(Un)Blurred Concept of Sovereign Rights at Sea : Implementation Context

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ABSTRACT

The term "sovereign rights" has been used on many occasions in referring to coastal states' actions in exploring and exploiting the ocean's natural resources beyond their sovereign territory. Not to mention the lack of comprehension between "sovereignty" and "sovereign rights" of the general public, it appears that the last term is also lacking clear definition available for a legal basis. This clarity is crucial to give the legal certainty for states' entitlement to conduct actions within their jurisdictions. This paper tries to clarify the legal definition of "sovereign rights" under international dan national practice. It concludes that no single universally accepted definition of sovereign rights. The explanation of rights and duties of such a definition is mostly practiced both internationally and nationally. The finding is based on the survey of the implementation of international rules, international judgments, and Indonesian court decisions.

Keywords: Sovereignty; Sovereign Rights; Domestic Implementation.

ABSTRAK

Istilah "hak berdaulat" telah digunakan pada banyak peristiwa yang merujuk pada tindakan negara-negara pantai dalam mengeksplorasi dan mengeksploitasi sumber daya alam laut di luar wilayah kedaulatannya. Selain kurangnya pemahaman antara "kedaulatan" dan "hak berdaulat" dari masyarakat umum, tampaknya istilah terakhir tersebut juga kekurangan adanya definisi yang jelas untuk dijadikan suatu dasar hukum. Kejelasan ini sangat penting untuk memberikan kepastian hukum bagi hak negara untuk melakukan berbagai tindakan di dalam yurisdiksi mereka. Tulisan ini mencoba untuk mengklarifikasi definisi hukum "hak berdaulat" dalam praktik internasional dan nasional. Disimpulkan bahwa tidak ada satu pun definisi hak kedaulatan yang diterima secara universal. Penjelasan mengenai hak dan kewajiban dari definisi tersebut sebagian besar dipraktikkan baik secara internasional maupun nasional. Penemuan ini didasarkan pada survei terhadap implementasi berbagai peraturan internasional, pertimbangan internasional, dan putusan pengadilan Indonesia.

Kata Kunci: Kedaulatan; Hak Berdaulat; Implementasi Domestik.

A. INTRODUCTION

Under UNCLOS 1982, coastal states are entitled "sovereign rights" over certain areas of the ocean to explore and to exploit the economic benefit. Internationally accepted, coastal states have sovereign rights over the economic exclusive zone (EEZ) and continental shelf for their abundant natural resources (Juda, 1987). Such rights are inherently

beneficial for the coastal states as significant economic potential could enable to lift national revenue (Nugraha, & Irman, 2014). Not only to enjoy the benefit, the coastal states also has the authority to apply and enforce its national law in these areas against any actors both domestic and international (Schatz, 2016). The areas with sovereign rights are in almost all locations bordering with other states. Further, in some situation, the areas are overlapped because the areas are not enough for states to claim maximum zone permissible under UNCLOS (Kim, 2017). Differ from the territorial sea delimitation, UNCLOS does not provide firm settlement for overlapping areas such as EEZ and continental shelf (Lando, 2017). It only allows the delimitation based on "an equitable solution" (United Nations Convention on The Law of the Sea, 1982) of which very loose nature of negotiating process. Thus, such agreement may take long time to achieve. During the time of negotiation or even the absence of such efforts, states keep exercising their sovereign rights to acquire economic revenue from those areas and created conflict between neighboring states (Brown, 1977; Churchill, 1993; Smith, 2010). In exercising states' sovereign rights on EEZ and continental shelf, the existence of national regulation over these areas is equally crucial. Such national regulation will clarify coastal state's claim over the area and how it manages the area for the benefit of the country (Gunawan, & Yogar, 2019) At the same time, the regulation should provide clear and comprehensive understanding the authority from the relevant legal enforcement agencies. Such comprehension of the rights should also be obtained by general public especially for those who are actually exploring and exploiting the resources in the areas. Nevertheless, in practice, ideal situation of understanding the concept and scope of "sovereign rights" seems in rarity. The latest case to show this phenomenon was experience by Indonesia when Chinese Coast Guard entering the Indonesian EEZ on North Natuna Sea (Wardi, & Nathalia, 2020). There was a public concern that China has violated Indonesian "sovereignty" (Ng, 2020). With no fishing activity by the Chinese coast guard, Indonesia cannot claim of violation of Indonesian law. It seems that this situation caused by the lack of understanding of the concept. Apart from dissemination issue, the available formal definition of "sovereign rights" is lacking. From the available literature, it appears that scholars frequently explain the term "sovereign rights" rather than defining legally what it is meant by term (Shearer, 2014). In addition, others have discussed the limits of states in exercising the sovereign rights towards other states or actors without defining the term of the rights (Scalieri, 2019). Putting into the real context, the writing is more on observing how the application of "sovereign rights" to certain areas or practice. Thus, from this brief literature survey, there is significant lack of available literature to provide discussion on the definition of "sovereign rights". It is the objective of this paper try to fill in academically.

This paper argues that no single universally accepted definition of sovereign rights. Explanation of how rights and duties should be implemented are mostly practiced both internationally and nationally. The finding based on the survey of implementation of international rules, international judgements and Indonesian court decisions. The paper begins to observe how the international national rules provides the discussion to avail any working definition and their difference of "sovereignty" and "sovereign rights". Indonesian national rules will be discussed as a focus because it provides illustration of how coastal state regulates its own areas with such rights. It follows by the discussion on how the international tribunals contribute to clarify the concept. Prior to the conclusion, this paper will look at again how Indonesia courts try to explain the concept in their decisions.

B. DISCUSSION

1. The Clarification of Concept: Regulations Observation

a. Sovereignty

As the primary law of the sea, the United Nations Convention on the Law of the Sea in 1982 (UNCLOS) recognizes the concept of state territorial sovereignty granted to coastal states over marine spaces under its jurisdiction. The terminology of sovereignty is mentioned in Article 2 paragraph (2) of UNCLOS which denotes sovereign territory of a state covers land area, sea and airspace. According to which:

> "The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea."

Similar statement regarding sovereignty of the coastal state also stated in Article 1 and 2 of the Convention on the Territorial Sea and the Contiguous Zone Done at Geneva in 1958. Although these conventions have mentioned things regarding the existence of sovereignty of the coastal state and the means to exercise its sovereignty, yet none of these conventions provide the concrete definition of sovereignty. The terminology of sovereignty itself is commonly described as the supreme authority (Oppenheim, 1912). The notion of 'sovereignty' is originally derived from Latin, -sui juris, esse suae potestatis, superanus or summa potestas-, which means that sovereignty refers to the supreme authority of the State (Schmitt, 2017). As the supreme authority, sovereignty has three different aspects (Oppenheim, 1912). First, sovereignty is independence in terms of sovereignty seen as excluding of dependence from any other authority of another state. Independence in this sense is also understood as the freedom of a state to act and impose its authority (Benoist, 1999). It is external independence with regard to the liberty of action outside its borders in the intercourse with other States and internal independence with regard to the liberty of action of a State inside its borders. Second, sovereignty is personal supremacy, if sovereignty

discussed is regarding the power of a State to exercise supreme authority over its citizens at home and abroad. Third, sovereignty is territorial supremacy, in case it is referred to the power of a state to exercise supreme authority over all persons and things within its territory (Oppenheim, 1912).

Sovereignty as intended by public international law is defined as the basic international legal status granted to a state within its territorial jurisdiction which makes a state not subject to foreign law other than public international law (Steinberger, 1987). Other definition comes from a scholar who considers sovereignty is the state's ability to independently determine its internal and external policies provided the respect for the civil and human rights, protection of minority rights and respect for international law without external interference (Gevorgyan, 2014). Definitions of sovereignty are also given in the consideration and resolution of specific international disputes, such as the definition that set forth in the arbitration judgment of the case Island of Palmas in 1928 given by an arbitrator Max Huber. It provides that (Bilder, 1994):

> 'Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.'

In another case, sovereignty is defined in the dissenting opinion of Judge Alvarez on the Corfu Channel case as a set of rights and attributes possessed by the State in its territory excluding any other State, and also in his relations with other states (Bilder, 1994). Accordingly, by looking at many definitions mentioned above in regards of the law of the sea, with its sovereignty, a coastal state can decide and administer its own laws and determine the use of its land within the limitations of international law, without any intervention from external influence, such as a person, group, tribe or other state (Pelizzon, 2016).

As a state party of UNCLOS, Indonesia also has provided regulations regarding law of the sea which recognize the concept of sovereignty. The terminology of sovereignty is mentioned, such as in Djuanda Declaration in 1957 which stipulated by Law Number 4/prp/1960 and amended by Law Number 6 of 1996 on Indonesian Waters has mentioned that Indonesia has an absolute sovereignty in land and its territorial waters as well (Djuanda Declaration, 1957). Furthermore, as stated in Article 4 of Law Number 6 of 1996 on Indonesian Waters, Indonesia's sovereignty applies over internal waters, archipelagic waters and territorial seas, as well as the seabed and air space above the territorial waters, including the source of natural resources contained therein.

In line with that, Article 1 paragraph (2) on Law Number 43 of 2008 on State Territory, Article 5 and 7 paragraph (3) letter a on Law Number 32 of 2014 on Maritime also clearly state similar statements as to Indonesian sovereignty over its territorial jurisdiction. Even explained in the General Explanation of Indonesian Law Number 43 of 2008 on State Territory and Indonesian Presidential Regulation

Number 16 Year 2007 on Indonesian Maritime Policy, sovereignty itself should be followed by the obligation of the Indonesian Government to manage for the welfare of the Indonesian people and in accordance with national interests, protecting national sovereignty, also considering Indonesian geostrategic and geopolitical aspects. Regardless, as well as international regulations concerning sovereignty over marine spaces under its jurisdiction, the concrete definition of sovereignty is yet to be found. Those regulations also only mentioned the terminology of sovereignty as an affirmation of the Indonesian state's right to possess its marine spaces and how the government must exercise its sovereignty as regulated in the law. As a comparison, the terminology of sovereignty is also recognized by other international provisions, such as provisions regarding airspace territory. According to Article 1 of the Chicago Convention on International Civil Aviation in 1944, the state party has sovereignty characterized by completeness and exclusiveness over the airspace above its territory. Similar thing is also stated in the Paris Conference on Convention Relating to The Regulation of Aerial Navigation in 1919. Territorial sovereignty is characterized by completeness, which means the State have rights to exercise its legislative and enforcement jurisdiction in its territory over all matters and all people in an exclusive manner unless international law provide otherwise (Tanaka, 2012). At the same time, territorial sovereignty is characterized by exclusiveness in the sense that only the State in question may exercise jurisdiction over its territory. These regulations indeed have clearly featured of sovereignty but still, none of these regulations seems to define sovereignty perspicuously. From all of those definitions above, it can be said that every definition regarding sovereignty, whether regulated in written law or doctrines, provide similar insight about what is defined as sovereignty. Essentially, sovereignty is defined as the exclusive authority owned by a state in order to carry out its national law independently without any external intervention (Waltermann, 2019). According to UNCLOS, it can be seen that sovereignty meant in this provision is referred to the coastal state's territorial supremacy over marine spaces under its jurisdiction, which are internal waters, territorial sea and archipelagic waters. It means that characters of territorial sovereignty, which are completeness and exclusiveness as explained above also applies in this regard (Tanaka, 2012). Since UNCLOS does not provide a certain definition regarding what is meant by territorial sovereignty, thus it is necessary to see other rules provided in UNCLOS which establishes the means to exercise the sovereignty.

According to UNCLOS, there are some provisions regarding on how the coastal state should exercise its exclusive jurisdiction in its territorial marine spaces. For instance, as stated in Article 212 UNCLOS, the coastal state has the right to adopt laws and regulations for the prevention, reduction and control of marine pollution of the marine environment from or through the atmosphere and

take other measures as may be necessary to prevent, reduce and control such pollution. Furthermore, the coastal state can also regulate, authorize and conduct marine scientific research in their territorial sea by virtue of Article 245 UNCLOS. In terms of freedom of transit that enjoyed by the land-locked states, according to Article 125 paragraph (3) UNCLOS, transit state as the holder of full sovereignty over its territory shall have the right to take all measures necessary in order to ensure that their rights and facilities in this regard are maintained. Other authorities possessed by coastal state in this context, such as carrying out surveillance activities on foreign vessels, controlling customs, having the right to catch fish, establishing defense zones and the right to hot pursuit (Sunyowati, & Narwati, 2013).

As well as in Indonesia, according to Article 10 Law Number 43 of 2008 on State Territory, Indonesian government as the executor of exercising state's sovereignty have some authorities, such as determining policies regarding management and conservation of state and border areas, giving permission for international flights to cross the territorial airspace on the path specified in the legislation, and more according to this regulation. Moreover, Article 6 paragraph (2) Law Number 32 of 2014 on Ocean states that Indonesia, in order to exercise its sovereignty, has the right to manage and utilize the natural resources and environment of the sea within its maritime territory (Lasabuda, 2013). In other words, Indonesian government has the freedom to utilize all of the natural resources under the territorial sea for the interests of Indonesian people, as stated in the General Explanation of Law Number 43 of 2008 on State Territory.

Regardless of provisions on the means to carry out its sovereignty, it also restricted by conditions established by international law. In other words, the exercise of sovereignty by a coastal state cannot be said to be absolute that it must be exercised by taking into account the other provisions of UNCLOS and international law by virtue of Article 2 paragraph 3 UNCLOS. As well as Indonesia, Article 24 paragraph (1) of Law Number 6 of 1996 on Indonesian Waters confirms that the enforcement of sovereignty in Indonesia are exercised in accordance with the provisions of the legal Convention other international regulations and applicable laws and regulations. One of the manifestations that sovereignty at sea is not as absolute as the land is the existence of the right of foreign ship crossing the sea territory of a country. In light of the freedom of navigation set forth in UNCLOS, the coastal states' sovereignty over the territorial sea is restricted by the right of innocent passage and the rights of transit passage for foreign vessels. It is considered as the most important difference between internal waters and the territorial sea is these rights does not apply to internal waters, whilst the right applies to the territorial sea (Tanaka, 2012).

Especially in Indonesia as an archipelagic state, there is also the right of archipelagic sea lane passage according to Article 53 UNCLOS. Furthermore, according to Article 9 of Law Number 6

of 1996, although Indonesia has full sovereignty over its internal waters, Indonesian government have to respect agreements or treaties made with other states regarding the legal use of its archipelagic waters for the exercise of traditional fisheries rights, the right of access and communication of neighboring countries, the installation, maintenance and replacement of cables on the seabed by other countries. It is also regulated in Government Regulation Number 36 of 2012 on Rights and Obligations of Foreign Ships in Implementing Innocent Passage through Indonesian Waters, Government Regulation Number 37 of 2012 on the Rights and Obligations of Ships and Foreign Aircraft in Implementing the Rights of the Archipelagic Sea Pathway through the Specified Archipelagic Sea Path.

Based on the explanation above, it can be concluded that although the law of the sea recognizes the concept of sovereignty, but the concrete definition that explains what it means is yet to be found in regulations, both in international and Indonesian regulation regarding the law of the sea. If drawn from the general definitions of sovereignty, the sovereignty meant by the law of the sea is the full authority possessed by the coastal state to implement its national law over the sea area which is part of its jurisdiction, precisely in the internal waters, territorial sea, and in the case of the archipelagic state is in the archipelagic waters, with restrictions set forth in international law. However, because none of these regulations are provided such things, the embodiment of sovereignty must be seen from the means to exercise its sovereignty that determined in the regulations.

b. Sovereign Rights

Since the law of the sea is continuously developing, new definitions or rules are undeveloped and tend to be ambiguous due to its constant transformation of the character and content of the international legal systems (Suganuma, 2002). That being said, definitions are often times a common trigger to the rise of a dispute regarding the law of the sea. As well as the basic term in the field, which is well established as ‘sovereign rights’, found to be having blurred lines with sovereignty. Sovereignty is a complete spatial jurisdiction and is characterized by exclusiveness, while sovereign rights are spatially limited by nature as it is as well-known as spatial jurisdiction. The limitation to the jurisdiction over EEZ and continental shelf is ratione materiae, which only to the matters defined by international law (Tanaka, 2012). Nonetheless, in common with territorial sovereignty, sovereign rights can also be exercised over all people regardless of their nationalities as it contains no limit ratione personae (Tanaka, 2012). Referring to philosophical categories’ “part” and “whole”, sovereignty as “whole” cannot be reduced to the properties of the mechanical the sum of properties of its “parts”, which are sovereign rights (Bytyak et al, 2017). Therefore, it is necessary to distinguish between sovereignty and sovereign rights clearly.

In international relations studies, sovereign right is regarded as the consequence of a specific internal legal quality that some territorial entities actually possess, it is the condition of having constitutions which are independent of other constitutions (Kurtulus, 2002). Rights of sovereignty are related to state independence, which in a narrow sense, denotes enjoyment of a certain legal status by exercising its will with direct reference. That can be to some other states or to persons and things, as long as it's within the sphere of its legitimate control (Kurtulus, 2002). As to many sectors in the field of political and social conceptions, it may be adopted different solutions (Correa, 1995). However, from studying existing legal instruments in the sector of maritime, it might be concerned how the term 'sovereign right' seems to be questionably vague. The development has been lacking systemic approaches (Bytyak et al, 2017). Though not well-defined, states have long applied and exercised sovereign rights. As in the case of Vietnam-Indonesia waters which happened on the overlapping exclusive economic zone between both countries, both claimed that they both have jurisdiction over the area (Avisena, 2019), since sovereign rights are logically, following the principle of sovereign equality of states, characterized as equal for each State (Bytyak et al, 2017).

UNCLOS provides the legal base for coastal State to exercise sovereign right in the exclusive economic zone (EEZ) and over the continental shelf. In regards of the enforcement of laws and regulations of the coastal States, Article 73 UNCLOS explains the means to exercise sovereign right itself, by exploring, exploiting, conserving and managing the living resources in the EEZ, also to take such measures including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with UNCLOS. In the EEZ, such means and measures apply to the living or non-living, the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds, as stated in Article 56 UNCLOS. While over the continental shelf, it applies to the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, immobile organisms at the harvestable stage, on or under the seabed, or are unable to move except in constant physical contact with the seabed or the subsoil as stated in Article 77 UNCLOS. It can be seen that this leading legal instrument only states how coastal State is entitled to sovereign rights and accommodates the basis for enforcement measures, without having in prior defined what the term does certainly mean.

Several mentions are also seen on marine environment matters' declarations. Principle 21 of the Stockholm Declaration, adopted by the United Nations Conference on the Human Environment states that, "States have, in accordance with the

Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies…". Both in the mentioned declaration and in the Convention on Biological Diversity, also embodied the qualification of the sovereign right, which includes "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction". It is then reproduced word for word in article 3 of the Convention on Biological Diversity of 1992, and has been altered to refer to 'environmental and developmental policies' in principle 2 of the Rio Declaration, adopted by the United Nations Conference on Environment and Development (UNCED) in June 1992 (Klemm, & Shine, 1993). Not only of maritime matters, the term was used to fix the sovereign rights over energy resources, as can be learned in the Concluding Document of the Hague Conference on European Energy Charter. From a number of conventions mentioned, we still can't find one which had defined the term in prior.

As a maritime country, Indonesia has its regulations regarding the law of the sea. Also, as a State party to the UNCLOS, Law Number 5 of 1983 on Indonesia Exclusive Economic Zone gives rule to Indonesia that it has the legality to exercise sovereign right. Article 4 (1) Law Number 5 of 1983, which is adapted from the substance contained in Article 73 jo. Article 56 UNCLOS, explains that in Indonesia Exclusive Economic Zone, the state has and enforce sovereign rights by exploring and exploiting, managing and conserving living and non-living resources from the seabed and its subsoil and of the waters superjacent to the seabed and other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds (see also Purba, 2019)

Law Number 32 of 2014 on Ocean mentioned the term sovereign right in Article 7 (3) and Article 7 (4). There, it's stated that Indonesia has sovereign right over EEZ, and continental shelf and sovereign right is enforced on the basis of law regarding Indonesia Continental Shelf, agreements between the Republic of Indonesia and the neighbor countries also provisions of international law applicable. Other than that, from Chapter II of the National Document of Indonesian Ocean Policy we can conclude that sovereign rights, which entitled to the unitary state of the Republic of Indonesia, must be aligned with international law. The rights also followed with the obligation of the Indonesian Government to manage in a good and sustainable manner for the welfare of Indonesian people and taking into account Indonesia's strategic interests, particularly those associated with the efforts to maintain its territorial integrity, protecting national sovereignty, while considering the geostrategic and geopolitical aspects.

It might be unclear regarding sovereign rights' definition since there is not yet a direct fixation both on national legislation and international legal instruments. Regulated provisions only state about scopes and measures. However, the lack of

normative securing does not deprive the value of it, which are entitled to each Coastal State.

2. Mapping the Landscape of Sovereign Rights Implementation Internationally

a. International Court of Justice

The absence of sovereign rights' definitive meaning may result to its limitless measures of exercise. For instance, the ongoing case which was brought by Nicaragua against Colombia to the International Court of Justice (ICJ) in 2013 with alleged violations of Nicaragua's sovereign rights and maritime zones. In its first and second counterclaims, Nicaragua held its principal claim stating that Colombia's Navy alleged interference with and violations of Nicaragua's exclusive sovereign rights and jurisdiction in Nicaragua's EEZ by preventing Nicaraguan fishing vessels, naval and coast guard vessels from navigating, fishing in Nicaragua's EEZ. Meanwhile, Colombia contended that private Nicaraguan vessels have engaged in predatory fishing practices and have been destroying the marine environment of the south-western Caribbean Sea, and such acts have been preventing the inhabitants of the San Andrés Archipelago, including the Raizal community, from benefiting from a healthy, sound and sustainable environment and habitat. It can be seen how both parties' claims made no relation in the factual complex, thus did not pursue the same legal aim (International Court of Justice, 2017).

Both parties finally made it in the third counterclaim that they sought to establish the responsibility of the other by invoking violations of a right to access and exploit marine resources in the same maritime area, the area between Quitasueño and Serrana, Luna Verde area. Colombia complained about the infringement of the customary artisanal fishing rights by alleged harassment, intimidation, and coercive measures by Nicaragua's Navy of Colombian local inhabitants in the waters of Luna Verde area. The treatment includes the seizure of the artisanal fishermen's products, fishing gear, food and other property which also infringed to the rights of the indigenous Raizal people to access and exploit their traditional fishing grounds. While Nicaragua, still on its principal claim, complains about the treatment by Colombia's Navy of Nicaraguan licensed vessels fishing in the same waters. Taking notes on it, the Court stated that Nicaragua's principal claims were based on customary rules in regards of a coastal State's sovereign rights and jurisdiction in its EEZ as well as its rights over marine resources located in the area. Thus, the respective claims of the Parties concerned the scope of the rights and obligations of a coastal State in its EEZ (International Court of Justice, 2017).

In the fourth counterclaim, Colombia submitted the affidavit adopting its Decree No. 33-2013 of August 19th 2013, that stated the extension of its internal waters and maritime zones beyond the permission of international law. The established straight baseline in the mentioned decree gives the geomorphologic claim of the coastal State that its seabed fall beyond 200 M and thus satisfied the

stipulations set out in Part VI of UNCLOS. Colombia then established its Integral Contiguous Zone on Decree 1946 of September 2013 which amended by Decree 1119 of 17 June 2014 (Edmonds, 2016). By virtue of these decrees, Colombia believed that Nicaragua has violated Colombia's sovereign rights and jurisdiction in their maritime area, namely in the south-western part of the Caribbean Sea lying east of the Nicaraguan coast and around the Colombian Archipelago of San Andrés.

Moreover, in the former dispute between same both Parties, there has been a ruling in 2012 by the court, that drew a demarcation line which increased the breadth of Nicaragua's continental shelf and EEZ in the Caribbean (International Court of Justice, 2012), giving it access to deposits and fishing rights. Nicaragua, given a transfer of about 30,000 square miles of sea which previously controlled by Colombia, has been dispatching ships to patrol its new waters, stating that the navy has established sovereignty in the whole territory (S.B., 2019). Colombia has not yet accepted the ruling, prompting Nicaragua to seek a judgment to abide by the decision (Brown, 2019).

Though for the time being there has not been any judgment to settle boundaries in the new disputed area, Judge Cançado Trindade in his declaration stated that the exercise of State sovereignty cannot make abstraction of the needs of the populations concerned, from one country or the other. Latin American international legal doctrine has been attentive to the fulfilment of the needs and aspirations of people of the international community as a whole, which flourishes the legacy of the jus gentium (S.B., 2019). He further explained:

> "States have human ends, they were conceived and gradually took shape in order to take care of human beings under their respective jurisdictions. Human solidarity goes pari passu with the needed juridical security of boundaries, land and maritime spaces. Sociability emanated from the recta ratio (in the foundation of jus gentium), which marked presence already in the thinking of the 'founding fathers' of the law of nations (droit des gens), and ever since and to date, keeps on echoing in human conscience". (International Court of Justice, 2012).

Special attention has been given to the fishermen from the local population of the Archipelago of the Raizal people, which in particular, "their traditional and historic fishing rights from time immemorial, and the fact that they are vulnerable communities, highly dependent on traditional fishing for their own subsistence" (S.B., 2019).

It was clear that there was an overlapping area of the continental shelf entitlements, which in this case fall of both State's seabed and subsoil. As Nicaragua based its claims on customary rules of international law that coastal State's sovereign rights and jurisdiction over its EEZ include the rights of the marine resources over the area, and Colombia based its claims on the adoption of domestic legal instruments which has fixed the extent of their maritime zones, both alleged violations of the sovereign right they each claim to possess relating to

the limits, régime and spatial extent of both the EEZ and contiguous zone (S.B., 2019). However, the exercise of Nicaragua's sovereign rights, various alleged acts such as intimidation and harassment of the artisanal fishermen by Nicaragua's Navy shows coercive measures in conserving its marine resources, given such entitlement in Article 56 of UNCLOS. But in this sense, according to Judge Trindade, regional legal doctrine shall take its role to become a consideration in regards of further ruling by the court which includes subsequent delimitation or even prevalence, regardless which state might be granted sovereign rights.

b. International Tribunal for the Law of the Sea

Another case relating to the exercise of sovereign rights that was brought to international institution was the M/V Virginia G case (Panama/Guinea-Bissau). On April 14, 2014, International Tribunal for the Law of the Sea (ITLOS) issued its ruling, to the dispute case No. 19, that arose out of Guinea-Bissau's 2009 arrest of the Panama-flag coastal tanker M/V Virginia G (International Tribunal for the Law of the Sea, 2014). It was on August 21, 2009, the tanker was detected bunkering, which in particular, refueling to foreign vessels fishing with Mauritanian-flagged in the Guinea-Bissau EEZ without having obtained a lawful bunkering permit. A few days later, the government confiscated the Virginia G as well as the gas oil, specifically diesel on board. At the request of the owner, The Regional Court of Bissau subsequently took provisional measures orders suspending the confiscation, but the Guinea-Bissau authorities still had the gas oil removed from the ship. The government decided to release the ship after its arrest in the following year, along with the persistent request by the Embassy of Spain for its release and took into consideration (Oxman, & Cogliati-Bantz, 2014), among other things, Guinea-Bissau's "friendship and cooperation with the Kingdom of Spain in the field of fisheries, knowing that although the vessel has a Panamanian flag, it belongs to a Spanish company" (Oxman, & Cogliati-Bantz, 2014).

After transferring the dispute to ITLOS which was initially submitted to arbitration, in its claim (International Tribunal for the Law of the Sea, 2014), the requirement that seemed to have Guinea-Bissau hopes up as a ground objection to the admissibility of Panama's claims was the UNCLOS Article 91, stating that there must exist a genuine link between the flag State and the ship. Unfortunately, in the operative provisions of its ruling, the objection was unanimously rejected by the Tribunal (International Tribunal for the Law of the Sea, 2014), even though the Tribunal decided to validate the existence of a genuine link at the time of the incident (International Tribunal for the Law of the Sea, 2014). Another objection was that the owner of the vessel and the crew were not nationals of Panama, but the Tribunal subsequently held that "Panama is entitled to bring claims in respect of alleged violations of its rights under the Convention which resulted in damages to these persons or entities" (International Tribunal for the Law of the Sea, 2014) regardless of its nationals.

In the question of the Convention violation as it claims, Panama alleged that Guinea-Bissau violated each of the four operative paragraphs of Article 73 of UNCLOS by its treatment of boarding, arrest and confiscation of the Virginia G, moreover seizing and withholding the passport of its crew for more than four months (Allen, 2019). Panama also pointed out that it was and is unlawful for Guinea-Bissau to exercise sovereign rights not attributed to it under the Convention. Panama further explained that the extent to which Guinea-Bissau's "sovereignty and jurisdiction were extended to the activities of the Virginia G and the resulting denial of freedom of navigation was not consistent with the provisions of the Convention" (Allen, 2019). Arguing that the bunkering services provided by the Virginia G shall fall within the category of freedom of navigation and other internationally lawful uses of the sea related to that freedom in terms of Article 58 (1) of the Convention, Panama maintained that it should have been in accordance with the exercise of sovereign rights stated in Article 56 (2) (Allen, 2019).

Panama subsequently questioned the qualification of bunkering in the EEZ, stating that Guinea-Bissau has extended its interpretation of fishing activities and fishing related activities to include bunkering, moreover by imposing tax or customs duty on bunkering activities carried out in its EEZ (Allen, 2019). Countering the claims, Guinea-Bissau pointed out that the EEZ has a sui generis status, but the interests of the coastal state in the preservation of maritime resources prevail over the economic interest of bunkering activities carried out by tankers, taking Article 56, 61, 62 and 73 of the Convention as the basis to owe sovereign rights and jurisdiction of the coastal State (Allen, 2019).

As for The Tribunal observed that the term "sovereign rights" encompasses "all rights necessary for and connected with the exploration, exploitation, conservation and management of the natural resources, including the right to take the necessary enforcement measures" (Allen, 2019). The Tribunal pointed out that the use of the terms "conserving" and "managing" in the notion of sovereign rights explained by The Tribunal indicates that the rights of coastal states go beyond conservation in its strict sense take into account Article 61 and Article 62 of UNCLOS. The tribunal also stressed matters regarding how the coastal state exercising its sovereign rights in terms of exploring, exploiting, conserving and managing the living resources of the EEZ, where the coastal state is entitled under the Convention, to adopt laws and regulations that specify the terms and conditions for access by foreign fishing vessels to its EEZ, which must conform to the Convention and may relate to, inter alia, the matters listed therein (Allen, 2019).

The Tribunal was of the view that Article 58 of UNCLOS which provides rights and obligations of the foreign coastal state to exercise its sovereign rights on EEZ is to be read together with Article 56 of the Convention on the rights and obligations of the coastal state to exercise its sovereign rights on its own EEZ. Then the Tribunal considered that Article

58 does not prevent coastal states from regulating about bunkering of foreign vessels fishing in their EEZ since such competence derives from the sovereign rights of coastal states to explore, exploit, conserve and manage natural resources (Allen, 2019). Therefore, the coastal states have sovereign rights for the purpose of conserving and managing marine living resources such sovereign rights also encompass the competence to regulate bunkering of foreign vessels fishing in the EEZ. Moreover, Article 73 paragraph 1 of UNCLOS provides that the laws and regulations of coastal states concerning the management of living resources may encompass the necessary enforcement measures. Since the laws and regulations on fisheries of Guinea-Bissau treat fishing and support activities alike, it follows in the view of the Tribunal that the relevant laws and regulations of Guinea-Bissau also provide for the possibility of confiscating bunkering vessels (Allen, 2019).

Based on the aforementioned explanation, it can be seen that The Tribunal implemented the concept of sovereign rights based on the provisions provided by UNCLOS. Although the definition of sovereign rights is not yet to be provided, The Tribunal interpreted sovereign rights in accordance with the provisions regarding rights, obligations and restrictions of how coastal states should exercise their sovereign rights. Essentially, it is necessary to note that there are restrictions regarding the exercise of the sovereign rights of coastal states in the area beyond the territorial sovereignty that are included EEZ and contiguous shelf, where there are foreign coastal state's rights which must also be respected by coastal states by taking into account the provisions in UNCLOS. Coastal states can regulate and take action, such as boarding ships, inspecting, capturing and carrying out judicial processes as needed while respecting the rights of other coastal states. Hence, this kind of limitation should be affirmed in the definition of sovereign rights.

3. Sovereign Rights at Home: Clarifying Regulation?

Indonesia has implemented rights, obligations and restrictions in carrying out its sovereign rights in accordance with applicable international and national regulations. This is shown from how Indonesia implemented it when there was a dispute in the area beyond the territorial sovereignty that included EEZ and contiguous shelf between Indonesia and another state. One of the cases related is the collision of the Indonesian Navy battleships (KRI Tjipadi-381) by a Vietnamese fishing vessel that occurred in Natuna waters due the fact that in parts of the northern region of Natuna Island there are still EEZ boundaries that have not been agreed between Indonesia and Vietnam (Nugraha, & Bhwana, 2019). The incident occurred because the Indonesian Navy felt authorized to make arrests of Vietnamese fishing vessels, on the other hand, the Vietnamese authorities with their coast guard vessels felt that Indonesian Navy was not authorized to make arrests. Therefore, both of states declared themselves to have the authority, so then the Vietnamese coast

guard ship wanted to free its fishing vessel which was captured by Indonesian Navy battleships by crashing into it (Kurmala, 2019).

The incident actually shows that each country is concerned about which state is entitled to exercise sovereign rights over Natuna Waters. Indonesia considered that they have the authority to exercise its sovereign rights over the area, so do Vietnam, thus each state tended to defend the sovereign rights they considered as theirs. Apart from the absence of concrete definition of sovereign rights, both countries seem to be understood what it means by sovereign rights by interpreting it taking into account operational regulations regarding sovereign rights in UNCLOS and national law and regulations. Another instance, in regard to maintaining its sovereign rights over Natuna waters, Indonesia also often takes action in terms of fisheries, such as arresting foreign fishermen who conducted illegal fishing in Natuna waters. In this regard, Indonesia is subject to the provisions regarding sovereign rights as mentioned in Article 56 of UNCLOS and Law No. 5 of 1983 concerning Indonesia's Exclusive Economic Zone.

Article 5 of Law No. 5 of 1983 emphasizes that whoever undertakes exploration and/or exploitation of natural resources or other activities for economic exploration and/or exploitation in the Indonesian EEZ, must obtain prior permission from the Government of the Republic of Indonesia or based on international agreements with the Government Republic of Indonesia and implemented according to the conditions of licensing or international agreement. Furthermore, in the context of exercising sovereign rights, the Indonesian law enforcement apparatus is authorized to take law enforcement actions in the Criminal Procedure Code, such as carrying out foreign vessel capture, with due regard to the exemptions provided for in Article 13 of the Indonesian EEZ Law. For instance, Indonesian Navy patrol vessel (KRI Bung Tomo-357) on 24 February 2019 had captured four Vietnamese-flagged fishing vessels (KIA) in the Natuna waters suspected of illegally fishing on the Natuna waters continental shelf (Iqbal, & Ambari, 2019). With patrols and the capture of foreign fishing vessels which have become routine activities shows the manifestation of Indonesia's commitment to safeguard its sovereign rights. Even in another concrete action that has been carried out by Indonesia is by sinking foreign ships found stealing marine resources in Indonesia's EEZ.

Noting the actions taken by Indonesia in exercising its sovereign rights, so far it has been running in accordance with applicable regulations, although the concept has only been interpreted by Indonesia and the coastal states in dispute with Indonesia. However, it is also necessary to look at how judges in Indonesia apply the concept of sovereign rights in handling cases in Indonesian courts. The concept of sovereign right was considered by judges in Indonesia in resolving cases involving foreigners who have committed crimes in Indonesia's EEZ. In the case in Decision Number 3/Pid.Sus-PRK/2014/PN.Tpg which involved a defendant from Thailand who was charged with a

crime of operating a foreign-flagged fishing vessel that did not have a Fishing License thus proven to violate the provisions of the Indonesian Fisheries Law, the judges considers the notion of sovereign rights by referring directly to Article 4 paragraph (1) of Law No. 5 of 1983 (Tanjungpinang District Court, 2014), which states as follows:

> "The sovereign right to explore and exploit, manage and conserve biological and non-biological natural resources from the seabed and the land beneath and the water above and other activities for exploration and economic exploitation of the zone, such as the generation of water, currents and wind."

The judge also added that it is necessary to consider the explanation of the article which explains that the sovereign rights possessed by Indonesia are not the same or cannot be equated with the full sovereignty owned and carried out by Indonesia over territorial sea, archipelagic waters and internal waters. Based on the foregoing, sanctions that are threatened in Indonesia's EEZ are different from sanctions that are threatened in waters that are under Indonesia's full sovereignty. Therefore, the judge then sentenced the defendant to a fine, which was also in accordance with the provisions of Article 73 UNCLOS which emphasized that the sentence that could be imposed for violating the law on fisheries in EEZ should not include confinement or other corporal punishment. Likewise Decision Number 6/Pid.Sus-PRK/2018/PN.Tpg and Decision Number 44/Pid.Sus-PRK/2017/PN.Tpg, which involves a Vietnamese citizen convicted of operating a foreign-flagged fishing vessel and fishing in Indonesia's EEZ without a Fishing License (SIPI). The judge in this case also considered the definition of sovereign rights by directly referring to articles in UNCLOS and Law No. 5 of 1983.

Whereas Decision Number 3/Pid.Sus/ PRKN/2013/PN.Tpi, in providing comprehension regarding sovereign rights, the judge handling cases in the a quo decision did not directly refer to articles concerning the operational definition of sovereign rights as in the three aforementioned decisions. The comprehension of sovereign rights granted by the judges is (Tanjungpinang District Court, 2013):

> "Sovereign right is to explore and exploit management and seek to protect, preserve natural resources, namely maintaining and conserving the integrity of the marine ecosystem. Sovereign rights in this matter are not the same as sovereignty full owned and carried out over the territorial sea and internal waters".

This definition is indeed almost similar to the operational definition of sovereign rights affirmed in Article 4 paragraph (1) of Law No. 5 of 1983 dan its explanation. However, the judges in a quo decision interpreted the definition of sovereign rights by combining the notion of sovereign rights embodied in Article 4 paragraph (1) of Law No. 5 of 1983, Article 1 letter d of Law No. 5 of 1983 regarding conservation of natural resources, and Article 1 letter e of Law No.

5 of 1983 regarding the protection and preservation of the marine environment (Simarmata, 2017).

Based on how the judges apply the concept of sovereign rights in considering decisions related to fisheries criminal cases in EEZ Indonesia, it appears that most judges directly referred to the meaning of sovereign rights in their regulations, such as Article 4 paragraph (1) of Law No 5 of 1983 and Article 73 paragraph (3) UNCLOS in the matter of sentencing the defendant. Due to the fact that there is no concrete definition of what is meant by sovereign rights, judges tended to directly refer it to the relevant articles in order to avoid any misunderstanding. However, there is also judges who provided their own definition of sovereign rights which is quite different from the operational definition provided by applicable laws. Apart from its consistent implementation since its operational regulations have been clearly regulated in international and national regulations, however, the notion of sovereign rights itself is still inconsistent and open up the possibility of misconception in the future. Thus, a concrete definition of sovereign rights is still needed. This is necessary to avoid any misunderstanding of the concept given the large number of cases that occur in areas where the concept of sovereign right applies.

C. CONCLUSION

The entitlement of “sovereign rights” for coastal states is undisputed legally. Such rights solidly embodied in a number of international regulations such as UNCLOS 1982 and others. In exercising the rights, coastal state, like Indonesia, has implemented in its national law. In so doing, Indonesia can explore and exploit natural resources these areas of EEZ and continental shelf. Due to uncertain time limit of delimitation agreement of these areas, frequently states are in conflict at sea to utilize the natural resources. Such conflict is exacerbated by the fact that domestically, sometimes, the comprehension of “sovereignty” and “sovereign rights” is far from ideal. It may be argued that dissemination of such concept may be positive to have a clear legal definition. Thus, as a legal concept, legal enforcement can be informatively educated. Such comprehension is crucial in the implementation context of legal enforcement. This context is well-founded in the case conflict between Indonesia and Vietnam on overlapping EEZ claims. Not only to display sovereignty correctly, Indonesia and Vietnam need to accurately enforce what are their actual authority over such areas.

The contribution from academic debate or literature is also found to be less convincing when it comes to provide clear legal definition of “sovereign rights”. Most of the discussions focusing on how the rights are exercised and enforced. As observed above, this paper argues that no single universally accepted definition of sovereign rights. Explanation of how rights and duties should be implemented are mostly practiced both internationally and nationally. In the end, by providing continuous dissemination of the concept to all stakeholders, it is safe to assume that such comprehension may be achieved. Thus, in any

case regarding the areas with sovereign rights, all parties could see the legal issues clearly.

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