REGULATION OF PEACEFUL PASSAGE RIGHTS IN THE TERRITORIAL SEA BASED ON THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UNCLOS)

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Abstract

The aim of this research is to conduct a detailed analysis of the regulation of innocent passage rights in territorial waters as outlined in UNCLOS (United Nations Convention on the Law of the Sea) and its practical application. This study utilizes a normative legal research methodology, incorporating legislative and case-based approaches. The findings of this study reveal that the regulation of innocent passage rights in territorial waters is governed by UNCLOS, spanning from Article 17 to Article 32. While the regulation has been extensively addressed, it is not yet fully comprehensive. There are evident ambiguities in the norms that impede the effective implementation of these regulations. The incident involving the entry of American warships into the territorial waters of the People's Republic of China, resulting in conflicts, serves as a prime example of the inadequacies in the regulation of innocent passage rights in territorial waters as outlined in UNCLOS. In this scenario, both nations hold differing interpretations of the norms within UNCLOS.

Keywords: *UNCLOS, Innocent Passage Right, Territorial Waters*

1. INTRODUCTION

The sea is an important element for humans, especially in activities related to trade, industry, traffic and power generation. These factors have also resulted in the sea being one of the things that is also very calculated in warfare strategies. Thus, controlling the legitimacy of the territory within the sea itself is crucial in order to maintain the security of coastal states. This is because if there is a siege or blockade in a country's port area, the supply of necessities such as food and others will also be cut off. The wars that took place on the sea have been going on for more than 3,000 years (Patton et al., 2021).

The regulation of the sea which was significantly recognized as a universal rule of law was only in 1982, namely the United Nations on the Law of the Sea (UNCLOS), an international treaty born from the results of a conference facilitated by the United Nations (UN). This agreement then came into force on November 16, 1994 which has been ratified by various countries such as the People's Republic of China (PRC), France, Germany, Indonesia, and many more (Ilyasa, 2020). UNCLOS itself essentially provides a reference for a country to submit delimitation of its maritime territory which can then be claimed. The method itself is through negotiations between countries that can be carried out either bilaterally or multiraterally to be written in a written agreement.

Boundary claims by each country are regulated in UNCLOS. In addition, UNCLOS also regulates Freedom of Navigation (FoN) which is defined as the freedom to sail as a key principle in the provisions of UNCLOS (Hasan & SH, 2021). The FoN principle is intended as a *"right of passage"* for the entire maritime regime established by UNCLOS. The meaning of passage itself is explained in Article 18 (2), namely: "passage shall be continuous and expeditious". In this case, it is intended as a passage only through a coastal

state, or to get to or from a port in the coastal state without stopping. As for sailing intended other than above, it can be allowed if in an urgent or emergency situation.

The UNCLOS itself recognizes 3 (three) terms for the Rights of Passage, namely:

1. Right of Innocent Passage which is a right for all ships to pass through the territorial sea as long as it does not disturb the peace, security and order of the coastal state;
2. Right of Transit Passage, which is a strait zone designated for international shipping in the area between the high seas and the exclusive economic zone;
3. Right of Archipelagic Sea Lanes Passage, which is a zone where the high seas and exclusive economic zones cross the territorial waters of an archipelagic state into the high seas or other exclusive economic zones (Lamandasa et al., 2023).

Through the regulation of maritime zones and rights of passage as stated in UNCLOS, UNCLOS has given each state the sovereignty to manage and explore the sea around them and also to respect the maritime boundaries of other states. However, these arrangements have not gone entirely well as in practice, the right of passage itself is often deviated from the UNCLOS formula, especially by states that have not ratified UNCLOS (Itasari & Mangku, 2020). One of the conflicts that has occurred related to violations of the rules of peaceful passage and territorial zone violations occurred in the case between the United States (US) and the People's Republic of China (PRC). The conflict began when warships from the US entered the South China Sea (LTS) with the aim of reviewing reclamation activities carried out by China which were deemed not to violate the principle of freedom of navigation in the international law of the sea. The US maintains that international law allows for innocent passage. However, the PRC argues that the use of US vessels for surveillance or patrol purposes is not innocent passage and thus violates the PRC's sovereignty in its territorial sea area.

Reviewing these legal issues is particularly interesting in this case in finding different interpretations between the PRC and the US of the norms in international law of the sea, particularly those in UNCLOS. The different interpretations relate to the right of free passage and the right of peaceful passage. The PRC through its national law in Article 6 of the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone, considers that in the case of military vessels carrying out activities in its territorial sea, it is required to give notification or permission from the country that owns the territory. Meanwhile, the US considers that the provision of notification or permission is not absolute because of the principle of freedom of navigation. The US statement itself is not entirely wrong because UNCLOS does not require that in order to conduct a peaceful passage, permission must be obtained first. This becomes interesting to examine further considering that UNCLOS in Article 21 requires ships to respect the national law of the coastal state, although with some limitations.

The implementation of the regulation of the right of peaceful passage in the territorial sea based on UNCLOS shows that this regulation still contains differences in interpretation of the law of the sea by the two countries, this is important to be mediated because it has the potential to create open conflict in the South China Sea if it continues and is not resolved. So based on this description, it is important to conduct further research to recognize the regulation of peaceful passage rights in the territorial sea based on UNCLOS.

1. This study focuses on two main questions: the regulatory framework for the Right of Peaceful Passage in the Territorial Sea under UNCLOS, and the mechanisms for

implementing these rights within the territorial sea as per UNCLOS. The aim of this article is to analyze the regulatory provisions related to peaceful passage in the territorial sea outlined in UNCLOS, with a specific emphasis on clarifying the details of its implementation.

2. RESEARCH METHODS

This research uses normative juridical legal research. This research is conducted by examining sources of legal materials such as legal principles, legal rules, laws and regulations, doctrines and legal teachings, legal theories, legal encyclopedias, legal dictionaries, and legal literature that have relevance to the problem. The type of approach used in writing this thesis is the Statute Approach and Case Approach. The statutory approach here is intended as an approach by examining legislation, which in this case is an international instrument related to the legal issues being analyzed. The case approach here is intended as to examine the existing cases in this study. The legal materials used in writing this thesis consist of Primary Legal Materials, namely official legal arrangements both Internationally and Nationally and Secondary Legal Materials, namely articles, books, journals, and views of legal experts relevant to the issues being discussed.

3. RESULTS AND DISCUSSION

3.1. Research Result

A. Regulation of the Right of Peaceful Passage in the Territorial Sea under UNCLOS

The right of peaceful passage in the territorial sea is a very crucial point in international law of the sea because it guarantees freedom of passage and navigation so that ships can move freely and unhindered through international waters. (Doodoh, 2018). The regulation related to the right of peaceful passage in the territorial sea itself is regulated in the United Nations Convention on the Law of the Sea (UNCLOS) through Chapter II Section 3. In Article 17, UNCLOS explains that *"… ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea*" (ships of all states, whether coastal or landlocked, enjoy the right of peaceful passage through the territorial sea). Ships of all states in the Palsal implies that this right of peaceful passage can be exercised by ships of all states whether party or non-party to UNCLOS. The Palsal also explains that regardless of whether a state is a coastal state or a landlocked state without a sea, it still has the same right to conduct peaceful passage within the territorial sea of another state (Luthfi, 2020).

The definition of peaceful passage is explained by UNCLOS through Article 19 where it is said that passage is categorized as peaceful as long as it does not harm the peace, order or security of the coastal state. This crossing must be carried out continuously, directly and as quickly as possible except in force majeure circumstances such as experiencing difficulties or providing assistance to others who are in difficult conditions (Riyadi & Sari, 2019). Furthermore, Article 19 paragraph 2 is categorized related to foreign cross-copal activities that are considered to endanger the peace, order or security of the coastal state, namely:

a. Any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal state, or in any other manner which constitutes a violation of the principles of international law as contained in the Charter of the United Nations;
b. Any exercise or practice with weapons of any kind;
c. Any act aimed at gathering information detrimental to the defense or security of the coastal state;
d. Any act of propaganda aimed at influencing the defense or security of the coastal state;
e. The launching, landing or reception of any aircraft on board a ship;
f. The launching, landing or receiving of any military equipment and supplies;
g. The loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary regulations of the coastal state;
h. Any act of intentional pollution contrary to the provisions of this convention;
i. Any fishery activity;
j. Research or survey activities;
k. Any act intended to interfere with any communication system or any coastal state facility or installation;
l. Any other activity that is not directly related to cross-border (Hadju, 2021).

Article 21 of UNCLOS explains that coastal states can make laws and regulations relating to peaceful traffic in the territorial sea as long as they are in accordance with the provisions in the convention. The regulations that can be regulated are explained in paragraph 1, namely: The safety of navigation and the regulation of maritime traffic; The protection of navigational aids and facilities and other facilities or installations; The protection of cables and pipelines; The conservation of the living resources of the sea; The prevention of infringement of the fisheries laws and regulations of the coastal State; The preservation of the environment of the coalstal State and the prevention, reduction and control of pollution thereof; Marine scientific research and hydrographic surveys; The prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coalstal State (Mandelly et al., 2022).

The coastal state itself has an obligation not to obstruct the peaceful passage of foreign shipping through its territorial sea. This obligation is stipulated in Article 24 paragraph 1 of UNCLOS, which states that the coastal state shall not: 1) Impose requirements on foreign ships which would result in the denial or diminution of the right of peaceful passage; or 2) Discriminate either formally or in fact against ships of any State or against ships carrying cargo to, from or on behalf of any State (Tetelepta et al., 2023). In relation to the right of protection for coastal states, Article 25 of UNCLOS explains in paragraph 1 that "The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent". Then in the same article in paragraph 3 it is also explained that the coastal State, without formal or actual discrimination among foreign ships, may temporarily suspend the peaceful passage of ships within a designated area of its territorial sea if such suspension is strictly necessary for its security, including the needs of weapons training. Such suspension shall take effect only after it has been duly announced.

Furthermore, Article 30 of UNCLOS states that "if any warship does not comply with the laws and regulations of the coastal State concerning passage through the

territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial seal immediately"(Jamilah & Disemadi, 2020).

Then based on Article 31 of UNCLOS, it is explained that "The flag State shall bear international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship or other government ship operated for non commercial purposes with the laws and regulations of the coastal State concerning passage through the territorial sea or with the provisions of this Convention or other rules of international law". In this case, the responsibility for supervising peaceful passage always belongs to the coastal State. With the exception of the preceding articles, this convention confirms in Article 32 that nothing in this convention reduces the immunity of warships and other government vessels operating for non-commercial purposes (Silviani, 2019).

B. Implementation of the Right of Peaceful Passage in the Territorial Sea according to UNCLOS

The development of the law of the sea today basically continues to reflect conflicts between countries that exercise unimpeded navigation, resource utilization, and or countries that exercise exclusive control over the sea adjacent to them. This is a stark contrast given that the law of the sea has been extensively regulated, yet conflicts still occur. This situation becomes an enigma, namely whether these arrangements basically work well in their application or on the contrary, in this case specifically related to the right of peaceful passage (Arifin, 2022).

The regulation of the right of peaceful passage in the territorial sea is regulated in Chapter II Section 3 of UNCLOS 1982, which basically regulates the provisions for countries to be able to compromise with foreign ships that cross their territorial sea in order to carry out their respective interests. These provisions can basically be considered successful in accommodating the sovereignty of coastal states as well as the interests of countries to cross the seas of other countries without fear of interference with each other, although not fully (Imon, 2018).

The implementation of the right to peaceful passage can be assessed through the initiatives of states, especially coastal states, in strengthening their national legislation, through international cooperation formed by states in developing initiatives and policies, and through the settlement of existing cases. In terms of international cooperation formed by states, one of the significant cooperation for the development of international law is the Joint Statement by the United States of America and the Union of Soviet Socialist Republics, September 23, 1989 (Uniform Interpretation of Norms of International Law Governing Innocent Passage). Through this statement, the two countries explicitly recognized the existence of the right of peaceful passage for warships under the conditions described in Article 19 of UNCLOS. Until now, this is even still explicitly mentioned in Article 12 of the Federal Act on the Internal Maritime Waters, Territorial Sea and Contiguous Zone of the Russian Federation.

On the other hand, although some countries have shown a form of implementation of the right of peaceful passage. There are several cases that show that the right of peaceful passage that has been regulated through UNCLOS has not fully provided protection and legal certainty for countries in the world, for example, the case between the United States (US) and the People's Republic of China (PRC). This conflict began

when a US warship entered the South China Sea (LTS). In the conflict between the People's Republic of China (PRC) and the United States (US) as explained earlier, the PRC denounced the US action as an act of violation of its sovereignty and as an act that violated its national law which stipulates that warships to cross the territorial sea require permission or notification. Basically, based on UNCLOS itself, there is not much that the PRC can do because basically the regulation of warship traffic in the territorial sea is not strictly regulated so it is prone to different interpretations. Regardless, the US warship did not take any action prohibited in UNCLOS. The only basis the PRC has to act here is based on Article 30 of UNCLOS to be able to demand the warship to leave its territorial sea immediately.

UNCLOS itself regulates the freedom of navigation and the right of peaceful passage for foreign vessels that wish to cross a coastal state. However, UNCLOS never explicitly mentions the right of passage for foreign warships (Buntoro, 2021). However, in UNCLOS itself there are basically several things that are important to note. First, Article 17 of UNCLOS which provides an understanding of the right of peaceful passage is a regulatory item under the sub-section which regulates the "rules applicable to all ships" (Jamilah & Disemadi, 2020). This in itself raises an assumption that the regulation applies to all ships, not excluding warships. Basically, once again UNCLOS has never prohibited or allowed the right of peaceful passage in the territorial sea by warships (Harahap, 2022). This of course remains a big question that will certainly continue to be questioned if there are no further developments to regulate it explicitly. However, according to the conflicts that have occurred and the reasons stated earlier, the US destroyer can be said to be legally conducting peaceful traffic in the PRC's territorial sea, as long as it has not been prohibited, and can be considered as a legitimate action, even if it seems to be a provocative action.

As the regulation of the right of peaceful passage has been mentioned in the previous section, it can be emphasized that the regulation of the right of peaceful passage in the territorial sea has not been well implemented due to the lack of relevant international regulations that comprehensively regulate and the lack of international cooperation and common understanding between states, especially the right of peaceful passage that applies to warships. Moreover, the regulation of notification or licensing of the right of peaceful passage by warships does not explicitly state whether it is permitted or prohibited, which has led to the different understanding and practices of countries. If this continues in the future, it will certainly continue the trend of inconsistency between this regulation and future practice.

4. CONCLUSION

The incident involving the entry of US warships into the territorial sea of the People's Republic of China in the South China Sea region highlights the inadequacies of the current provisions in UNCLOS. While it may be viewed as a routine test conducted by the United States against China, it cannot be deemed illegal due to the lack of explicit regulations in UNCLOS, leading to ambiguity between the two parties. In such cases, the People's Republic of China can request the warship to depart from its territorial sea promptly. The regulations concerning the right of peaceful passage in the territorial sea are outlined in Chapter II Part 3, spanning from Article 17 to Article 32 of UNCLOS. Although these regulations are comprehensive to some extent, there are still several aspects that remain unaddressed, such as the specific guidelines regarding the peaceful

passage of warships in the territorial sea. The current regulations on the right of peaceful passage are somewhat vague as they do not clearly specify whether the peaceful passage of warships in the territorial sea requires notification or permission.

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