

## EXAMINING THE STATE'S JURISDICTION IN SEXUAL ASSAULT STATELESS VICTIMS ON SHIPS ON THE HIGH SEAS

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### ABSTRACT:

Issues regarding jurisdiction over the handling of sexual assault cases, especially on the high seas, are a major concern of the international community, especially if the victim is a stateless person. They are often isolated and have limited access to legal assistance. This situation makes them one of the most vulnerable groups to sexual assault. The Stateless Convention 1954 stipulates that stateless persons can request legal protection from the state parties to the Convention. While on the high seas, UNCLOS 1982 has regulated that the flag state has jurisdiction over every activity on a ship flying its flag. However, there is no clarity regarding specific protection for stateless persons on ships. This paper will identify which jurisdictions can apply when there is a sexual assault against a stateless person on a ship on the high seas. The research method used is prescriptive normative law with a statute approach by examining laws and regulations. We argue that when it comes to ships flying a particular flag and sailing on the high seas, UNCLOS 1982 should be considered customary international law. Furthermore, when similar crimes occur, there must be a justification for intervention by other states.

**Keywords;** High Seas, Jurisdiction, Sexual Assault, Stateless Person.

### A. Introduction

Ships have become a vital means of transportation, practical for exploration and trade, or for providing aid to people in need. Amidst the various functions on the high seas, crimes such as sexual assault are not uncommon. Sexual assault is any form of sexual contact, whether verbal or non-verbal, that is committed without the victim's consent and with the aim of forcing the victim to engage in sexual activity.<sup>1</sup> An act is considered consensual when it is accepted with free will, not when physical resistance fails to occur. Sexual assault has been known since World War II, when there were many cases of sexual assault such as rape.<sup>2</sup>

<sup>1</sup> Kathleen C Basile, Kathryn Jones, and Sharon G Smith, "Sexual Assault," *The Office on Women's Health*, 2022, <https://www.womenshealth.gov/relationships-and-safety/sexual-assault-and-rape/sexual-assault>.

<sup>2</sup> Mella Fitriyatul Hilmi, "Kekerasan Seksual Dalam Hukum Internasional," *Jurist-Diction* 2, No. 6 (2019), p. 2204, <https://doi.org/10.20473/JD.V2I6.15949>.

The problem of sexual assault on board ships has been known to exist since at least 1998. Sexual assault on ships has been widely reported since 2015, where it has been recorded that there have been 450 cases of sexual assault on ships in the period from 2015 to 2022. In the year 2019 alone, up to 101 cases of sexual assault on ships have been recorded. Although in 2020 and 2021 there was a decrease of 22 cases and 11 cases, in 2023 there was an increase in the number of sexual assault cases on ships from 87 cases in 2022 to 131 cases in 2023, where the majority of the victims were passengers.<sup>3</sup> The exact number of sexual assaults on ships is likely to be higher than what is reported, as these statistics are only those reported by the United States. In addition, an estimated two out of three sexual assaults are not reported due to the complexity of the laws governing ships and the challenges of reporting and investigation.<sup>4</sup>

Due to the challenges of uncertainty regarding state authority and responsibility, the issue of jurisdiction to address cases of sexual assault on ships on the high seas is undoubtedly of concern to the international community. The ship is a closed and unique environment. It has its own set of rules and social dynamics. There are a large number of crew members and passengers on board, consisting of different languages, cultures, and nationalities. Furthermore, the issue becomes even more complicated when stateless persons are involved. In principle, it is the right of every human being to have a nationality, which is also laid down in various international legal instruments, such as the “Universal Declaration of Human Rights” (“UDHR”). However, as of July 2023, there are an estimated 4.4 million people without a nationality, commonly referred to as stateless persons.<sup>5</sup>

Stateless persons are defined as people who are not legally recognized as citizens of any country.<sup>6</sup> However, the actual number of stateless persons may be much higher,<sup>7</sup> as the

<sup>3</sup> US Department of Transportation, “Cruise Line Incident Reports” (2023), <https://www.transportation.gov/mission/safety/cruise-line-incident-reports>.

<sup>4</sup> Chris Eberhart, “Cruise Ship Rapes and Sexual Assaults Hit Record High in 2023: FBI,” *New York Post*, 2024, <https://nypost.com/2024/01/27/news/cruise-ship-rapes-and-sexual-assaults-hit-record-high-in-2023-fbi/>.

<sup>5</sup> United Nations High Commissioner for Refugees “Global Trends Report 2022” (2023), p. 5, <https://www.unhcr.org/global-trends-report-2022>.

<sup>6</sup> Tetiana Drakokhrust, “The Concept and Structure of Status of Stateless Persons - International Law Approach,” *Studia Prawnoustrojowe*, No. 59 (2023), p. 61, <https://doi.org/10.31648/SP.8582>; Andrés Ordoñez Buitrago, “Statelessness and Human Rights: The Role of the United Nations High Commissioner for Refugees (UNHCR),” *EAFIT: Journal of International Law* 2, No. 2 (2011), p. 10, <https://api.core.ac.uk/oai/oai:ojspublicaciones.eafit.edu.co:article/631>.

<sup>7</sup> Pristina Widya and Najamuddin Khairur Rijal, “The Role of the United Nations High Commissioner for Refugees (UNHCR) in Dealing with Stateless Problems in Malaysia,” *Journal of Social and Policy Issues* 2, No. 2 (2022), p. 44, <https://doi.org/10.58835/jspi.v2i2.46>.

problem of statelessness is often a "hidden issue" with no precise data available.<sup>8</sup> On average, the number of stateless persons is increasing each year, such as in 2022, when the number increased by 2% compared to the previous year. To date, the most significant numbers of stateless persons have been reported from Bangladesh (952 thousand), Côte d'Ivoire (931 thousand), Myanmar (630 thousand) and Thailand (574 thousand). The increase in the number of stateless persons is due to several reasons, including the slow pace of completion of the registration of stateless persons.<sup>9</sup> In addition, in many cases, the increase in the number of stateless persons is the result of discriminatory state legislation against certain groups of people.

There are some factors that can cause a person to become stateless, which can be divided into two categories: the factor of statelessness by birth and the factor of statelessness after birth. A person who becomes stateless by birth is usually caused by the difference in the citizenship of his or her parents and was born in a country that follows the principle of *ius sanguinis*, where in that country the citizenship of a child is determined by the citizenship of his or her parents.<sup>10</sup> On the other hand, people who become stateless after birth may be caused by various factors, such as legal conflicts arising from the granting of citizenship status,<sup>11</sup> unilateral action by the State or denaturalization for specific reasons,<sup>12</sup> a change in the territory of their country of origin,<sup>13</sup> and obstacles to administrative rules related to the acquisition, restoration or loss of citizenship status.<sup>14</sup>

The urgency of this research is due to the presence of stateless persons on the high seas, who are often isolated and have limited access to legal assistance, makes them one of the most vulnerable groups to sexual assault. Moreover, it is not uncommon for jurisdiction

<sup>8</sup> Laura van Waas, Amal de Chickera, and Ottoline Spearman, "Stateless in a Global Pandemic" (2020), p. 4, [https://files.institutesi.org/Covid19\\_Stateless\\_Impact\\_Report.pdf](https://files.institutesi.org/Covid19_Stateless_Impact_Report.pdf).

<sup>9</sup> United Nations High Commissioner for Refugees, "Global Trends Report 2022," p. 43.

<sup>10</sup> Ajeng Citra Mukti, "Pelaksanaan Pendaftaran Untuk Memperoleh Kewarganegaraan Republik Indonesia Anak Hasil Perkawinan Campuran Yang Lahir Sebelum Dan Sesudah Berlakunya Undang-Undang Nomor 12 Tahun 2006 Tentang Kewarganegaraan Republik Indonesia" (2013), pp. xiv-xv.

<sup>11</sup> Rafifrian Evandio, "Dampak Terjadinya Stateless Terhadap Kehidupan Masyarakat Etnis Rohingya Pasca Penerapan Myanmar Citizenship Law Tahun 1982" (2020), p. 13, <https://lib.ui.ac.id/detail?id=20499839&lokasi=lokal>.

<sup>12</sup> Widodo Ekatjahjana, "Masalah Kewarganegaraan Dan Tidak Berkewarganegaraan," INOVATIF: Jurnal Ilmu Hukum 2, No. 3 (2010), p. 107, <https://online-journal.unja.ac.id/jimih/article/view/205>.

<sup>13</sup> Utiyafina Mardhati Hazhin, "Aspek Kedudukan Hukum Etnis Rohingya Menurut Hukum Pengungsi Internasional (Studi Perlindungan Hukum Etnis Rohingya Di Indonesia)" (2013), pp. 77-78, <https://digilib.uns.ac.id/dokumen/34626/Aspek-Kedudukan-Hukum-Etnis-Rohingya-Menurut-hukum-pengungsi-internasional-Studi-Perlindungan-Hukum-Etnis-Rohingya-di-Indonesia>.

<sup>14</sup> Muhyiddin Syarif, "Perlindungan Hukum Kepada Non-Refugees Stateless Person Dalam Perspektif Hukum Internasional" (2019), p. 20, <http://repository.unair.ac.id/id/eprint/94220>.

to be contested when the flag state is different from the state of the perpetrator. As a result, the international community, at the national and international levels, needs to pay close attention to improving the treatment of stateless persons who are sexually assaulted on ships on the high seas and protecting their rights. This journal aims to analyze and highlight the legal complexities that arise in such situations. It also aims to identify possible legal gaps in international jurisdiction, discuss the challenges of determining the competent authority to prosecute such cases, and examine the extent to which international law protects stateless persons from sexual assault on the high seas. The problems that will be discussed in this study are to identify the legal position and challenges in addressing the problem of sexual assault against stateless victim. Then, at the end, it will analyze jurisdiction applicable to cases of sexual assault on ships on the high seas against stateless persons.

## **B. Research Method**

This research is conducted using prescriptive normative legal research, where this research seeks to describe the jurisdiction that applies when there is a sexual assault on a ship on the high seas that occurs to a stateless person. Normative legal research is primarily characterized by its reliance on secondary data sources when conducting legal studies. These sources are typically categorized into three tiers: primary legal materials, secondary legal materials, and tertiary legal materials. The approach used in this research is a statutory approach through the examination of legislation on primary legal materials, such as “the 1954 Convention Relating to the Status of Stateless Persons”, “the 1961 Convention on the Reduction of Statelessness”, and “the United Nations Convention on the Law of the Sea”. In addition, this research will also make use of secondary legal materials drawn from publications related to the law, such as "*Statelessness and Human Rights: The Role of the United Nations High Commissioner for Refugees (UNHCR)*" written by Andrés Ordoñez Buitrago or from the Internet such as unhcr.org.

## **C. Discussion**

### **1. The legal position of a stateless person**

Statelessness refers to the absence of legal recognition of nationality by any state.<sup>15</sup> Stateless persons have been in existence since the early 20th century when statelessness was recognized with the granting of Nansen passports, which were used for access to entry

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<sup>15</sup> Drakokhrust, "The Concept and Structure of Status of Stateless Persons – International Law Approach," p. 61.

and transit in other countries. In international law, stateless persons are divided into the following categories:

- a. Stateless *de jure*, which refers to people who are stateless due to the loss of their citizenship status as a result of not having been granted citizenship status at birth or not having acquired a new citizenship status.<sup>16</sup>
- b. *De facto* statelessness refers to persons who do not have the status of a citizen because they hold more than one nationality or because they are unable or unwilling, for legitimate reasons, to avail themselves of the protection of their country of origin.<sup>17</sup> Although the 1961 Convention recommends that *de facto* stateless persons be treated on an equal basis with those classified as *de jure* stateless, those who are considered *de facto* stateless do not enjoy the protection of the 1954 Convention.<sup>18</sup>

The legal status of stateless persons is governed by international law, particularly the “1954 Convention on the Status of Stateless Persons” (“CSP”) and the “1961 Convention on the Reduction of Stateless Persons” (“CRS”). The CSP governs the protection and rights of stateless persons. These include the right to an identity card, administrative assistance, travel documents, and the right not to be discriminated against.<sup>19</sup> In addition, stateless persons are also required to comply with the laws and regulations of the country where they reside. The purpose of the CSP is to provide a framework for the protection of stateless persons and to ensure that they receive the necessary rights and assistance. Meanwhile, the CRS was explicitly created to require each country to provide protection in its laws and regulations to prevent statelessness both from birth and in the future, such as by changing countries or losing nationality.<sup>20</sup> As a result, the legal status of stateless persons is often

<sup>16</sup> Widya and Rijal, “The Role of the United Nations High Commissioner for Refugees (UNHCR) in Dealing with Stateless Problems in Malaysia,” p. 44; Indira Goris, Julia Harrington, and Sebastian Köhn, “Statelessness: What It Is and Why It Matters,” *Forced Migration Review*, No. 32 (2009), p. 4, <https://www.fmreview.org/statelessness/goris-harrington-kohn>.

<sup>17</sup> Hugh Massey, “UNHCR and *De Facto* Statelessness” (2010), p. 61, <https://www.refworld.org/docid/4bbf387d2.html>.

<sup>18</sup> United Nations High Commissioner for Refugees, *Handbook on Protection of Stateless Persons* (2014), p. 44, <https://www.refworld.org/docid/53b676aa4.html>.

<sup>19</sup> Khalid Fadri Siddiq and Budi Ardianto, “Stateless Person dalam Tinjauan Hukum Nasional dan Hukum Internasional di Indonesia,” *Uti Possidetis: Journal of International Law* 1, No. 3 (2020), pp. 290–91, <https://doi.org/10.22437/up.v1i3.10873>.

<sup>20</sup> International Development Law Organization and United Nations High Commissioner for Refugees, “Addressing Statelessness Through the Rule of Law” (2022), p. 5, <https://www.idlo.int/publications/addressing-statelessness-through-rule-law>.

recognized in the national legislation of several States, which regulate the rights of stateless persons in their country.

In addition to the CSP and CRS, the fundamental rights applicable to stateless persons are also laid down in several international human rights instruments. First, the UDHR establishes everyone's right to equal treatment, the right to life and security, the right to access to justice, and the right to nationality. Second, the "Convention on the Rights of the Child" ("CRC") and the "International Covenant on Civil and Political Rights" ("ICCPR") provide rules on the right of every child to be born with a nationality and to have his or her birth registered. Third, the "International Convention on the Elimination of All Forms of Racial Discrimination" prohibits all forms of discrimination, including guaranteeing an individual's right to citizenship without discrimination. In addition, customary international law also prohibits racial discrimination against stateless persons, reinforcing the provisions of the CSP and CRS.<sup>21</sup>

In the context of sexual assault, human rights instruments also provide protection for stateless persons. For example, Article 7 of the ICCPR affirms the right of everyone to be free from torture or cruel and inhuman treatment. Indeed, the prohibition of torture, in this case sexual assault, is a *jus cogens* norm that binds states under international treaty law.<sup>22</sup>

## **2. Challenges in Addressing the Problem of Sexual Assault against Stateless Persons**

Fundamentally, international law regulates the interaction between states. Consequently, the state has always been the main subject of international law.<sup>23</sup> Thus, when a stateless person is victimized by a crime, such as sexual assault, there is often no recourse available.<sup>24</sup> This is mainly due to the fact that the victims generally have to rely on the country of their nationality in order to file a claim.<sup>25</sup> However, over time, access to redress

<sup>21</sup> *Ibid.*

<sup>22</sup> Veriena J B Rehatta, "Kekerasan Seksual Terhadap Perempuan Di Daerah Konflik (Kajian Hukum Internasional Dan Penerapannya Di Indonesia)," *SASI* 20, No. 2 (2014), p. 55, <https://doi.org/10.47268/sasi.v20i2.327>.

<sup>23</sup> Aditya Gunawan and Nellyana Roesa, "Legal Analysis of Recognition for the State Under International Law (Case Study on General Assembly of United Nation Resolution Number 2758 (XXVI) About Restoration of the Lawful Right of the People's Republic of China in United Nation)," *Jurnal Ilmiah Mahasiswa Bidang Hukum Kenegaraan* 1, No. 2 (2017), p. 106, <https://jim.usk.ac.id/kenegaraan/article/view/13094>.

<sup>24</sup> Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, Cambridge Studies in International and Comparative Law (2012), pp. 92-93, <https://doi.org/10.1017/CBO9781139096171>.

<sup>25</sup> Maria Jose Recalde-Vela, "Access to Redress for Stateless Persons Under International Law: Challenges and Opportunities," *Tilburg Law Review* 24, No. 2 (2019), p. 183, <https://doi.org/10.5334/tilr.153>.

for a crime has become less dependent on the state. Human rights law has long provided protection for stateless victims through the establishment of less State-dependent rules for access to redress, where stateless persons can seek protection despite the lack of nationality or habitual residence status. For example, in a 1999 case before the Inter-American Court of Human Rights, victims of statelessness from the Dominican Republic suffered expulsion, detention, and sexual assault. Although the Dominican Republic rejected the claim due to lack of evidence and the statelessness of the victims' identities, the Court ruled that the absence of identity did not erase their status as victims.<sup>26</sup> However, in practice, there are still many cases where stateless persons have difficulties in obtaining redress for their harms due to the need for proof of their identity,<sup>27</sup> while a person must have a legal link to citizenship in order to have a legal identity.<sup>28</sup> Furthermore, stateless victims are often discriminated against while trying to access justice.<sup>29</sup>

The consequences of being stateless can be profound. Statelessness potentially exposes a person to further human rights violations, not only violations of the right to nationality<sup>30</sup> but also other violations, such as difficulties in accessing basic rights such as education, health care, employment and freedom of movement,<sup>31</sup> or even human rights violations committed by the State authorities of their own country, as in the case of the Rohingya.<sup>32</sup> Stateless persons may also be detained for an indefinite period of time at the Immigration Department due to the lack of valid travel documents as a result of a variety of obstacles. In addition, it is not uncommon for stateless persons to be at risk of sexual assault and exploitation.<sup>33</sup>

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<sup>26</sup> Inter-American Court of Human Rights, *Expelled Dominicans and Haitians People v. the Dominican Republic*, No. 282 (Inter-American Court of Human Rights 2014), para. 182.

<sup>27</sup> Recalde-Vela, "Access to Redress for Stateless Persons Under International Law: Challenges and Opportunities," p. 197.

<sup>28</sup> International Development Law Organization and United Nations High Commissioner for Refugees, "Addressing Statelessness Through the Rule of Law," p. 4.

<sup>29</sup> *Ibid*, p. 9.

<sup>30</sup> Mark Manly and Laura van Waas, "The State of Statelessness Research: A Human Rights Imperative," *Tilburg Law Review* 19, No. 1-2 (2014), p. 3, <https://doi.org/10.1163/22112596-01902029>.

<sup>31</sup> I Putu Dwika Ariestu, "The State Responsibilities Relating to Human Rights Violations to The People with Stateless Persons Status in Rohingya Crisis," *Jurnal Magister Hukum Udayana* 7, No. 2 (2018), p. 159, <https://doi.org/https://doi.org/10.24843/JMHU.2018.v07.i02.p02>; Bureau of Population Refugees and Migration, "Gender-Based Violence Among Stateless and National Populations in the Dominican Republic" (2017), <https://2017-2021.state.gov/prm-funded-research-and-evaluation/gender-based-violence-among-stateless-and-national-populations-in-the-dominican-republic/>.

<sup>32</sup> Recalde-Vela, "Access to Redress for Stateless Persons Under International Law: Challenges and Opportunities," p. 185.

<sup>33</sup> United Nations High Commissioner for Refugees, "Statelessness Explained," *UN Refugee*, 2023, <https://www.unrefugees.org/news/statelessness-explained/>.

Studies show that stateless women are far more vulnerable to sexual assault than women with citizenship status, with 52% of stateless women more likely to be sexually assaulted than women with citizenship status.<sup>34</sup> Apart from women, stateless men are also 4% more likely to be victims of sexual assault compared to stateless men. The lack of legal documentation and legal protection for stateless persons exacerbates their vulnerability to sexual assault<sup>35</sup> and makes it more difficult for them to access justice. This is evidence that the level of vulnerability of stateless persons to legal injustice is higher than that of persons who have citizenship.

Statelessness can result in stateless persons being victimized in a variety of ways,<sup>36</sup> including through sexual assault. By virtue of the right of victims to seek and obtain reparation for the harm they have suffered, there is an obligation to provide reparation when there are acts that violate international norms and cause harm.<sup>37</sup> However, due to the fact that the victim, in this case, was a stateless person, who is considered a vulnerable person, it is not uncommon for stateless persons to be reluctant to seek redress from international organizations or associated States when they are victims of harm.<sup>38</sup> Redress is closely related to reparation. This has implications for its close relationship to the concept of access to justice. In international law, it is recognized that there is an obligation to provide all forms of reparation to which victims may have access when violations have occurred.

### **3. Jurisdiction to Address Sexual Assault Against Stateless Persons on Ships at High Seas**

#### **a. Jurisdiction when flag state and perpetrator state are parties to the CSP**

In the framework of international law, every ship must fly the flag of the country, which shows the ownership or jurisdiction of the ship, generally known as the flag state. The purpose of the flag state on the ship is to indicate which jurisdiction is applicable to the ship and who has the right to be responsible for all activities that take place on the ship. The “1982 United Nations Convention on the Law of the Sea” (“Sea Convention”) governs the maritime areas, which are divided into areas of absolute sovereignty, areas of sovereign

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<sup>34</sup> Bureau of Population Refugees and Migration, “Gender-Based Violence Among Stateless and National Populations in the Dominican Republic.”

<sup>35</sup> Office to Monitor and Combat Trafficking in Persons, “Trafficking in Persons Report 2016” (2016), p. 15, <https://2009-2017.state.gov/j/tip/rls/tiprpt/2016/258689.htm>.

<sup>36</sup> Zelda van der Velde and Rianne Letschert, “Collective Victimization of Stateless Peoples: The Added Value of the Victim Label” 19, No. 1-2 (2014), p. 285, <https://doi.org/10.1163/22112596-01902027>.

<sup>37</sup> Recalde-Vela, “Access to Redress for Stateless Persons Under International Law: Challenges and Opportunities,” p. 186.

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



rights, and areas beyond the jurisdiction of any state.<sup>39</sup> The high seas are areas beyond the territorial waters of any country.<sup>40</sup> Therefore, the jurisdiction of the flag state applies when a ship is sailing on the high seas and there are activities on board.<sup>41</sup>

Jurisdiction in the context of international law has a crucial role in the determination of the authority and responsibility of States with respect to violations or crimes, including human rights violations, especially on the high seas. The high seas are governed by the principle of freedom, which makes the high seas legal order refer to the principle of exclusive flag state jurisdiction.<sup>42</sup> The term flag state was first encountered in the *Muscat Dhows* case, which stipulates that the state has the right to decide which ships can fly its flag and also make rules regarding the granting of the right to fly the flag of the state. Each state is required to prove that the ships it has registered possess the nationality of that state. In order to be registered as a national, ships must have a real connection with the state in question. For the determination of the real connection, the Draft Provisional Articles Concerning the Regime of the High Seas, prepared by the International Law Commission (ILC), provides rules, namely that:

- 1) whether the ship is owned by the State concerned; or
- 2) more than half owned by nationals or persons lawfully resident in the State, or by an enterprise the majority of whose employees are nationals of the State; or
- 3) owned by a limited liability company incorporated under the laws of that State and having its registered office in that State.

In the future, the state will be required to provide a document stating that the ships have obtained the right to fly its flag.

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<sup>39</sup> Heryandi et al., *Hukum Laut Internasional: Pengaturan Zona Maritim Dalam United Nations Convention on the Law of the Sea 1982 Dan Dalam Peraturan Perundang-Undangan Indonesia* (2021), pp. 41–130; Ahmad Syofyan, "Illegal, Unreported, Unregulated Fishing Menurut Hukum Internasional Dan Implementasinya di Indonesia," in *Hukum Laut Internasional Dalam Perkembangan*, Vol. 3 (2015), p. 150, <http://repository.lppm.unila.ac.id/2747/>.

<sup>40</sup> Grace Carolina et al., "UNCLOS 1982 Analysis Regarding Problems of State Jurisdiction and Law Enforcement on Foreign Flag Ships," *IJRAEL: International Journal of Religion Education and Law* 2, No. 1 (2023), p. 48, <https://doi.org/10.57235/IJRAEL.V2I1.323>.

<sup>41</sup> Asri Dwi Utami, Siti Muslimah, and Ayub Torry Satriyo Kusumo, "Yurisdiksi Internasional Penanggulangan Perompakan Di Laut Lepas," *Yustisia* 3, No. 1 (2014), p. 98, <https://doi.org/10.20961/YUSTISIA.V3I1.10130>.

<sup>42</sup> Yoshifumi Tanaka, *The International Law of the Sea* (2019), p. 186, <https://doi.org/10.1017/9781108545907>.

Enforcing protection and order on the high seas depends on the concept of the nationality of ships.<sup>43</sup> According to the Sea Convention, the nationality of a ship is determined by the flag under which it is flying. Flag States exercise prescriptive jurisdiction and have jurisdiction over any ship that flies their flag, regardless of where it may be sailing.<sup>44</sup> The specificity of the flag state in having authority and jurisdiction over ships sailing on the high seas is emphasized in the international law of the sea, in particular Sea Convention. In terms of law enforcement, the flag state has jurisdiction over all persons on board. Therefore, there is a so-called floating island theory in the international law of the sea.

The law of the sea recognizes the main theory of jurisdiction over ships, namely the floating island theory. This theory is a concept used in the context of the criminal jurisdiction of a foreign ship, which emphasizes that foreign ships are considered as a legally separate territory from their home state.<sup>45</sup> Any ship flying the flag of a state means that it is part of that state's territory, which means that jurisdiction over any crime or offense that occurs on the ship lies with the flag state.<sup>46</sup> The jurisdiction of other states' courts over matters occurring on the ship is overridden, particularly on the high seas, where the jurisdiction of the flag state prevails. The exclusivity of the flag state over its jurisdiction on the high seas can also be proven by several cases in international courts, such as in *The 'Enrica Lexie' Case (Italy v. India)* the Court of Arbitration agreed that the flag state of the ship has law enforcement jurisdiction over activities that occur on the ship.

The jurisdiction of a state to prosecute a crime, in this case sexual assault, committed on the high seas is a complex issue in the context of international law. The high seas, which is an area that is not bound by the jurisdiction of any state,<sup>47</sup> ultimately results in the determination of the state that is entitled to try the perpetrator being applied to the flag state.

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<sup>43</sup> Malcolm N Shaw, *International Law* (2021), p. 1219.

<sup>44</sup> Jiancuo Qi and Pengfei Zhang, "Enforcement Failures and Remedies: Review on State Jurisdiction Over Ships at Sea," *Journal of East Asia and International Law* 14, No. 1 (2021): p. 13, <https://doi.org/10.14330/JEAIL.2021.14.1.01>.

<sup>45</sup> Gotthard Mark Gauci, "The Ship as an Extension of Flag State Territory and an Entity with Human Attributes – Is It Time to Jettison These Legal Fictions?," *International and Comparative Law Review* 21, No. 2 (2021), p. 7, <https://doi.org/10.2478/iclr-2021-0011>; Tanaka, *The International Law of the Sea*, p. 190.

<sup>46</sup> Lusy K F R Gerungan, "Yurisdiksi Teritorial Atas Kapal Asing Dalam Pencegahan Ilegal Fishing Di Wilayah Perairan Indonesia Dan Philipina," *LEX ET SOCIETATIS* 4, No. 7 (2016), p. 18, <https://doi.org/10.35796/les.v4i7.12612>.

<sup>47</sup> Jeremia Humolong Prasetya, "The Operation of Unmanned Vessel in Light of Article 94 of the Law of the Sea Convention: Seamaning Requirement," *Indonesian Journal of International Law* 18, No. 1 (2020), p. 109, <https://doi.org/10.17304/ijil.vol18.1.804>.

This is also reinforced by the principle of territoriality, where a State, particularly the flag State in this case, can claim jurisdiction over a sexual assault committed against a stateless person as the crime occurred on its territory.<sup>48</sup> The territoriality principle is one of several principles used as a basis for a State's jurisdiction over the acts of a person. However, the application of flag State jurisdiction in cases of sexual assault against stateless persons on ships on the high seas may depend on several factors, namely:

- 1) Nationality of the Ship: Flag state jurisdiction applies to ships registered in that state. If the ship involved in a sexual assault case is registered in a state, then the state has jurisdiction to handle the case.
- 2) National Laws: Flag states may have national laws governing crimes that occur on their registered ships, including cases of sexual assault. If the flag state's national laws cover such crimes, it can enforce its laws against the perpetrators.
- 3) International Conventions: Several international conventions govern crimes at sea, including sexual assault. For example, Sea Convention provides a legal framework governing the jurisdiction of states in cases of crimes at sea. Flag states can exercise their jurisdiction based on the provisions of Sea Convention or other relevant international conventions.
- 4) International Cooperation: In some cases, flag states may cooperate with other countries to address cases of sexual assault on ships on the high seas. This can involve information sharing, coordination of investigations, and joint prosecution of perpetrators.

Nevertheless, international law has evolved over time to reduce the primacy and priority of the application of the territorial principle. The development in question is the existence of the principle of nationality, where the States of the perpetrator are entitled to apply their jurisdiction to prosecute perpetrators of sexual assaults on ships on the high seas since State sovereignty is not limited to territorial jurisdiction only but also includes extraterritorial jurisdiction.<sup>49</sup>

- 1) Active personality principle emphasizes that even if the alleged crime or offense occurred outside the territory of the state concerned, each state has the right to

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<sup>48</sup> Leonard Marpaung, "Yurisdiksi Negara Menurut Hukum Internasional" (2017), p. 2, <https://diskumal.tnial.mil.id/fileartikel/artikel-20180511-152350.pdf>.

<sup>49</sup> *Ibid*, p. 1.

exercise its jurisdiction over its respective citizens.<sup>50</sup> Based on the active personality principle, the state in question does not have to extradite the citizen who committed the crime or violation to another state on the grounds that the state in question can prosecute the perpetrator under its jurisdiction.

- 1) Passive personality principle emphasizes more on its citizens who are affected by crimes or violations or become victims of crimes that occur in other states.<sup>51</sup> This principle justifies that each state has the right to protect its citizens in other countries and is authorized to punish the perpetrators in its territory if the state where the crime occurred is unwilling or unable to punish the perpetrators.

In the case of sexual assault involving a stateless person, based on Article 16 of the CSP, they may seek justice from the States concerned, either the flag state or the state of the perpetrator, as long as the State is a party to the CSP. Accordingly, the stateless victim may not only seek legal assistance from the flag state but may also seek legal assistance from the state of the perpetrator, based on the active personality principle and the CSP, as long as the state of the perpetrator is a party to the Convention.

Practically, the active personality principle is implemented by countries that have national laws to prosecute their citizens who commit crimes abroad. For example, the case of Khasanah, an Indonesian citizen who committed murder in Singapore in 2017, was tried in the Central Jakarta District Court. This is in accordance with the Indonesian Criminal Code which stipulates that Indonesian law applies to its citizens who commit crimes abroad, thus the perpetrator is not handed over to the country where the crime occurred. In this case, although the stateless victim may request the protection of the perpetrator's state and the State willing and able to try the crime, the perpetrator's state must obtain the consent of the flag state, as the flag state has exclusive jurisdiction on the high seas.<sup>52</sup>

#### **b. Jurisdiction when flag state and perpetrator state are non-parties to the CSP**

Sea Convention is an international legal instrument that specifically governs the various laws that apply at sea. This Convention was adopted in 1982 after nine years of

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<sup>50</sup> Cedric Ryngaert, *Jurisdiction in International Law*, 2nd ed., Oxford Monographs in International Law (2015), p. 104.

<sup>51</sup> Kenneth S Gallant, *International Criminal Jurisdiction: Whose Law Must We Obey?* (2022), p. 564, <https://doi.org/10.1093/oso/9780199941476.001.0001>.

<sup>52</sup> Qi and Zhang, "Enforcement Failures and Remedies: Review on State Jurisdiction Over Ships at Sea," p. 13.

negotiations from 1973 to 1982 at the Third United Nations Conference on the Law of the Sea. Sea Convention has several main objectives,<sup>53</sup> namely:

- 1) Establishes national boundaries for claiming marine areas such as the territorial zone, exclusive economic zone, continental shelf, and high seas. This rule aims to avoid disputes over territories by each state and to promote international cooperation regarding the utilization of marine resources.
- 2) Provides rules on the rights and obligations of states to use and protect marine resources. Sea Convention also regulates navigation rights, natural resource utilization rights, and the obligation of states to protect and preserve the marine environment.
- 3) Provides rules on dispute settlement mechanisms related to the law of the sea between states, including rules on dispute settlement through arbitration and the “International Tribunal for the Law of the Sea” (“ITLOS”).

Sea Convention is an international treaty that has been ratified by 168 states, demonstrating its widespread acceptance<sup>54</sup> by coastal and non-coastal states around the world. The consistent practice of many states in applying Sea Convention in various cases that have arisen at sea has also contributed to Sea Convention becoming a customary international law.<sup>55</sup> The International Court of Justice also has recognized Sea Convention as customary international law,<sup>56</sup> as reflected in several cases, such as *Nicaragua v. Honduras* in 1986 and *Romania v. Ukraine in the Black Sea Delimitation Case* in 2009.

If a stateless person is sexually assaulted on a ship whose flag state is not a party to the CSP, and the perpetrator is a national of a non-party to the CSP, law enforcement may look to Sea Convention, where the ship's flag state still has jurisdiction to investigate and prosecute the perpetrator. According to Sea Convention, the flag state is responsible for all

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<sup>53</sup> Mark Usher et al., “The United Nations Convention on the Law of the Sea and the Legal and Institutional Framework for Ocean Affairs in Belize Sustainable Marine Fisheries, Marine Aquaculture, Seafood Processing, Marine and Coastal Tourism” (2019), p. 1, <https://unctad.org/publication/united-nations-convention-law-sea-and-legal-and-institutional-framework-ocean-affairs>.

<sup>54</sup> Miguel de Serpa Soares, “High-Level Commemorative Meeting of the General Assembly to Mark the 40th Anniversary of the Adoption of the United Nations Convention on the Law of the Sea (UNCLOS)” (, 2022), p. 2. <https://www.un.org/ola/sites/www.un.org.ola/files/documents/2022/05/29042022-mss-statement-40-anniversary-unclos.pdf>.

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

<sup>56</sup> Zhengkai Mao et al., “Binding Force of Extended Continental Shelf Limits: Investigating Whether Article 76(8) of UNCLOS Constitutes Customary International Law,” *Front. Mar. Sci.* 10 (2023), p. 8, <https://doi.org/10.3389/fmars.2023.1266802>.

activities on the ship. Even if the flag state has not ratified Sea Convention, it still applies due to the fact that Sea Convention is customary international law that must be followed and adhered to by the entire international community. Sea Convention has clearly established that the flag state has full jurisdiction over its ships. Therefore, even in cases of sexual assault against stateless victims who do not have the nationality of the flag state of the ship, the flag state is still responsible for protecting everyone on board.

**c. The intervening state jurisdiction**

The high seas are an area where flag state jurisdiction is prioritized. However, in some cases, such as on refugee boats, it is difficult to identify the flag state on the ship. In fact, some ships are often found to be stateless ships. It is also not uncommon for the states involved, either the flag state or the perpetrator state, to be unwilling or unable to prosecute perpetrators of sexual assaults that occur on ships on the high seas against stateless victims. Unwilling or unable is a doctrine that asserts a state's lack of readiness or ability to take steps that can reduce the occurrence of threats.<sup>57</sup> This situation can be caused by many things. For example, the state is in an unstable condition or is in a period of conflict.

Sexual assault is a heinous act that is recognized by various international human rights laws.<sup>58</sup> Sexual assault committed against stateless victims certainly has a major impact as they are categorized as vulnerable individuals and must be protected by various international treaties such as the UDHR. Thus, there is a need for intervention from other states to prevent more serious human rights violations from occurring when the states concerned are unable or unwilling to prosecute the perpetrator.

The authority for another state's intervention in a ship, particularly a stateless ship, is set out in Article 110 Sea Convention. In addition, there are two theories that provide justification for the state's action to intervene in all actions on a stateless ship, namely:<sup>59</sup>

- 1) The Any State Theory asserts that any state can enforce its jurisdiction over ships that do not have a flag state or nationality with the justification that such action

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<sup>57</sup> Madeline Holmqvist Skantz, "The Unwilling or Unable Doctrine - The Right to Use Extraterritorial Self-Defense Against Non-State Actors" (2017), p. 32, <https://www.diva-portal.org/smash/get/diva2:1134709/FULLTEXT02.pdf>.

<sup>58</sup> Amnesty International, Council for the Development of Economic, and Social Research in Africa, Monitoring and Investigating Sexual Violence in Africa (2000), p. 5.

<sup>59</sup> Human Rights at Sea, "Insight Briefing Note: Stateless Vessels A Commercial Legal Review" (2021), p. 4, [https://www.humanrightsatsea.org/sites/default/files/media-files/2021-12/HRAS\\_Insight-Briefing-Note\\_Stateless\\_Vessels\\_JUNE\\_2021\\_SP.pdf](https://www.humanrightsatsea.org/sites/default/files/media-files/2021-12/HRAS_Insight-Briefing-Note_Stateless_Vessels_JUNE_2021_SP.pdf).

is to prevent immunity for what happens on that ship that might cause chaos on the high seas, including the possibility of human rights violations on the stateless ship. Academics mostly choose this theory since it is considered to provide more opportunities for the states to enforce their jurisdiction in order to maintain the law in the stateless ship and thus be more useful to maintain order on the high seas.

- 2) The Nexus State Theory provides justification for other states to intervene and enforce their jurisdiction on the condition that there must be a relationship between the intervening state and the stateless ship. This relationship can be with various things such as the presence of its citizens who become crew on the stateless ship.

Sexual assaults against stateless victims on the high seas are grave breaches of human rights, particularly the right to safety, security, and dignity.<sup>60</sup> The use of Any State Theory to justify another state enforcing its jurisdiction over a stateless ship becomes more legitimate in this case due to the low likelihood of humanitarian grounds being challenged. In addition, the case of *Molvan v. Attorney-General* for Palestine reinforced the justification for the intervening state. The case involved the ship *Asya*, which was found without a flag on the high seas by a British vessel. Despite flying a Turkish flag, the *Asya* eventually lowered it and flew a non-state flag upon inspection. Without proof of state identity, the British ship's actions were upheld by the Privy Council. This case confirms the right of states to inspect suspicious vessels without national identity as per Article 110 of the Sea Convention.

#### **d. Universal Jurisdiction**

In sea, universal jurisdiction accommodated in Article 100 Sea Convention regarding piracy. Besides that, this type of jurisdiction also regulated in the “*Rome Statute of the International Criminal Court 1998*” regarding of extraordinary crimes such as genocide, crimes against humanity, war crimes, and aggression. Universal jurisdiction is exclusively related to *jus cogens* and piracy.

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<sup>60</sup> United Nations High Commissioner for Refugees, “Protection from Sexual Exploitation and Abuse (PSEA)” (2023), p. 1, <https://emergency.unhcr.org/protection/protection-principles/protection-sexual-exploitation-and-abuse-psea>.

When associated with sexual assault cases against stateless person on the high seas, it is mandatory to look whether this crime fall into the situation that is governed in Sea Convention and/or Rome Statute. The measure to assess whether cases of sexual assault against stateless persons on ships on the high seas can be subject to universal jurisdiction is by referring to *jus cogens* and *erga omnes*,<sup>61</sup> once there are norms which are against conscience and all states agree on the existence of such norms, it gives rise to universal jurisdiction. At present, the crimes listed as *jus cogens* are only those set out in the Rome Statute, including torture.

Torture is an act committed by a public capacity that causes severe suffering or pain intentionally directed at a person to obtain a confession or certain information, discriminate, or punish a person. In principle, when a stateless victim is sexually assaulted on a ship on the high seas, the crime is a general criminal offense, resulting in territorial or nationality jurisdiction taking precedence. Meanwhile, in order to placing this case under universal jurisdiction, the crime needs to reach the *jus cogens* threshold, especially torture. Therefore, it is difficult to place such cases under universal jurisdiction.

#### **D. Conclusion**

In a situation where a stateless person experiences sexual assault on a ship while sailing on the high seas, there are two main legal frameworks related to the applicable jurisdiction. The CSP provides access to courts for stateless victims to states that have become parties to the Convention. Consequently, when both the flag state and the perpetrator state are state parties to the CSP and are willing to redress the harm, the stateless victim can rely on the CSP. However, if the states concerned are non-state parties to the CSP, then the stateless victim can request assistance to redress the harm to the flag state by relying on the Sea Convention as customary international law. In addition, in cases where the flag state cannot be identified, or both the flag state of the ship and the perpetrator state are unwilling or unable to enforce the law for the stateless victim, it might be considered for granting authorization to other states to intervene for reasons of humanity. However, in this case, universal jurisdiction cannot be implemented, considering the crime has not met the threshold to be categorized as torture as well as *jus cogens*.

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<sup>61</sup> Mark Chadwick, "Piracy and the Origins of Universal Jurisdiction: On Stranger Tides?," Vol. 34, *Queen Mary Studies in International Law* (2019), p. 237.



## E. Suggestion

Although there is no room for states to avoid their responsibilities in the event of a crime in their territory or committed by their citizen, it is necessary to clearly regulate the process for stateless persons to request compensation or demand a settlement for crimes that occur to them either with individuals or States. In addition, there also needs to be further action when it has been identified as to who is liable to redress it, such as providing a mechanism to access the redress of harm.

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