and its violent extremist ideology, as well as, its abuses and violation towards human rights and international humanitarian law, and clause 5, the clause emphasizes on seeking cooperation among all member countries to fight against ISIL (United Nations, 2014).

In UN charter article 2(7), it seems that it referred to the authorization of UN

Security Council as the only legal institution that gives legitimation on the launch of humanitarian intervention. However, referring to UN charter article 51, which emphasizes on the possibility of individual or collective self-defense, arguably in the book of Public International Law by Tim Hiller, it is stated that a third state may lawfully come to the aid of an authenticated victim of armed attack provided that the requirements of a declaration of attack and a request for assistance are complied with (Hillier, 1998). In the case of Syria where the government does not request or stay unwilling to cooperate in destroying ISIL, it can be argued that U.S. intervention against ISIL in Syria is based upon the request of self-defense by Iraqi government, because the consequence of ISIL emergence in Iraq and its spread in Syria has posed a threat towards Iraqi government and disrupt the stability of Iraq.

In order to justify the intervention against ISIL in Syria, it is important to take upon the concept of acquiescence. In this case there is no clear opposing statement or clear stance upon the intervention in Syria, therefore the customary international law on acquiescence can be applied in this matter. It is because in the international politics, states might admit that their action is unlawful but justify this on the grounds that it is the only means to prevent or end genocide, mass murder and ethnic cleansing, therefore the test of collective legitimation would be how far such actions were approved or acquiesced in by wider international society (Wheeler, 2000). On a report by Danish institute of International Affairs on Humanitarian Intervention: Legal and Political Aspects commissioned by the Danish Government recommended the adoption of the policy in which in extreme cases, humanitarian intervention might be necessary and justified on moral and political grounds even if there is a lack of UN Security Council authorization. In the intervention against ISIL, U.S. does not act unilaterally as it did aftermath the War on Terror foreign policy was megaphoned. In this case, U.S. acts multilaterally that involved the presence of other military participation from United Kingdom, Australia, etc.

Moreover, elaborating on the fact that the action that has been taken by the U.S. government is protected under the provision of international humanitarian law's R2P, it is regulated under the first pillar of the principle that explains, the activation of R2P when there are genocide, war crimes, crimes against humanity and ethnic cleansing. In the case of ISIL emergence in Iraq and Syria, the act of terrorism cannot be categorized as genocide, war crimes, or ethnic cleansing. However, the UN Security Council has declared a statement that said (MacDiarmid & Park, 2014), "Wide-spread or systematic attacks directed against any civilian populations because of their ethnic background, religious beliefs or faith may constitute a crime against humanity." And by this it is arguable that ISIL act of terrorism in Iraq can be categorized as crimes against humanity, and thus U.S. intervention can be legitimized under the principle of R2P due to the reality that ISIL issue is under the condition of overwhelming humanitarian necessity.

Based on the elaboration of facts explained above, it is also to conclude that U.S.-led intervention in the Middle East is far away defined as military aggression. It is because aggression in the international law is defined as the use of force by one state against another, not justified by self-defense or other legally recognized exceptions (Ratner, 1999). This is also to

say that even until today there is no claim of against the intervention towards ISIL. Moreover, as it has been explored before, U.S. intervention follows the rule of collective self-defense justification. Basically, the intervention is not merely an initiative of U.S. in order to fulfill its strategic interests; yet, it has come to a necessity to eliminate the crimes against humanity action by ISIL. U.S. action is not only an individual action, but it is a form of multilateral action, it also meant that it gains support from the international community. As the definition of aggression is state conduct that either initiates war against another state or brings about a situation in which the victim is (or may be) driven to war, then U.S. action does not falls under this category (Dinstein, 2012).

D. Concluding Remarks

As a conclusion, this research justifies the act of humanitarian intervention by the government of U.S.-led coalition against ISIL in Iraq by saying that that it is morally responsible and legitimate due to the fact that it is upholding the values and principles of the Norm of R2P, UN charter, as well as, UN Security Council resolution. However, not to mention whether or not the action is illegal or legal, the author sees that by the existence of UN charter article 51 and the unwillingness of the Syrian government to deal with the emergence ISIL, this opens a possibility of the international community to build their own legitimacy in responding towards this issue. Collective self-defense is also taken into the main justification in this sense due to the request of the Iraqi government for intervention because they have been firstly targeted by the ISIL. Plus, additionally in this case of intervention against ISIL, U.S. are not deploying troops to direct attack the ISIL group, however, they focused on an offshore balancing strategy in which U.S. should primarily transfer its responsibility of regional security to its allies in the Middle East and persuades them to balance the Islamic hostile forces, as it would be helpful to avoid the Islamic sentiments (Bo, 2013:82-83). Lastly, as it does not involve in direct combat troops against ISIL, U.S. only focus on arming or giving assistance towards the Middle Eastern troops in combatting ISIL, airstrikes, and naval power.

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THE PLIGHT OF "ENVIRONMENTAL REFUGEES"*

Yustia Rahma Priyantari**

Abstract

Among many challenges faced by modern society, global warming and climate change have – if not the most – profound impact as it affects mankind as a whole. Farming communities around the world suffer dying corps and failed harvest due to unpredictable weathers, and cities report unprecedented temperature during summer. One of the most discussed is how the rising global temperature affects the ice caps in the North and South Pole. Compared to data from a hundred years ago, it is shown that the ice formation in the North Pole has decreased in mass and takes longer time to reform in the winter. Scientists predict that if the ice in Greenland melted, the sea level would rise up to seven meters, drowning many coastal cities and low-lying islands. Large States could afford to evacuate their citizens to the mainland, however such is luxury that small, archipelagic States do not possess. The paper seeks to examine whether the international community is prepared in terms of legal instrument should such event occur, and what protection can be granted to people who have lost their homes to the sea.

Intisari

Di antara banyak tantangan yang dihadapi oleh masyarakat modern, pemanasan global dan perubahan iklim memberikan - jika bukan yang paling - dampak yang mendalam karena mempengaruhi umat manusia secara keseluruhan. Masyarakat pertanian di seluruh dunia menderita tanaman mati dan gagal panen karena cuaca yang tak terduga, dan kota-kota melaporkan suhu yang belum pernah terjadi sebelumnya selama musim panas. Salah satu yang paling sering dibahas adalah bagaimana meningkatnya temperatur global bisa mempengaruhi lapisan es di Kutub Utara dan Selatan. Dibandingkan dengan data dari seratus tahun yang lalu, terlihat bahwa pembentukan es di Kutub Utara mengalami penurunan massa dan membutuhkan waktu lebih lama untuk pulih di musim dingin. Para ilmuwan memprediksi bahwa jika es di Greenland mencair, permukaan laut akan naik sampai tujuh meter, banyak kota pesisir yang akan tenggelam dan dataran pulau-pulau menjadi rendah. Negara besar mampu untuk mengevakuasi warga mereka ke daratan utama, namun itu adalah kemewahan yang negara kepulauan tidak memiliki. Jurnal ini bertujuan untuk menguji apakah masyarakat internasional, siap dari segi instrumen hukum, dan perlindungan apa yang dapat diberikan kepada orang-orang yang telah kehilangan rumah mereka yang tertelan laut.

Keywords: refugee, international law, environment, climate change, global warming.
Kata Kunci: *pengungsi, hukum internasional, lingkungan, perubahan iklim, pemanasan global.*

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Recently, the international community has been particularly concerned about the fate of the people of Tuvalu, an archipelagic nation located in the Pacific Ocean halfway between Hawaii and Australia. The people of Tuvalu have battled with harsh conditions since the first settlers colonized the islands, from sandy soil unsuited for crops to severe tropical storms. Yet the biggest challenge is man-made; rising sea levels have slowly consumed the outer edges of the low-lying islands they call home and show no sign of receding.

Concerned with the fate of his people and nation, the Prime Minister has requested environmental refugee status for its citizens from both Australia and New Zealand. Neither responded to the plea. Much to the indignation of Tuvaluans, Australia firmly refuses granting the status of refugees to the displaced Tuvaluans. The response from New Zealand is much kinder as announced in 2001, New Zealand provides a quota of 75 Tuvaluans to apply for permanent residency in New Zealand under *Pacific Access Category*.[66] However considering that Tuvalu has the population of 11.000,[67] at the rate of 75 Tuvaluans a year it would take 140 years before the current of people of Tuvalu can secure themselves. Scientists have predicted that the Tuvaluan islands will be submerged in 50 to 90 years' time.[68] Studies show that sea levels in western Pacific are rising at about four times the global average,[69] making finding a solution is even more of a necessity.

The plight of the people of Tuvalu is shared across the Pacific and Caribbean. Rising sea level due to increase of carbon dioxide in the atmosphere following heavy use of fossil fuel – a phenomenon popularly known as "global warming" – threatens to inundate and completely submerge low-lying islands that millions in the Pacific and the Caribbean call home. Severe tropical storms further complicate the matter; in March 2015, Vanuatu was ravaged by Cyclone Pam.[70] Almost half of its population was displaced and islands on the edge of its territory were rendered uninhabitable. Kiribati's President Anote Tong predicted that his country – home to about 103.000 people – will start to disappear by 2030.[71] Faced with the prospect of losing the very land they stand on, these people find themselves migrating in the thousands, an event known as "environmental migration", or Environmentally Displaced People (EDPs).[72]

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66 "Government announces Pacific access scheme". Mark Gosche, Pacific Island Affairs Minister (NZ). 20 December 2001. Retrieved on 20 November 2015.

67 "Tuvalu: Millennium Development Goal Acceleration Framework – Improving Quality of Education" (PDF). Ministry of Education and Sports, and Ministry of Finance and Economic Development from the Government of Tuvalu; and the United Nations System in the Pacific Islands. Retrieved on 20 November 2015.

68 Patel, S. S. (2006). "A sinking feeling". Nature 440 (7085): 734–736. doi:10.1038/440734a. PMID 16598226.

69 UNEP News Centre. (2014, 5 June). Sea-Level Rise in Small Island Nations - Up to Four Times the Global Average - to Cost US$ Trillions in Annual Economic Loss and Impede Future Development: Shift to Green Policies and Investment Critical. Retrieved on 20 November 2015.

70 Rkaina, S. (2015, 17 March). Cyclone Pam: Vanuatu death toll hits 24 as 3,300 people displaced by 'monster' storm. *Mirror*. Retrieved on 20 November 2015 from http://www.mirror.co.uk/news/world-news/cyclone-pam-vanuatu-death-toll-5347338.

71 Statement by H.E President Anote Tong, 69th UNGA, New York, 26 September 2014. Retrieved on 20 November fromhttp://www.un.org/en/ga/69/meetings/gadebate/pdf/KI_en.pdf.

72 Science for Environment Policy (2015) Migration in response to environmental change Thematic Issue 51. Issue produced for the European Commission DG Environment by the Science Communication Unit, UWE, Bristol. Available at: http://ec.europa.eu/science-environment-policy.

The United Nations (UN) defines "disaster" as "a serious disruption of the functioning of a society, causing widespread human, material, or environmental losses which exceed the ability "of affected society to [cope] using only its own resources."[73]Severe drought, violent storms and stifling summer heat have all been attributed to the changing climate. Numerous environmental disasters have indiscriminately touched all continents with devastating effects. Various political, economic, or social factors can cause environmental disasters, which are far-reaching and inextricably linked to growth and development. However, history has repeatedly shown that the environment itself can also be a source of disaster.[74]

Over the past forty years, scientists have approached the issue of environmental degradation from different perspectives and with different rules and procedures. The body of international environmental law sets forth a variety of norms aimed at preventing, reducing, and remedying the multiple aspects of environmental degradation, ad environmental degradation ultimately lead to environmental disasters. In contrast, humanitarian law and human rights law consider environmental degradation from an anthropocentric point of view, addressing the adverse effects of environmental degradation on human beings. While migration to escape an environment temporarily or permanently disrupted is a critical aspect of the issue, the current international legal regime disregards the correlation between environmental degradation and human migration.

The importance of the issue of environmentally-induced migration has been highlighted by scientists, which provoked much debate among legal academics. The seminal event in the development of a comprehensive study on the problems related to environmentally-induced migration was a 1985 United Nations Environment Programme paper on environmental refugees. The term "environmental refugee" appeared for the first time in 1992 in the report of the IOM and RPG. The definition adopted by the organization in 2008 characterizes them as: "persons or groups of persons who, for reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to have to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their territory or abroad".

The expression "environmental refugees," though widely used for the past twenty years, is mistakenly applied. Despite being colloquially known as "refugees", EDPs often find themselves stranded in foreign land without the benefit of persons granted such designation. Common understanding applies the term "refugee" to any person who has been forced to involuntarily leave their home, for reasons of war, persecution by the government or natural disaster. With such definition in mind, it is not difficult to conclude that EDPs are refugees. However, in Legalese, EDPs are, in fact, not "refugees".

Although the term has seen use since late 17th century, it was not until the middle of 20th that the international community came into agreement on the definition of "refugee". After the Second World War,

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[73] University of Wisconsin. Disaster Management. Centre., An Overview of Disaster Management 14 (Intertect Training Servs. ed., 2d ed. 1992), available at http://www.undmtp.org/english/Overview/overview.pdf.

[74] Anthony H. Richmond, The Environment and Refugees: Theoretical and Policy Issues at 1, 5, U.N. Doc. ST/ESA/SER.N/39, U.N. Sales No. E.95.XIII.17 (1995).

as the refugee problem had not been solved, the need was felt for a new international instrument to define the legal status of refugees. Instead of *ad hoc* agreements adopted in relation to specific refugee situations, there was a call for an instrument containing a general definition of who was to be considered a refugee.[75]The Convention relating to the Status of Refugees was adopted by a Conference of Plenipotentiaries of the United Nations on 28 July 1951, and entered into force on 21April 1954.[76]

The definition of "refugee" is found within Article 1 of the 1951 Refugee Convention, amended by the 1967 Protocol:

> *"A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."*[77]

A person claiming to be a refugee, under the provision of the 1951 Convention, must therefore exhibit characteristics provided by the aforementioned article, namely: 1) Well-founded fear of persecution due to certain reasons, 2) outside the country of his nationality, and 3) unable or unwilling to request protection from the country of nationality. The *travaux préparatoires* of the 1951 Refugee Convention, and affirmed in the 2010 UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, emphasize the need for a manifestation of "well-founded fear of being persecuted", without which application for the status of refugee will not be granted. Grammatical deconstruction provides further insight to the establishment of the criterion; there must be an active act of persecution that results in well-founded fear.

Although international sources lack a universally agreed definition of 'persecution', [78] however 'ordinary meaning' may be gleaned from several sources. In most cases, the active act of persecution is performed by the government, or other parties within the State. Well-founded fear of being persecuted is easily established in such cases, which would ease the process of applying for the status of refugee. However, EDPs do not enjoy the same privilege. EDPs migrate across international borders due to environmental reasons, lacking the critical characteristic of refugees, namely, well-founded fear of being persecuted, simply because persecution does not exist.

The Committee, in the drafting of the 1951 Refugee Convention, assumed that, unless he seeks adventure or just wishes to see the world, a person would not normally abandon his home and country without some compelling reason. There may be many reasons that are compelling and understandable, but only one motive has been singled out to denote a refugee. The

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75 UN High Commissioner for Refugees (UNHCR), Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/1P/4/ENG/REV. 3.

76 United Nations Treaty Registry. Retrieved on 20 November 2015.

77 United Nations Convention relating to the Status of Refugee, Article 1. United Nations, Treaty Series , vol. 189, p. 137.

78 UN High Commissioner for Refugees (UNHCR), Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37), October 1997.

expression "owing to well-founded fear of being persecuted" – for the reasons stated – by indicating a specific motive automatically makes all other reasons for escape irrelevant to the definition. It rules out such persons as victims of famine or natural disaster, unless they also have well-founded fear of persecution for one of the reasons stated.

Therein lies the reason why the legal status of EDPs lies in a precarious situation. Since the 1951 Refugee Convention remains the most ratified convention of its kind, legal framework of most states follow the definition set forth by the Convention. Majority of States do not acknowledge 'refugees' beyond the scope provided by the Convention, thus denying legal protection to EDPs. Denied of being classified as refugees, EDPs often find themselves designated and treated as illegal migrants, which is no less incorrect as migrant implies that the people have crossed international border voluntarily. Neither do they enjoy protection nor have their basic rights fulfilled; millions end up in slums with deplorable living condition.

However, the Convention itself does allow some room of interpretation. There is an increasing call from the international community – States, organizations and scholars alike – to widen the perceived narrow interpretation of the Convention, particularly towards those who do not traditionally qualify under the mainstream interpretation of 'refugee'. The conference that adopted the Refugee Convention immediately adopted a recommendation and attached it to the Final Act, urging states to extend refugee benefits to individuals not qualifying under the narrow terms of the Refugee Convention:

> *"The Conference expresses the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides."*[79]

This statement could be interpreted to acknowledge, or possibly even express *opinio juris*, that a complementary definition would develop under customary international law. Many authors have attempted to argue that just such a definition under customary international law has arisen. Some have argued that the prevailing restrictive reading of the term "refugee" in the Convention is incorrect, disregards usage of the term prior to the Convention and is not supported by the *travaux préparatoires*.

Another indication of the supposed flexible nature of the Convention manifest in the lack of definitions in the Convention, particularly on 'persecution'. Such may be construed to imply As stated by Professor Atle Grahl-Madsen:

> *"The term 'persecution' has nowhere been defined and this was probably deliberate. It seems as if the drafters have wanted to introduce a flexible concept which might be applied to circumstances as they might arise; in other words, that they capitulated before the inventiveness of humanity to think up new ways of persecuting fellow men."*

Some have even argued that the Refugee Convention is merely one in a collection of human rights instruments that must be read as a whole so that the protections described by the Refugee Convention apply to any person who enjoys some form of *non-refoulement* from any human rights instrument. For example,

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[79] Conference of Plenipotentiaries, UN Doc. A/CONF.2/SR.19 (1951).

Maria-Teresa Gil-Bazo argues that "in addition to refugees within the meaning of the Geneva Convention, there are other categories of individuals that have a right to protection under international law and accordingly, they are 'refugees' in a broader sense."[80]

As provided by Article 31 of Vienna Convention on Law of Treaties:

> "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*"[81]

The 1951 Refugee Convention, at its core, is a human rights treaty. In general, human rights treaties possess the purpose of advancing human rights, especially belonging to those of vulnerable groups. In its second Advisory Opinion, the Inter-American Court in 1982 explained this special feature of the human rights instruments with clarity, emphasizing that:

> "*Modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting states. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other states, but towards all individuals within their jurisdiction.*"[82]

The European Commission of Human Rights applied the same approach in the case of *Austria v. Italy*:

> "*[T]he obligations undertaken by the High Contracting Parties in the European Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.*[83]

This specific human rights-centered interpretation is also apparent in the jurisprudence of the European Court of Human Rights. In *Wemhoff v. Federal Republic of Germany*, the ECHR noted that because the Convention is a 'law-making treaty, it is [...] necessary to seek the interpretation that is most appropriate in order to realize the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties'.[84]

Interest in expanding the definition of refugee is further evidenced by the growing number of regional instruments. Both Africa and Central America recognized that the 1951 Convention was not adequate to cover the massive flows of refugees in their regions. The 1984 Cartagena Declaration and the 1969

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80 UN High Commissioner for Refugees (UNHCR), Asylum in the practice of Latin American and African states, 1 January 2013, ISSN 1020-7473.

81 V ienna Convention on Law of Treaties, Article 31. United Nations, Treaty Series , vol. 1155, p. 331.

82 The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Article 74 and 75), IACHR, Series A, No. 1, at paragraph 29 (Advisory opinion at the request of the Inter-American Commission of Human Rights).

83 Austria v. Italy, no. 788/60, decision of the Commission of 11 January 1961, Yearbook 4, p. 116).

84 Wemhoff v. Germany, 2122/64, Council of Europe: European Court of Human Rights, 25 April 1968.

Organization for African Unity (OAU) Convention expanded the definition of a refugee to include people compelled to leave their country due to events that have "seriously disturbed public order". The Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa adopted a regional treaty based on the Convention, adding to the definition that a refugee is:

> "*Any person compelled to leave his/her country owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality*."

In 1984, a group of Latin American governments adopted the Cartagena Declaration, which similar to the OAU Convention, added more objectivity based on significant consideration to the 1951 Convention. The Cartegena Declaration determine that a 'refugee' includes:

> "*Persons who flee their countries because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order*."

Examples show that there are indeed changes in contemporary international law on the definition of refugee. The author opines that one must not concern himself only with the letter of the law, but its spirit as well. The author argues that the current refugee regime is too restrictive and disregards the plight of others who are in "refugee-like situation"; deprived of the same basic rights as "refugee", but cannot enjoy protection due to semantics.

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QUESTIONING INDONESIA'S BAN ON EXPORT OF ORE POLICY UNDER INTERNATIONAL INVESTMENT AND TRADE LAW*

Erwin Prasetyo**

Abstract

This paper discusses the position of Indonesia's policy to ban export of raw minerals under the international law, which questioned the balance between the concept of state sovereignty and the private entities rights. The issue mainly deals with the legitimacy of such law under international agreement which Indonesia party to. Analysis drawn on several government rules on mining sector which further linked with the obligation derived from international agreement in investment or trade law. The author concludes that Indonesia's rules on mining sector have several flaws which require improvement or the State would be prone towards any lawsuits and losses in the international tribunal.

Intisari

Makalah ini membahas posisi kebijakan Indonesia dalam larangan ekspor mineral mentah di bawah hukum internasional, yang mempertanyakan keseimbangan antara konsep kedaulatan negara dan hak-hak lembaga swasta. Masalah ini terutama berkaitan dengan legitimasi kebijakan tersebut dengan perjanjian internasional yang Indonesia sepakati. Analisis ditarik pada aturan pemerintah di sektor pertambangan yang dikaitkan dengan kewajiban dari perjanjian internasional di bidang investasi atau perdagangan. Penulis menyimpulkan bahwa aturan di Indonesia pada sektor pertambangan memiliki beberapa kelemahan yang memerlukan perbaikan atau Negara akan rentan terhadap segala tuntutan hukum dan kerugian di pengadilan internasional.

Keywords: ore export ban, WTO, investment, Indonesia.
Kata Kunci: *larangan ekspor mineral, WTO, investasi, Indonesia.*

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A. Introduction

It is commonly agreed by the international community that a State shall preserves permanent sovereignty over its natural resources and must use those resources for their national development and the well-being of its people (GA Res 1803, 1962). Affirming this notion, the Article 33(3) of Indonesia's Constitution mandated the State to use natural resources only for the prosperity of the people. Thus, It is inevitable that foreign investment or project in minerals sector would be heavily regulated by the host State as every state goal is to give prosperity to its people.

As a country that is well known for having abundant of natural resources, Indonesia trade and economy is highly dependent with the export of its natural resources with Nickel and Bauxite as the 'star'. Indonesia's exports in minerals generating USD 2 Billion for the state revenue amounting to 17% of the total export revenue (Ministry of Industry, 2011). In the international trade itself, Indonesia is considered as a major player in global metal market, amounted for around 20 percent of the global nickel supply and 10 percent of Aluminum supply.

However due to deficit on the trade balances, Indonesia is trying to add value to its mineral by imposing the Law No. 4 of 2009 concerning Mineral and Coal Mining which bans export of 'unprocessed' minerals. Bearing in mind the general sense of the Law, Indonesia implemented the notion through the Government Regulation No. 1 of 2014 and ESDM Regulation No. 1 of 2014 which set the motion of the banning policy per January 12th 2014.

Despite having permanent sovereignty over natural resources, the Host state of the project is also obliged to give favorable business climate for foreign investor through giving minimum standard treatment and certainty under international investment law. Besides that, a State is no longer fully sovereign to control its trade policy as far as the State ratified the WTO Agreements. Having in mind the aforementioned circumstances, shall Indonesia's policy banning export of raw ore be justified?

B. History and Regulations concerning Indonesia ore export bans

As mentioned before, the notion to restrict exports of raw ore firstly comes up within the Law No. 4 of 2009 concerning Mineral and Coal Mining ('2009 Mining Law'). The government claims that there are two motives behind the enactment of the law; firstly is that the government wanted to add value to their minerals, and the latter is to preserve the minerals for its domestic demand. The issue of the debate raised by two provisions of the Law which are the Article 103 and the Article of the 170 of the law. The Article 103 prescribed that "[the authorized company] shall process and purify the minerals domestically" which implicitly prohibits export of the raw materials. The Article 170 further regulates that any operational companies shall follow the obligation under the Article 103 no later than 5 (five) years after the law has been promulgated.

The enactments of the 2009 Mining Law later followed by several implementation regulations *inter alia,* Ministry of Energy and Mineral Resources ('ESDM') Regulation No. 7 of 2012 and Government Regulation ('GR') No. 24 of 2012 concerning Implementation of Mineral and Coal Mining Business Activities. The ESDM Regulation 2012 and the Government Regulation required company who wish to continue or planning to start business to build smelting facilities which increase the purity of the minerals no later than January 2014. The ESDM Regulation

also regulates the minimum purity of the processed minerals that are allowed to be exported. To give 'breathing space' for sudden change of the business climate, the ESDM Regulation allowed companies with certain permit (IUP and 'IPR') prior the promulgation of the Regulation to export raw materials/ores after having recommendation from the Minister of ESDM.

Despite the claims by the government that the mining companies had given certain flexibility, numerous companies still express hostilities towards the 2009 Law. As we can see in the 'Judicial Review' case that petitioned by Indonesia's Association of Minerals Entrepreneur ('APEMINDO') to the Constitutional Court in 2014 (Decision No. 10/PUU-XII/2014), where The Association challenged the Article 102 and 103 of the 2009 Mining Law that prohibits export of ore because its opposition towards the Article 1 of the Constitution which ensure legal certainty in Indonesia. The Association further argued that such provision would lead to thousands' layoffs and other detrimental effects towards numerous mineral companies. However, the Court deemed that the Articles were constitutional and within government powers to add value to its mineral resources. The Court further concluded that layoffs and other detrimental effect won't occur if the companies were committed to add value to Indonesia's minerals.

Despite having deemed constitutional, the government tried to take into account the entrepreneur's interests to create more favorable climate without abandoning the efforts to add value to Indonesia's mineral. This notion later implemented in the ESDM Regulation No. 1 of 2014 which gives more flexibility towards the entrepreneur. Through the Regulation, government allowed export of 6 commodities in form of concentrate which are Copper, Iron, Manganese, Lead, Zinc, Ilmenite and Titanium with progressive export tariffs until 2017 (Annex I of the ESDM Regulation 1/2014). However, the government still prohibits the export of particular minerals including gold, silver, bauxite, tin, nickel and chromium which only allowed to be exported once they reached certain level of purity. The government further adds, that they also allowed export of gold contained within concentrate of copper as it considered as 'side' mineral. However, despite the government efforts to adapt the Law, some enterprises still reluctant to abide the law as it remained considered as a sudden change in the business climate in the investment and trade area.

C. Reviewing policy in in international trade law

In general, there are two types of export restriction known in the international trade practices which are export taxes and quantitative restrictions. Export taxes include duties and charges which can take the form of and *ad valorem* tax specified as a percentage value of the exported tax. The general idea of the export taxes is to reduce the volume of exports by increasing final export prices. In the other hand, quantitative restrictions are widely used for social policy objectives including environmental protection or conservation of natural resources. The quantitative restriction may take form in export bans which totally prohibit the exportation of specified products and the export quota which limiting the number of product exported (Kim J., 2010:7).

It is generally agreed that there is no single GATT/WTO article that deals with the export restriction *per se*. The current GATT rules prohibit use of quantitative export restriction with some exceptions. It has been acknowledged that the current rule do not prohibit use of export of taxes

or duties (Piermartini R., 2004:2). Currently, there are two GATT 1994 Articles that relevant to export restrictions [85] : Article XI on general Elimination of Quantitative Restriction, and Article XX on General Exceptions (WTO Report, 2010: 18).

The Article XI which is the key provision on export restriction stipulated that States may not prohibit export through quotas, import or export licenses, or other measures excluding duties, taxes or other charges. In this issue, Indonesia prohibits export of ore and obliges the investor to process such ore beforehand ergo violates the provision under Article XI.

Not only prohibit quantitative restrictions, the Article also gives leeway that allows several reasons of restriction which are supply shortage, standard compliances, and for agricultural product in order to avoid economic strains that might be caused by the GATT provisions. Akin to Article XI (2), Article XX of the GATT also provides leeway but applied generally for all GATT provisions. Among 10 exception clauses within the Article XX, notably there are only two clauses that relevant for the present issue, which are the point (g) and (i) which allowed restriction for conservation of exhaustible natural resources or as part of government stabilization plan towards failed vital domestic industry.

The *ratione* of the Government to ban ore exports are prescribed within article 3 of the 2009 Mining Law which *inter alia*, to ensure domestic minerals supplies considering mineral resources are exhaustible, ensure the mining industry to have sustainability and environment oriented viewpoint, and to add value towards domestic minerals for the prosperity of the people (emphasis added). However, among those *ratione* as aforementioned before, the government mainly concerned to add value to domestic mined minerals.

It may seems that government's action is legitimate, however as has mentioned before that unfortunately the GATT/WTO only allowed several exception towards export restriction. And among the previously mentioned *ratione*, perhaps only one reason that is in line with the GATT exception which is the point (g) of the Article XX. The Article XX (g) allowed export restriction for the purpose of preserving exhaustible natural resources which might be in-lined with the government excuse "to ensure the domestic supplies". Nevertheless, the Article also prescribed that the State also needs to restrict domestic production or consumption which the government did not do in this instance. This notion affirmed within the both ESDM Regulation 1/2014 and the GR 1/2014 that the government intended to strictly prohibit export of raw materials and only allowed processed or refined or purified minerals. Thus, Indonesia cannot invoke the Article XX (g) as the ground to prohibit export of ore.

Other than the Article XX (g), there is no other provision that might exempted the government since neither the government action taken based on shortage of supplies nor as part of stabilizing vital domestic industry nor taken as compliances towards certain standardization of minerals. Therefore, the current government mining regulation is prone to be brought to Dispute Settlement Body under WTO.

Learning from China case

Great lesson perhaps must be learned from the recent WTO DSB case involving China and United States concerning China rare earth mineral's export restriction in 2012. Akin to the

[85] In addition to the General MFN Provision under Article I GATT.

present situation in Indonesia, China tried to restrict export of 17 elements including tungsten, neodymium, lanthanum and molybdenum which collectively known as rare earths and commonly used for production of various types of electronic apparatus. Similarly to Indonesia, China argued that the restrictions are related to the conservation of exhaustible natural resources, and necessary to reduce pollution caused by mining. Supporting those arguments, China imposed three types of restrictions on export of the rare earths which through export duties, export quota and certain limitation on permitted enterprises to export the minerals (WT/DS431/R, 2014: 24).

After careful observation, the Panel decided that China's export quotas were design to gain industrial policy goals rather than conservation, bearing in mind that china's domestic industry which heavily relied on the rare earths minerals did not affected by the law. The Panel further noted that China had failed to fulfill the 'even-handedness' required by the Article after seeing that the restrictions would encourage domestic extraction and secure preferential use of those minerals by Chinese manufactures.

The Panel discussion on the Article XX (g) should be noted by the Indonesia government since what Indonesia do in the 2009 Mining Law is similar to what China did in 2012. Should Indonesia wish to invoke the Article XX (g) to justify its action, Indonesia required to demonstrate tangible evidence that there is need of preservation of those natural resources and also demonstrate that the domestic market are equally affected by the regulation or at least incurred some losses as required by the last sentence of the Article.

D. Reviewing policy under International Investment Law

State's export restriction might be *prima facie* has nothing to do with the International Investment law. However due to the nature of a mining project, mining projects or minerals extractions might entitled towards particular treatment and protection which regulated under the investment law. Since the project in mining sector are usually conducted in long term basis, made significant contribution to the host state economic development, and exposed to several risk during the projects and therefore fulfill the 'Salini test' established by the ICSID Tribunal and further entitle towards standard treatment (Salini v. Morocco, 2001:52).

It is commonly agreed under international investment law that foreign investors are entitled towards certain minimum standard of treatment and protection from the Host State. One might argue that there are several minimum standard treatments under international investment law; however the fair and equitable treatment standard become more relevant as it's contained in nearly all bilateral and multilateral investment treaties (Dolzer/Steven, 1995: 8). The treatment defined broadly that investors entitled to be treated fairly and equally to other investors by the Host state. The Tribunal of International Centre for Settlement of Investment Disputes ('ICSID') in *Tecmed v. Mexico* has established that the Principles required the host state to act in consistent manner, free from ambiguity, and totally transparent in relation with the foreign investors (Tecmed v. Mexico, 2003:154).

Although it is difficult to generalize the core treatment provided by the principle, August Reinich had noted that there are 2 key treatments under the principle *inter alia* a) Due Process of Law,

and b) Legitimate Expectation (August Reinich, 2009: 41)

i. Due Process of Law

The ICSID Tribunal had established that the existence of the due process element under the FET principles is to prevent potential injustice or any procedural irregularity conducted with bad faith intention (Alex Genin v. Estonia: 2001:371). Within the process of the enactment of the 2009 Mining Law, it seems that the government did not invite all *stakeholders*, particularly mining companies that would be mostly affected by this regulation later. This conception grows as the numerous reluctances from the mining company shown through the initiation of the 'Judicial Review' towards the 2009 Mining Law especially prior the enactment of the ESDM Regulation 1/2014. Those reluctances show that investor interest had not been taken into account when the government made the policy. The Tribunal also noted that investor lacks of opportunity to express its concern on the regulation enacted by the host state may lead to breach of due process principles (Metalclad v. Mexico, 2000:91). Thus Indonesia might be deemed to have breached the due process principle since its failure to transparently discuss the intention and the substance of the regulation.

ii. Legitimate Expectations

This principle or element mainly deals with the predictability and the stability of the investment climate in the host state since those two element is crucial for investors in making their investment decisions or what kind of situation that being expected by investors. The Tribunal noted that the legal framework of investment in the host state shall not be unreasonably changed in contradiction to a particular assurance (El Paso v. Argentina, 2011: 364). Perhaps this principle would be the source of investment dispute for Indonesia in the future, since there has been sudden change in the regulation in mining in 2009. Prior 2009, notably there are only 4 regulations that deals with the mining issue which lastly updated in 2001. However, up to six years after 2009 there have been more than 13 regulations that complemented the 2009 Mining Law.[86] Not only suddenly changed the law, the government also shows several inconsistencies while enacting the implementing regulations. Those aforementioned 13 regulations are not enacted as a new law but some of them were revising the previous regulation. And among those revisions, the inconsistency of the government had shown through the enactment of the ESDM Regulation 1/2014 which suddenly allowed export of certain minerals with certain degree of purity or forms that also allegedly intended to benefit certain enterprises.

Potential dispute concerning this issue has shown by the Japanese government intention to bring this issue to the WTO as Japan highly dependent to the Indonesian raw nickel (Nikkei Asian Review, 2014). Japan would probably base their argument with the article 63 and 99 of the Indonesia-Japan Economic Partnership Agreement which prescribed that the parties are not allowed to impose law concerning trade and investment to achieve given level or percentage of domestic content and prohibits Indonesia to enact law that violates legitimate expectation of investors. Additionally, Japan also may add TRIMs Agreement which prohibits certain manufacturing requirements. Thus, Indonesia needs to reevaluate the law so it

[86] The regulation take form in Government Regulation or Ministerial Regulation (particularly, Ministry of Energy and Mineral Resources, Ministry of Finance, Ministry of Trade).

would not counterproductive with the aim of Indonesia to invite more investors.

iii. Indirect Expropriation

Aside from the obligation to follow the standard treatment rules, the government action also must not intended to interfere with the investor's rights on property prescribed under the BIT. Prohibition of expropriation as common ground norm under investment law dictates that the host state shall not either directly or indirectly nationalize or expropriate an investment of the investor except for public purposes and with appropriate compensations (Schreuer, 2005: 1; Sornarajah, 2008:364-365). Despite the real intention, interference of government on these rights of investor might look like a shy of expropriations. Among many form actions that a government might amounted to expropriations, Brownlie pointed out that the decisive element in an indirect expropriation is the substantial injury on control or economic value of an investment without a physical taking (Brownlie, 2003: 509).

The imposition of ore's ban policy might appear legal since it does not hamper the investor rights on property or undermine the economic value of the investment. However, expropriatory measures are not only limited to single policy measures, but also include step-by-step measures taken by government (Philips Petroleum Co. v. Iran, 1989). Thus, the ban's policy might be amounted to expropriation if it's corroborated by other policy that substantially deprived rights of the investor on property or irreversibly undermine the economic value of investment.

E. Closing

Although States generally owned permanent sovereignty over natural resources, the balance between the States and enterprises interest are required to fully gives the prosperity to the people since states might not able to explore and exploit natural resources by themselves. By joining into WTO or enter into investment agreement with other states, a State may not arbitrarily enact regulation that may impair interest of others.

Notwithstanding the government ability to create policy, the interest of investor also plays vital role as their rights and interest are protected by the law and shall not arbitrarily deprived. To avoid unnecessary legal dispute and losses, the government need to find mutual solution that could both add the value of Indonesia natural resources and economically beneficial to the investors.

The government of Indonesia needs to create stable and predictable legal framework to convince the enterprises that its action was not only beneficial to certain party hence create unfair trade. This notion arises due to several inconsistencies during 5-years after the enactment of the 2009 mining law. Within 5 years, the government had revised the implementing regulation on Government Regulation level for 3 times, in 2010, 2012 and in 2014, while the ESDM Minister had revised its regulation twice in 2012, and once in 2014. A stable and predictable legal framework not only could prevent economic volatility of the state macroeconomics but also safeguard the state from economic crises.

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