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ANALYSIS OF SELF-DEFENCE A STATE ACCORDING TO INTERNATIONAL LAW

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ABSTRACT:

Self-defence in international law is an inherent right of the state to defend its sovereignty and territory from armed attacks conducted by other countries against it. However, Self-defence is often used by countries to compete for strength and initiate attacks. This study is examining the various provisions governing the application of Self-defence which are justified under International Law. This type of study is normative legal research. The problem approach used was the statute approach, conceptual approach, and case approach. The results of the study explained that Self-defence is the right of every country to use violence in the event that its sovereignty is threatened and endangering international security and peace. The provisions of international law make it clear that the right to defend or self-defence the main country must have received an attack or an imminent threat from another country and this attack was conducted by military forces.

Keyword: Self-Defence, State Rights, Attack

INTRODUCTION

The state, disputes, and war are elements that are connected to each other in terms of dispute resolution. War became a natural thing and became the last resort to resolve conflicts or disputes between the parties before World War II (Eustace, 2011). Conflicts can occur against any party (Babcock et al., 2018). However, this method does not guarantee the achievement of a meeting point

for the parties, instead it causes a prolonged conflict and even the international community is worried that it will become a threat to world peace and security.

According to the perspective of the realist ideology group, war is aimed at fulfilling the national interests of his country. War is an integral part of military power and century is considered obsolete in the present (Pannen et al., 2019). According to the UN Charter, the settlement of disputes must be performed in a peaceful manner in order to resolve disputes or conflicts between countries. Conflicts resolved by law are better than other means (Nguyen, 2017).

Efforts to create world peace thus each country has their respective rights and obligations that are already regulated in international law (Stewart, 2019). One of the rights held is Self-defence. Self-defence is a right inherent in any country (March & Wagstaff, 2017). The right is certainly intended to protect the country's sovereignty. Although the main objective is the right to protection, in fact, there are still many state practices that abuse the right of self-defence.

One example of abuse of Self-defence is the attack of the United States and its allies against Iraq which was conducted on March 19, 2003 under the pretext of "disarming Iraq of weapons of mass destruction, to end Saddam Hussein's support for terrorism, and to free the Iraqi people" (Sotelino, 2005). Coalition forces consist of US, British, Polish, and Australian military forces. The attack began with US suspicion of Iraq allegedly possessing weapons of mass destruction and alleged links between Saddam Hussein and the Al-Qaeda terrorist network. Besides that, this is also based on hatred of the Al-Qaeda network that is allegedly the primary architect. Bush's speech at the 56th General Assembly of the United Nations declared that terrorists were a serious threat and invited all countries to join the fight against them.

From the statement of the President of the United States, it can be seen that the basis is a justification for the United States to conduct self-defence to countries suspected of being a den of terrorists even though there is still no proof of truth as alleged. Abuse of self-defence by means of violence is condemned by international law due to it can affect world peace.

The use of violence is in fact a powerful "bluff" for superpower countries to frighten countries that are considered "weak". The counterterrorism proposition, protecting the people of other countries from "dictatorial" leaders, and other shared international security protections, is used as a basis for them as a justification for the use of such violence (Zamzami et al., 2019). The purpose of this study is reviewing various provisions governing the application of Self-Defence that are justified under International Law.

RESEARCH METHODS

This study used a normative method, namely research that used a problem approach to examine various provisions governing the application of Self-Defence and the use of force according to international law. The problem approach used in this study was the statutory approach, conceptual approach, and case analysis (Barus, 2013).

Case analysis was conducted by examining cases related to legal issues in this study (R. Sugandhi, 1998). The case was based on facts from incidents in society today related to misuse of state self-defence. Cases related to study were analysed based on laws and regulations and legal concepts

Legal Sources: United Nations Charter 1933 Montevideo Convention, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, United Nations Resolution A / RES / 25/2625: Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, United Nations Resolution 3314: Definition of Aggression.

RESULT AND DISCUSSIONS

Settlement of Disputes under International Law

Peaceful dispute resolution consists of (United Nations Handbook on Peaceful Settlement Disputes): Dispute resolution mechanisms with diplomatic procedures consisting of Negotiations, Good Offices, Mediation, Inquiry, and Conciliation. While the settlement through adjudication is settled through Arbitration and the International Court of Justice (Páez Chávez et al., 2020).

1. Negotiation: Negotiation is "a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter". Negotiations become an option in resolving disputes that arise between the parties in a bilateral and multilateral framework in certain circumstances (Lee, 2005).

2. Consultation: Settlement of disputes arising from the interpretation or application of related agreements (RP, 2018).

3. Good Offices: Good offices or well-known called as good services are "the involvement of one or more States or an international organization in a dispute between other States with the aim of settling it or contributing to its settlement" (Potter, 2000).

4. Mediation

Third parties who perform their role as Good Services are authorized to take more than go-between actions and allowed to play an active role in the dispute resolution process by developing solutions (Putra, 2019).

5. Inquiry

Inquiry in operational meaning often becomes a major component of arbitration, conciliation, and actions by international organizations and methods involving other third parties (Lincoln, 2007).

6. Conciliation

In the conciliation method, settlement between the parties involves third party intervention in formal legal footing and is institutionalized in a comparable way in terms of inquiry or arbitration (Van De Mieroop & Carranza, 2018).

7. Arbitration

One characteristic of arbitration is that the outcome of this settlement method is binding on the parties to the dispute (Batubara et al., 2013).

8. International Courts

The International Court of Justice (hereinafter referred to as ICJ) that born in 1945 replaces the Permanent Court of International Justice (PCIJ) as the main organ of the United Nations (Posner & De Figueiredo, 2005).

9. Regional Agencies / Regional Arrangement

Regional arrangement is a settlement of disputes taken by the parties based on regional multilateral agreements that they make without creating permanent institutions.

The Use of Violence according to International Law

The use of violence according to international law consists of 3 ways, including:

1. Reprisal: According to international law, reprisal is a non-legal act. Reprisal is an act of retaliation committed by one country against another country. However, reprisal can be a legal act if the act is preceded by illegal actions from other countries (Lu et al., 2006).

Example: Reprisal can be seen in the Naulila case between Germany and Angola. Three German citizens were accidentally killed inside Angola in 1928 (at that time it was still under colonial Portugal). Germany mobilized military forces to destroy Angolan property or assets as a form of retaliation. Reprisals conducted by involving the armed forces can be declared legal if performed in accordance with the right of self-defence. Reprisal is performed when the situation is peaceful.

2. Retortion: Retortion is an act of retaliation against the legal activities of other countries. This action is a legitimate way of showing displeasure at the expense of other countries "within the bounds of legality" (Sotelino, 2005). For instance, the termination of diplomatic relations, such as termination of diplomatic relations by Saudi Arabia against Iran over the attack of the Saudi Arabian Embassy in Tehran by the demonstrators. The foreign envoy's office cannot be disturbed as stipulated in Article 22 of the 1961 Vienna

Convention, thus the recipient country is obliged to protect it from "intrusion or damage or impairment of its dignity." The act was clearly detrimental to the Saudi Arabia.

3. The Right of Self-defence

Self-defence is a right inherent in any country. This right is absolutely intended to protect state sovereignty (Franck, 2001).

Self Defence according to International Law

Self-Defence is the right to self-protection for the country. This right is certainly aimed at protecting the country's sovereignty. Daniel Webster mentioned several elements of self-defence. Countries can conduct self-defence as regulated in Article 51 of the UN Charter in international law. Article 51 has become the main pillar of all forms of individual and collective self-defence law (Yoram, 2008). But, it is unfortunate, the fact is until this moment, the notion of self-defence in state practice, several countries interpret widely. The right to defend and simultaneously be completed collectively, namely Collective self-defence.

Collective self-defence is the exercise of self-defence rights by the State together with Smeekes and Verkuyten, (2013) what is meant by jointly is countries are bound because certain agreements are related to collective security agreements. An example of this collective self-defence is the North Atlantic Treaty Organization (hereinafter referred to as NATO). NATO was born under the North Atlantic Treaty agreement, on April 4, 1949. The purpose of NATO's establishment as following below (Donald, 2004):

- a) Soviet deterring expansionism;
- b) Forbidding the revival of nationalist militarism in Europe through a strong
- c) North American presence on the continent; and

Fundamentally, this intergovernmental organization was formed to safeguard the freedom and security of its members through political and military means. The collective self-defence of this agreement is apparent in Article 5 of the North Atlantic Treaty stating that:

"The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that if such an armed attack occurs, each of them, in the exercise of the right of individual or collective self-defence is recognized by Article 51 of the Charter of the United Nations will assist the Party or Parties so attacked by taking forth, individually and in concert with the other Parties, such actions as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area."

While individual self-defence is conducted by the State itself against attacks from other countries that threaten sovereignty. Each State is allowed to conduct self-defence as an embodiment of self-defence, that:

"Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake."

It should be underlined, that self-defence as an inherent right then any country has the right to take self-resistance when its country is threatened. Inherent rights under international law are "a right that cannot be transferred or surrendered, especially a natural right."

Legal Basis for Self-Defence

Self-defence in international law is an inherent right which is the right to defend oneself and attached to every country. Self-defence is part of customary international law which over time is concretized in Article 51 of the UN Charter. Customary international law is defined as a source of international law based on state practices accompanied by the belief that such practices are important instruments in terms of international law.

Even though Article 2 paragraph (4) of the UN Charter clearly stated the prohibition on the use of force, the UN does not necessarily prohibit the use of violence in the event that a country feels that its sovereignty is threatened.

Self-Defence Criteria

According to Article 51 of the UN Charter, self-defence performed individually or collectively is subject to the provisions of necessity and proportionality. The elements of self-defence in Article 51 of the UN Charter. Necessity according to Daniel Webster, Secretary of State of the United States of America is elaborated with the following principles:

- a) Instant; self-defence was performed immediately, when an attack threatening sovereignty from another country was accepted.
- b) Overwhelming; the attacks received with conditions in a very great amount.
- c) Leaving no choice of means; pursuing peaceful means is no longer an option for the country, because of the imminent threat received.
- d) No moment for deliberation; the receipt of the imminent threat, there is no time for deliberation.

The criteria are accepted by the British government as a reply from Ashburton to the United States who conveyed the British government's apology by letter. Now, these principles have become a habit of international law.

In fact, with the development of an understanding of international law, the understanding of self-defence also expanded, namely anticipatory self-defence. However, in anticipatory self-defence, the state that exercises the right must be able to prove the imminent threat that will be directed at him. In terminology, anticipatory is a term that "refers to the ability to foresee the consequences of some future actions and measures aimed at checking or countering those consequences."

Linkages of Self-Defence with the Military

Article 51 of the UN Charter explicitly stated the use of violence in question is self-defence (Jeihan, 2019). In terms of the content of Article 51 of the UN Charter which stated that: measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to as Security Council Resolution which calls for its termination the battle at Islas Malvinas and continued with the parties to a peaceful settlement.

There is the word armed attack in this article. According to experts, self-defence is considered valid if armed forces respond to armed attacks carried out by a country against it. The experts' views are also in line with the principle of proportionality thus self-defence is certainly closely related to the military. Proportionality is also one of the principles of International Humanitarian Law. The principle of proportionality means that the retaliation of the attacks received must be balanced. If attacked with military force, the attacked State has the right to mobilize military power in self-defence as well.

Self-Defence Practice

The state as the subject of international law and the owner of international characters certainly in relation to foreign relations must "behave" as stipulated in The Declaration on Principles of International Law concerning Friendly Relations and Co-operations among States in 1970 (Kalalo, 2016).

A consensus emerged that states that bringing peace must be the main goal for all members of the international community and this was reinforced by the birth of the United Nations in 1945 in San Francisco (Antonio, 2005). As a result, countries agreed that peacekeeping must be a public matter and stated that the state was not allowed to break or even endanger peace relations.

Examples of the application cases of Self-Defence I: Falkland Island or known as Islas Malvinas in Spanish is an island located in the South Atlantic Ocean (Oakes, 2006). Historically, the sovereignty of this island has changed with a different country. The Falkland Islands War occurred in 1982 regarding sovereignty claims between Argentina and Britain over the Falkland Island. The conflict continued to cause war starting with Argentina invading Islas Malvinas who was triggered and led by Commander-in-Chief Admiral Jorge Anaya. Claims made by Argentina without a legal foundation because Islas Malvinas based on British constitutional constitutes the crown colony of Britain with British citizens who have mostly settled in the region since the early 19th century. On April 3, 1982, the UN Security Council adopted a Resolution with rules, including:

- a) Demands an immediate cessation of hostilities;
- b) Demands an immediate withdrawal of all Argentine forces from the Falkland Islands (Islas Malvinas);

c) Calls on the governments of Argentina and the United Kingdom to seek a diplomatic solution to their differences and to respect the objectives and principles of the Charter of the United Nations.

Regarding the birth of the Resolution, the British took action in response to the invasion by severing diplomatic relations and bringing together the Task Force to retake Islas Malvinas. Task Force which was a British military expedition sailed towards the South Atlantic.

Argentina's claim to invade Islas Malvinas on the grounds that Falkland Island was part of its sovereignty was rejected by the UN Security Council. The UN Security Council justified the actions taken by the British at that time which used violence (bringing military forces to Islas Malvinas) as a form of implementing self-defence as stipulated in Article 51 of the UN Charter.

Examples of the application cases of Self-Defence II: Iraq Invasion (2003), cases began from 9/11 and caused the United States to speak out loud at the UN General Assembly to crush the Al-Qaeda network in areas of the Middle East that became its suspicion. Then President Bush also stated at the time that he would continue to attack Iraq in order to eradicate terrorists. The statement was stated at the NATO meeting (Roberts et al., 2004). From the speech also the United States invited its alliances to form a coalition and supported the plan militarily and politically. Given the official statement of the United States of America at the time, the basis for an attack on Iraq. President Bush also stated that his actions were a form of anticipatory self-defence.

Allegations directed at Iraq by the United States include;

1. Ownership of Weapon Mass destruction that can endanger international security and peace;
2. There is an alliance between Saddam Hussein and Al-Qaeda.

But of all these allegations, after a direct visit to the relevant location as conducted by the UN Weapons Inspector from the United Nations, all the allegations were not found at all. The inspection, led by Hans Blix, did not find banned weapons as alleged by the United States. Looks at Memo from British Attorney General Goldsmith to Prime Minister Tony Blair who initially stated that "the authorization of the use of force on UNSC Resolution has been reviewed on UNSC Resolution". Hence, the United States has been allowed to launch the use of force against Iraq. However, his opinion changed when asked again at the House of Lords, Lord Goldsmith said the UN Security Council Resolution did not mention the permissibility of the use of violence and was merely reporting and discussion.

The inconsistency of Lord Goldsmith's opinion was suspected due to pressure from Tony Blair, who was then serving as Prime Minister of the United Kingdom and fully supported the idea of the United States of America to carry out "anticipatory self-defence" against Iraq. So, some said that the invasion attack in Iraq was full of political nuances.

Self-Defence Practices in Accordance with International Law

After knowing 2 examples of Self-defence cases. The correct practice of self-defence was as practiced by the British against Argentina in the case of the Falkland Islands War (Oakes, 2006). Look at the efforts made by the British who immediately reported the matter to the Security Council and submitted a draft resolution. The resolution proposed clearly passes and allows Britain to conduct the right of self-defence.

The basis of the UN Security Council grants permission to exercise these rights which was based on Article 51 of the UN Charter. Argentina has proven to harm international peace and security by invading Falkland Island which in fact was the British Crown Colonies or under British administration. Britain certainly has the right to perform self-defence in order to protect its people who live on the island and maintain its sovereignty.

CONCLUSION

Self-defence is the right of every country to use violence in the event that its sovereignty is threatened and endangering international security and peace. In exercising the right to self-defence, the state which wishes to exercise that right must have received an attack or an imminent threat from another country and this attack was performed by military forces. Implementation of self-defence by a country must consider the principle of necessity and proportionality. The principle of necessity is explained by Daniel Webster, "instant, overwhelming, leaving no choice of means; and no moment for deliberation"(these four elements are cumulative).

In fact, the self-defence echoed by countries to justify themselves using violence is not in accordance with international law. One example is the 2003 Iraq Invasion, namely the argument of the USA attacking Iraq cannot be justified given the force launched by the USA is not authorized or not approved by the Security Council and the United States has no right to attack Iraq which is supported by unreasonable reasons and everything the accusation is not proven. The invasion by the United States was clearly due to political interests.

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