

# DIGEST

## INDONESIA

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### Passage Rights in Indonesian National Waters: Some Notable Cases

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#### 1. Introduction

Maritime States maintain that archipelagic State will interfere with the fluency of international navigation, since the waters, which were formerly territorial seas and high seas, have been redefined as being archipelagic waters. However, Profesor Hasjim Djalal opines that holding sovereignty over waters between islands is critical to attaining national unity for large archipelagic States.<sup>1</sup> An extension of the jurisdiction by a State may be regarded as undermining the freedom of the seas. In the course of the third United Nations Conference on the Law of the Sea, the group of archipelagic States proposed that the regime of innocent passage right should prevail over foreign ships in archipelagic waters. The proposal provided that the right of innocent passage should be guaranteed on sea lanes prescribed by the coastal State. It was, however, rejected by maritime States.

Just as the right of innocent passage is applied to the straits for international navigation, it is guaranteed in archipelagic waters. But the right of archipelagic sea lanes passage applies to only certain sea lanes. The maritime States persistently endeavor to maintain right of free passage for their ships. The position of the

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<sup>1</sup> HASJIM DJALAL, *INDONESIAN REPUBLIC'S STRUGGLE IN LAW OF THE SEA AREA 68-9* (Bandung: Publisher Bina Cipta, 1979). <available only in Indonesian>

maritime States is dynamic, resembling the opinion of archipelagic States, taking the form of establishment of a dual regime. The maritime States suggest that the passage regime, which applies to certain sea lanes, should not be a right over archipelagic sea lane passage, but that of free transit. Eventually, negotiations at the Third UN Conference on the Law of the Sea consented to the right of archipelagic sea lanes passage, which is stipulated in Article 53 of the United Nations Convention on the Law of the Sea of 1982 (“UNCLOS”).

The Republic of Indonesia as a party to the UNCLOS has already implemented the right in Law Number 6 Year 1996. It is specified in Government Regulation No. 37 (2002), regarding the right and duty of foreign ships and aircrafts, in the exercise the right of archipelagic sea lanes passage through designated archipelagic sea lanes.

The States in South East Asia were startled over ten years ago when two US military aircrafts penetrated Indonesian air space over Bawean Island and archipelagic waters within the Province of East Java. The two aircrafts from a US naval mother ship conducted manoeuvres endangering flight safety, since the air space in the area has high density of commercial aircrafts owned or operated by domestic and foreign airlines. In 2015, an Australian civil aircraft departing from Darwin (Australia) to Cebu (The Philippines) was forced to land on Sam Ratulangi air base in Manado.<sup>2</sup>

This essay is to analyze and compare some of these navigation rights applied over Indonesian national waters. These navigation rights (rights of navigation) encompass the right of innocent passage, transit and archipelagic sea lanes passage. Furthermore, some cases constituting a violation of provisions regarding the archipelagic sea lanes passage in Indonesian national waters will be discussed.

## 2. National and International Law

The waters in the inner sides of Indonesian archipelagic straight baselines are categorized as archipelagic waters. Their legal status is the same as that of territorial seas,<sup>3</sup> because they are subject to the sovereignty of Indonesia. This sovereignty

<sup>2</sup> ALKI I has ALKI branch Ia. ALKI II has no branch, but ALKI III has five branches, namely branch IIIa, branch IIIb, branch IIIc, branch IIId, branch IIIe. See Law Regulation No. 37 (2002) art. 11, ¶¶ 1-5.

<sup>3</sup> MOCHTAR KUSUMAATMADJA, INTERNATIONAL LAW OF THE SEA 195 (Bandung: Publisher Binacipta, 1978). <available only in Indonesian> See UNCLOS arts. 2 & 49. See also *Territorial Infringement, Australian Aircraft was Forced to Land on Manado*, News.liputan 6.com, Oct. 22, 2014, available at <https://www.youtube.com/watch?v=W3EJHfCbImo> (last visited on Nov. 11, 2016). <only available in Indonesian>

covers the water column, air space, seabed, subsoil and natural resources contained therein. However, Indonesia's sovereignty over these resources is not absolute, since it is accompanied by some duties stipulated in Article 4 of Law No. 6 (1996), in reference to Article 48 of the UNCLOS. Indonesia is obliged to recognize and respect the right of foreign ships to innocent passage, transit passage and archipelagic sea lanes passage.

The right of innocent passage in Indonesian territorial waters is given to foreign ships to navigate through Indonesian territorial sea and/or archipelagic waters. As a result, there are some possible sequences of events regarding foreign ships traversing Indonesian territorial waters. The first possible sequence is that the foreign ship from the high seas, merely passes through Indonesian territorial seas and/or archipelagic waters, and stops at internal waters, such as a port or roadstead. The second possible sequence is that the foreign ship leaves the port or roadstead, passes through Indonesian territorial seas and/or archipelagic waters and heads into the high seas or international waters. The third possible sequence is that the foreign ship goes from one area of the high seas to another area, passing through Indonesian territorial seas or archipelagic waters. Ships exercising the right of innocent passage must do so continuously, straightly and expeditiously. However, a foreign ship may stop and cast its anchor, as long as such activity is related to usual navigation or if such activity needs to be conducted as a result of experiences of *force majeure* or distress on the part of the foreign ship. Furthermore, the foreign ship may stop and cast its anchor if she has to come to the humanitarian aid of person, ship or aircraft in danger or distress. The foreign ship traversing Indonesian territorial waters shall not engage in activities prejudicial to the peace, order and security of Indonesia. It should not constitute any threat or use force against the sovereignty, territorial integrity or political independence of Indonesia. In brief, the foreign ship should not conduct any of the listed activities that are prohibited in Law No. 6 (1996) and the UNCLOS,<sup>4</sup> while on Indonesian territorial seas and/or archipelagic waters. The Indonesian government incorporated Article 19 (innocent passage in territorial sea), Article 38 (transit passage in straits used for international navigation), Article 45 (innocent passage in straits used for international navigation), Article 52 (innocent passage in archipelagic waters), and Article 53 (archipelagic sealanes passage) of the UNCLOS into the draft of a government regulation stipulated in 1998. But the regulation only came into force in 2002 on the basis of the Indonesian Government Regulation No. 37 (2002), governing the Indonesian archipelagic sea lanes and the existing nineteen

<sup>4</sup> Indonesian territorial seas are located at the outer sides of the archipelagic straight baselines, as stipulated in Article 48 of the UNCLOS and Law No. 6 (1996).

requirements which must be observed by a foreign ship traversing the Indonesian archipelagic sea lanes.

The right of transit passage is carried out in the straits used for international navigation, which is a part of the sea located between and connecting a part of an exclusive economic zone (“EEZ”) or high sea and another part of the EEZ or high sea.<sup>5</sup> On such straits, all types of foreign ships and aircrafts are allowed to exercise the right of transit passage. Therefore, any activity apart from the exercise of the right of transit through the strait has to be subject to other provisions of the convention.

Meanwhile, in accordance with Article 53 of the UNCLOS, the archipelagic State shall designate sea lanes and air routes thereabove, suitable for the continuous and expeditious passage of foreign ships and aircrafts through or over its archipelagic waters and the adjacent territorial sea. All ships and aircrafts enjoy the right of archipelagic passage in such sea lanes and air routes. Archipelagic passage means the exercise of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit along the international strait.

### 3. Some Passages

In order to clearly understand the three passage regimes which can be conducted in Indonesian territorial waters, it is necessary to compare the regime of innocent passage with that of archipelagic sealanes passage and transit passage. First, the three passage regimes oblige all kinds of foreign vessels to respect and obey Indonesian national laws and international regulations concerning national waters, including the regulations of navigation safety, such as the SOLAS Convention and the COLREG Regulation. The foreign ships and aircrafts traversing Indonesian national waters should follow the Government Regulation dated June 28, 2002.

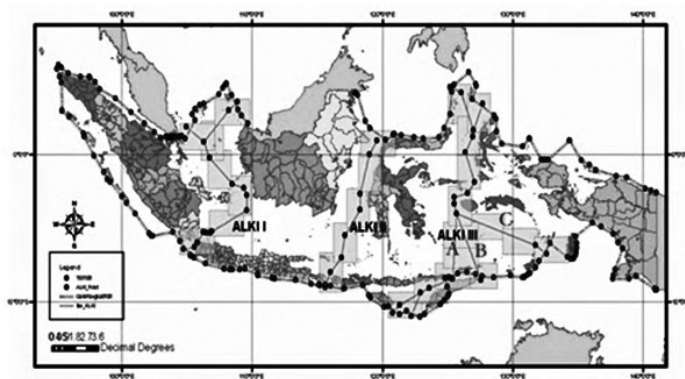
Second, the three passage regimes force all kinds of foreign ships to commit to continuous and expeditious navigation. Nevertheless, this obligation does not mean that foreign ships passing through Indonesian national waters may not stop and anchor at all, since the ship can stop and anchor as long as this activity relates to usual navigation, or if it needs to be conducted by virtue of *force majeure* or distress or to help any person, ship or aircraft in danger.<sup>6</sup>

<sup>5</sup> UNCLOS arts. 19 & 52.

<sup>6</sup> *Id.* arts. 37-45.

Third, the three passage regimes force foreign ships traversing national waters to maintain the established sea lanes and the traffic separation scheme prescribed by Indonesian Government. Five Indonesian archipelagic sea lanes (ALKI) have been in existence since 1995 by virtue of a national meeting attended by several concerned departments and institutions. The meeting produced a concept of North-South ALKI which is similar to the ALKI concept produced by the 1991 Navy Strategy Forum. The archipelagic sea lanes passage are captured in Chapter III of Law Regulation No. 37 (2002) regarding the establishment of archipelagic sea lanes.<sup>7</sup>

Figure 1: Archipelagic Sea Lanes of Indonesia



Source: Law Regulation No. 37 (2002)

The ALKIs were established by three concepts of the North-South ALKIs: (1) ALKI I with two branches in the north, begins from the South China Sea or Natuna Sea, passes through the Karimata Straits, the Java Sea, the Sunda Straits, and ke Selat Karimata, and moves to the Indian Ocean; (2) ALKI II begins from the Celebes Sea, passes through the Makassar Straits, the Flores Sea, the Lombok Straits, and heads to the Indian Ocean; and (3) ALKI III has five branches in the South including ALKI III(A), ALKI III(B), ALKI III(C), ALKI III(D) and ALKI III(E). ALKI III(A) starts from the Pacific Ocean, traverses the Moluccas Sea, the Seram Sea, the Banda Sea, the Ombai Straits, and heads to the Savu Sea. ALKI III(B) navigates from the Pacific Ocean to the Indian Ocean or alternatively, traverses the Moluccas Sea, the Seram Sea, the Banda Sea, and the Leti Straits.<sup>8</sup> ALKI III(C) is used for navigation from the

<sup>7</sup> Law Regulation No. 37 (2002) (Government Official Gazette Year 2002), art. 4, ¶ 6.

<sup>8</sup> *Id.* art. 11.

Pacific Sea to Arafura Sea or alternatively, to traverse the Moluccas Sea, the Seram Sea, and the Banda Sea.<sup>9</sup> ALKI III(D) is used for navigation from the Pacific Ocean to the Indian Ocean or alternatively, to traverse the Moluccas Sea, the Seram Sea, the Banda Sea, the Ombai Straits, and the Savu Sea.<sup>10</sup> ALKI III(E) is used for navigation from the Indian Ocean to the Celebes Sea or alternatively, to traverse the Savu Sea, the Ombai Straits, the Banda Sea, the Seram Sea and the Moluccas Sea. It is also used for navigation from the Arafura Sea to the Celebes Sea or alternatively, to traverse the Banda Sea, the Seram Sea and the Moluccas Sea.<sup>11</sup> These ALKI concepts mentioned above and Traffic Separation Scheme were submitted to the International Maritime Organization (“IMO”) to be adopted. Through three sessions of the IMO’s Maritime Safety Committee,<sup>12</sup> on May 19, 1998, ALKI concepts submitted by the Indonesian Government was adopted by the Committee of Safety Navigation.<sup>13</sup> From one direction, each ALKI has an entry point in the northern part beyond Indonesian territorial sea and exit point in the southern part beyond Indonesian territorial sea. From the other direction, each ALKI also has entry point in the southern part and exit point in the northern part. Both the entry and the exit points are absolutely determined by the location of foreign ship passing the Indonesian national waters. According to the existing provision, ALKI shall be designed by *axis lines approach* which runs continuously from the northern part to the southern part or from the southern part to the northern part through the territorial seas and archipelagic waters. [Emphasis added] Based on the axis lines approach, ALKI is a path or corridor of 25 miles in its maximum breadth, which can be used and attended by a foreign ship when it passes through the national waters of Indonesia. The foreign ship may not deviate from the limit of 25 miles on the left and the right side of its passage route.<sup>14</sup> The foreign ship may not navigate towards any coastal area of the islands which are nearest to the sea lanes or its passage routes.

Fourth, Indonesia is obliged not to hamper the passage of foreign ships since, in principle, the three passage regimes offer the right to navigate continuously and expeditiously without any obstacle, except if the law and security apparatus have strong grounds to hamper such passage. A possible reason is a violation of any law, which amounts to disturbing territorial sovereignty and integrity. If such violation

<sup>9</sup> *Id.* art. 11, ¶ 5 (a).

<sup>10</sup> *Id.* art. 11, ¶ 5 (b).

<sup>11</sup> *Id.* art. 11, ¶ 5 (c).

<sup>12</sup> *Id.* art. 11, ¶ 5 (d).

<sup>13</sup> MSC - 67 IMO on December 2-6, 1996; MSC - 43 IMO on July 14-18, 1997; MSC - 69 IMO on May 11-20, 1998.

<sup>14</sup> MSC - 69 IMO.

occurs, Indonesia shall properly notify with concerns of any danger in its territory. All the obligations or duties stipulated in the UNCLOS and Law No. 6 (1996) essentially declare the rules of international customary law, which have been confirmed through the Corfu Channel case in 1949.<sup>15</sup> These are the similarities between the three regimes of passage.

The differences among the three regimes are as follow. First, the regime of innocent passage stipulates the obligation of a submarine to emerge on the surface of the sea and show its national flag while traversing Indonesian national waters. This obligation is not applicable to any submarine traversing Indonesian national waters based on the regime of transit passage and archipelagic sea lanes passage. This means that the submarine may navigate in its normal mode (under water) in conformity with its design.<sup>16</sup>

Second, the right of innocent passage is enjoyed by foreign ship of all kinds. Foreign aircraft flying through any air route above the Indonesian territorial waters can do so following an agreement or authorization; it is not based on the right of innocent passage, since the regime of innocent passage is not applicable to the air law. On the contrary, the right of transit passage and archipelagic sea lanes passage are enjoyable by both foreign ships of all kinds and foreign aircrafts. The aircrafts may fly over the air routes existing above the Indonesian archipelagic sea lanes. However, they should not threaten or use force against the sovereignty, the territorial integrity and the political independence of Indonesia.<sup>17</sup> Also, they should not violate in any other way, the principles of international law under the UN Charter. The right of aircrafts, including military aircrafts brought by a mother ship, may traverse Indonesian archipelagic waters freely without any approval or license by the Indonesian Government, as stipulated in the UNCLOS and Law No. 6 (1996). These laws, however, may be incompatible with the 1944 Chicago Convention on International Civil Aviation, which has already become Indonesian national law. In principle, the Chicago Convention provides that the flight of foreign aircrafts through national air space may only be carried out on the basis of an approval or license by the subjacent State.<sup>18</sup> It will be applied to the Indonesian case, as well. Nevertheless, both provisions do not always contradict each other; they can be valid by virtue of *lex specialis derogat legi generali* and *lex posterior derogat legi priori*. Here, the specific law (UNCLOS or the Law No. 6 (1996)) puts the general law (Chicago Convention)

<sup>15</sup> L. GREEN, INTERNATIONAL LAW THROUGH THE CASES 228-37 (1978).

<sup>16</sup> Law Regulation No. 37 (2002), art. 4, ¶. See also UNCLOS art. 53, ¶ 3.

<sup>17</sup> Law Regulation No. 37 (2002), art. 4, ¶ 3.

<sup>18</sup> Chicago Convention art. 5.

aside, and the law later created (the UNCLOS or the Law No. 6 (1996)) puts the law previously created (Chicago Convention) aside. Further, the arrangement based on the UNCLOS and Law No. 6 (1996) relating to the right of archipelagic sea lane passage for foreign ships, particularly warships and military aircrafts, has been implemented through Government Regulation No. 37 (2002), stipulating various requirements in traversing ALKI. Foreign warships and military aircrafts shall not exercise mock warfare.<sup>19</sup> Foreign warships and aircrafts, squads and units of foreign warship, foreign nuclear-powered ship and ship carrying nuclear or other inherently dangerous or noxious substances are expected to notify the Indonesian Government in advance, the Commander-in-Chief of the Indonesian Army in this case. The advance notification by such ships is aimed at ensuring the safety of navigation and taking the early measure permitted if something unfavourable occur.

Third, the regime of innocent passage allows Indonesia to suspend the passage of foreign ships in its national waters. Whereas the regime of transit passage and archipelagic sea lanes passage do not allow the Indonesia to suspend such passage. There are several requirements to be fulfilled before a ship in innocent passage is suspended. They are as follows: (1) in certain areas of the Indonesian national waters; (2) temporarily; (3) to demonstrate the sovereignty of Indonesia over its national waters, and to guarantee navigation safety; and (4) in effect after being properly published. The Indonesian Government should not block or close certain parts of the sea without cause. If so, it is regarded as obstructing or hampering foreign ships from traversing its national waters. The Government, in this case, has a duty to provide other areas of the sea which can be used as alternative to ensure that foreign ships consistently enjoy the right to traverse Indonesian waters through the established archipelagic sea lanes.

It is pertinent at this point, to explain several important provisions concerning the implementation of the three international navigation passage regimes. Such passage regimes have a lot of similarities (besides their differences). It implies that these passages in Indonesian national waters cannot be separated from each other. Several important provisions in Government Regulations originate from a concept initiated and created by the Indonesian Navy, i.e., the Law Founding Service of the Indonesian Republic.<sup>20</sup> They are as follows:

<sup>19</sup> Law Regulation No. 37 (2002), art. 4, ¶ 4.

<sup>20</sup> Illumination of the Indonesian Sea Lanes, The Law Founding Service of Indonesian Navy, The Headquarters of the Indonesian Navy, Cilangkap, Jakarta (1998), at 2-3. <available only in Indonesian>



1. The foreign ship passing through ALKI shall neither disturb the sovereignty, territorial integrity, independence and national union of Indonesia,<sup>21</sup> nor perform activities contrary to the UN Charter.
2. The foreign warships and military aircrafts traversing the archipelagic sea lanes and air routes above the sea lanes shall not conduct any military exercise.<sup>22</sup> Except in a situation of *force majeure* or disaster, the aircraft carrying out the right of archipelagic sea lanes passage shall not land on Indonesian territory.<sup>23</sup> All foreign ships carrying out the right of archipelagic sea lanes passage shall not stop, anchor or perform any related activity, except in a situation of *force majeure* or in an attempt to aid persons or ships in disaster.<sup>24</sup> The US planes above the Bawean Island case is a violation of the sovereignty and territorial integrity of Indonesia, since the UN Charter obliges the US to honour the territorial integrity of any sovereign State. Furthermore, as a permanent member of the Security Council, the US has a solemn responsibility to maintain international peace and security.
3. Foreign warships and aircrafts should give early signal in order to ensure navigation safety if they encounter any unfavourable incident. It is suggested that they notify the Army (Military Commander in Chief) in such situations.<sup>25</sup>
4. Ships containing nuclear materials should have the security protection equipment and be in continuous contact with the Indonesian Navy in accordance with the Convention regarding Physical Protection of Nuclear Materials, in order to ensure the safety of navigation.<sup>26</sup>
5. Foreign military aircrafts and other foreign aircrafts exercising the right of archipelagic sea lanes passage shall obey any air regulation stipulated by the International Civil Aviation Organization. At all times, the aircraft shall monitor the radio frequency assigned by the internationally designated Air Traffic Control (“ATC”) authority or the appropriate international emergency radio frequency.<sup>27</sup>

<sup>21</sup> *Supra* note 20. *See also* Law Regulation No. 37 (2002), art. 4, ¶ 3.

<sup>22</sup> *Supra* note 20. *See also* Law Regulation No. 37 (2002), art. 4, ¶ 4.

<sup>23</sup> *Supra* note 20. *See also* Law Regulation No. 37 (2002), art. 4, ¶ 5.

<sup>24</sup> *Supra* note 20. *See also* Law Regulation No. 37 (2002), art. 4, ¶ 6.

<sup>25</sup> *Supra* note 20. *See also* Law Regulation No. 37 (2002), art. 9.

<sup>26</sup> *Supra* note 20. *See also* Law Regulation No. 37 (2002), arts. 6, ¶ 2 & 9, ¶ 3; UNCLOS arts. 23, 52 & 54.

<sup>27</sup> *Supra* note 20. *See also* Law Regulation No. 37 (2002), art. 8.

## 4. Case Analyses

### A. US F-18 Hornet case

As mentioned above, the US military aircrafts (F-18 Hornet) which flew in the air space above Bawean Island (East Java), violated Indonesian sovereignty. It threatened and endangered Indonesian territorial integrity without any clear notification to concerned authorities.<sup>28</sup> The Union State of Indonesian Republic has full and exclusive sovereignty over the air territory of Indonesian Republic.<sup>29</sup> The Indonesian air force is assigned the role of intercepting foreign aircrafts violating its air space. On the basis of national and international rules, the aircrafts violating the national territory of Indonesia has to be reminded and ordered to leave the territory.<sup>30</sup> If they do not comply with the authority's order but forcefully resist interception attempts by the Indonesian air force, then the use of force becomes almost inevitable. It is not clear so far, as to why the US demonstrated a show of force in Indonesia's national routes above archipelagic waters and archipelagic sea lanes. The action was just assumed to have been conducted in relation to the Indonesian Government's plan to purchase a certain number of aircrafts from Russia instead of the US. The US is of the opinion that the flight by foreign military aircrafts above Bawean island is an exercise of the right of archipelagic sea lanes passage based on freedom to fly in order to transit the air routes above archipelagic sea lanes.<sup>31</sup> However, this opinion is incorrect, because the passage is subject to national regulations based on the UNCLOS and other international treaties.<sup>32</sup> The actions of US aircrafts, such as Carl Vincent, which took off from a mother ship and conducted manoeuvres near Bawean island, endangering the safety of other flights, constitutes a show of force and threatens the sovereignty, territorial integrity, and political independence of Indonesia, as established under the UN Charter. They might not carry out duties relating to archipelagic sea lanes passage, particularly to inform and notify the ATC in Jakarta or Surabaya, because

<sup>28</sup> Law No. 1 (2009) regarding the flight, art. 5, available at <http://hubud.dephub.go.id/?id/uu> (last visited on Oct. 25, 2016). This article is in conformity with Article 1 of the Chicago Convention of 1944.

<sup>29</sup> *Id.* art. 8.

<sup>30</sup> *Id.*

<sup>31</sup> The Foundation for the Development of International Law in Asia (DILA) International Conference of 2015, was provided at Law Faculty, Hasanuddin University, on October 15-17, 2015. Hikmahanto Juwana and one of joint article's authors stated that the military aircrafts of the US over Bawean Island is contrary to the principle of archipelagic sealanes passage, since any foreign military aircraft has to attend air routes above archipelagic sea lanes established by Republic of Indonesia. See UNCLOS art. 53, ¶ 5.

<sup>32</sup> *Id.*

the US has not signed the UNCLOS yet. The US has maintained that air space above archipelagic waters and archipelagic sea lanes can be freely accessed by any State. Although the US is not a party to the UNCLOS, it shall not be an excuse to violate principles embodied in the United Nations Charter, such as respect for the freedom, sovereignty, and territorial integrity of member State (Indonesia). In this case, the Indonesian authority intercepted and asked foreign aircrafts to leave the national air space, because State owned aircraft shall have sovereign immunity. Hence, the national laws of Indonesia can not be exercised by Indonesian law enforcement agencies.<sup>33</sup> The US is obliged to show its obedience to the rules and principles of international law and apologize to the Indonesian Government according to the doctrine of imputability.<sup>34</sup>

### ***B. Australian Civil Aircraft case***

On October 22, 2015, a civil aircraft manned by two Australian citizens (Mcwine Richard, pilot and Jeklyn Paul, copilot) flew over Indonesian air space without any flight clearance. According to information, the aircraft conducted the flight from Darwin (Australia) to Cebu (Philippines).<sup>35</sup> When the aircraft traversed the height of ten thousand feet within Indonesian air space, exactly above the territory of Kupang (Province of Nusa Tenggara Timur), it was caught by the radar instrument of the National Air Defence Military Command. The aircraft was intercepted by the Indonesian military aircraft (Sukhoi) and was ordered to leave the air space of Indonesia, but did not comply. The military authority then commanded the civil aircraft to land in the Ambon air base, while it was in the air space above Ambon territory. But the pilot did not comply with the order until the Indonesian military aircraft threatened to shoot the foreign aircraft down. Eventually, the aircraft was guarded by two military aircrafts and finally forced to land on the air base in Sam Ratulangi (Manado). The actions of the Indonesian military are in line with Article 8 of Law No. 1 (2009) regarding illegal foreign flights. The article stipulates, *inter alia*, that:

Aircrafts violating the national territory of the Union State of Indonesian Republic shall

<sup>33</sup> M. AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 88-9 (4th ed., 1983).

<sup>34</sup> J. STARKE, *INTRODUCTION TO INTERNATIONAL LAW* 284-5 (9th ed. 1984). *See also* M. SHAW, *INTERNATIONAL LAW* 411-3 (1986).

<sup>35</sup> Yudho Raharjo & Daru Waskita (Yogyakarta), *Causal Factor relating to foreign aircraft chatting about Republic of Indonesia* (Penyebab Pesawat Asing Kerap 'Lecehkan' Indonesia), VIVAnews, Nov. 12, 2011, at 1, available at <http://m.news.viva.co.id/news/read/5575331> (last visited on Oct. 25, 2016).

be reminded and ordered to leave the territory concerned. If the reminder and order are not obeyed, the State aircraft shall force the aircraft concerned to go out of the national territory or restricted area or to land on a certain air base or airport in national territory.

Some views may consider that the flight of the civil aircraft, as an exercise of the right of archipelagic sea lanes passage, guarantees freedom of navigation of flights that are conducted without malice, expeditiously, continuously and without obstacles.<sup>36</sup> However, this argument is not convincing because the aim of the right of archipelagic passage is to transit from entry to exit point through designated archipelagic sea lanes.<sup>37</sup> However, the Australian civil aircraft deviated over 25 miles on both sides of the axis line of the archipelagic sea lanes, as it flew near the coasts of Nusa Tenggara Timur and Maluku Provinces. This deviation is a violation of the sovereignty, territorial integrity and national laws of Indonesia, especially the laws regarding national defense and security. There is no guarantee that the personnel manning the aircraft did not have the intention of carrying out espionage activities, which could be harmful to national interest, mainly in the defense, and security sectors. Therefore, the Indonesian authority acted legally and followed due process in intercepting the aircraft.

## 5. Conclusion

Based on all the reasons and arguments mentioned above, the following conclusions are in focus. First, the right of archipelagic sea lanes passage is an integral part of the right of innocent passage in a general sense. Since all the principles and rules applied to innocent passage are also applied to archipelagic sea lanes passage, all the ships traversing national waters are obliged to comply with all the national laws relating to the exercise of the passage rights. The right of archipelagic sea lanes passage (and transit passage) can be enjoyed by both ships and aircrafts, in that there is a link between the law of the sea and aviation law. The substantial difference between the right of innocent passage on the one hand, the rights of archipelagic sea lanes passage, and transit passage on the other, lies in the aim of each passage. Innocent passage for foreign ships is not to conduct transit from entry point to exit point, but to conduct navigation through national waters (territorial seas and archipelagic waters)

<sup>36</sup> UNCLOS art. 53, ¶ 5; Law Regulation No. 37 (2002), art. 4, ¶ 1.

<sup>37</sup> UNCLOS art. 53, ¶ 3; Law Regulation No. 37 (2002), art. 4, ¶ 2.

attending archipelagic sea lanes or out of these sea lanes. By contrast, the purpose of archipelagic sea lanes passage and transit passage for foreign ships (and aircrafts) is to conduct transit from entry point on one part of the high seas towards the exit point on another part of the high seas. When foreign ships in archipelagic sea lanes do not conduct such transit any more, the passage is then subject to the regime of innocent passage and not to the regime of archipelagic sea lanes passage.

Second, like foreign ships in archipelagic sea lanes passage, aircrafts shall not constitute any threat or use force to undermine the sovereignty and territorial integrity or carry out any other activities contrary to the principles of international law. It shall observe all the domestic laws of the coastal State, and international laws, particularly the UNCLOS which places an obligation on the aircraft flying the air routes above archipelagic sea lanes to have flight licence or clearance from the Indonesian authority. Without clearances, it has to notify the air traffic control in relation to its flight through the air routes. Refusal to notify air traffic control is a violation of the sovereignty and territorial integrity of Indonesia. In the US F-18 Hornet case, the police and related law enforcement agencies could not enforce the law in relation to the violation of Government Regulation No. 37 (2002) and Law of Flight No. 1 (2009) because the foreign military aircraft has sovereign immunity. Nevertheless, in the Australian civil aircraft case, law enforcement agencies acted decisively. The enforcement by the police and related authority is legal, since it is a civil aircraft, having no sovereign immunity. The flight is illegal because it violates the Government Regulation on archipelagic sea lanes passage, the Law of Flight and the Law of Defence and Security, particularly as it concerns espionage activity in Indonesian territory. This violation can be investigated under the extant laws and procedure.