

**THE JURIDICAL ANALYSIS OF STATE SOVEREIGNTY PRINCIPLE
IN THE INTERNATIONAL COURT OF JUSTICE PROCEDURE**

THESIS

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**TINJAUAN YURIDIS PRINSIP KEDAULATAN NEGARA DALAM
MAHKAMAH INTERNASIONAL
(STUDI KASUS SENGKETA DJIBOUTI DAN PRANCIS MENGENAI
KEPASTIAN KERJASAMA DI BIDANG KRIMINAL, 2006)
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ABSTRAK

Sebagai salah satu institusi hukum internasional, MI hanya menerima negara sebagai pihak yang dapat beracara di dalamnya. *Special Agreement* atau perjanjian khusus tentang penundukan kepada yurisdiksi MI, harus terlebih dahulu dibuat oleh para pihak sebelum beracara. Penundukan ini didasarkan pada prinsip kedaulatan Negara. Proses beracara di MI hanya dapat dilakukan dengan adanya *consent* dari para pihak yang akan beracara. *Consent* ini didasarkan atas asas konsensualisme atau *free will* dari negara yang terkait. Dari syarat ini dapatlah dilihat bahwa MI menjunjung tinggi kedaulatan sebuah negara untuk tunduk atas dasar *free will*. Lebih jauh lagi, pengakuan MI akan kedaulatan negara ini juga dapat dilihat dari kekuatan mengikat dari keputusan MI. Keputusan yang dikeluarkan oleh MI hanya mempunyai kekuatan mengikat bagi para pihak yang bersengketa dan terbatas pada kasus yang diajukan. Dalam kasus Kepastian Kerjasama di Bidang Kriminal antara Djibouti dan Prancis dapat dilihat penerapan dari prinsip kedaulatan negara. MI menyatakan tidak akan menerima perkara tersebut jika tidak ada kesepakatan oleh kedua belah pihak. Dalam kasus ini, Djibouti mendasarkan penuntutannya terhadap Prancis pada pasal 38(5) Peraturan MI. Ketentuan tersebut membenarkan tindakan Djibouti dan kewenangan MI sampai Prancis menyatakan kesepakatannya. Hal ini dikenal dengan ketentuan *forum prorogatum*. Lebih jauh penulisan ini ingin mengetahui kedudukan dari prinsip kedaulatan negara dalam prosedur MI apakah kedudukannya absolut atau terbatas serta penerapan prinsip kedaulatan negara pada kasus antara Djibouti dan Prancis. Selanjutnya, metode penelitian yang digunakan untuk mendukung penulisan ini adalah metode penelitian yuridis normatif, dengan menggunakan data primer dan data skunder, dengan menggunakan data skunder sebagai data yang utama untuk mendukung dan memperkuat data primer. Kedudukan prinsip kedaulatan negara dalam MI adalah tidak absolut akibat kesepakatan dari para pihak untuk tunduk pada yurisdiksi MI yang secara otomatis menyebabkan negara tersebut telah mengenyampingkan kedaulatannya dan memiliki kewajiban untuk mematuhi peraturan MI serta keputusan MI tanpa memperhatikan kedudukan pihak yang berperkara adalah negara adikuasa.

CHAPTER I

INTRODUCTION

A. The Background

In international society, the relationship among states are reciprocity and fortunately to each other. However, the differences of international interest by states that came from a variety of grounds such as politic, economic, territory and ideology can arise non-justifiable to another state.¹In addition, it can make a dispute between states or more states. Dispute is a natural matter happened in this community. In Public International Law, dispute can be defined as a specific disagreement concerning a matter of fact, law, or policy in which a claim or assertion of one party is met with refusal, counter-claim or denial by another.²

In International Law, dispute shared into two categories. They are legal and political dispute. The legal disputes are the differences of material according to positive law. The political disputes are the differences on point of view according to how the state interest can be protected.³

At this period, International Law has prepared the settlement of disputes by peaceful means. It needed to maintain international peace and security.⁴The settlement of disputes by peaceful means fall into two categories. They are diplomatic

¹ Oppenheim Edited by Lauterpacht, 1952, *International Law A Treatise: dispute, War, and Neutrality*, Vol.II, 7th Ed., Green and Co. Ltd., Longmans, p.3.

² J.G. Merrils, 1998, *International Dispute Settlement*, 3rd Ed., Cambridge University Press, New York, p.1.

³ komar Kantaatmadja, 1999, "*Penyelesaian Sengketa Internasional*", Dalam Jean Elvardi, "*Penyelesaian Sengketa Internasional antara Indonesia dan Malaysia tentang Pulau Sipadan dan Ligitan*", PPS-UNAIR, Surabaya.

⁴ Article 2(3) Charter of The United Nations, "*All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endanger*".

and adjudication procedure. Diplomatic procedure involves negotiation, inquiry, mediation and conciliation. Adjudication procedure involves the determination either by arbitration or by the decision of judicial organs.⁵ It also endorses by Article 33(1) Charter of The United Nations (UN). It has stated the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement resort to regional agencies or arrangements or other peaceful means of their own choice.

In international society, one of the judicial organs of settlement disputes by peaceful means is International Court of Justice (ICJ). ICJ is primary means to settle dispute between states in the world. Martin Dixon also said that the ICJ has often thought of as the primary means for the resolution of disputes between states.⁶

Since 1946, the ICJ has settled 115 cases brought before the Court by state. In respect to settlement of disputes by peaceful means, on 4 January 2006, the Republic of Djibouti registrar to the Court concerning the refusal by the France governmental and judicial authorities to execute an international letter rogatory.⁷ By 1998, Indonesia-Malaysia has ever brought their case before the ICJ according to sovereignty over Sipadan and Ligitan Islands.⁸

On 9 January 2006, the Republic of Djibouti filed in the registry of the ICJ an application. In its application, Djibouti indicated that it sought to found the

⁵ Ian Brownlie, 2003, *Principle of Public International Law*, 6th Ed., Oxford, New York, p.18.

⁶ Martin Dixon, 1990, *Textbook on International Law*, Blackstone Press Limited, London, p.256.

⁷ www.icj-cij.org, Access on 4 January 2008, at 10.06 am.

⁸ Kompas, Wednesday 18 December 2002, p.11.

CHAPTER IV
CLOSING REMARKS

A. Conclusion

1. At this period, the state sovereignty principle in international community is unfettered. This theory is also implemented in the ICJ. ICJ as one of the international institutional law and the dispute settlement body has a duty to respect the state sovereignty principle. In practice, this principle has worked when state as the party brought its case before the Court. Fundamentally, ICJ can not settle its case without the consent by the parties. It cause no state can be compelled to litigate against its will. State may use special agreement, treaty, *forum prorogatum*, or optional clause as the legal basis to get the Court's jurisdiction. According to the implementation of state sovereignty principle in the ICJ, the Court may also respect to the legal equality of the party. In practice, this matter worked when one of the parties has no judge and the other have a judge from its nationality. The state may choose an ad hoc judge to represent it's before the Court. However, the consent by the state automatically has waived its sovereignty. State has a duty to apply rules of the Court. Beside that, state also has a duty to enforcement the Court's decision. Based on its, state sovereignty in the ICJ is not absolute but restriction. If state does not execute the Court decision, based on Chapter VII the Security Council may take a special measure to enforcement the party to complied its.

2. The implementation of state sovereignty principle in the ICJ in the *Certain Question of Mutual Assistance in Criminal Matters between Djibouti and*

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