

STATE BORDER VERSUS CULTURE: AN INTERNATIONAL LEGAL EXAMINATION

by Hamid Awaluddin

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1 STATE BORDER VERSUS CULTURE: AN INTERNATIONAL LEGAL EXAMINATION

Hamid Awaludin*

* Faculty of Law, Universitas Hasanuddin
Correspondence: awaludinhamid@hotmail.com

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Abstract

This essay examines whether or not foreign cultural practices in one particular country, can be considered as an infringement of state border. Legal arguments, is certainly not sufficient to explore this issue. Various reasons to be employed in order to reach the conclusion; cultural practices are not incompatible with the principle of state sovereignty. Cultural practices cannot be limited in certain or fixed space. Culture always follows who advocates and practices it. Globalization makes culture no more bound to geographical area, race and religion.

Keywords: state border, state sovereignty, infringement, culture, and globalization

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I. INTRODUCTION

State border is always related to the concept of physical territorial integrity where state can function to control and rule. The legal base for this principle is derived from the Montevideo Convention of 1933 which defines statehood as a subject of international law if it meets the following criteria: 1) a defined territory; 2) a permanent population; 3) a government and 4) a capacity to enter into relations with other states. It is very clear here that territory of state is very important one.¹

In larger sense, the international political perspective can also offer us a very useful meaning. State border can be associated with the concept of sovereignty of state. We can trace this notion back to the Westphalia Agreement, signed by several states in October 24th of 1864. This agreement ended the thirty years conflict in Europe. One of the essence of this agreement is the acknowledgement of nation state, replacing

¹ Montevideo Convention on the Rights and Duties of States, in force 26 December 1934.

the empire system. With this, non-interference principle prevails. This notion has now become a base for the principle of sovereignty of state.

The basic ingredient of sovereignty of state is authority within territory. This brings two main elements; 1) state as the holder of sovereignty has absolute authority and to exercise the authority, 2) state must have territory. RP Wolf describes this as “The rights to command and correlatively the right to be obeyed.”² Henry Kissinger provides us best picture on this issue. He writes, the concept of sovereignty deals with the right of each signatory to choose its own domestic structure and free from intervention.³ State sovereignty, in sum, is about a legality of state to rule and control within certain territory. Since state has full authority to control and rule, then no one should have a right to intervene.⁴

Based on the background above, this paper poses one central important question. Can legally state charge, control or rule foreign culture practices within its territory on **the ground of violation of state border (intervention)?** In other words, **whether or not, foreign cultural practices within one particular country can be considered a violation of state border?** Having considered many factors, the paper argues that there would not be any violation to state border. State or any entities should not perceive or judge foreign cultural practices in the territory of one or more particular states on the ground of infringement of state border or intervention of state sovereignty.⁵

To elaborate and sustain this standpoint, I should first offer my understanding regarding culture. Since we are dealing with very broad concept and definition, I limit myself to provide elements of **culture, instead of providing a fixed definition. Culture consists of ideas, conditioned emotional responses, and pattern of habitual behavior which the members of that society have acquired through instruction or**

² Hamid Awaludin, Arti Sebuah Kedaulatan (Meaning of a Sovereignty), *Kompas*, 26 February 2015, 6.

³ Henry Kissinger, *World Order*, Penguin Book 2014, p 26.

⁴ Ruth Lapidoth, “Sovereignty in Transition,” *Journal of International Affairs*, p. 325. (325-346)

⁵ Julian Ku & John Yoo, “Globalization and Sovereignty,” *Berkeley Journal of International Law*, (2013), p. 226. (210-235).

limitation and which they share.⁶ In a more concrete, culture must include knowledge, belief, art, law, morals, customs and other capabilities.

Having had those, we certainly should understand culture as a product of a certain society which mostly based on ethnicity, race, religion, or a particular geographical society.⁷ However, the latest development of international society shows that some new culture developed and practiced with certain groups of society not based on ethnicity, religion or race anymore. Phenomenon of globalization clearly shows this trend. Some groups of society from many parts of the world never meet in one particular place and time, can share the same pattern of behavior, values, customs, etc.⁸ This is led by the advancement of technological communication and transportation that connect people very quickly.⁹ The massive flow of people moving around the globe today is unprecedented. They move so fast with different motives and forms.

II. GLOBALIZATION

Globalization undoubtedly becomes a key factor to push cultural practices not only in the country where the culture was invented, but also elsewhere. Globalization opens a great opportunity for the flow

⁶ Rebecca L. Spang, "The Cultural Habits", *Food and Foodways*, Vol. 2 (1988), p. 369.

⁷ See Ceri Peach, "Social Geography: New Religions and Ethnoburbs – Contrasts with Cultural Geography", *Progress in Human Geography*, Vol. 26, No. 2 (2002), 252–260; Deborah Phillips, "Ethnic and Racial Segregation: A Critical Perspective", *Geography Compass*, Vol. 1, No. 5 (2007), 1138–1159; and Anoop Nayak, "Geography, Race and Emotions: Social and Cultural Intersections", *Social & Cultural Geography*, Vol. 12, No. 6 (2011), 548–562

⁸ Tony Brown, "Challenging Globalization as Discourse and Phenomenon", *International Journal of Lifelong Education*, Vol. 18, No. 1 (1999), 3–17.

⁹ See for example Jahangir Karimi, Yash P. Gupta and Toni M. Somers, "Impact of Competitive Strategy and Information Technology Maturity on Firms' Strategic Response to Globalization" *Journal of Management Information Systems*, Vol. 12, No. 4 (1996) 55– 88; Terri R. Lituchy and Anny Rail, "Bed and Breakfasts, Small Inns, and the Internet: The Impact of Technology on the Globalization of Small Businesses" *Journal of International Marketing*, Vol. 8, No. 2 (2000) 86–97; Costas Lapavistas And Paulo L. Dos Santos, "Globalization and Contemporary Banking: On the Impact of New Technology" *Contributions to Political Economy*, Vol. 27 (2008) 31–56.

of people.¹⁰ To this, Malcolm Waters defines globalization as a social process in which the constraints of geography on social and cultural arrangements recede and in which people become increasingly aware that they are receding.¹¹ With this definition, Waters emphasizes that globalization must involve the receding of geographical constrain

With those frames of culture and globalization, it is very fair to say that culture shall not be perceived to intervene the territorial integrity of state, so state legally cannot take action against culture based on intervention reason. Under globalization, the world becomes a small village. Relations between culture and globalization, is described very well by McLuhan. He points out, determining principle of culture is the medium by which it is transmitted rather than its content. Media includes any means of extending the senses and therefore include technologies of both transportation and communication. McLuhan's intention to this, is that cultural practices under the advancement of technological transportation and communication can penetrate anywhere, depends on society who advocates it. Cultural practices cannot be limited in certain territories.¹²

Globalization of culture, or what Mike Featherstone calls: transnational cultures, are oriented beyond national boundaries. While quoting Appadurai, he points out, there are five dimensions of global cultural flows which move in non-isomorphic path. It starts from *ethnoscapes* produced by flows of people. This brings tourists, immigrants, refugees, exile and guest workers. *Technoscape* is the next feature of our world today. This produces machinery and plant flows with multinational and national corporations and government agencies. Next, *financescapes* which produced by rapid flows of money in the

¹⁰ Such phenomenon brings many challenges. See Henk Overbeek, "Towards a New International Migration Regime: Globalization, Migration and the Internationalization of the State" in Robert Miles & Dietrich Thranhardt (eds), *Migration and European Integration: The Dynamics of Inclusion and Exclusion* (London: Pinter Publishers, 1995) 15-35; Lydia Morris, "Globalization, Migration and the Nation-State: The Path to a Post-National Europe?" *The British Journal of Sociology*, Vol. 48, No. 2 (1997) 192-209; and Stephen Castles, "Migration and Community Formation under Conditions of Globalization" *The International Migration Review*, Vol. 36, No. 4, (2002), p. 1143-1168.

¹¹ Malcolm Waters, *Globalization*, (London: Routledge, 1995), p. 3.

¹² Ibid.

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currency markets and stock exchanges. We also witness *mediascapes*, the repertoires of images and information, the flow which produced and distributed by printed media, social media, film and television. Finally, we have *ideoscapes* which linked to flows of images which are associated with state or counter state movement ideologies, such democracy, freedom, welfare and rights.¹³

Moreover, the flows of people today become unstoppable and undeniable movement. People move massively and very quick. And indeed, people always bring their own culture together, wherever they go. Once they establish themselves in one particular place or space, they practice their own culture, just like they did at their own original home. This is the nature of every person.

Another reason, isolation is no longer today's practice. People interaction is seemingly unlimited in terms of time and space. People connect with each other without boundaries. Limitation of territorial space simply becomes an administrative issue. Human interaction today is world interaction. Nationality is only a label for identification purposes. Human interaction is motivated by various human interests.

III.LEGAL REASONS

Now, I should provide legal reasons for my position. It is a common understanding that intervention refers to the external actions that influence the domestic affairs of another sovereign state. Some experts understand the notion of intervention in narrow definition; forcible interference in the domestic affairs of another state.¹⁴ Pertaining culture and state border, I share the same view above. Under the United Nations Charter, Article 2 paragraph 4: "*All members shall refrain in their international relations from the threat of use of force against the territorial integrity of political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.*" This provision clearly limits our understanding that the Charter of the United

¹³ Mike Featherstone, ed, *Global Culture, Nationalism, Globalization and Modernity*, (New York: Sage Publications, 1993), p 6.

¹⁴ Joseph Nye Jr and David A Welch, *Understanding Global Conflict and Cooperation*, 8th ed. (New York: Longman, 2011), p 197.

Nations prohibits any state to intervene the territorial integrity of other states by using of force. In other words, no state is allowed to interfere state border of other states by using force. Foreign cultural practices in one particular sovereign state, do not fall within this category. Cultural practices do not involve the use of power.

Along with this line, Article 51 of the Charter of the United Nations obviously guarantees members of the organization to protect their inherent right, individually or collectively, for self-defense, if an armed attack occurs. This provision clearly requires states to protect themselves or to defend their sovereign territorial integrity if an armed attack occurs. Foreign cultural practices are completely not the same as an armed attack, even if they are present and exercised in foreign sovereign states. In this respect, no moral and legal justification to consider or treat foreign cultural practices in sovereign state, as an infringement of the territorial integrity of state. Culture, as Joseph Nye, Jr calls, is a soft power, not hard power.¹⁵

The next approach that we can use to sustain that legal position, is human rights. Let's take the protection of cultural heritage as an issue. Article 1 of the 1966 UNESCO Declaration of the Principles of International Cultural Cooperation proclaims: "in their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind." This clearly shows that pluralism and diversity are part of the general interest of humanity.¹⁶

Furthermore, the 2001 of the General Conference of UNESCO adopted the Universal Declaration on Cultural Diversity. Article 1 of this instrument reiterates "as a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity for nature."¹⁷ With this, it is necessary to perceive that cultural heritage as the wellspring of creativity; therefore, it flourishes when it goes with other cultures. That is the reason why we have to preserve it, instead of

¹⁵ Joseph Nye, "Soft Power," *Foreign Policy*, vol 80, p 170.

¹⁶ Francesco Francioni, "Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity," *Michigan Journal of International Law*, vol. 25, issue 4, hlm. 1226.

¹⁷ *Ibid.*

blaming it. Cultural heritage shall not be treated as mere commodities, but self-identity, values and meaning of dignity of humankind.

As the interest of humanity, international law shall protect, preserve and safeguard the cultural heritage. Culture absolutely does not antagonize the principle of state sovereignty. Formation of modern nation state is cemented by language, literary, beliefs, arts, etc, as the products of culture. The independence of statehood in all parts of the world were triggered by culture, both as products and process. Values of cultures inspired the independence of statehood.

Since we acknowledge cultural heritage as a source of creativity and basic element of dignity, international human rights law protects all the people who preserve, maintain and practice it. Both the United Nations Charter and the Universal Declaration of Human Rights 1948 recognize the inherent dignity and of the equal and inalienable rights of all members of the human family.¹⁸ This means that international human rights law protects and respects the entitlement of the people to the cultural heritage which embedded of their history, civilization, and identity. Violation of this is a violation of people's personal dignity. Article 22 of the Universal Declaration of Human Rights of 1948 stipulates that everyone, as a member of society has cultural rights indispensable for his dignity and the free development of his personality. This goes along with Article 27 (1) of the Declaration: "Everyone has the right freely to participate in the cultural life of the community...." Moreover, Article 15 (1) of the International Covenant On Economic, Social And Cultural Right, 1966, obliges states to recognize the right of everyone to take part in cultural life. Along with line, Article 27 of the International Covenant on Civil and Political Rights, 1966 also requires states not to deny the rights of minorities to enjoy their own culture, ethnic, religion, and language.

To strengthen that position, we shall refer our attention on some cases decided by the international tribunals, on the ground of violation of cultural heritage. Take, for instance, the decision of the International Criminal Tribunal for Yugoslavia (ICTY) on the case of bombing of the old city of Dubrovnik, a site inscribed in the UNESCO World

¹⁸ Nepal Bar Association, "Recommendation for the Constitution," <http://www.nepal-bar.org/nba/Recommendation%20for%20the%20New%20Constitution.pdf?>

Heritage List. In this case, *Prosecutor vs. Strugar*. In this case, Strugar, the Commander of the Yugoslavian army, was indicted for international destruction of cultural property of humankind as a whole. He was responsible for the bombing and destruction of the city, so he must be punished.¹⁹ On another case in March, 2004, the ICTY reached its verdict by sentencing another perpetrator for shelling of the old town of Dubrovnik in 1991.²⁰

The court holds that “the crime of destruction or willful damage done to institutions dedicated to science, religion, arts, education, and historic monuments, represents a violation of values especially protected by the international community. The court continues, such crime, being perpetrated against a site protected by the World Heritage List on behalf of humankind as a whole, “is even greater seriousness.”²¹

IV. CONCLUSION

Many more other international legal cases regarding this issue. They are all punishable. Especially these two international legal cases on cultural heritages, it goes without saying it, culture must be protected, as well as people who advocate and practice it. States, in this regard, are obliged to respect the culture and people who preserve it. Culture; as a consequence, does not infringe the state border or violate the territorial integrity of any sovereign state. Culture even cements the cohesion and territorial integrity of states.

A cultural element, whether closely associated or unaffiliated in any way with the action or policy of a State, will always leave a certain level of mark in the world stage. Moreover, a State is obliged to respect and protect the culture, as well as the people who preserve said culture.

¹⁹ William J. Fenrick, “The Prosecution of Unlawful Attack Cases Before the ICTY.” *Yearbook of International Humanitarian Law*, Vol. 7, 2004), 153–189.

²⁰ Federico Lenzerini, “The Role of International and Mixed Criminal Courts in the Enforcement of International Norms Concerning the Protection of Cultural Heritage”, in Francesco Francioni and James Gordley, eds., *Enforcing International Cultural Heritage Law*, Oxford University Press, 2013.

²¹ Francesco Francioni, “Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity”, *Michigan Journal of International Law*, Vol. 25, No. 4, 2004, 1215-1216.

Therefore, cultural element cannot infringe a State's sovereignty and territorial integrity. In many aspects, a culture or cultural element serve as a cement, or even the bedrock, for the sustainability of national cohesion.

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