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## **Arrest and Detention of 'Boat People' in Indonesia Territory Water**

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### **Abstract**

As a Coastal State, Indonesia has full sovereignty to implement its national regulations to prevent illegal fishing in their territorial waters. One example of prevention effort can be pointed out by the arrest and detention of hundreds of 'boat people' while they were conducting illegal fishing in Derawan Islands territory waters, East Kalimantan. They did transshipment and their fishing methods were prohibited regarding to Indonesian regulations. The issue of illegal fishing will be analyzed in regard to international law and as a part of the enforcement of Coastal State sovereignty. 'Boat people' refer to a group of people who spend most of their life and do all their activities in a boat, within the territorial waters of Indonesia, Malaysia and Philippines. The 'boat people' issues would be determined from two conceptions. The first one would be nationality issue. Most of the 'boat people' were proven to be stateless while few of them have been identified as citizen of Philippines. Indonesia and Malaysia authorities denied and did not recognize them as part of their nationality. It was contrary from what 'boat people' were claiming that they were originally from Semporna, Malaysia. Indonesia itself considered 'boat people' as a foreign fishers. There will be diverse approaches in dealing with those who hold a nationality and those who do not. The second conception would be concerning to the terminology of 'traditional fishers' and 'traditional fishing rights' based on international law and national regulation, and how state practices implement it. Furthermore, there would be comparison of international practices related to traditional fishing rights based on international law.

**Keywords:** 'boat people', illegal fishing, nationality, stateless person, traditional fishing rights.

### ***Penangkapan dan Penahanan 'Orang Kapal' di Wilayah Perairan Indonesia***

#### **Abstrak**

*Sebagai negara pantai, Indonesia mempunyai kedaulatan penuh untuk mengimplementasikan kebijakan nasionalnya untuk mencegah penangkapan ikan ilegal di wilayah perairan teritorialnya. Salah satu contoh dari tindakan pencegahan adalah penangkapan dan penahanan ratusan 'manusia perahu' pada saat mereka melakukan penangkapan ikan secara ilegal di perairan kepulauan Derawan, Kalimantan Timur. Mereka melakukan transit dan penangkapan ikan dengan metode yang dilarang oleh hukum Indonesia. Isu penangkapan ikan ilegal akan dianalisa dengan hukum internasional dan sebagai bagian dari penegakan kedaulatan negara pantai. 'Manusia*

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*perahu' mengacu pada sejumlah orang yang menghabiskan sebagian besar aktivitas hidupnya dalam kapal, dalam perairan teritorial Indonesia, Malaysia dan Filipina. 'Manusia perahu' berkenaan dengan dua konsep. Pertama adalah isu nasionalitas. Kebanyakan 'manusia perahu' terbukti tidak mempunyai kewarganegaraan, sedangkan sebagian dari mereka sudah diidentifikasi sebagai warga negara Filipina. Otoritas Indonesia dan Malaysia tidak mengakui mereka sebagai bagian dari warga negara kedua negara ini. Hal ini sangat berlawanan dengan 'manusia perahu' yang melakukan klaim bahwa mereka berasal dari Semporna, Malaysia. Indonesia sendiri menganggap 'manusia perahu' sebagai penangkap ikan asing. Ada beberapa cara dalam menangani mereka yang telah mempunyai kewarganegaraan dan mana yang belum. Konsepsi kedua adalah berkenaan dengan terminologi 'penangkap ikan tradisional' dan 'hak menangkap ikan secara tradisional' berdasarkan hukum internasional dan peraturan nasional, dan bagaimana praktik negara diimplementasikan. Lebih lanjut lagi, akan ada perbandingan mengenai praktik internasional berkenaan dengan hak memancing tradisional berdasarkan hukum internasional.*

**Kata Kunci:** *'manusia perahu', illegal fishing, kebangsaan, tak berkewarganegaraan, hak nelayan tradisional.*

#### A. Introduction

In November 2014, the issue of arrest and detention of 'boat people' in Berau District, East Kalimantan became a national headlines in Indonesia's media. There were 544 people (consist of 259 adults and 288 children) had arrested while they were sailing around Derawan Island.<sup>1</sup> They were arrested by Indonesian National Army, Maritime Police and Maritime Special Security Force (formed by Ministry of Marine Affairs and Fisheries Republic of Indonesia to eliminate and deter IUU Fishing). The authorities also detained 166 units of boat they used for sailing, consist of 44 vessels and 84 crafts (sampan).<sup>2</sup>

The arrest and detention is a result of complains and gathered information from local fishers in Derawan to the Minister of Marine Affairs and Fisheries, Mrs. Susi Pudjiastuti, when she was visiting Berau District. It is said that many foreign fishers were operating in East Kalimantan water, near the main island. They use restricted fishing tools such as poison, trawl and bomb, and they operated in the location that is classified as a conservation area.<sup>3</sup> Besides, they often steal or seize the belonging of local fishers.<sup>4</sup> Mrs. Susi Pudjiastuti also stated, there were possibility that those foreign fishers did the transshipment, which is contrary to the regulation of Indonesian Fisheries Act.<sup>5</sup>

<sup>1</sup> Interview report with Mr. Selwas, Mr. Andika and Mr. Lany, as the team of Ministry of Foreign Affairs RI representatives who examine the 'Boat People' issues, in Berau District, East Kalimantan, 25-26 November 2014.

<sup>2</sup> Ibid.

<sup>3</sup> Kompas, "Minister of Marine Affairs and Fisheries, Mrs. Susi : Hundreds of 'Boat People' From the Philippines Seize Indonesia's Marine Resources (Menteri Susi : Ratusan 'Manusia Perahu' Asal Filipina Jarah Hasil Laut Indonesia)", <http://nasional.kompas.com/read/2014/11/21/15211541/Menteri.Susi.Ratusan.Manusia.Perahu.Asal.Filipina.Jarah.Hasil.Laut.Indonesia>.

<sup>4</sup> Kompas, "Local Fishers Says The 'Boat People' Often Asks Their Supplies Forcibly (Nelayan Lokal Bilang Manusia Perahu Kerap Meminta Paksa Perbekalan)", <http://nasional.kompas.com/read/2014/11/26/17121921/Nelayan.Lokal.Bilang.Manusia.Perahu.Kerap.Meminta.Paksa.Perbekalan>.

<sup>5</sup> Ibid.

All of the foreign fishers allocated in a temporary camp while being verified by the authorities. The verification process held by local government, local police officer, representatives from Ministry of Foreign Affairs, Ministry of Law Affairs and Human Rights and Ministry of Marine Affairs and Fisheries. The authorities found that those foreign fishers only speak in Bajau Language. Most of them confessed that they originally come from Semporna, Malaysia, only few declared come from Balekukup, Indonesia and few come from Bengau, the Philippines.<sup>6</sup> All of them do not have any identification or any civil documents to prove their nationality. The authorities found all of the foreign fishers have carried around Indonesian Rupiah, Malaysian Ringgit, and the Philippines Peso because they were trading in those three States.<sup>7</sup>

Malaysian Consular-General representative, came to the shelter camp after getting report from Indonesian authorities, refused to admit the 'boat people' as their citizens, because they did not have any documents to prove as Malaysian nationality.<sup>8</sup> However, the Philippines Consular-General representative who came to Derawan to do verification and identification, admitted 88 of 'boat people' as their citizens.<sup>9</sup>

The 'boat people' claimed that the only source of income came from many kind of fish

they get, that were usually sold or bartered in order to fulfill their basic needs, in other words, for economic purposes only.<sup>10</sup> The authorities found most of their fishing tools were simple fishing tackle, trawl and traditional spear.<sup>11</sup>

The final conclusion of verification process, can be assumed that their habitual residence is Semporna, Malaysia, because they have been spending most of their time, when aboard on land, in that area.<sup>12</sup> Most of them were born or were labor in Semporna. Many of them have relatives also in Semporna, and if they die, they will be buried in Semporna. They did not aware that the location they were operating is restricted according to Indonesian law and regulation. They also felt regretful and made a promise to the authorities, that they will not coming back to fishing in Indonesia Territory Water in the future. After almost 5 months being detained, Indonesian Government decided to release all of them.

#### **A. Who are 'Boat People'?**

The terminology of 'boat people' derives to classified a group of people who live in a boat and should be distinguished from 'boat people' known as a refugees or asylum seekers. 'Boat people' or 'Sea Nomads' known as a part of Bajau/Bajo Tribe, for generations have living on the ocean, rarely setting foot on land except for trading fish and buying supplies. They were highly skilled free divers, plunging to depths

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<sup>6</sup> Op.Cit, Interview report.

<sup>7</sup> Ibid.

<sup>8</sup> The Malay Online, "Sabah Police looking into report that Malaysians were arrested in East Kalimantan waters", <http://www.themalaymailonline.com>.

<sup>9</sup> Kompas, "The Philippines : 'Boat People' are only fishing for living (Filipina: Manusia Perahu Cari Ikan Hanya Untuk Makan)", <http://www.regional.kompas.com>.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid., Interview report.

<sup>12</sup> Ibid.

of 30 metres and more on a single breath, to hunt pelagic fish or search for pearls and sea cucumbers.<sup>13</sup> They were also subsisting on whatever they could harvest from the reefs, and occasionally selling their meagre catches at local markets.<sup>14</sup> Their lifestyle seemed to be driven as much by economic necessity as by the vital connection they had with the natural surroundings.<sup>15</sup>

The 'boat people' wander nomadically in the area between Indonesia, Malaysia and the Philippines waters, known as Coral Triangle. Bajau Tribe are discovered as the last true marine nomads, although many of them have been forced to settle permanently on land, but a dwindling number still call the ocean home.<sup>16</sup> They do not conceive any concept of nations, they have been a natural seafarer for centuries, sail freely in the ocean without any knowledge of maritime boundaries between states. It shall be the root of the 'boat people' issues concerning their existence versus national integrity and soon other problem followed such as nationality.

The 'boat people' now became a minority entity. Three states, Indonesia, Malaysia and the Philippines, recognize them as foreign fishers and treat them as an outsider. In the verification process, although the 'boat people' admitted their habitual residence is

Semporna, Malaysia, but Malaysian authorities keep extruded them away. However, in the case concerning sovereignty over Pulau Ligitan and Pulau Sipadan between Indonesia and Malaysia, both states mentioned 'boat people', or in this case, Bajau Tribe, to support in both arguments, their effective occupation over those disputed islands. The 'boat people' has also become a part of Indonesian and Malaysian advertisement for enticement tourism, because of their attractive and unique activity and their capability on living in the ocean.

Bajau Tribe is not the only 'boat people' remaining, there is Moken, Moklen and Urak Lawoi People, a 'sea gypsies' of Myanmar who live in the area of Andaman Sea.<sup>17</sup> The Moken are 'sea gypsies', one of three groups who have roamed the waters straddling southern Thailand and Myanmar for centuries.<sup>18</sup> They are all animists and culturally distinct from Thais and Burmese, speak their own languages and have their own set of traditions.<sup>19</sup> While the other sea gypsy groups, the Moklen and the Urak Lawoi, have integrated Thai society and acquired a modern lifestyle on land, the Moken remain semi-nomadic.<sup>20</sup> They live in boats out in the sea during the dry season, coming ashore only during the wet months.<sup>21</sup> The total population amounts to approximately 3000; 200 live on Thailand's Surin Islands and the rest in Myanmar.<sup>22</sup>

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<sup>13</sup> James Morgan, "Last of The Sea Nomads: Indonesia's Bajau Laut", <http://www.jamesmorgan.co.uk/features/bajau-laut-sea-nomads/>.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> UNESCO, "Sea Gypsies of Myanmar", <http://ngm.nationalgeographic.com/2005/04/sea-gypsies/ivanoff-text/1>.

<sup>18</sup> UNESCO, "The knowledge that saved the sea gypsies", <http://www.unesco.org/new/en/natural-sciences/priority-areas/links/biodiversity/publications/articles/the-knowledge-that-saved-the-sea-gypsies/>.

<sup>19</sup> Ibid.

<sup>20</sup> UNESCO, [http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SC/pdf/sc\\_links\\_awos\\_seaGypsies\\_EN.pdf](http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SC/pdf/sc_links_awos_seaGypsies_EN.pdf).

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

The Moken People frequently use the Surin Islands (approximately 60 km from Thailand's mainland coast) as their permanent basis and build their houses on stilts above the sea.<sup>23</sup> In 1981 Thailand Government declared the Surin Islands a protected area and established a national park, the Moken no longer have the right to continue traditional resource harvesting nor even to live within the park.<sup>24</sup> To address this issues, UNESCO supported a project implemented by the Chulalongkorn University Social Research Institute called the Local and Indigenous Knowledge Systems programme (LINKS) to provide information for the conservation of the natural and cultural heritage of the Moken and the Surin Islands.<sup>25</sup> The projects also proceed several project activities for finding a solution that benefit the indigenous communities, and the environment as well as national tourism.<sup>26</sup>

### **B. Whether 'Boat People' Conducting Illegal Fishing in Indonesia?**

As an Arcipelagic State, with a coastline length of more than 95.181 km and consist of 17.480 islands, Indonesia has difficulty to protect its water territory.<sup>27</sup> Illegal fishing is one of the biggest problem in Indonesia. The Ministry of Maritime Affairs and Fisheries of Indonesia estimates that illegal fishing costs the state

30 trillion rupiah (about 3,11 billion dollars) annually.<sup>28</sup> The number of patrol vessels in Indonesia is not adequate enough to prevent illegal fishing. Illegal fishing conducted by foreign fishing vessels is inclined to be committed in boundaries area, such as Malacca Straits, Natuna Sea or South China Sea, Northern Sulawesi Sea and Kalimantan, Arafura Sea, Southern Java Sea and Indian Ocean.<sup>29</sup>

The Government through several policies has been taking a serious measure to eradicate illegal fishing and to protect its territorial integrity. Many of foreign fishing vessels who had been caught and proven to be conducting illegal fishing in Indonesia territory water, have to envisaged a Government's harsh measures, that is to detonate and sink the vessel (based on national court judgment). Many of illegal foreign fishing vessels came from Vietnam, The Phillipines, Thailand and Malaysia.

According to Indonesian Ministry of Marine Affairs and Fisheries website, from October 2014 to October 2015 there were 107 illegal fishing vessels from several States had been sunk, specifically 39 vessels from Vietnam, 34 vessels from the Philippines, 21 vessels from Thailand, 6 vessels from Malaysia, 2 vessels from Papua New Guinea and 1 vessel from China.<sup>30</sup> Indonesia's controversial measure

<sup>23</sup> UNESCO, "A place for indigenous people in protected areas, Surin Islands, Andaman Sea, Thailand", <http://www.unesco.org/new/en/natural-sciences/priority-areas/links/biodiversity/projects/a-place-for-indigenous-people-in-protected-areas-surin-islands-andaman-sea-thailand/>.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> UNESCO, "Environment and Development in Coastal Regions and In Small Islands", [www.unesco.org/csi/pub/papers2/surin10.htm](http://www.unesco.org/csi/pub/papers2/surin10.htm).

<sup>27</sup> Dewan Kelautan Indonesia, "Indonesia has the 4th Longest Coastline (Garis Pantai Indonesia Terpanjang Keempat)", <http://www.dekin.kkp.go.id/index.php?q=news&id=20111106210310652339567237753972939794806095>.

<sup>28</sup> Asean News, "Illegal Fishing Costs Indonesia 3 Billion Dollars a Year", <http://www.aseannews.net/illegal-fishing-costs-indonesia-3-billion-dollars-a-year/>.

<sup>29</sup> Kementerian Kelautan dan Perikanan Republik Indonesia, "Ministry of Marine Affairs and Fisheries Consistently Against Illegal Fishing (KKP Konsisten Perangi Illegal Fishing)", <http://kkp.go.id/index.php/pers/kkp-konsisten-perangi-illegal-fishing/>.

<sup>30</sup> Kementerian Kelautan dan Perikanan, "Ministry of Marine Affairs and Fisheries Sinks Vietnamese Fishing Vessel (KKP Kembali

triggers objection excessively from States whose vessels were being detonated and sunk. The proceedings are in line accordance with the Fisheries Act, Article 69, Paragraph 4 (Law Number 45 Year 2009, as Amendment of Law Number 31 Year 2004 of Fisheries) which stated "The authorities and/or Fisheries Inspectors allow to conduct any special measures in form of burning and/or sinking foreign fishing vessels with sufficient preliminary evidence." Such measures considered as the enforcement of State's sovereignty. The increasing of illegal fishing shows the weakness of coastal State's maritime jurisdiction.

Another adverse impact of illegal fishing is the destruction of coral reefs and its impacts to the marine ecosystem. Many fishers use endanger fishing tools, for examples, trawl, cyanide and dynamite. Indonesia has determined a certain location considered as national marine conservation area, for instance, Derawan Coast in East Kalimantan, the place where hundreds of 'boat people' had arrested. The enthusiasm for eliminate illegal fishing has driven the government to respond any information immediately, including local fishers complaints in Derawan.

The minister accused 'boat people' did the transshipment, means that act of transferring the catch from one fishing vessel to either another fishing vessel or to a vessel used solely for the carriage of cargo.<sup>31</sup> Ministry of Marine Affairs and Fisheries of Indonesia has regulated the prohibition of transshipment in Minister Regulation Number 58/PERMEN-KP/2014. According to the verification process, only few of 'boat people' who sold the fish to the crew

of large vessel that incidentally encountered. It might be a reason of the transshipment accusation be addressed. Nonetheless, the 'boat people' cannot be said entirely innocent, because a few were prove using a trawl, although the others use a spear and fishing tackle. Indonesia now has a Minister Regulation Number 2 Year 2015 that prohibit trawl as a fishing tools use in Indonesia Fisheries Zone.

The spirit to eradicate illegal fishing is one thing to be appreciated. This has been a hard duty for the Ministry of Marine and Fishery due to so many obstacles in guarding Indonesia sovereignty in its own territory. Regardless, there is no reason for government to conduct arresting without strong evidence. One thing to consider regarding this issue is how the handling of boat people arresting ends up anticlimax.

The existence of 'boat people' in Derawan Water is not something new. They have been sailing and interacting with local resident since decades ago. The interaction of 'boat people' and local resident has not always been going well. There must have been friction and disputes especially between local resident and foreign 'boat people'. The result of verification process on the arrest of hundreds of 'boat people' revealing other issue: stateless person status and neglected community.

### **C. Whether 'Boat People' can be assumed as a Stateless Person?**

At the beginning of this paper, we already consider the situation of 'boat people' who do not have any identification paper nor any evidence such as birth certificate or passport to prove their nationality. According to the

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Tenggelamkan Kapal Asal Vietnam)", <http://kkp.go.id/index.php/berita/kkp-kembali-tenggelamkan-kapal-asal-vietam/>.

<sup>31</sup>FAO, <http://www.fao.org/docrep/003/w3591e/w3591e03.html>.

circumstances, can we assume the 'boat people' as a stateless person? To answer that question, we have to elaborate what is stateless person first.

Nationality is everyone's rights, the basic rights contained in the Universal Declaration of Human Rights. Without nationality, the individual will lose the basic rights that should be the State's obligations as pointing out in the ICCPR in Article 2 (1) which examines that "States Parties are obliged to respect and ensure the rights recognized in the present Covenant, which intended for all individuals who are in the territory and subject to its jurisdiction". That is entanglement between the state and its citizens will guarantee the realization of basic human rights of the individual. It can be realized through nationality, the other words, nationality is a legal bond between a person and a state. Nationality provides people with sense of identity, but more importantly enables them to exercise a wide range of rights.<sup>32</sup>

In international law, a condition when a person does not have nationality referred to as a stateless person. The stateless person emerged as a sort of inevitable by product of the nationalization process that began in the nineteenth century with the rise of European national movements which defined the state as a nationally homogeneous entity.<sup>33</sup> The status of stateless persons under international law into the classification of persons in need of international protection, together with refugees

and asylum-seekers (refugees and asylum seekers), returnees (ex-refugees) and internally displaced persons (people forced to leave his place of residence because of the armed conflict, international disputes, the systematic violence, natural disasters or disasters caused by human activity).

There are two international conventions concerning stateless persons, the 1954 Convention Relating to Stateless Persons and the 1961 Convention on the Reduction of statelessness. According to the Article 1 paragraph (1) Convention 1954, stateless person can be defined as the condition of someone who is not considered as a national by any State under operation of its law. The object and purpose of this article is to ensure that the stateless persons enjoy the widest possible exercise of their human rights and applies in both migration and non-migration contexts.<sup>34</sup> To determine statelessness, based on existing international standards and States practice in the area of reduction of statelessness, such ties include long-term habitual residence.<sup>35</sup> This definition also recognized in customary international law. The convention does not cover so-called *de facto* stateless persons for whom no universally accepted definition exists in international law, however, *de facto* stateless person entitled to protection under international human rights law.<sup>36</sup> Article 1 paragraph (1) 1954 Convention covers only *de jure* stateless persons.

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<sup>32</sup> UNHCR, "Protecting the Rights of Stateless Person", <http://www.unhcr.org/519e20989.html>, pg. 1.

<sup>33</sup> Miriam Rürup, "Lives in Limbo: Statelessness After Two World Wars", [http://www.ghi-dc.org/files/publications/bulletin/bu049/bu49\\_113.pdf](http://www.ghi-dc.org/files/publications/bulletin/bu049/bu49_113.pdf).

<sup>34</sup> Handbook on Protection of Stateless Persons, Under the 1954 Convention Relating to the Status of Stateless Persons, UNCHR, Geneva, 2014, <http://www.unhcr.org/53b698ab9.html>, pg. 10.

<sup>35</sup> *Ibid.*, pg. 11.

<sup>36</sup> *Ibid.*, Protecting the Rights of Stateless Person, pg. 4.

De facto statelessness has traditionally been linked to the notion of effective nationality and some participants were of the view that a person's nationality could be ineffective inside as well as outside of his or her country of nationality, accordingly, a person could be de facto stateless even if inside his or her country of nationality.<sup>37</sup> However, international law tries to conclude the definition of de facto stateless persons through many discussions. De facto stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country.<sup>38</sup> Protection in this sense refers to the right of diplomatic protection exercised by a State of nationality in order to remedy an internationally wrongful act against one of its nationals, as well as diplomatic and consular protection and assistance generally, including in relation to return to the State of nationality.<sup>39</sup>

Both the convention mentioned above cannot be applied to the situation of 'boat people'. They are not a victim of State succession, nor the victim of war or expulsion. They have chosen to live nomadically, because they supposed to live in or near the ocean. Nobody can force them to settle permanently on land. Moreover, Indonesia has accepted and recognizes many of 'boat people' who chose to become Indonesian citizens, as well as the Philippines. Indonesia and Malaysia has not ratified the convention above, however the Philippines had ratified the 1954 Convention. For that matter, it cannot be assumed that 'boat people' has an international protection

regarding stateless persons status. The situation which currently afflicts the 'boat people' should be distinguished with the situation that required to fulfill, according to 1954 Convention.

#### **D. Traditional Fishing Rights According to UNCLOS 1982**

The Philippines representatives asserted there were 88 of 'boat people' recognized as its citizenship, and according to its authorities, they did not conduct any illegal fishing in Indonesia Territory Water, because they were catching fish to be consumed by themselves. Furthermore, the Philippines representatives asked as if they can be classified as traditional fishers. As a consequences, the Philippines propose a cooperation between two States through bilateral agreement so-called Memorandum of Understanding (MOU) to provide the traditional fisheries rights.

Traditional fisheries rights conducted in Article 51 paragraph (1) UNCLOS 1982, which stated "... an archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighboring States in certain areas falling within archipelagic waters. The terms and conditions for the exercise of such rights and activities, including the nature, the extent and the areas to which they apply, shall, at the request of any of the States concerned, be regulated by bilateral agreements between them. Such rights shall not be transferred to or shared with third States or their nationals".<sup>40</sup> It provides that an archipelagic State must respect

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<sup>37</sup> *Ibid*, Handbook on Protection of Stateless Persons, pg. 5.

<sup>38</sup> *Ibid*.

<sup>39</sup> *Ibid*.

<sup>40</sup> Article 51 paragraph (1) UNCLOS 1982.



these rights of other States in certain areas of its archipelagic waters, although the exercise of such rights by other States, is to be without prejudice to the sovereignty of the archipelagic State over those waters.<sup>41</sup>

This provision was the impact where the archipelagic waters, or territorial waters measured therefrom, of an archipelagic State include areas, which previously had been considered as high seas. The archipelagic State shall give special consideration to the interests and needs of its neighboring which regard to the exploitation of living resources.<sup>42</sup> The archipelagic State has an obligation to recognize traditional fisheries rights which has been practicing before the State existed. The implementation of this article can be seen in MoU between Indonesia and Malaysia. Through the 1974 MOU involved two major issues Malaysia's conditional support of the Indonesian archipelagic concept and a Malaysia's request for a special corridor of passage.<sup>43</sup>

The second is the 1976 MOU which resulted the recognition and support from Malaysia of the Indonesian archipelagic State regime, recognition from Indonesia to the right of access and communication through Indonesian territorial waters and archipelagic waters between East and West Malaysia by sea or air for civil or military purposes, including naval and aerial maneuvers, excluding third parties, the continuation of traditional fishing in existing areas of Indonesian waters before

the application of the archipelagic regime, protection of existing cables and pipelines between East and West Malaysia and the laying of new ones after due notice, protection of other legitimate interests and the conclusion of a bilateral treaty before the final adoption of an international convention.<sup>44</sup> Indonesia ratified the MoU by the Law Number 1 Year 1983 to appreciated the bilateral cooperation between two States.

Other provision which implicitly mentioned about traditional fishing rights regulated in Article 62 paragraph (3), as follows:

“in giving access to other States to its exclusive economic zone under this article, the coastal State shall take into account all relevant factors, including, inter alia, the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of articles 69 and 70, the requirements of developing States in the sub region or region in harvesting part of the surplus and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks”.<sup>45</sup>

The article is a section of an Exclusive Economic Zone (EEZ) chapter, which examine sovereign rights of coastal States to explore and to exploit its natural resources, in this

<sup>41</sup>Satya N. Nandan and Shabtai Rosenne, *United Nations Convention on the Law of the Sea 1982, A Commentary*, Martinus Nijhoff Publishers, 1993, pg. 448.

<sup>42</sup>*Ibid.*, pg. 449.

<sup>43</sup>Polite Dyspriani, *Traditional Fishing Rights: Analysis of State Practice*, Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, The United Nations, New York, 2011, [http://www.un.org/depts/los/nippon/unff\\_programme\\_home/fellows\\_pages/fellows\\_papers/dyspriani\\_1011\\_indonesia.pdf](http://www.un.org/depts/los/nippon/unff_programme_home/fellows_pages/fellows_papers/dyspriani_1011_indonesia.pdf), pg. 60.

<sup>44</sup>*Ibid.*, pg. 61.

<sup>45</sup>Article 62 paragraph (3) UNCLOS 1982.

case, fisheries. Coastal States shall determine the quantity of allowable catch by taking into account the best scientific evidence and be responsible in performing conservation and fishery management, otherwise, the fisheries resources would be excessive exploited.<sup>46</sup> The provision in Article 62 paragraph (3) above indicate the existence of a traditional fisheries rights by referring to phrase "... States whose nationals have habitually fished in the zone ..." in particular to the interests of other developing States, known as Geographically Disadvantage States (GDS) and Land-locked States (LLS) with adjacent or opposite coast, or in the same region.

Coastal States shall give a permit to other developing States and States with special needs, such as GDS and LLS mentioned above, have access into its EEZ to harvesting its fisheries surplus. The permit can be given after the coastal States have previously identified by scientific evidence, by taking into account the economic factors and their national interests.<sup>47</sup> The coastal States has a freedom to determine which States they may give an access to exploit their surplus.<sup>48</sup>

It is important to ensure, those States which had been given access, should have habitually fished in the EEZ of the coastal States. Other requirement established in the provision of Article 62 paragraph (2), that the coastal States that does not able to exploit total allowable catch in its EEZ are allowed to provide the surplus to other States, through

bilateral agreement or any other form. The requirements for giving an access shall be made according to the law and regulations of the coastal State which consistence with UNCLOS 1982.<sup>49</sup> Those regulations indicate the sovereign rights of coastal States to maximize the exploitation of its marine natural resources by taking into account, the obligations to implement conservation measures.

According to the explanation above, can both states, Indonesia and the Philippines conclude a bilateral agreement concerning traditional fishing rights based on UNCLOS 1982? Given the narrow scope of the provisions in Article 51 stipulating that a traditional fishing right established by a bilateral agreement as a consequence of the emergence of archipelagic States regime. Meanwhile, the provisions of Article 62 paragraph (3), even though contains a phrase that indicate the existence of traditional fisheries right, difficult to implement between two states, because the provision in paragraph (2) does not apply to the exact location of fisheries zone, which is EEZ. The location where 'boat people' conducting their fishing activity was the territorial sea. Other things importance, the State which can be given the fisheries right should possess the status of GDS or LLS, and the surplus should be proven by scientific evidences and the determination of the conservation area that became an obligation of Indonesia.

A bilateral agreement concerning traditional fishing rights that the Philippines proposed cannot be applied according to

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<sup>46</sup> Donald R Rothwell and Tim Stephen, *The International Law of the Sea*, Hart Publishing, Oxford and Portland, Oregon, 2010, pg. 88.

<sup>47</sup> Louis B. Sohn and Kristen Gustafson, *The Law of the Sea in a Nutshell*, West Publishing Company, St Paul Minnesota, 1993, pg. 126.

<sup>48</sup> R.R. Churchill and A.V. Lowe, *The Law of the Sea*, Juris Publishing, Manchester University Press, Manchester, United Kingdom, 1999, pg. 290.

<sup>49</sup> Article 62 paragraph (4) UNCLOS 1982

UNCLOS 1982. Notwithstanding, the probability to conclude a bilateral agreement specifically mention traditional fishing rights is still available.

#### **E. State Practice: Bilateral Agreement on Traditional Fishing Rights**

In dealing with the recognition of fishing rights of other States, a coastal States or an archipelagic States entered into agreements or arrangements with other States to allow them to continue their fishing activities within specific areas of the its waters.<sup>50</sup> There are several state practices relating to bilateral agreement concerning traditional fishing rights as a State practice. The practice of the traditional fishing rights for Indonesian traditional fishers was regulated under bilateral arrangements between Indonesia and Australia, in 1974, 1981, 1988, and 1989.<sup>51</sup> The scope of all these arrangements was addressed to allow the Indonesian traditional fishers to continue fishing in areas within 12 nm from the Australian baselines with some conditions.<sup>52</sup> It is should be noted that these bilateral arrangements do not have obligation under the UNCLOS 1982, but it is because of the political will of Australian officials.<sup>53</sup> It was embark when seabed boundaries between Indonesia and Australia were agreed upon in the Arafura Sea and the eastern part of the Timor Sea in 1971, Australia was concerned about the activities of the Indonesian fishers who regularly sailed beyond

the agreed limits.<sup>54</sup> To ensure the continuation of the Indonesian traditional fishers in the AFZ and continental shelf on the one hand, and to protect the Australian interests on the other hand, Indonesia and Australia have entered into some bilateral agreement/arrangement.<sup>55</sup>

The bilateral agreement between two states has been stipulating in 1974 MoU Regarding the Operations of Indonesian Traditional Fishermen in Areas of the Australian Exclusive Fishing Zone (EFZ). According to the MoU, Indonesian traditional fishers are allowed to engage fisheries activities in EFZ with stipulation, the fishers should use a traditional boat, in the specific area, and catch specific fish species, which had been concluded between two States. The practice of Indonesian traditional fishers in Australian waters has been going on for centuries and has historic and cultural significance as well as economic association with islands and reefs in Australian waters, mainly for fresh water, fishing, and shelter as well as to visit grave sites.<sup>56</sup>

Indonesia traditional fishers have been practicing fisheries activity in the area, even longer that Australia itself established. Australia unilaterally changed the provision under the MoU, and diminished a several clauses due to the expansion of Australia Fishing Zone and a conversion status of the area, from traditional fishing area become national nature reserve that should be protected. The other reason is the

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<sup>50</sup> *Ibid.*, Polite Dyspriani, pg. 54.

<sup>51</sup> *Ibid.*, pg. 72.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*, pg. 69.

preservation of fishery resources particularly for specific species that previously allowed to be exploited. There also a prohibition to do activities considered as violations committed by Indonesian traditional fishers in EFZ.<sup>57</sup>

The existence of the bilateral agreement concerning traditional fishing rights between Indonesia and Australia has eventually triggered a tension between the two States, because Australia perceived that the form of MoU agreement was not illegally binding, but rather only morally binding. Many of Indonesian traditional fishers are arrested by Australian authorities because they were accused to violate Australian law and regulation concerning conservatory zone. Until now, the continuity of the MoU becomes a major issue between both States.

The interesting case is that concerning the Philippines, whereas the Philippines once have requested Indonesia to open the traditional fishing rights for Philippine fishers in Indonesia territory water.<sup>58</sup> Indonesia and the Philippines had a bilateral agreement in 1976 in which one of the clauses containing the traditional fishing rights proposed by the Philippines had been denied by the Indonesian Government.<sup>59</sup> The Philippines proposed for traditional fishing rights for pump boat and for the establishment of the possible the Philippines-Indonesia friendship Corridor at the certain

area in Sulawesi.<sup>60</sup> It was difficult to accept the Philippines' proposal for Indonesia, because to defined those categorizing pump boats activities to be recognized as traditional fishing activities are not applicable under the LOSC and common practice.<sup>61</sup>

#### **F. Definition of Traditional Fishers and Traditional Fisheries Right According to International Law**

Traditional fishing is usually restricted to local or inshore waters due to technological limitations, including the ability of local fishing communities to go farther offshore and their limited methods of which to preserve their catch.<sup>62</sup> Since artisanal or traditional fisheries are limited by access and ownership to the areas or waters where they fish, it is necessary to grant them fishing rights in order to secure the continuation of their fishing activities.<sup>63</sup> The definition and criteria of traditional fishing rights can be derived from the practices by examining the relevant regulations of some States' domestic legislation and bilateral agreements or arrangements between the States concerned.<sup>64</sup> Traditional fishing rights are defined as fishing rights granted to certain groups of fishers of a particular State who have habitually fished in certain areas over a long period.<sup>65</sup> These rights are based on the habitually practices for long ago and inherited from the previous generations.<sup>66</sup>

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<sup>57</sup> Akhmad Solihin, "Economic Rights of Indonesia Traditional Fishers in Border Area (*Hak Ekonomi Nelayan Tradisional Indonesia di Wilayah Perbatasan*)", [http://pustakahpi.kemlu.go.id/app/Volume%203,%20September-Desember%202011\\_9\\_17.PDF](http://pustakahpi.kemlu.go.id/app/Volume%203,%20September-Desember%202011_9_17.PDF).

<sup>58</sup> *Op., Cit.*, Polite Dyspriani, pg. 55.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, the location where the Phillipines proposed located at the northernmost part of the Sulu-Sulawesi Sea.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*, Polite Dyspriani, pg. 1.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*, pg. 2.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

International law does not have any specific, or comprehensively definition of traditional fishers nor traditional fisheries rights. The definition varies depending on how a coastal States formulates it in its national regulation. The terminology related to traditional fishers can be found on FAO glossary, known as small-scale fisheries and artisanal fisheries, it state "Traditional fisheries involving fishing households (as opposed to commercial companies), using relatively small amount of capital and energy, relatively small fishing vessels (if any), making short fishing trips, close to shore, mainly for local consumption. In practice, definition varies between countries, e.g. from gleaning or a one-man canoe in poor developing countries, to more than 20-m. trawlers, seiners, or long-liners in developed ones. Artisanal fisheries can be subsistence or commercial fisheries, providing for local consumption or export. They are sometimes referred to as small-scale fisheries".<sup>67</sup>

Traditional fisheries rights regulated in UNCLOS 1982 do not provide a specific definition, either in a concept or in the criteria required. The convention regulates only fisheries right as an impact of archipelagic States regime. The convention only regulates, though implicitly, the practices of habitually fishing carried out by other States in coastal States EEZ shall continue as far as comply with coastal States law and regulation, and in line with the convention itself. Nevertheless, traditional fisheries rights has been acknowledged and accepted as a part of customary international law.

### **G. Indonesian Legislations Relating to the Activities of Traditional Fishers and Definition of Traditional Fisheries Rights**

There is a legislation in Indonesia that regulates the definition of traditional fishers, though by difference terminologies. Law Number 45 Year 2009, in Article 1 paragraph 11, stated that small-scale fishers are those who live by fishing to fulfill their daily life needs, by using no more than 5 (five) gross tones (GT) scale vessel. A similar definition is provided in Article 1 paragraph 8 of Regulation of Ministry of Marine Affairs and Fisheries Number 57/PERMEN-KP Year 2004.

The Regulation Ministry of Marine Affairs and Fisheries Number 40 Year 2014 on Participation and Empowerment of Community in Managing Coastal Areas and Small Islands stated that traditional community is the fisheries community whose traditionally fishing and any other activities in specific area in the archipelagic waters consistent with international law of the sea. Similar definition found in Article 1 Paragraph 18 of Indonesian Government Draft Regulation on Localization Permits and Coastal Area and Small Islands Management.

Related to the provisions of Article 62 UNCLOS 1982, Law Number 5 Year 1983 Concerning Indonesian EEZ, in provision of Article 5 paragraph (3), stipulated "... exploration and exploitation of a natural resources in specific area within Indonesia EEZ by individual or corporations of Foreign States Government may be permitted if the quantity allowed by the Indonesian government, exceeds the capacity

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<sup>67</sup>FAO, "Small-scale and artisanal fisheries", <http://www.fao.org/fishery/topic/14753/en>.

to harvest it." However, in currently situation, because of no scientific evidence to prove any surplus in Indonesia yet, this provision has never been implemented. Indonesia does not have any specific regulation concerning traditional fisheries right, although Indonesia has concluded several bilateral agreements, with regard to the matters, with other States.

#### H. Conclusions

The issue of illegal fishing has become an international problem that urged many States to systematically response in order to protect its marine resources. The increasing of illegal fishing activities reflects the lack of enforcement of State sovereignty in its territory water. The 'boat people' had not proven to conduct any illegal fishing in Indonesia territory waters. The enthusiasm of eradicating illegal fishing leads Indonesia government to deal with 'boat people' issues, that eventually reveal other issues, which is their stateless persons status. Until now, it can be assumed that international law has no adequate solution to abolish the stateless persons status of the 'boat people'. In contrary, international law is more applicative on resolving the stateless persons issues for the refugee and asylum seeker compare to 'boat people'. It resulted from the condition of 'boat people' that have no attachment to any particular State, they are only have a habitual residence.

The 'boat people' issues should obtain a certain consideration from the three States, Indonesia, Malaysia and the Philippines in particular and international community in general. The three States should manage to cooperate to share responsibility concerning the 'boat people' issues. What Thailand has done related to the Moken people, should be

considered as a good example for resolving the issues. It applies the approach of indigenous people to overcome the issue of boat people since it has already been regulated in international law. Negligence the 'boat people' status of stateless persons is another form of human rights violations.

A comprehensive definition of traditional fishers and traditional fisheries rights has not stipulated in international law nor national law regulation and it remains unclear, so there will be a difficulty of settling the status of 'boat people' as a traditional fisher nor give them the traditional fisheries rights. Except for the 'boat people' who have been recognized by the Philippines as its citizens, the proposal to conclude a bilateral agreement between States that provide an access to traditional fishers to conduct fishing activities in the territory among three States can be realized through their political will.

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