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NUSANTARA IN FRONT OF MAKASSAR STRAIT: A REVIEW OF INTERNATIONAL LAW OF THE SEA

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Abstract

Relocation of the national capital of Indonesia to the Borneo region is not only fraught with considerations of the socio-economic, political, and physical environment. The safety factor is also a very important aspect because the capital city is the center of gravity of the country. Nusantara, the new capital city, directly faces the Makassar Strait which has been designated as an archipelagic sea lane. An archipelagic sea lane must be subject to the international law of the sea, especially the United Nations Convention on the Law of the Sea (UNCLOS) 1982. Foreign voyages and flights have the right of normal mode and continuous passage through archipelagic sea lanes. Therefore, they cannot be blocked. The right of passage is not only granted to merchant ships but also to military ships and even submarines. The extent of the security threat to the capital due to the abovementioned legal regime is analyzed by normative legal research, using a conceptual approach to the legal norms governing the sea lane. This study aims to provide an overview of the legal norms that apply to the Makassar Strait as a consideration in developing a defense and security strategy for the national capital, the archipelago. In conclusion, Nusantara in the Makassar Strait must pay attention to the international law of the sea norms in preparing the defense and security strategy for the new national capital city.

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INTRODUCTION

The Republic of Indonesia will have a new national capital soon. The discourse on capital relocation, which commenced during the era of President Soekarno, was re-initiated by President Joko Widodo (Ministry of National Development Planning/National Development Planning Agency of the Republic of Indonesia, 2021). The House of Representatives approved the relocation of the capital through the enactment of Law Number 3 of 2022 concerning the National Capital (Ibu Kota Negara [IKN] Law) on February 15, 2022. The capital of Nusantara covers a land area of approximately 256,142 ha and a sea area of approximately 68,189 ha, with the following regional boundaries:

1. To the south, it is bordered by Penajam District in Penajam Paser Utara Regency and Balikpapan Bay, West Balikpapan District, North Balikpapan District, and East Balikpapan District, all in Balikpapan City.
2. To the west, it is bordered by Loa Kulu District in Kutai Kartanegara Regency and Sepaku District in Penajam Paser Utara Regency.
3. To the north, it is bordered by Loa Kulu District, Loa Janan District, and SangaSanga District, all in Kutai Kartanegara Regency.
4. To the east, it is bordered by the Makassar Strait.

At least fourteen countries have relocated their national capital since the end of World War II. There are three common reasons for the transfer of capital, namely political, socioeconomic, and physical considerations (Rukmana, 2020). Indonesia refers to Brazil and Australia (Bappenas, 2021). Changing the location of the capital should also take into account projections about potential security risks or threats. Traditionally, the concept of capital security generally refers to the designation of the capital as the center of gravity of a county; thus, it requires a special security strategy to protect every part of it.

According to Strange & Iron (2004), "on the strategic level, centers of gravity might include a military force, an alliance, a set of critical capabilities or functions, or national strategy itself". For them, site selection is an intrinsic part of security and territorial integrity, so the movement of the capital must pay attention to non-security issues that are potentially politicized and then 'securitized' by external parties.

This view is in line with Rossman's, as cited Reva (2016), "capital city relocation refers to the proximity of the capital city to the borders of the country and external sources of threats". According to him, in the past, strategic and military reasons were taken into account, while contemporary countries were more motivated by domestic problems. However, it should be emphasized that this security issue is more related to external threats than to internal security impact.

The position of Nusantara, the new capital, which directly faces the Makassar Strait, is one of the external aspects that should raise concerns about defense and security. This is because the Makassar Strait has been designated as an Indonesian Archipelagic Sea Lane (IASL), according to the provisions of the United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982), which Indonesia has ratified through Law Number 17 of 1985 Concerning Ratification of the United Nations Convention on the Law of the Sea.

Although it is located in archipelagic waters, since the Makassar Strait is a part of the sea lane that has been authorized by the International Maritime Organization (IMO) Resolution MSC.72[69] on Resolution on Adoption, Designation And Substitution Of Archipelagic Sea Lanes on 19 May 1998 (The Maritime Safety Committee, n.d.), its position must comply with international law of the sea.

Based on UNCLOS 1982, sea lanes are routes designated by coastal states for foreign voyages to maintain the safety of navigation. Archipelagic sea lanes cross the waters and straits between the islands.

Foreign shipping exercises the right to passage through these archipelagic sea lanes, both in the form of the right to innocent passage and the right to transit passage. Such sea lanes not only apply to all types of foreign ships but are also passageways for foreign aircraft. Article 53 paragraph (2) of UNCLOS 1982 provides that "all ships and aircraft enjoy the right of archipelagic sea lane passage in such sea lanes and air routes". The UNCLOS 1982 regulation implies that the Makassar Strait has become the main route for foreign warships when crossing the waters of the Indonesian archipelago. This situation must be alerted so that it does not pose a security threat to the national capital.

This study was conducted to analyze international law of the sea, especially regarding the position of Makassar Strait as part of the second Indonesian Archipelagic Sea Lane (IASL II). Understanding the provisions that apply to the Makassar Strait will be the main basis for building strength and developing strategies to prevent potential threats to the security of the national capital.

METHODS

This research is qualitative and employs the normative legal research method (also known as doctrinal research). Doctrinal research is research that provides a systematic explanation of the rules governing certain legal categories, analyzes the relationships between regulations, describes areas of difficulty, and, perhaps, predicts future developments (Marzuki, 2005). Regarding the analysis, this study uses the 1982 United Nations Convention on the Law of the Sea (UNCLOS) as its primary source, while secondary legal materials sourced from literature, including print and online, are used to complement the process of qualitative analysis. Furthermore, the results of the research are described descriptively to ascertain whether or not there is a relationship between a symptom

and other symptoms. Also, it is emphasized that the research results provide an objective description of the actual state of the object in question to formulate a conclusion and provide recommendations.

RESULT AND DISCUSSION

Determination of Indonesian Archipelagic Sea Lanes

Conceptually, the legal regime that applies to the sea lane is essentially the result of a compromise on the paradox between the doctrine of freedom of the seas and the principle of state sovereignty. The concept of the open sea teaches that the sea is open to everybody by nature. Human freedom also implies freedom of navigation. However, freedom of navigation seems to be threatened by the recognition of a country's sovereignty over territorial seas, inland seas, and archipelagic waters. The international law of the sea addresses this contradiction by establishing a right-to-passage regime. To comply with the provisions related to the right to the passage while maintaining sovereignty and safety of navigation, a state is given the right to designate sea lanes that would be used by ships when passing through its territorial sea area or the waters of an island country. If a coastal state or island nation does not specify which sea lanes can be used for the passage of foreign ships, then the principle of "normally used routes for international navigation" will be enforced. With the establishment of UNCLOS in 1982, island states have been given the authority to determine sea lanes but still provide rights of navigation and overflight. According to Agoes (2009), Indonesia's efforts to establish sea lanes must be accompanied by various diplomatic efforts, targeted at both world maritime countries and authorized international organizations (IMO).

Indonesia designed the archipelagic sea lanes with various considerations, including the defense and security of the state as well as hydro-oceanographic

conditions, to ensure safety for each passing ship. The Indonesian archipelagic sea lanes were established and ratified at the 69th session of the Maritime Safety Committee in London in 1998, through Resolution MSC.72(69). The implication of this resolution emerged that IMO has claimed the mandate of being the 'competent international organization' referred to in the UNCLOS 1982 for designating ASLs (Forward, 2009).

This resolution reads in full as follows:

1. **ADOPTS**, by SOLAS regulation V/8, resolution MSC.71(69) and UNCLOS article 53, **the Partial System of Archipelagic Sea Lanes** in Indonesian Archipelagic Waters, as set out in the Annex to the present resolution.
2. **RECOMMENDS** that any associated rules and regulations adopted governing the use of archipelagic sea lanes by the Government of Indonesia shall be consistent with UNCLOS, including article 42.
3. **REQUESTS** the Secretary-General to bring this resolution and its Annex to the attention of Members of the Organization and Contracting Governments to the 1974 SOLAS Convention.

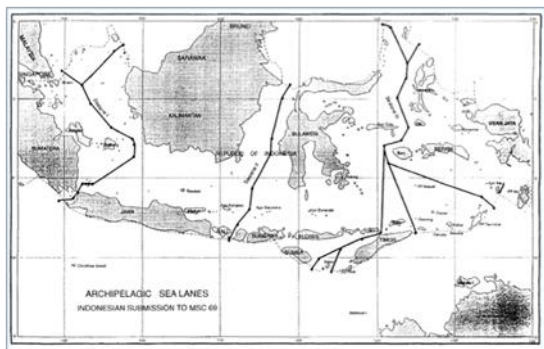


Figure 1. Archipelagic Sea Lanes ratified
Source: IMO Resolution MSC.72(69), n.d

The acceptance of the design of the Indonesian Archipelagic Sea Lanes by IMO is considered a result of successful international diplomacy in the field of the law of the sea. However, there is still a problem regarding the sea lanes. If we look closely, Resolution MSC.71(69) states that

IMO accepts (adopts) "the Partial System of Archipelagic Sea Lanes in Indonesian Archipelagic Waters". This statement means that what was accepted by the IMO was part of a system. In other words, Indonesia turned out to have only delivered part of an archipelagic sea lane system to the IMO, which was accepted and ratified. If examined normatively, Indonesia is considered to only provide a part of a marine flow system because the provisions of Article 53 paragraph (3) of UNCLOS 1982 stipulate that:

Archipelagic sea lanes passage means the exercise by this Convention of the rights of navigation and overflight in the normal mode solely for continuous, expeditious, and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

The phrase "transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone" means that archipelagic sea lanes designated by the island nation are supposed to provide a connection between one part of the high seas and another, between one part of the high seas and one part of the exclusive economic zone (EEZ) and vice versa, or between one part of the EEZ and another part of the EEZ. So if Indonesia wants to establish a complete archipelagic sea lane, it should establish a sea lane that connects the entire high seas and exclusive economic zone bordering the archipelagic water area. The established IASL only connects the north to the south and vice versa but does not connect the west to the east and vice versa.

As a result, Indonesia still has the opportunity to convey to the IMO the design of other sea lanes in the Indonesian archipelagic sea lanes system. However, due to the nature of the provisions for the determination of sea lanes, it is not an obligation of the state ("An archipelagic

State 'may' designate sea lanes ...": Article 53(1) of UNCLOS 1982). If Indonesia does not stipulate sea lanes, the provisions of Article 53(12) of UNCLOS 1982 apply:

If an archipelagic State does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation.

Resolution MSC 71(69) can be interpreted to mean that IMO has accepted part of the design of the Indonesian archipelagic sea lanes and as long as Indonesia does not specify the other part of the sea lanes, then the provision of UNCLOS 1982 regarding the routes normally used for international navigation applies. Due to the partial designation of the archipelagic sea lanes, other countries, especially major maritime countries, not only question the Indonesian archipelagic sea lanes but also carry out navigation based on normal routes of international navigation. A case in point is the Bawean Island incident of July 3, 2003. The United States, which relied on the principle of freedom of navigation (Stephens, 2006), conducted a convoy of warships, consisting of the aircraft carrier USS Carl Vinson (CVN-70), loaded with 100 fighters, 16 reconnaissance aircraft, and six helicopters, along with two frigates and a destroyer, through the Java Sea from west to east and outward through the Lombok Strait to the high seas. The United States Navy stated that it was crossing international waters (Handini & Risdiarto, 2019).

The Bawean incident can be assessed as a test of Government Regulation Number 37 of 2002 Concerning the Rights and Obligations of Foreign Ships and Aircraft In Seeking the Right of Archipelagic Sea Lanes Passage Through Archipelagic Sea Lanes Assigned Article 3 paragraph (2) of the regulation emphasized that:

The right of archipelagic sea lane passage by the provisions in this government regulation in other parts

of Indonesian waters can be carried out after such a sea lane has been designated in those waters for this transit.

The phrase "after the other parts of the archipelagic sea lane is established" in this provision hints that foreign ships and aircraft may only pass through the designated IASL if they want to cross Indonesian waters. There is no other alternative because Indonesia has not yet determined other sea lanes. The most fundamental reason that should be acceptable to the international community is related to navigation safety, as it is the basis for the establishment of a sea lane regime. Data shows that at some points of the Java Sea, there are shallow areas that are less safe for use as large navigation routes. In addition, there are also several national parks and nature reserves. If an archipelagic sea lane is established in the Java Sea area, then not only international navigation must be watched out for but also crossing aircraft.

However, the United States still claims that in addition to the three established routes, the right to archipelagic sea lanes passage can also be exercised on other routes commonly used for international navigation. Attempts to restrict it are incompatible with the freedom of navigation, which is also reflected in UNCLOS 1982 (United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs, 2014). The claim of the United States, in addition to adhering to the principle of freedom of navigation, is based on the fact that although the United States has not acceded to UNCLOS 1982, it views the norms and principles contained therein as the codification of international customary law norms, which are also obeyed by the country.

Based on a document released by the United States Navy in 1999 titled "The Development and Operational Impact of Indonesia's Approved Partial System of Archipelagic Sea Lanes", written by

Edwards (1999), the United States and Australia have submitted a trail map which they think is the “normal passage routes used for international navigation in the Indonesian archipelago”. The report noted that the normal route maps that had been used for international navigation, submitted by the United States and Australia, were not given a response or rebuttal by Indonesia. Edward later stated:

These maps, along with the unchallenged transits they represent, can be considered evidence of the existence of normal passage routes in the indicated areas.

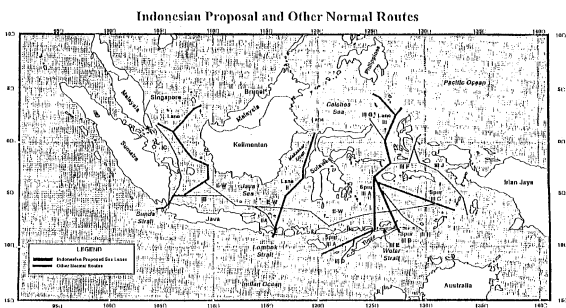


Figure 2. The Map of Normal Passage Routes Used for International Navigation
 Source: Edwards, 1999

The description of the history of the Indonesian Archipelagic Sea Lanes was determined to be very important. Understanding the process of establishing IASL means understanding how the maritime state views the Makassar Strait which will have a possible impact on the security issues of the new capital, Nusantara.

Implications for the Security of the New Capital City

The Second Indonesian Archipelagic Sea Lane (IASL II) has been designated as a sea lane that can be used to carry out the right of passage for navigation from the Sulawesi Sea to the Indian Ocean or vice versa, across the Makassar Strait, Flores sea, and Lombok Strait, whose axis is a line connecting points II-1 to II-8, as stated in the List of Coordinates referred to in Appendix II based on Government

Regulation Number 37 of 2002 Concerning the Rights and Obligations of Foreign Ships and Aircraft In Seeking the Right of Archipelagic Sea Lanes Passage Through Archipelagic Sea Lanes Assigned.

The Makassar Strait is the main trade route from Australia to Japan and other Asian regions, and vice versa. In addition to trade, the Makassar Strait is also a shipping route for oil palm, liquefied petroleum gas (LPG), and liquefied natural gas (LNG), especially from Japan (Kimura, Morikawa, & Singh, 2016). Makassar Strait connects the western Pacific Ocean and the northeastern Indian Ocean (through the Lombok Strait), which is one of the eight major straits in the world with important military and economic interests. It has become the main node of important routes from the South China Sea, the Philippines to Australia (Xiao et al., 2022).

If the IASL II designation is depicted on a map, then the pattern will appear as can be seen in Figure 3.

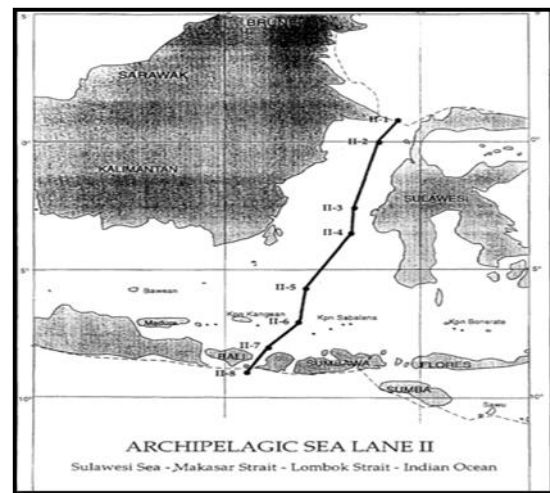


Figure 3. The Map of IASL II
 Source: IMO Resolution MSC.72(69), n.d

According to Buntoro (2017), sea control in IASL is needed to maintain state security and navigational safety. Also, security needs to be carefully studied to establish strategies and defense systems along the archipelagic sea lane, especially at entry/exit points, turning points, and

chokepoints. Security involves two main activities, namely surveillance and enforcement. The forms of surveillance and enforcement activities including the type and severity vary, depending on the goals to be achieved and the availability of means.

Objectively, several conditions that will affect these methods of marine control are analyzed based on the legal norms contained in UNCLOS 1982. The following description can be a recommendation that should be of concern to the government in laying out the security and defense strategy of the new capital.

First, the island nation is given the right to determine the axis lines and coordinate points of its archipelagic sea lanes, including the flight route on it. The determination can be made based on consideration of the normal route of international navigation, shipping safety, and hydro-oceanography. The significance of the axis lines is to provide certainty about the paths that foreign voyages and flights will pass through in the territorial waters of the archipelago. This makes it easier for Indonesia in terms of developing a surveillance strategy for security and defense. Violations of this trajectory will be easier to recognize for the necessary actions to be taken. Also, the axis lines ensure legal certainty. These provisions are the primary legal basis in the event of a dispute or violation of the use of the right of archipelagic sea lanes passage.

Second, the certainty of the position, as outlined in the first point, is further reinforced by Article 53 (5) of UNCLOS 1982, which stipulates that:

Ships and aircraft in archipelagic sea lanes passage shall not deviate more than 25 nautical miles to either side of such axis lines during the passage, provided that such ships and aircraft shall not navigate closer to the coasts than 10 percent of the distance between the nearest points on islands bordering the sea lane.

This provision is also very useful to measure and establish the perimeter and location of naval bases based on the axis areas and coordinate points of the archipelagic sea lanes. This provision can also lead to the appropriate selection of defense systems. A surveillance virtual gate system may as the best approach to apply.

Third, the right to passage, both in the form of the right of innocent passage and the right of transit passage, is the right for foreign navigation and flights to cross the sea area of coastal states. There are no restrictions on the types of ships and aircraft that can exercise such rights. This provision makes it possible for military ships or warships as well as foreign fighter aircraft to pass. With the new capital city located in front of an archipelagic sea lane, any type of ship that passes by can be monitored and certain actions can be carried out to provide deterrence in a measured manner. An issue that still needs to be considered is that there is still a discourse on the notion of 'normal mode' in the use of such cross-rights.

Article 53 (3) of UNCLOS 1982, talks about the exercise of "the rights of navigation and overflight in the normal mode". Some are of the view that 'normal mode' covers all activities of ships and aircraft when sailing or flying (Klein, 2019; Campbell, 2005). If this approach is used, then the submarine is declared to be in normal mode whenever passing in a submerged state. This is different from the provisions of Article 20 of UNCLOS 1982 which provides that "submarines and other underwater vehicles in the territorial sea are required to navigate on the surface and to show their flag".

The debate arose because some hold the view that the obligation to come to the surface applies only when the submarine is crossing the territorial sea (Masahiro, 2006; Nadimi, 2019). There are no provisions for submarines crossing archipelagic sea lanes. The discourse on normal mode also involves warships and

military aircraft. Indonesian Government Regulation Number 37 of 2002 Concerning the Rights and Obligations of Foreign Ships and Aircraft In Seeking the Right of Archipelagic Sea Lanes Passage Through Archipelagic Sea Lanes Assigned declares that "when exercising the right of Archipelagic Sea Lane Passage, foreign military and warships must not conduct military exercises or exercise any type of weapons with ammunition" However, the maritime powers would view exercising as part of the normal mode of warship transit (Bateman, 2005).

However, if the debate is related to studies on the security of the new national capital, then there should be no cause for concern because all foreign navigation and aviation routes must go through the axis or coordinate points of IASL II and its territorial boundaries. Therefore, surveillance and other security strategies related to the defense of the national capital tend to be easier to carry out. It is different if the position of the capital city is in the territory of the normal route of international navigation, where there is no limit on the flow of navigation.

Fourth, island countries are also given the right to establish a traffic separation scheme. Article 53 (6), however, hints at separation only in small straits in the archipelagic sea lane. Nonetheless, another basis for considering the establishment of the traffic separation scheme (TSS) is to ensure navigation safety, for example when the density of shipping traffic flow raises safety issues. In this regard, when the new capital city officially starts to function, there will likely be a surge in the flow of navigation in the Makassar Strait as well as the level of flight density. UNCLOS 1982 does not define 'narrow channels' rigidly. The underlying clause is "for the safe passage of ships" (Cay, 2010). This provision could be one of the opportunities within the framework of ensuring the security of the capital Nusantara. The only challenge is the

necessity to consult and obtain approval from the IMO, as the Lombok Strait TSS determination was passed in June 2019 (International Maritime Organization, 2019).

Fifth, under Article 53 (7) of UNCLOS 1982, an island nation may change the sea lane and the traffic separation scheme (TSS) if circumstances require it. This requires quite a lot of effort considering the history of the formation of IASL or TSS of the Sunda and Lombok strait, which had to deal with the interests of the world's maritime countries. But, such changes are not prohibited by international law of the sea norms, so if it is in the interest of the security of the national capital, the center of gravity of the country, then changes are possible.

CONCLUSIONS, RECOMMENDATION AND LIMITATION

The international law of the sea regime that applies to archipelagic sea lanes strictly stipulates a path that must be used by foreign voyages and flights when passing through the territory of an archipelagic country. Such legal norms provide convenience in the framework of building a surveillance system to prevent and anticipate potential security vulnerabilities. Thus, when the national capital, as the center of gravity of a country, is located in a position facing the Makassar Strait and subject to the sea lane legal regime, then the security system and strategy can be based on the norms of international law of the sea. The surveillance strategy can be more focused on the axis and coordinate points of the Indonesian Archipelagic Sea Lanes (IASL II), which have been established over the Makassar Strait. Such surveillance may include activities on the surface, under the sea, and in the air. Security oversight and defense systems become integrated with maintaining sovereignty and protecting the national capital.

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