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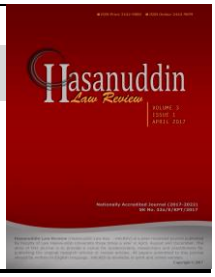

Reviewing the National Courts in Creating Orderly International Law and Community

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ABSTRACT

Orderly international community and international law are determined by a national court. Essentially, the national court must be competent to maintain the balance between the national interest which based on the national sovereignty as well as the provisions of international law within the framework of peaceful coexistence. This article reviews the role of national courts in creating and developing the customary international law. As it turns out in practice, however, it has certain weaknesses, particularly in view of the accountability and legitimacy aspects of its establishment. This purpose could be achieved if national courts were able to maintain a balance between the national interest based on the sovereignty of State on the one hand and the provisions of international law on the other. The function of the national court was to maintain a balance between international law and national law.

1. Introduction

International community as the sociological grounding of the international law lately has been undergoing major changes. The changes in politics mapping related to the political power pattern which showed by the emerged of small and independent countries after the World War II has been changing the paradigm of international law. Development in technology and the dynamics of technology transfer has brought great changes to the international community and law. In this context, a constant and continuously relationships among countries is a needed.

International relations among countries as members of the international community which based on different needs, interests and abilities as well as the desire for peaceful

coexistence need to be set and maintained.[1] Law is required in order to ensure certainty in any orderly relationship. Every country acts on the assumption that the relationship among states are governed by law and the law which governs the relations among countries is the international law.[2] In this case, international law is defined as the overall principles and rules to govern the relationships or issues cross boundaries between (a) from country to country; (b) countries with other legal subjects which are not the state or legal subject which are not one country and another.[3]

The form of international law could be a set of rules and principles which bind members of the international community, which mainly consisted of countries in their relations to one another. The object of international law is the relationship between states or cross borders (international relations).[4] International law directly regulates the overall activities of international relations among countries as a major subject of international law. International law directly affects the course of international relations and establishes order in the international community.

Recent development shows that modern states have recognized that international law is a part of domestic law. This view, "doctrine of incorporate", was originally developed in the Anglo-Saxon countries. This is in line with Monism and primacy of international law which emphasis that national law is often rooted in the international law, which is a legal instrument from the higher hierarchy. According to this concept, national law is subjected to the international law and in fact the binding force of the national law is based on a delegation of authority of international law.[5]

Basically, the majority of international community recognize the rule of (international) law which bind the international relations. The evidence that international law does exist and binds the countries in the dynamics of international relations, could be seen in some instances as follows: (1) International law is being practiced or implemented mostly by the officials of foreign countries, foreign officers, national courts and international organizations. (2) The countries that violate international law in practice do not say that they were breaking the law because the international law did not bind. (3) The majority of states obey the international law. The number of violations occurred are less than the obedience occurred. (4) The existence of legal settlement institutions, such as arbitration and various international courts always use legal arguments in dispute resolution; (5) In practice, international law could be accepted and adapted into national law states.[6]

On the other hand, according to J.G. Starke,[7] until now international remains colored by notions and application of the principles of state sovereignty (national) and territorial jurisdiction, equality independence of the perfect states and recognized by political theory which underlying the modern nation-state system. The recognition of the state sovereignty which developed from Jean Bodin's opinion and was seen as a

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1 Burke-White, W.W. (2008). "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice," *Harvard International Law Journal*, *49* (1): 53-108

2 Green, M.N.A. (1982). *International Law, Law of Peace*. London: Macdonald and Evans, page 1.

3 Kusumaatmadja, M., and Etty, R. A. (2003). *Pengantar Hukum Internasional.* Bandung: Alumni, page 4.

4 Tsani, M.B. (1990). *Hukum dan hubungan internasional.* Yogyakarta: Liberty, page 7.

5 Kusumaatmadja, M., and Etty, R. A. (2003). *Op.Cit*, page 60.

6 Sefriani. (2016). *Hukum Internasional, Sebuah Pengantar.* Jakarta: PT RajaGrafindo Persada, page 8.

7 Starke, J.G;. (1988). *Introduction To International Law.* (Translated by: Sumitro L.S Danuredjo). Jakarta: Aksara Persada Indonesia, page 7.

formal juridical sense has resulted in consideration of sovereignty as the absolute power and above the law.

Jean Bodin's doctrine of sovereignty did not only contain a denial toward the possibility of subjected and obedient countries to certain kind of law, but also raised a difficult issue in the international law.[8] This difficulty occurred mainly as a result of the function of a "national courts" in deciding issues related to violations of international law. These violations of international law referred to whether they were perpetrated by the state, the state institutions and state officials which were protected according to the international law or obtained immunity in international law.

Function of the national court in judging cases of violations of international law was based on Article 38 paragraph (1) sub d of the Statute of the International Court of Justice. The article stated that judicial decisions and the teachings of prominent scholars were the additional source of law in international law. In this case, the court has a broader sense which includes the International Court of Justice and the National Courts of the countries in the world. The decision of national courts which were related to international law issues was also important as evidence compared to what has been accepted as international law by those national courts.

In this case a national court must give a decision which could provide a balance between the creation of international legal order and national interest based on state sovereignty. [9] This was due to a national court which was an agent of the international community in creating an international legal order.[10] This dual role, according to Richard Falk, was very helpful in overcoming institutional deficiencies at the supranational level. If it happens, then it is not impossible that the international public order based on international law would be realized. The role of national courts to materialize the orderly international community which is based on the international law always collides with the recognition of the sovereignty of the state, the provision of legal protection of the state (immunity) which would eventually hamper the jurisdiction of these countries.

Assessment of the role of national courts was based on two important issues as follows. (1) Whether the order in the international community could be materialized through the conception of sovereignty, immunity and jurisdiction under international law. (2) The extent to which role of the national courts in order to realize the international community through a balance between international law and sovereignty, immunity and jurisdiction.

2. Orderly of International Community in Relation to the State Sovereignty, Jurisdiction, and Immunity Principles

International community is a form of collective life of independent and equal countries. There are two essential elements of the existence of an international community. (1)

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8 Bhakti, Y. *The Development of Sovereignty State in the International Practice*. Pro Justitia; Faculty of Law, Padjadjaran University; Bandung No. 17. March 1982; page 9.

9 Kusumaatmadja, M., and Etty, R. A. *Op.Cit*, page 151.

10 Falf, R.A. (1964). *The Role of Domestic Court In International Legal Order.* New York: Syracuse University Press, page 66.

There must be some independent countries as the members and (2) the stable and constant relationship between the members of international community.[11]

In accordance with the state as main actor of international relations, the primary concern of international law is the rights and obligations of the state as well as the interests of the state. States were expressed as a subject of international law in the first place since reality showed that states were the first to order the international relations. The rules provided by the international community could be ensured in the form of rules of conduct must be adhered to by the state to make contact.[12] The rules provided by the international community in terms of relations between countries is intended to ensure the countries to live in peace, to maintain the viability of the countries and respect their independence. It is important because the implementation of international relations shows that substantially, states implement at least three postulates: freedom, equality and effectiveness. Due to this approach, all countries are equal, free to conduct the right actions, but seldom countries may use of force, and international law provides the possibility for it.[13]

The state is the main subject of international law that has several features which among other things are as follows. (a) The state has sovereignty which is the highest authority within its borders and (b) the state determines the existence of other subject of international law, either directly or indirectly; in other words, the state is the basic entity and starting point for the formation of international community. Orderly international community and law with the state as the main subject still has an important influence due to these four important factors. (1) The state still holds the monopoly on force or power which would be reduced if it violated the national interests. (2) The pattern of national loyalties still seems to be important for the new states in political imagination. (3) The awareness of mutual destruction caused by nuclear war has been able to neutralize the inequities politics between countries. (4) The ability to neutralize the power of injustice or inequality gives greater meaning to the rejection of certain rules of international law by the small states, such as the rules that support immunity and foreign investment.[14]

Efforts to regulate on international relations among states under international law to reach the orderly international community and law could be realized through vertical Conception of International Law and horizontal Conception of International Law. Vertical Conception of International Law could be analyzed through (a) the need for maintenance of international peace which requires the presence of vertical control and (b) the vertical structure of more familiar national legal order which taken as a model for the establishment of an international legal order.

The framework has also been noted by many international law's authors who wished there would be a supranational institution to give birth of World Law and has the legislative, executive and judiciary boards to create and implement the World Law. The world's conception of law is heavily influenced by the analogy of constitutional law. The world is a sort of state law (federation) world covering all the countries in the

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11 Kusumaatmadja, M., and Etty, R. A. *Op.Cit*, page 12.

12 Tsani, M.B. *Op.Cit*, page12.

13 Sefriani. (2016). *Peran Hukum Internasional Dalam Hubungan Internasional Kontemporer*. Jakarta: PT. RajaGrafindo Persada, page 18.

14 Falk, R.A. *Op.Cit*, page 34.

world. World countries which are hierarchies is above the national states. The orderly world according to the concept was the orderly subordination law.[15]

If the legal conception of the world took place, then the position of the court decision in accordance with Article 38 paragraph (1) sub d Statute of the International Court shall have a certain binding force. This is important since according to International Court of Justice, rule of binding precedent was unknown which was clear in Article 59 that states: "The decision of the Court has no binding force expect between the parties and in respect of the particular case".

The binding strength is also considered as the national court's decision because Article 38 paragraph (1) sub d regulates the courts in the broad sense includes international tribunals and national courts. While conception Horizontal Orderly International Law is based on the principle of equality/degrees, mutual respect for independence and still provide an important position for the sovereignty of each country. International law never requires a country to ask for protection from the supra-national decision maker. The evidence of orderly international law conception could be seen concretely in the case of "S.S. Lotus" in 1927, in which the Permanent Court of International Justice argued that "The only thing that could be expected of a country was that the country never overstep the boundaries which set by international law on jurisdiction, within the limits of this right of the state to held a sovereign jurisdiction located within.[16]

State sovereignty in the international law is a supreme power possessed of a state that has always been considered contrary to the international law, particularly in realizing the orderly international community. From various literatures, it appears that Jean Bodin was the first legal expert who gave a scientific form of the state's theory of sovereignty so he could be called Father of Sovereignty Theory. For Bodin, sovereignty was the primary of any political entity which called state; without it, there would be no state's sovereignty. Therefore, sovereignty was the absolute and eternal power of the state which was not limited and could not be divided.

The above definition of sovereignty from Jean Bodin according to the author lies in the internal relations of a state which could conflict the existence of a state externally. As a member of the international community who wants order and peace in the world, it was inevitably that the state must recognize the existence of another state. The principles of independence, equality, and the right of peaceful coexistence have narrowed the scope of state sovereignty. According Boer Mauna, sovereignty was the highest authority which was owned by a state to freely carry out various activities according to its interests as long as such activities did not conflict international law.[17] Therefore, according to Kusumaatmadja and Etty,[18] sovereignty as the supreme authority contained two important limitations: (1) the power was limited to the boundaries of a state which has the sovereignty and (2) the power ended where another state power began.

In the concept of international law, sovereignty has three main aspects as follows. (1) External Aspects: the sovereignty as the form of rights for each state to freely

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15 Kusumaatmadja, M., and Etty, R. A. *Op.Cit*, page 9.
16 Falk, R.A. *Op.Cit*, page 54.
17 Mauna, B. (2001). *Hukum Internasional: Pengertian, Peranan dan Fungsi dalam Era Dinamika Global*. Bandung: Alumni, page 15.
18 *Ibid*, page 18.

determine its relationship to other states or other groups without the supervision of another state. (2) Internal Aspects: the sovereignty as the form of rights or exclusive authority of a state to determine the form of its institutions, their performance, and rights to make the needed regulation and action to comply them. (3) Aspects of Territorial: the sovereignty as the form of full and exclusive power which was owned by the state over individuals and objects inside, under, and above the region.[19]

Restrictions on the absolute power of the state in its sovereignty was developed through orderly international law conception horizontally where the state sovereignty has been narrowed by the respect for independence and equality among states as members of the international community. Therefore, according to Richard A. Falk,[20] that national courts must respect the horizontally and orderly international law by not determining the illegality of the actions of foreign governments which took place within the territory, except when such actions violated the universal standards of international law.

As a follow up of the state sovereignty, that state was given the authority to maintain order and security in its territory by establishing and running the legal provisions, either national law or international law. International law provided the authority to all states to execute all jurisdiction over people, objects, actions and things that were happening in their territories. This principle was very well stated by Lord Macmillan as follows:[21]

> "*There is an essential feature that is important from the actual sovereignty as well as the sovereign of independent state, that it should have jurisdiction over all persons and things within its borders and in all civil and criminal cases arising in the region*".

The above understanding was in line with the provisions of article 42 of "The restatement Conflict Law" which stated: A State may create or affect legal interests whenever its contacts with a person, thing or occurrence are sufficient to make such action reasonable. The power so to create or affect legal interest is "jurisdiction", as that term is used in the Restatement of this Subject".[22] International law did not limit the jurisdiction which would be carried out by each country. This was seen clearly in S.S. Lotus Case 1927, which the Permanent International Court of Justice ruled that "there are no restrictions on the jurisdiction that is run by a state, unless the restrictions have proved the existence of a principle of international law.

Issues regarding jurisdiction was often debated with the existence of international law since it was a unilateral legal action by national states in order to maintain the existence of sovereignty. On the other hand, jurisdictions were often interpreted as a weapon of war between the developed countries with high technology and the newly independent developing countries. This was an evident from the development of nationalization of foreign companies under the reason of economic recovery and the creation of international sea law norms which enabled the birth of law principles that allowed the smaller countries to have jurisdiction over their territories. International law did not limit the jurisdiction of a state's air space, including against the civilian aircrafts which strayed into another state's territory, but the shootings of civil aircrafts

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19 *Ibid.*, page 17.
20 Falk, R.A. *Op.Cit*, page 102.
21 Starke J.G. *Op.Cit*, page 184.
22 Falk, R.A. *Op.Cit*, page 33.

was contrary to the international law. In this case, there was a provision that was characterized by humanity that arbitrary killings against air passer was not allowed under international law.[23] Therefore, jurisdiction could act as a balancing process between the state's interests towards its sovereignty with the territorial limits under the interests of the international law for ensuring orderly international community. The role of national courts in relation to this jurisdiction also must maintain the balance so that the orderly international law could be maintained based on the principle of independence of the state, equality and peaceful coexistence.

The classical doctrine of state sovereignty provided the states an absolute immunity under international law. Essentially it was accepted that a state absolutely could not be prosecuted or sued in other countries if the accused government has been recognized by the government in which the claim was made. It is obvious with the adage of "*Par in parem non habet imperium*", which means that the sovereign state could not execute its jurisdiction against other the sovereign states.[24] Respect for the absolute immunity was based on the friendly reciprocal relationship as well as to maintain harmonious relations among countries. The development of states practice proved that the theory of absolute immunity was already untenable. There was a reduction to the value of the state sovereignty in relations with other sovereign states. This was due to the implementation of several legislation of a national state in practicing the inter-state relations, especially concerning the civil field.

Such developments must first be given clear limits on the qualification of the national actions. According Gautama,[25] immunity over the state sovereignty was only granted if the state acted in its quality as a country, namely the political entity (*iure imperii)*. Immunity would not be granted if the state was in *iure gestionis*, namely as a trader committed a Commercial Act. Thus, whether an independent and sovereign state could be sued before the foreign court, the answer lied in the status of the concerned state, whether it carried out the status of *iure imperii* or *iure gestionis*. Therefore, it could be said that the doctrine based on the state sovereignty could no longer be justified in the development of international law since the limitation of the state in matters concerning private matter.

Practically, this absolute immunity theory in the United States has been left after the announcement from the Ministry of Foreign Affairs through the *Tate Letter* in 1952, which in principle stated that immunity did not apply to a foreign country in the demands of the civil state or private foreign countries. This letter (*Tate Letter*) declared the shifting of wisdom in United States' Department of State of the theory of absolute immunity (which guaranteed the immunity if it was requested by the sovereign state) to Restrictive theory (which sought to distinguish between public action and private action of a sovereign state). Among others, *Tate Letter* stated as follows.

> *"A study of the law of sovereign immunity reveals the existence of two conflicting concept of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of*

[23] Greig, D.W. (1976). *International Law.* London: Butterworths, page 358.
[24] Starke, J.G. *Op.Cit*, page 176.
[25] Gautama, S. (1990). *Civil Law and International Trade.* Bandung: Alumni, page 4

sovereign is recognized with regard to sovereign or public act (jure imperii) of a state, but not with respect to private acts (jure gestionis)".[26]

Further regulation of the restrictive theory in which sovereign immunity did not be given to states which undertook private action seen in "Foreign Sovereign Immunity Acts" 1976 which no longer imposed the absolute immunity, but it was based on a restrictive immunity. According to Richard A. Falk,[27] a rejection of absolute immunity was due to two things: (1) there was an emphasis on remedial fix for participants in international trade business; and (2) in response to the changing character of the life of the international community. According to Richard A. Falk,[28] the rejection of absolute immunity due to two things: (1) there was an emphasis on remedial fix for participants in international trade business and (2) in response to the changing character of international community. This restriction would greatly assist the national courts to carry out their duties without the interference of the state's executive. Therefore, there are three additional reasons for the rejection of the immunity as follows. (a) Determination of immunity was too often determined by the dominance of the executive policy. (b) Immunity would interfere the optimum implementation of the domestic courts in the implementation of the international system. (c) Immunity was the raw rule and unable to differentiate the perfect time to restraint and to assess the competence of national courts.

3. The Role of National Courts

Article 38 paragraph (1) of the Statute of the International Court of Justice regulated the formal legal sources in international law which could be used by the court in deciding international law disputes, as well as a resource for the orderly international law. It is important since the compliance of law formalities, such as international treaties, international custom and the common law principles would largely determine the levels of orderly international law order desired. Meanwhile the international court decisions and opinions of the scholars were the additional source of international law, but it should also be adhered.

This statement was based on the provisions of Article 59 Statute of the International Criminal Court which stated that "The decision of the Court has only binding power over the parties and only relate to particular case". If it was related to the national court, the occurred issues were that the position of national courts in the orderly international law and whether a national court decision could be binding according to the international law.

Additional law sources according to Article 38 paragraph (1) sub d of the Statute of the International Court of Justice was the judicial decisions and the teachings of the most prominent scholars from various countries. In this case the meaning of court decision in Article 38 paragraph (1) sub d Statute of the International Criminal Court was a

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[26] Waring, M.C. (1965). "Waiver of Sovereign Immunity," *Jounal The Harvard International Law Club,* 2: 191.

[27]. Falk, R.A. *Op.Cit*, pages 140-142.

[28]. *Ibid,* page 143.

court in its broadest sense which included all kinds of international and national justice, including tribunals and committees of arbitration.[29]

According to Richard A. Falk,[30] a broad conception of the sources of international law should be developed to give reality to the nature and essence of the international law in the international events. International law was seen as the embodiment of all normative phenomena which created stable expectations in the international arena. Special attention was given to the norms produced by the national courts, but has never been recognized internationally or less implemented as international customs.

The recognition of the existence of national court was undoubtable. It is important because the court decisions which related to international law problems were the evidence of admission of international law principles by the national courts concerned. Therefore, polemic on the relationship between international law and national law could be balanced through the recognition of the existence of national courts in ensuring orderly international law. It is important since according to Parthina,[31] in the structure and atmosphere of modern international community, problems had more than one aspect to emphasize the international and national aspects. This situation required the international community to be consistent in governing their national law as well to act no differently towards the international law principles which regulated the same thing.

If we wished for the existence of a safe and prosperous international community, then inevitably we must admit the international laws which regulated the international community.[32] In this case the international community still had the taste and values of justice, obedience, and truth which must be upheld even though in the structure of international community, there was no supranational body served as the executor or enforcer that international law should obey. According Muladi,[33] the international community was familiar with the enforcement of international law (law of states, the law made between one state and another) that regulated the relations among nations rooted in various international treaties, internationally customary law, the principles of common law as well as jurisprudence and doctrine. Applicability of international treaties into domestic law was on the basis of indirect enforcement method/dual nature, namely the state performing ratification then followed up with the implementing legislation. International law was state-centered and was valid as a law among the legal system of independent, autonomous and sovereign states (system of sovereign states). In this context, the role of national courts would be strategically important in building an argument that was proportional to the development of international law.

Regarding the binding force of a court decision, both nationally and internationally, it could be said that law principles which put upon the decision also affected the formation of customary international law. In this case, decision of the court (international and national) has been laying the solid basis for the growth of modern international law. It is important because despite the decision of the court (national and

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29. Kusumaatmadja, *Op Cit*, page 141.
30. Falk, R.A. *Op Cit*, page 3.
31 Parthiana, I.W. (2003). *Pengantar Hukum Internasional.* Bandung: Mandar Maju, page 3.
32 *Op.Cit*, page 86.
33 Sefriani. (2016). *Op.Cit*, pages 22-23.

international) only bid and applied to the litigants, but often the legal value in it could act as the general law.

A certain fact was that in judging one international problem between the state or citizen of the state and the state or foreign citizen, the court was faced with a choice: to implement the provisions of international law or to maintain national existence by applying national laws which incriminated other state. This option became complicated when there were sharp clashes between the provisions of national law and principles of international law. According Starke,[34] the fact that the national court must prioritize the national law in any conflict with the international law did not affect the fulfillment of international obligations. As state organ, the national court was subjected to the national law even though there were international laws which were contrary to national law and should remain the primary responsibility to the state if it was in violation of international law. This means that even if the national court was subjected and always conducted its national law, but if it was a contrary to international law then the state was responsible to the international community. Therefore, the judiciary freedom in the state system became a dominant influence towards the court decisions of the state concerned. On the other hand, national courts have faced problems in terms of application of national law if the state of the national court has determined that international law has been a part of domestic law.

According to Richard A. Falk,[35] a national court must provide a balance decision between the creation of the orderly international law and the national interest based on state sovereignty. Thus, the national courts could play a double role: as an international institution in order to create order and international peacekeeping where welfare of humanity could be assured and on the other hand, the national court could maintain the existence of a sovereign state that in principle despite the orderly international law. In this case, the national courts could maintain the balance between interests of national and international law. The existence of national courts in maintaining the balance between national interests and international law could be seen in Bremen's Tobacco Case.

This the case occurred between the Dutch company (*De Verenigde Deli Maatschapijen*) who sued the Government of Indonesia and Indonesia Association of Germany Tobacco (Deutsh Indonesishen Tabaks Handels G.m.b.H). The Dutch, *De Verenigde Deli Maatschapijen*, has sued the Government of Indonesia and Indonesia Association of Germany Tobacco under the pretext (excuse) that the Indonesian Government nationalization over Dutch companies in Indonesia (Law No. 8/1958, retroactive to December 3, 1957) was not valid due to no compensation or unappropriated compensation offered. The lawsuit was filed with the court in Bremen (Germany) where Indonesian Government tried to convince the court with the argument that the act of nationalization was an act of a sovereign state in order to change the structure of Indonesian people from a colonial economic structure into the national economy of Indonesia.[36]

Regarding claims for compensation demanded by the Dutch that the compensation should be "prompt, effective and adequate", it was denied by the Indonesian

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[34] Starke, J.G. *Op cit*, page 78.
[35] Falk, R.A. *Op Cit*, page 66.
[36] Kusumaatmadja, *Op Cit*, page 64.

Government. If the proposition was accepted then, it would not be no new growing states elsewhere that would change the structure of its economy because the argument was not possible fulfilled. In this case the compensation provided by the Indonesian Government as the party that perform nationalization was based on Government Regulation No. 9/1959 which state that "certain percentage of the selling results from tobacco and other plantations would set aside for the payment of compensation".

The decision taken by District of Bremen Court (*Bremen Landesgericht*) in April 21, 1959 stated that the courts did not interfere the legality of take over and nationalization made by Indonesian Government and rejected the proposition of compensation requested by the Dutch. Decision from District of Bremen Court was later reinforced by the decision of the Highest Court of Bremen (*Bremen Oberlandesgercht*) because the plaintiffs have appealed. The treatment for foreigners and rights of foreign property was granted by international law and adhered by all the states. The fact that there were times when the host country took action against the foreigners or rights of foreign property did not mean that international law did not apply here. The truth was that in a particular circumstance, the provisions of international law on the treatment of foreigners and foreign-owned property could not be sustained due to more urgent and higher interests. [37]

On the other hand, the decision of the national court (Bremen, Germany) has affected and shifted the old norms of international law and replaced it with some new international legal norms. In this case, the Court of Bremen (district and highest courts) has been ruled out the pervious international legal norms on the payment of compensation in case of nationalization of foreign-owned property based on the principle of "prompt, effective, and adequate" with a new principle that compensation payment based on "the ability of the State" which perform nationalization. These new international legal norms were soon followed by other states in nationalizing of foreign-owned property in their country, mainly by the developing countries. Therefore, it could be said that the national courts have balanced national law (of sovereignty) and international law for the establishment of a new international legal norms followed by the states to create orderly community and international law.

4. Conclusion

Mutual interests to prosper mankind has provided sufficient support to the independent and sovereign states to create an orderly international community by respecting the rules of international law. Efforts to create orderly community and international law was carried out by combining the principles of state sovereignty and implemented the provisions of international law agreed. Restrictions on the ideology of sovereignty in international law was seen from the implementation of "Act of State Doctrine" in the national courts in the United States and European countries. Essentially, the government of a sovereign state could not be brought to justice in the state which has recognized the sovereignty of the state. This was reinforced by the implementation of restrictive immunity instead of absolute immunity which distinguished the acts of the State as *iure imperii* and *iure gestionis*.

The role of national courts in order to create and develop the orderly community and international law was essential in accordance to Article 38 paragraph (1) sub d Statute

[37] *Ibid*, pages 63-64.

of the International Court of Justice, in order to create and develop customary international law. In concrete terms, this was seen in the case of Bremen tobacco, especially in the changes of international legal principles regarding compensation in nationalization. The role of national courts in creating and developing customary international law could be achieved if national courts were able to maintain a balance between the national interest based on the sovereignty of State on the one hand and the provisions of international law on the other. The function of the national court was to maintain a balance between international law and national law.

Based on the conclusions above, suggestion as follows are offered. (1) In deciding the disputes relating to international law, the national courts in each state must keep the balance between international and national law which cored in the sovereignty of the state; and not only taking into account the national interests of the country concerned. (2) To maintain that balance, there is a need for national legislation relating to acts of the state as part of a foreign policy which could provide a guide to the court in deciding a dispute relating to international law.

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