

Dimensions of National Defence Perspective in International Law

Jeffrey Alexander Ch. Likadja¹, Muhammad Ashri², Juajir Sumardi³,
Marwati Riza⁴

¹(Doctoral Student, Postgraduate of Hasanuddin University, Makassar, Indonesia)

^{2,3,4}(Professor, Faculty of Law, Hasanuddin University, Makassar, Indonesia)

ABSTRACT: *The identity of a nation is sometimes measured by the availability existence of military force capability with the availability of sophisticated and latest military equipment, which can be utilized to preserve and defend the territorial integrity, particularly in confronting any threats and security problems internationally, regionally and nationally. The dynamics of the security situation in the region is unstable and various forms of real threats such as terrorism efforts, radicalism, territorial violations and theft of natural resources, is the proof that the country's military strength is very weak and unable to stem and cope the threat. Therefore, Indonesia needs to revitalize the power of national armaments, as an essential element in supporting and defending the sovereignty of the state, involving the power of all components in a defense system that is universal and able to support Indonesia as World Maritime Shaft.*

Keywords: *revitalization of military force, universal defense system, state sovereignty*

I. INTRODUCTION

Consideration on geopolitical situation and dynamics occurs in the Asia Pacific region is the basis of numerous states in preparing and organizing national defense strategy respectively especially in arranging the strategic policies to determine the national defense system possible to encounter the threats of the modern dimension of Hybrids war. Disputes in the South China Sea, East China Sea, the Korean Peninsula, and the tension in some border areas, is classified as threat that has not been yet necessary to obtain attention and be addressed wisely.

The development of the Asia-Pacific region is very dynamic, it will have very complex challenges and potential conflicts between states, further have an impact on the security issues and obviously to defense of a state. India and China as state of over 1 billion inhabitants, modern military technology, has a Human Resources (hereinafter abbreviated HR) large military certainly has an enormous influence in the field of economics and politics in the region and even globally (Buku Putih Pertahanan Indonesia)[1].

China with high economic growth and modernization of its military, as well as the movement of a counterweight conducted by the United States through three initiatives in the Asia Pacific region: security with military power, economic with the *Trans-Pacific Partnership* (TPP) to offset the *Regional Comprehensive Economic Partnership* (RCEP) and *Diplomacy Engagement*, can affect the security and stability in the Asia Pacific region (Buku Putih Pertahanan Indonesia)[2].

Measures of China which claims occupation for almost 90% of the South China Sea with the concept of *nine dash lines* and the concept of sovereignty in the Artificial Island (<http://internasional.kompas.com/>)[3], led to a dispute with the five coastal states such as Vietnam, Malaysia, Brunei Darussalam, Philippines, Taiwan (<http://internasional.kompas.com/>)[4]. Post verdict of *Permanent Court of Arbitration* (PCA), which asserts that "China has violated the sovereign rights of the Philippines in its exclusive economic zone" and authority statement in Beijing decline and will not acknowledge the decision as well to conduct necessary measures to protect its sovereignty in the South China Sea (<http://internasional.kompas.com/>)[5], which heightened tensions in the region.

Previously, reclamation by China has invited the US presence in the region under the pretext that the US interests of freedom of navigation will be disrupted by this reclamation. Therefore, by performing a series of Freedom of Navigation Program (FONOP), US warships deliberately crossed SCS to ensure that its party it is entitled to enjoy (according to the type of waters) freedom of navigation and the right of innocent passage (Damos Dumoli Agusman, 2016)[6].

The series of operations Freedom Of Navigation (FON) in SCS conducted by the United States to send out warships to traverse the waters in zones around such artificial islands and refusal of China on the pretext that the US has been manipulating the freedom of navigation arising (Damos Dumoli Agusman, 2016)[7]. According to political observers in Beijing, Xu Liping, anger and frustration of the people of China are also directed to United States and Japan, hence it is considered the PCA decision has been influenced by both countries (<http://internasional.kompas.com/>)[8].

Dispute in South China Sea (SCS) which involves five coastal countries (Vietnam, Malaysia, Brunei Darussalam, Filipina, and Taiwan) and the intervention of superpowers such as the United States (US) and Japan to hold joint military exercises in the SCS in May 2016, with Philippines, has escalated the potential for open conflict (armed) which possibly affect international security and stability, especially in the region. Indonesia, even though act as non-Claimant in SCSdispute, had issued a memorandum of protest (as an attitude of 'persistent objection') which rejected the claims of China on Indonesia ZEE as Traditional Chinese Fishing Ground around the Natuna waters (Damos Dumoli Agusman, 2016)[9]. Although it is addressed politically, but the Chinese attitude that tends to underestimate the rules of international maritime law (UNCLOS), will potentially involve Indonesia in open conflict in the SCS.

Unfavorable conditions in the Asian region in general and the involvement of Superpower countries in the battle of power in South East Asia in particular, as well as the various threats that threaten the existence of domestic sovereignty, particularly related to the defense (and security) nationwide in Indonesia, has caused this writing to be focused on the issue of how to manage the use and deployment of military force in international law?, and how the ideal concept of national defense system? which should be prepared and developed by Indonesia, as a strategy in anticipation of open conflict that could threaten the country's sovereignty.

II. DISCUSSION

1. International Law and Use of Power

Sublimation of human anxiety on its existence will urge to survive, creating the concept of a sovereign state, is a manifestation of society (human), which aims to create a sense of security, in order to overcome the anxiety of the existence the human himself [10]. Starting from Westphalia agreement (Year 1648), sovereignty understood as full jurisdiction over territorial sovereignty and the principle of mutual recognition, as the demands of globalization make the interaction between countries increasingly intense and complex, so the state sovereignty as internal power, sometimes unable to stem the sovereign foreign intervention in the domestic affairs of a country.

Internal Jurisdiction (territorial) and mutual recognition is the core Westphalia agreements [11], which by Petronella Magdalena Ferreira-Snyman, explained that "*the principle of absolute sovereignty of equal states came to be recognized as the foundation of modern international relations theory*" [12]. As for the area (territorial), which is a rule implemented entirely, as it is known in the doctrines of experts and practiced should have provisions consisted of: (a) stable; (b) limited; and (c) continuously (Giovanni Distefano, 2010:26)[13].

That there is a dichotomy in the Indonesian constitution of fifth theory of sovereignty (God, the King, the State, the People and Law) either listed explicitly or implicitly, to ensure the dynamics of state concept in Indonesia, in accordance to law in its living [14]. The sovereignty of the state designated to maintain the defense, security, integrity, orderliness, protection and law enforcement; sovereignty of the people for democracy and politics; the rule of law for the concept *Rechstaat*; God's sovereignty as the basis of the state and; meaning of King Sovereignty (implicit) as a form of state recognition of local government units that are specific or special (Article 18B, Constitution of the Republic of Indonesia 1945), is a form of assertiveness of Indonesian nation to be recognized and acknowledge the presence sovereignty as part of the identity of a state. Thus, in principle, any form of intervention and disruption to the territory of Indonesia, is a violation and a threat to the integrity and sovereignty of the country.

Uniformity agenda in various fields, particularly law, is actually a reflection of the emergence of concepts of novelty, which changed the understanding of the meaning of sovereignty (changing Nature of International Law). Stating it, for example, Globalization, Global Governance and International constitutionalism, will have consequences on the quality of the relationship between national law and international law (Magdalena Petronella Ferreira-Snyman, 2009:6-14)[15]. Hence, although international relations relating to mutual recognition and efforts to mutually define each other (Walter Carlsnaes, et.al., 2013:323-336)[16], yet according to Krasner, recognition and application of the principle of non-intervention in the affairs of other countries, for example, will be transformed into intervention, which is actually reasonable in the context of international relations (Krasner)[17].

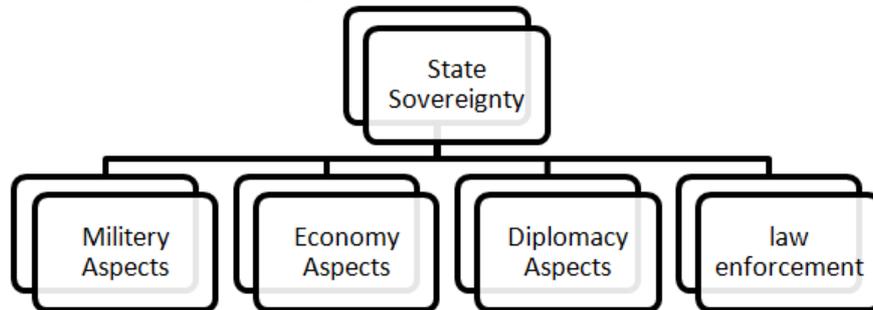
Geographically and geopolitics, Indonesia with the presence of 92 small islands and outermost are not managed well, border land area has not yet achieved a collective agreement, and the patterns of contemporary conflicts which is conducted of non-linear ways and have proxy war sense will trigger the problem of state sovereignty both in air and sea areas as well to emerge grave problems along with increasing potential for internal conflict to divide all nation components with a pattern of *divide et impera* (Buku Putih Pertahanan Indonesia)[18].

The fact of the existence of threat to the sovereign territory of Indonesia, causing aspects of national defense and security is vital to be strengthened and maintained its presence. Shortly, the country's defense has two important definitions, namely understanding of strategic aspects definition and economic aspects strategic definition. In the first definition, the country's defense related to territory, jurisdiction and national security (Montevideo convention). Whilst the second definition, related to the function of the state of the non-military

aspects, such as the empowerment of economic resources, natural resources (SDA) and human resources (HR), artificial resources, including the entire infrastructure of the country.

Hans J. Morgenthau (2007:23)[19] asserted that the power of the state is said to be located on three pillars, namely the military, economic and diplomatic. If observe closely to the three pillars, then according to the researchers, these three things are still lacking, therefore requires to be accompanied with the force of law (legal force). Hence the interaction of the countries reflected in the form of International agreements (bilateral, regional and multilateral) and is part of the international legal system, which has been recognized and practiced by modern states, therefore it is an obligation in the association community of nations (*jus cogens*).

Image: Pillars of State Sovereignty



Source: Arranged by Authors

The four pillars of national sovereignty, as in the picture above, indicate that military force, are on equal terms with the other three pillars. In conjunction with military force as a pillar of sovereignty, then the existence of the law is particularly regulations relating to the arrangement and the usage of armed force by countries of the world, either international domain, regional and national level has turned to be a central issue public interaction (state) globally.

Before discussing the normative existence of rules relating to the usage of military force in international law domain, firstly, will be presented data on military forces of countries in the world based on data from the Global Fire Power (hereinafter abbreviated as GFP), which was composed and measured by ratings of each criterion or elements of military power.

Based on data from GFP, there are five countries that occupy the best position in terms of military power, namely the United States, Russia, China, India and France. Indonesia itself is at position 14 with a total index of 0.03354 or 12th rank with a total index of 0.5238 (the government version) as well as at the bottom of the order occupied by Africa with a total index 3, 7343. There are several indicators that serve as a benchmark for determining these ratings, which are grouped into several major parts, namely: man power, land systems, air power, naval power, resources, logistics, financial, and geographic Hans J. Morgenthau (2007:23)[20].

Briefly, some of the states mentioned above, is a country that is recognized as a superpower, because it has the ability to state adequate economic and military power that supported by sophisticated and modern supply. Judging from the achievement of these countries in strengthening the main pillars of the state, certainly not without the firmness of these countries in stating the purpose of each country in the national constitution (political law), then implemented to a regulation that possible to apply and ultimately, contribute to the state sovereignty.

Confrontation of military force (show of power) as an option to resolve the conflict between the warring countries based on the principle of self-defense in international law, is still a fairly popular solution.

Even in the international legal system, the use of military force as a sanction is often regarded as valid and legally after the provision of the UN Security Council on a threat to peace, breach of peace or act of aggression. However, the opinion by most experts to the absence of legal nature of international law caused by the vacuum of coherent sanction framework, accepted and comprehensive, is still remained room for debate. However, the fact that many countries still adhere to the principles and rules of international law in resolving international disputes that exist, also cannot be denied.

Based on positivism, then international law is clearly rules governing the social order that requires certain behavior to be accomplished by arranging measurable force, which is referred to as enforceable orders (a coercive order) (Jimly Asshiddiqie and Ali Safa'at, 2012:24-25)[21]. There are 3 matters directing law to be equated with enforceable orders, namely (Jimly Asshiddiqie and Ali Safa'at, 2012:27)[22]:

1. Simply enter sanction element, hence law can be distinguished with other social order;
2. Coercion is a very significant factor as knowledge of social relationships and become the main character of the law; and
3. The existence of sanctions is the main character of modern law in relation between law and state.

The purpose of the UN Charter affirms that the member states have agreed to live together in peace as good neighbors, and to join forces in order to maintain security and peace, and may not use armed force, except in the public interest (countries-interest based), see Charter of United Nations; For These ends: to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples.

Thus, the use of force even unification or merger of military force by member countries of the union (collective measures), to prevent things that threaten international peace and security (See Article 1 UN Charter : To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace)as well as the intent and purpose of the charter, is allowed in principle. The attempt to use military force by the countries within the scope of the United Nations, are divided into several groups of actions as follows:

1. Preventive Diplomacy

As an action to prevent wider scope of dispute or limit dispute expansion with prior on diplomacy of United Nations organs [23].

2. Making Peace

Security Council suggests recommendations on way or method of settlement is appropriate [24].

3. Peace Keeping

Sending UN military personnel, United Nations police and civilian personnel [25]. This technique has been used since 1945 and based on rating data of United nations in July 2016, has involved 101.674 military and police personnel who contributed by 121 countries (<http://www.un.org>)[26].

4. Peace building

An action to identify and support structures in place to strengthen peace to prevent conflicts reconciled turns back into conflict. This involves two or more countries in the conflict [27].

5. Peace Enforcement

The UN imposed sanctions as stated in article 41 and 41 of the UN charter. Further explanation on this subject, will be discussed on sanctions subsection.

The measures that have been described above indicate that the purpose of the United Nations to maintain international peace and security is a command which has been agreed by almost all countries of the world. Hence, an agreement (consensus) to execute it by the member states have become the purpose and intent of all countries of the world were given to the United Nations to be implemented. Thus, the positivism character of international law is accomplished.

2. The Geneva Convention; Rule of War

The phenomenon of emulation development of countries military power in the world and the fact that there is still a conflict between countries using military force still tinged the international community until now, of course, will be consequential in losses due to the war, not least the loss of life. For that purpose, in order to uphold the values of human rights, international humanitarian law (hereinafter abbreviated IHL), have arranged some matters that must be considered and obliged to be obeyed by every country involved in a war.

Two codification of international law, namely the 1949 Geneva Convention and Human Rights Instrument, a momentum to appreciate the values and principles of humanity. In Geneva Convention III, Section II, emphasized on the protection of prisoners of war at any time (Handbook of the International Red Cross and Red Crescent Movement, 1994:72-73)[28], while for human rights instruments, with regard to the Convention against Torture and Degrading Treatment or Punishment Other Cruel, Inhuman, and Degrading Human Dignity 1984. In essence, both this convention, providing protection against prisoners of war, both combatants and non-combatants (civilians) with the aim to avoid inhumane treatment, which must be respected and protected in all circumstances (See General Assembly Resolution 39/46, December 10, 1984. Entry into force June 26, 1987, according to the Article 27 Paragraph 1).

The principle of humanity is one of the principles set out in the Geneva Convention III of 1949 on prisoners of war in article 12 specifies that prisoners of war as an enemy prisoner, not a prisoner of individuals or military units who have captured them (Handbook of the International Red Cross and Red Crescent Movement, 1994:72-73)[28]. Retaining state is responsible for the treatment given to them. There are two groups can be defined as a prisoner of war, namely: the regular army and non regular army. Regular army, militia and members of the volunteer ranks (civil) can enjoy the legal guarantees established for prisoners of war throughout respecting the laws and customs of war (LiaYulia, 2015:280-287)[29].

Therefore every prisoner of war who were not treated humanely or create a dangerous situation to prisoners of war, are the sole responsibility of the state and the stakeholder must be considered contrary to the Convention. For example, the cases of the Guantanamo prison in Cuban territory, where there has been torture by US soldiers against detainees (LiaYulia, 2015:280-287)[30], as an act that must be considered contrary to this Convention, and injured universal human values.

3. Dimensions of National Defense

Sovereignty is defined as a fundamental principle in international law usually may be interpreted with various definitions and meanings simultaneously. Nevertheless, there are two definitive view on sovereignty as expressed by Fassbender (Magdalena Petronella Ferreira-Snyman, 2009:35)[31], *firstly*, sovereignty means absolute power is upper the law and express that absolute sovereignty is one of the strongest principles and cannot be tampered with international law and *secondly*, country as the most important subject in international law, never claimed that they (countries) are higher than law or international law is not binding upon them.

State as a subject of international law with its sovereignty has been recognized to entitle fundamental rights including self-determination that includes domestic sovereignty dimension and interdependence sovereignty. Briefly, the domestic sovereignty refers to the political organization of country and levels of control under the authority of each institution in the country based on national regulations, especially in the field of defense and security, while interdependence sovereignty with regard to the country's ability to monitor, limit and anticipate every action that certainly crossed the border regions of the country (Magdalena Petronella Ferreira-Snyman, 2009:35)[32].

Construction of defense forces obviously is not separated from government financial support to the budget necessity by the Ministry of Defense used to meet the minimum essential forces target (MEF) necessary to maintain national sovereignty. In 2016, the budget Kemhan / TNI Rp 99.47 trillion (<http://www.cnnindonesia.com/>)[33], while in the 2014 revised budget, the Ministry of Defense and Armed Forces was funded 83.3 trillion. While based on the 2015 state budget, the Ministry of Defense and Armed Forces was funded Rp 96.9 trillion (<http://nasional.tempo.co/>)[34].

The government's commitment to strengthening national defense as a pillar of national sovereignty through the provision of a budget which reached 1.5% of total GDP for the Ministry of Defence and TNI in the range of Rp 180 trillion to Rp 200 trillion by the year 2017 (<http://nasional.kompas.com/>)[35], seems difficult to be realized. Because, if taken benchmark calculation of 40% (capex) of 180 trillion, it will reach 72 trillion for military defense equipment budget in the year 2017 or arise to 32.21 trillion.

To achieve this goal, the Ministry of Defence in carrying out its duties and functions as a state institution responsible for implementing the program and work agendas in order to prepare the national defense system that is comprehensive, combining all the powers of the nation, both military and non military in the development and management of country defense system to be reliable. The integration of military and non military force is the embodiment of the nation's defense system adopted by Indonesia, which is a defense system that is universal (The Defense Doctrine, Ministry of Defence of the Republic of Indonesia).

Pursuant to Law No. 3 Year 2002 on National Defense, the state's defense system not only involves all citizens of the state, but also including to territory, other national resources, and prepared early by government and conducted entirely, integrated, directed, and continues to uphold state sovereignty, territorial integrity, and safety of the entire nation from any threat (The Defense Doctrine, Ministry of Defence of the Republic of Indonesia).

Implementation of state defense prepared by government and set the military as a major component in encountering military threats whilst facing of non military threat, putting government agencies outside the defense sector as a main element, according to the form and nature of the threats encountered with support by other elements of nation strength (Article 7 Law Number 3 Year 2002 on National Defense).

The strength of the nation is apparently includes spare parts and components supporting the explanation of Article 1 paragraph 1, is a national resource covering human resources, natural resources and artificial resources. If look at the provisions of Article 7 and Article 8, then what distinguishes these two components is that the reserve components have been prepared while supporting components, but eligible to use to strengthen primary and backup components.

According to the author's understanding, if interpreted with a view to explain the position and function between these two components, then the fundamental question is the determination of citizen who will enter as a reserves component and supporting component. If it is connected with the rights and obligations of citizens to participate in defending the country (Article 9 Law Number 3 Year 2002 on National Defense), then difference between the two components are not supposed to exist. Therefore, the previous understanding that distinguishes between mandatory components (military member who has exhausted his term) and voluntary components (police and trained people) no longer fit and able to cope with threats to the development of the country today. So that the state, requires the involvement of all citizens to maintain and safeguard sovereignty.

The Constitution makes it clear that defending the country is the right and duty, so that when the state call (require), every citizen is obliged to defend his country, especially when they appear voluntarily awareness of people (the right) to rise up, unite and defend his country. Essentially, the people as essential in the defense system of the country, should be prepared early, both mentally and skills sufficient to support the concept of defending the country in the form of a more assertive, namely through military service is limited for all citizens, to support the defense system people of the universe (sishankamrata).

III. CONCLUSION

The legitimacy of international law in principle prohibits not (yet restrict) the use of military force as a last form of diplomacy in maintaining the national interests of each country. even in the scale of organization of the United Nations (UN), the combined military power states (United nations Force) prepared to escort the policies of these organizations (UN resolution) is consensual UN member states.

The Geneva Conventions and the Convention against Torture and Degrading Treatment or Punishment Other Cruel, Inhuman, and Degrading Human Dignity 1984, are the two international legal instruments that should be appreciated and respected by all countries of the world (especially the UN member states), particularly if certain countries are in a situation of conflict (war). Therefore, the two conventions are part of international efforts to protect human values which tend to be very vulnerable and harmed in future disputes between nations.

The nature of national defense is a universality which means the involvement of all the people, national resources, national infrastructure and entire regions of the country as a unified whole, by placing citizens as the main subject of national defense. The overall defense system should be dedicated with the people and for the benefit of all the people, so that the form of the development of defense systems nationally, appropriate space for the people to be trained and prepared early and professionals through a program to defend the country and military service, so that will be able to face any kind military threat, either in the form of a real threat or not.

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- [13]. Giovanni Distefano, *Theories on Territorial Sovereignty: A Reappraisal*, Journal of Sharia & Law, issue No. 411 Muharram 1431 H, January 2010, pages 26, As far as the main features of the territory are concerned, it is generally recognized by the doctrine and consolidated practice that the territory must be (a) stable, (b) delimited, (c) continuous. The first characteristic refers to the permanence of the residing population, thus excluding the phenomenon of nomadism. With regard to the second one, it has not to be interpreted in a restrictive manner when it is affirmed that the state's territory has to be clearly delimited,... Finally, the third one refers to the continuity of State's territory.
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