Why international law cannot rule over the South China Sea

Commentary

Evan A. Laksmana

JAKARTA

The dispute in the South China Sea, which the heart of the matter is who is right or wrong under international law, UNCLOS in particular. But here's why international law is not a panacea, nor should it be Indonesia's only refuge in dealing with the problem.

One, the South China Sea is perhaps the prime example of the use of legal documents and arguments in strategic competition between states — often dubbed “lawfare.” The substance or spirit of the law, while important in themselves, are not what matters. Instead, it is about strategically cherry-picking parts of the law to one's advantage.

This is clearly seen, for example, in the odd reality that the US has not ratified UNCLOS but behaved accordingly while China has ratified but ignored it — at different times of the year — as dictated to by their respective interests. Thus, while the barrage of legal debates over the tribunal’s ruling is important, we should not forget the South China Sea’s larger strategic stake: who gets to design what kind of regional order and to whom benefits.

Two, the “logic of consequence” — acting pragmatically driven by consequent goals — seems to matter more in the South China Sea than the “logic of appropriateness” — behaving according to existing norms—underpinning international law. This dominant logic of strategy is particularly the case because regional governments still think more about the domestic “audience cost” — who they aim or enter their policies or statements to—than external ones.

As the domestic audience cost is higher, short-term domestic legitimacy often matters more than long-term international reputation (generally cultivated when following international law, among others). As such, states might opt to “ignore” international law, as long as they satisfy domestic political needs; even more so on strategic issues such as the South China Sea.

Put differently, while becoming a good international citizen may be appealing in the long run, it is difficult to expect governments to always favor international law at the expense of regime legitimacy or even survival, especially with the current state of global politics.

Third, the growth of lawfare and the importance of the domestic audience cost also points to one of the fundamental problems of international law, including UNCLOS: the absence of enforcement beyond the good graces and political will of the signatory parties. In other words, international law, including UNCLOS, is essentially epiphenomenal, but the convention itself might not be what the government should start thinking about reforming our maritime governance system, in particular with regard to law enforcement and rules of engagement at sea involving the fisheries ministry, Navy, Maritime Security Agency (Bakamla) and police.

Indeed, abundant research in political science suggests that institutions, of which international law is an example, are essentially epiphenomenal — basically without independent causal effect; more often than not, the effect is a function of some other factors, such as domestic legitimacy or military power. At best therefore, UNCLOS is nothing more than an “intervening variable” in state interests and compliance (with the tribunal’s ruling).

To exacerbate the problem, not only is UNCLOS’s utility epiphenomenal, but the convention itself is a mixed bag of compromises made over years of negotiations between the parties. As such, some of the crucial clauses, including the status of rocks, for example, or innocent passage, are by nature open to different interpretations.

That being said, while international law writ large is not a panacea to the South China Sea’s strategic challenges, developing more circumscribed, practical, and mutually agreed upon cooperative mechanisms at sea; such as the Code for Unplanned Encounters at Sea (CUES), is a worthy endeavor Indonesia should support.

In addition, we should also be cognizant of our dimming leadership in ASED, which has led to the grouping’s diminished centrality in both the management of the South China Sea (through the Code of Conduct process) as well as the broader development of the regional architecture. Jokowi’s commitment implied in the South China Sea “non-claimant” rhetoric, in particular, has led some of our regional partners to question our commitment to ASED.

Furnishmore, the South China Sea highlights the growing strategic significance of illegal fishing activities—as our recent encounters with China in Nautina waters have shown—the government should also start thinking about reforming our maritime governance system, particularly with regard to law enforcement and rules of engagement at sea involving the fisheries ministry, Navy, Maritime Security Agency (Bakamla) and police.

International law cannot be tailored to suit its interests, then what good is “lawfare”? The US has not ratified UNCLOS but behaved accordingly while China has ratified but ignored it — at different times of the year — as dictated to by their respective interests. Thus, while the barrage of legal debates over the tribunal’s ruling is important, we should not forget the South China Sea’s larger strategic stake: who gets to design what kind of regional order and to whom benefits.