

Action against and Punishment for Illegal Fishing Inflicting Financial Losses on The State

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Abstract—Illegal fishing has been rampant in the Indonesian Exclusive Economic Zone (EEZ) since these last five years. This has resulted in the detriment to the finances of the State and breach of the sovereignty of the State. Per the Ministry of Marine Affairs and Fisheries Republic Indonesia suffers financial losses of USD 20 billion or IDR 240 trillion annually from illegal fishing. Therefore, the Indonesian Government has established a Task Force for Illegal Unreported and Unregulated (IUU) Fishing. One of its tasks is to sink foreign ships stealing fishes in the Indonesian waters without any judicial process. However, the action is considered to breach the international maritime law, especially Paragraph (4) of Article 73 of UNCLOS 1982. The research aims to explore whether the action is effective to fight illegal fishing and return the detriment to the finances of the State. A normative research method was applied in the research and interviews with economic law experts in marine and fishery sectors were conducted. The research recommends the need to harmonize laws and regulations related to illegal fishing to the United Nations Convention on the Law of the Sea. Illegal fishermen should be liable for criminal liability to pay compensation to immediately return the detriment to the finances of the State.

Keywords—*Illegal Fishing, Suppress and Punish, Marine*

I. INTRODUCTION

The rampant illegal fishing in Indonesia since these last five years has caused various problems in marine and fishery sectors in the country. It has resulted in not only the detriment to the finances of the State but also breach of the sovereignty of the State. Indonesia suffers financial losses of USD 20 billion or IDR 240 trillion annually from illegal fishing [1]. It also breaches the sovereignty of the State because many foreign ships illegally enter the Indonesian waters and steal fishes in the Indonesian Exclusive Economic Zone (EEZ) with various modus operandi which cannot be dealt with easily.

The Indonesian exclusive economic zone is the outer strip bordering the Indonesian territorial sea as determined by the law applicable to the Indonesian waters, covering the sea-bed, the subsoil thereof and the water above it with an outermost limit of 200 (two hundred) nautical miles, measured from the baseline of the Indonesian territorial sea [2]. With the EEZ, the Government of Indonesia has a full right to implement its policies to regulate foreign ships which are used for or involved in illegal fishing in the Indonesian waters.

As an archipelagic country with total area of 5,193,253 square kilometers, consisting of 1,890,754 square kilometers of land and 3,302,498 square kilometers of sea,

Indonesia is rich in marine resources that can be used to increase its economy [1]. Illegal fishing is rampant in the Indonesian waters, especially in Natuna, South Arafura, North Bitung and West Papua Seas as well as seas of the Indian Ocean [3].

There are some illegal fishing cases which have been taken to court. One of them is the case of Zhu Nian Le, a Chinese ship captain, in 2015. He was the captain of M.V. Hai Fa Ship and was prosecuted under Article 100 *juncto* Paragraph (2) of Article 7 of Law Number 31 Year 2004 which was amended through Law Number 45 Year 2009 on Fishery [4]. In their decision, Ambon Fishery Court ordered the defendant to pay a fine of 200 million rupiahs. However, the punishment is considered too light because illegal fishing of 15 tons of sharks (*carcharhinus longimanus and sphymaspp*) not only has destroyed Indonesia's marine resources but also breached the sovereignty of the State [5].

The sinking and burning of dozens of foreign ships by the Ministry of Marine Affairs and Fisheries without any judicial process are the authority of the State. This is in line with Paragraph (4) of Article 69 of Law Number 45 Year 2009 on the Amendment of Law Number 31 Year 2004 on Fishery stipulating that in the performance of the functions referred to in paragraph (1), the investigator and/or Fishery Controller is entitled to take special actions in the form of burning and/or sinking a fishing ship flying a foreign flag based on sufficient initial proof [6].

Since Indonesia has ratified the United Nations Convention on the Law of the Sea (UNCLOS), it has an authority and sovereignty to enforce laws and regulations related to the national interests in its territorial seas which border with other countries. However, in the law enforcement, it must harmonize the national laws to the international laws [7]. Paragraph (4) of Article 73 of the UNCLOS stipulates that in cases of arrest or detention of foreign vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed [8].

H.L Packer states that someone is punished because he or she has done a wrongdoing to prevent repetition or give suffering or both [9]. So far, the existing laws and regulations have not yet properly regulated illegal fishing, especially to make offenders be liable for returning financial losses suffered by the State.

Up to now, there are still pros and cons of policy of the Minister of Marine Affairs and Fisheries because Law

Number 45 Year 2009 on Fishery has not yet given a strong legal basis for regulating action against and punishment for foreign ships used for illegal fishing. The situation is deteriorated by the issuance of Presidential Regulation Number 115 Year 2015 on Task Force. It serves as legal basis for government to take a controversial action by sinking the ships. So far, the regulation is only effective to fight against fish theft but it fails to return financial losses suffered by the State resulting from illegal fishing.

Based on situations above and the fact that findings of previous researches on illegal fishing still cannot clearly explain action against or punishment for offenders of illegal fishing inflicting financial losses to the State, the writers are interested in discussing the issue through his research entitled "Actions Against and Punishment for Illegal Fishing Inflicting Financial Losses to the State".

II. METHODOLOGY

It is a normative legal research. Data in the research was collected from different sources. The primary data was collected from law practitioners through interviews with parties relevant to the subject matter such as Task Force for the Eradition of Illegal Unreported and Unregulated Fishing (IUUF) and Mrs. Ina Primiana, an Economic Observer in Marine and Fishery Sectors of Padjajaran University [10]. Meanwhile, the secondary data was collected from references through a library study and/or a document study related to the subject matter. The secondary data includes the followings [10]:

- a. Primary legal materials: They include laws and regulations such as Law Number 45 Year 2009 on the Amendment of Law Number 31 Year 2004 on Fishery, UNCLOS 1982 which has been ratified by UNCLOS 1985 (United Nations Convention on Law of Sea), Presidential Regulation Number 115 Year 2015 on Task Force for the Eradition of Illegal Fishing and Decision of Ambon Fishery Court No. 01/Pid.Sus/PRK/2015/PN.AMB.
- b. Secondary legal materials: They are references to support information and primary data. The secondary data was collected through a literature study of books, research reports, magazines, newspapers, scientific articles and other publications related to the subject matters.

III. THEORETICAL FRAMEWORK

The number of illegal fishing cases in the Indonesian territorial sea has increased since 2008. There are many foreign ships from China, Thailand, the Philippines and Taiwan which illegally enter and steal fishes in the Indonesian waters. Consequently, local fishermen's catch sharply decreases and the State suffers financial losses up to 1-4 million rupiahs per ship [11].

The Government of Indonesia has taken actions to fight illegal fishing by sinking foreign ships and punishing ship captains. The question is whether the actions can give justice to the State and return financial losses suffered by the State or not. Illegal fishing is a transnational organized crime which must be seen not only from legal perspective

but also from economic perspective to ensure that offenders are punished and financial losses suffered by the State can be returned.

The history of criminal law development and criminal cases in some countries, especially crimes against life and body, show that corporal punishment (imprisonment) is considered effective [12]. This is in line with the "felicific calculus", an algorithm formulated by utilitarian philosopher Jeremy Bentham or equilibrium between the seriousness of crimes and their sanctions [13]. Per the researcher, it is important to ensure that the imposed fine is equal to financial losses suffered by the State.

Analytical approach to microeconomic on criminal law comes from microeconomic theory stating that the study of how scarce resources are allocated among competing ends [13]. Microeconomic theory offers a general theory of how someone, a leader or a group of people makes a decision [14]. In case of illegal fishing, the researcher will analyze actions taken by government to punish offenders of illegal fishing in the Indonesian territorial sea.

Punishment for offenders of illegal fishing should be in line with the goal of imposition of punishment on someone who has committed a crime or violated a law. It is a result of law enforcement. Black's Law Dictionary defines punishment as any fine, penalty or confinement inflicted upon a person by authority of the law and judgement and sentence of a court, for some crime of offence committed by him, or for his omission of a duty enjoined by law [9]. A criminal punishment is imposed intentionally by an authorized person or entity which originally aiming to give suffering or other unpleasant results on someone who, per the law, has committed a crime [9].

IV. FINDINGS AND DISCUSSION

A. Mechanism for taking action against and punishing illegal fishing in Indonesia

Fish resources, with their biological natures and beneficial environment, do have renewable resources although it does not necessarily mean they are unlimited. If human excessively exploit them without carefully considering the principles of rational resource management, it is likely that fishery business and fishermen will be lack of catch as their resources have been destroyed [9]. Kent Sondakh (the Chief of the Indonesian Navy 2002-2005) says that violation of laws in the sea is a threat because it has potential to devastate economy of the State [15]. Therefore, government needs to take an effective and serious action to save Indonesian marine ecosystem and return financial losses suffered by the State.

Currently, Indonesia has some laws and regulations related to fishery and marine sectors, especially related to illegal fishing. One of them is Presidential Regulation Number 115 Year 2015 on Task Force for the Eradication of Illegal Fishing. It is hoped the presidential regulation will be able to minimize fishery crimes and maximize the use and protection of marine resources. Sadly, the existing laws and regulations still cannot effectively prevent and

eradicate illegal fishing because they have not yet targeted organizations or corporates which are criminally liable for returning trillions rupiah of financial losses suffered by the State every year.

B. The sinking of foreign ships used for or engaged in illegal fishing

Per data from Task Force 115, there are 176 fishing ships used for or engaged in illegal fishing which have been sunk by the Task Force in collaboration with the Indonesian Navy, the Ministry of Marine Affairs and Fisheries and Security Development Agency (*Badan Pemeliharaan Keamanan – BAHARKAM*) of the Indonesian Police. Of the 176 fishing ships, which have been sunk, 162 are foreign ships from Vietnam, the Philippines, Thailand, Malaysia and China. This shows that there are many foreign ships which are used or engaged in illegal fishing in the Indonesian waters [16].

Per its First Quarterly Report 2016, Task Force 115 sank 37 foreign ships from January to September 2015 after getting court decisions and approvals. Article 73 of the UNCLOS stipulates that in cases of arrest or detention of foreign vessels the coastal States shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed. The coastal State is only required to send a notification to the flag State of the arrested, detained or sunk ships. So, the flag State cannot negotiate or protest laws and regulations applicable in Indonesia or intervene the judicial process. An owner of a foreign ship from the Philippines had ever requested the Government of Indonesia not to take any legal action against his ship because he wanted to post reasonable bond as regulated in Article 73 of the UNCLOS. Since at that time Article 110 of Law Number 45 Year 2009 on Fishery did not yet enter force, the judicial process continued.

The sinking of foreign ships is controversial and considered to breach the UNCLOS. Analysis on the handling of illegal fishing cases shows that flag States which protest the sinking of ships used for illegal fishing support illegal unreported and unregulated fishing. In the legal process, investigators ask for approval from court to sink the ships as stipulated in Article 76 A of Law Number 45 Year 2009 on Fishery while Article 45 of the Code of Criminal Procedure stipulates that the ships may be destroyed and the legal process continues by presenting ship owner or operator rather than ship captain.

C. Action against offenders of illegal fishing inflicting financial losses to the State

It is strongly believed that there is a connection between illegal fishing and transnational organized crime (TOC). Paragraph 87, Part IV of Resolution A/RES/70/75 Year 2015 which was adopted in the 70th UN General Assembly, states: "Also notes the concerns about possible connections between transnational organized crime and illegal fishing in certain regions of the world, and encourages States, including through the appropriate international forums and organizations, to study the causes and methods of and contributing factors to illegal fishing to

increase knowledge and understanding of those possible connections, and to make the findings publicly available, and in this regard takes note of the study issued by the United Nations Office on Drugs and Crime on transnational organized crime in the fishing industry, bearing in mind the distinct legal regimes and remedies under international law applicable to illegal fishing and transnational organized crime [17]."

Unfortunately, the real offender, organization, still cannot be prosecuted and punished. This can be seen from the results of our interview with a crime analyst who has ever become an investigator. He says that up to know, investigator still cannot investigate the main offender although they are criminally liable to return financial losses suffered by the State. Court usually imposes light fine on ship captains and this, of course, cannot return financial losses suffered by the State. They usually cannot afford to pay high fine because they do not have much money. If they cannot pay the fine, their imprisonment will be increased.

It is not easy to investigate organizations as the main offender of illegal fishing because they are usually protected by governments in their country. Therefore, a strong legal basis will be needed to enable the Government of Indonesia to investigate, prosecute and convict main offender of illegal fishing by using the existing laws such as Law on Corporations, Law on Exclusive Economic Zone (EEZ), Law on Taxes, Criminal Code and UNCLOS and involving relevant parties so that financial losses suffered by the State can be returned. Although the Government of Indonesia has taken actions to fight and eradicate illegal fishing by sinking and/or burning foreign ships used for illegal fishing, they still cannot return financial losses suffered by the State.

So far, the government, through Task Force for the Eradication of Illegal Fishing, can only sink and/or burn arrested and detained foreign ships used for illegal fishing and punish the ship captains but still cannot investigate, prosecute and convict organizations as main offenders of illegal fishing. This transnational organized crime needs to be seen not only from legal perspective but also from economic perspective to ensure that financial losses suffered by the State can be returned.

Illegal fishing is not only a legal issue but also an economic issue because it also can inflict financial losses to the State. Analytical approach to microeconomic on criminal law comes from microeconomic theory stating that the study of how scarce resources are allocated among competing ends [9].

Microeconomic theory offers a general theory of how someone, a leader or a group of people makes a decision [18]. The researcher will analyze actions taken by government to punish offenders of illegal fishing in the Indonesian territorial sea. So far, action against and punishment for offenders of illegal fishing are not yet focused on economic issue. The imposition of punishment on the offenders not only needs to be able to give a legal certainty but also consider justice and utility of law. In most cases, the amount of fine imposed on ship captains is too

small so that it cannot return financial losses suffered by the State.

Juridically, offenders of illegal fishing are prosecuted and punished for violating applicable laws and regulations. Sadly, the imposed punishment cannot give any deterrent effect to the offenders and return financial losses suffered by the State. Therefore, government, especially the Ministry of Marine Affairs and Fisheries, the Indonesian Navy and court, needs to make a decision based on economic perspective. Microeconomic theory is a theory of human's behaviors which is based on three principles: (i) optimization (maximization and minimization), (ii) equilibrium and (iii) efficiency [19].

In criminal law context, the equilibrium principle should be able to explain how financial losses suffered by the State can be returned by the main perpetrators and whether the imposition of imprisonment and small fine on ship captain will be able to return financial losses suffered by the State [9]. This is in line with the "felicific calculus", an algorithm formulated by utilitarian philosopher Jeremy Bentham or balance between seriousness of crimes and their sanctions [9]. Per the researcher, it is important to ensure that the amount of fine imposed on the perpetrators is equal to the amount of financial losses suffered by the State.

The imposition of sanctions for the criminal act of illegal fishing must carefully consider the third microeconomic principle, efficiency. This principle is relevant to answer question whether it is the imposition of imprisonment or the imposition of fine which is more efficient or whether it is the provision of a compensation to victim of the crime, the return of financial losses suffered by the State or the imposition of imprisonment which fairer. The punishment is considered efficient if it can improve the personality of the perpetrators of illegal fishing and economy of the State. Imprisonment or fine can be imposed on ship captains who fail to return financial losses suffered by the State and strict liability can be imposed on ships. It is advised to employ ship crews in fishery companies in Indonesia.

In legal context, perpetrators of illegal fishing must be punished because the imposition of criminal sanctions such as imprisonment and fine will serve as deterrence. Although the sinking of foreign ships by Task Force for Illegal Unreported and Unregulated (IUU) Fishing is effective to minimize the number of foreign ships used for or engaged in illegal fishing in the Indonesian waters, it is ineffective to return financial losses suffered by the State.

Therefore, the imposition of criminal sanctions on offenders of illegal fishing must be in accordance with punishment theories developed by H.L Packer, absolute and retributive theories (*vergeldingstheorieën*). Per these theories, criminal sanctions must be imposed merely because someone has committed a crime (*quia peccatum est*). It is an absolute result which must present as a reprisal against someone who has committed a crime [9]. So far, there is no sanction which gives absolute result to offenders of illegal fishing such as ship captain, crews and organization/corporation for their crime. Nigel

Walker says that per the pure retributivist, criminal sanction must be equal to crime committed by the offender [9].

The severity of punishment contained in Law Number 45 Year 2009 on Fishery is not equal to the seriousness of crimes committed by offenders of illegal fishing. Per Article 100 of the law, the maximum fine is only two hundred and fifty million rupiahs while the value of catch of many foreign ships is much higher than the maximum fine. In criminal law, a fine can be imposed on perpetrators to compensate. So, if the amount of the compensation is lower than the value of the stolen fishes, the financial losses cannot be compensated.

V. CONCLUSIONS

Based on explanations about action against and punishment for illegal fishing inflicting financial losses to the State above, it can be concluded that illegal fishing is a transnational organized crime. It is estimated that Indonesia suffers financial losses of IDR 240 trillion annually from illegal fishing. There are 176 fishing ships used for or engaged in illegal fishing which have been sunk by Task Force 115. Of the 176 fishing ships, which have been sunk, 162 are foreign ships from Vietnam, the Philippines, Thailand, Malaysia and China. This shows that there are many foreign ships which are used or engaged in illegal fishing in the Indonesian waters. The sinking and/or burning of these 176 foreign ships still cannot return financial losses suffered by the State because it is only ship captains who are tried and punished and the punishment is not equal to crimes they have committed. Ships are not yet investigated. The existing laws and regulations are still weak so that they cannot be used to take action against and punish offenders of illegal fishing effectively. Some cases have been taken to court but the punishment is not equal to the committed crime.

Based on conclusions above, it is recommended to amend Law Number 45 Year 2009, especially the punishments of imprisonment and fine. It is recommended to investigate the main offenders which are legal entity or non-legal entity to ensure that they are criminally liable for the crime. It is also recommended to use microeconomic approach to criminal law in taking action against and punishing offenders of illegal fishing because microeconomic theory can be used to address the issue and ensure that the severity of the punishment is equal to the seriousness of the crime as it is based on the principles: optimization (maximization and minimization), equilibrium and efficiency.

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