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Illegal fishing as a trans-national organized crime

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Abstract

This article aims to investigate illegal fishing as a trans-national organized crime and is written based on empirical-qualitative research conducting through observation, conduct interviews with law enforcement officials and government agencies. As a result, the biggest challenges in combating illegal fishing include several aspects such as politics, law, institutions, educations, and law enforcement. In conclusion, eliminating Illegal, Unregulated, and Unreported (IUU) Fishing requires bilateral, regional, and international cooperation and it needs common perception among States to categorize IUU Fishing as TOC so that criminal justice system can be implemented effectively.

Keywords: Illegal, Fishing, Marine, Environment, Transnational.

La pesca ilegal como crimen organizado transnacional

Resumen

Este artículo tiene como objetivo investigar la pesca ilegal como un crimen organizado transnacional y está escrito en base a investigaciones empíricas y cualitativas que se realizan a través de la observación, entrevistas con funcionarios encargados de hacer cumplir la ley y agencias gubernamentales. Como resultado, los mayores desafíos en la lucha contra la pesca ilegal incluyen varios aspectos como la política, la ley, las instituciones, la educación y la aplicación de la ley. En conclusión, la eliminación de la pesca ilegal, no reglamentada y no declarada (INDNR) requiere cooperación bilateral, regional e internacional y necesita una percepción común entre los Estados para clasificar la pesca INDNR como TOC para que el sistema de justicia penal pueda implementarse de manera efectiva.

Palabras clave: Ilegal, Pesca, Marina, Medio ambiente, Transnacional.

1. INTRODUCTION

Indonesia is the largest archipelagic country in the world with an abundance of fisheries resources. However, studies show that there is significant increase in exploitation and exploration of fisheries resources in Indonesia during the last decade – particularly those conducted through Illegal, Unregulated, and Unreported Fishing (IUU Fishing) methods (SIHOTANG, 2005). Research conducted by Indonesian Ministry of Marine and Fisheries shows that Indonesian water is one of the only two potential fishing grounds in the world (POERNOMO, 2014). Accordingly, the potential and vulnerable zones of IUU Fishing in Indonesian waters are Malacca Sea, Java Sea,

Arafuru Sea, Timor Sea, Banda Sea and waters near Maluku and Papua. Furthermore, the immediate impact of IUU Fishing on fisheries resources management in Indonesia is over-fishing in some Fisheries Management Areas (FMA) in Indonesia (SUNYOWATI, 2013).

In addition, IUU Fishing may cause severe economic impact to the coastal state. FAO research data in 2014 shows that the global lost to IUU Fishing is between the US \$ 10 billion to the US \$ 23 billion per year of which the IDR 30 trillion is Indonesia's lost (SYALTOUT, 2012). Furthermore, Indonesian Ministry of Marine and Fisheries Affairs (KKP) stated that Indonesia's loss rate is about 25% of Indonesia's total fisheries potential of 1.6 million tons per year (WIDODO, 2015). With regard to law enforcement, KKP has conducted fisheries surveillance and arrested 89 foreign ships and 95 local fishing boats from 2007 to 2014. Another research estimated that Indonesia lost due to IUU Fishing is IDR 439.6 billion which includes IDR 34 billion of Fisheries Income Tax, IDR 23.8 billion of fuel subsidy and IDR 381 billion of fisheries resources per year (WARDHANINGSIH, 2014).

IUU Fishing may also cause political impact. It may trigger diplomatic tensions between States, e.g. Indonesia-Malaysia diplomatic conflict on traditional fishing Rights and Indonesia's diplomatic tensions with Thailand, Myanmar, the Philippines and Taiwan on the use of trawling boats and vessel's double flags (SUNYOWATI, 2013). Accordingly, this paper analyzes and reviews the Indonesian Government's strategic policy framework on fisheries,

which then becomes the basis of the research suggestions on how to strengthen law enforcement towards IUU Fishing. This paper also provides legal analysis, which can be used as a theoretical ground to include IUU Fishing as Trans-National Organized Crime (DAULAY, 2012).

2. METHODOLOGY

This research was conducted in Surabaya (Department of Marine and Fisheries of East Java Province and Indonesian Navy-Eastern Fleet), Jakarta (Ministry of Marine and Fisheries Affairs of the Republic of Indonesia), Medan and Ambon (Fisheries Courts) with aims to strengthen anti-IUU Fishing laws and regulation as well as to include the crime as TOC. Furthermore, this research includes a Focused Group Discussion (FGD) involving Economics, Law, Marine and Fisheries experts. In addition, the case approach is employed to make this research more comprehensive.

3. RESULTS AND DISCUSSION

Definition of Illegal, Unregulated, Unreported Fishing (IUU Fishing): IUU Fishing is regulated in the FAO's Code of Conduct for Responsible Fisheries (CCRF) 1995. Further details of the Code of

Conduct can be found at the organization's International Plan of Action (IPOA), which includes the following activities as IUU Fishing:

Activities conducted by national or foreign vessels in waters under the jurisdiction of a state, without permission, or in contravention of its laws and regulation;

Activities conducted by vessels flying the flag of states that are parties to a relevant Regional Fisheries Management Organization (RFMO) but operate in contravention of the conservation and management measures adopted by the organization and by which states are bound, or relevant provisions of the applicable international; and

Activities in violation of national laws or international obligations include those undertaken by cooperating states at a relevant RFMO.

International Regulation of Fisheries:

a. The United Nations Convention on the Law of the Sea (UNCLOS) 1982

The UNCLOS 1982 does not specifically regulate IUU Fishing. Instead, it provides general provisions on fisheries. It regulates that fisheries in the territorial sea are subject to the sovereignty of the coastal state and that the exploration, exploitation, conservation, and management of fisheries in the Exclusive Economic Zone is the

sovereign rights of the coastal State subject to a number of duties contained in the convention. Furthermore, the convention also specifies that fishing on the high seas is in principle open to all states subject to the restrictions pertaining to specific species including straddling and highly migratory fish (LOWE, 1999).

b. Agenda 21 Global 1992

Chapter 17 of Agenda 21 Global 1992 regulates the management of marine biological natural resources, the protection of the marine environment and all of its contents, including the sea closed and semi-enclosed, including coastal areas and their protection, rational use and development of biological resources by States (the United Nations Conference on Environment and Development (UNCED)). The document highlights that the marine environment and its ecosystems are an important component of the global life support system and make a significant contribution to sustainable development.

c.FAO Compliance Agreement 1993

Fisheries provisions in the UNCLOS 1982 are insufficient to address high seas fisheries issues, particularly on straddling highly migratory fish stocks. The application of conservation and management principles on the species can only be applied to fishing vessels flying the flag of RFMO States. Thus, by exercising freedom of fishing on the high seas, vessels of non-RFMO States can freely fish

on the prescribed fishing areas. A further problem arises as the number of non-RFMO States is larger than the number of members.

d. The United Nations Fish Stocks Agreement (UNFSA), 1995

The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, known as the UN Fish Stocks Agreement (UNFSA) 1995 was concluded in harmony with Chapter 17 Agenda 21, Area C, Program on Sustainable Use and Conservation of Marine Living Resources of the High Seas. Accordingly, States should take effective measures, including bilateral and multilateral cooperation, at the sub-regional, regional and global levels, to ensure that fisheries in high seas are managed in accordance with the provisions of the UNCLOS 1982 (ETTY, AGOES & LLM, 2016).

e. Code of Conduct for Responsible Fisheries (CCRF) 1995

In 1992, the FAO prepared the International Code of Conduct to deal with fisheries issues, which based on international principles and standards for the conservation, management, and development of all types of fisheries. The CCRF contains the necessary frameworks in national and international efforts to ensure the exploitation of marine resources meets harmonious sustainable development standards. Although the CCRF is voluntary, certain provisions in the code of

conduct are based on international legal rules, including the UNCLOS 1982. Moreover, the CCRF establishes international principles and standards for responsible fisheries activities to ensure effective conservation, management, and development of marine biological resources. The code is intended to be used by all fishing actors.

f. International Plan of Action (IPOA) - IUU Fishing 2001

The IPOA-IUU Fishing is created to prevent, fight and eliminate the IUU Fishing. The principles used to achieve these objectives include: (1) broad participation and coordination among States, as well as representatives from industry, fishing communities and non-governmental organizations (NGOs); (2) phasing out actions to implement IPOA-IUU Fishing on an agreed-upon schedule as early as possible; (3) the use of a comprehensive and integrated approach, to address all fishing impacts due to IUU Fishing activities; (4) maintenance of consistency with conservation and sustainable use of fish stocks and environmental protection; (5) transparency; and (6) non-discrimination in all its forms to any State or its fishing vessel.

g. Port State Measures Agreement (PSMA) 2009

Port State holds an important role in combating IUU Fishing as its jurisdiction recognized by international law and has structure and infrastructure to fight the crime. PSMA 2009 main purpose is to prevent, cope and eliminate IUU Fishing through the role of the port state. This Agreement requires its parties to harmonized their domestic

measures, enhance regional and international cooperation and prevent the flow of fish caught by IUU Fishing into national and international markets.

h. Voluntary Guidelines for Flag State Performance 2014

This instrument serves as a tool to ensure Flag States compliance with international obligations on the identification of international fishing vessels. These are examples of Flag State's initiatives to fight IUU Fishing: (1) Joint Statement on IUU Fishing signed by the EU and the US; (2) The IUU Fishing regulation of the EU, including on the development of catch certification scheme; (3) establishment of international guidelines for catch documentation schemes coordinated by the FAO.

Law of the Republic of Indonesia No. 31 of 2004 on Fisheries as Amended with Law of the Republic of Indonesia No. 45 of 2009: Both of the regulations regulate fisheries and apply simultaneously as the later law does not revoke the previous law was amended as it is lacking rules on IUU Fishing conducted by a foreigner. The previous law also has weaknesses in fisheries management provisions, among others, the lack of inter-agency coordination and mechanisms related to fisheries management. Thus the later law includes provisions on supervision and law enforcement, coordination mechanisms among agencies in fisheries crime investigations, the application of sanctions (penalties or fines) and the fisheries crime tribunal.

TOC is a relatively new phenomenon that emerged in the 1990s as a result of the growing globalization process of the last few decades. The term transnational crime or a transboundary crime is used in one of the United Nations (VII) Resolution on the Prevention of Crime and Treatment of the Law Offenders of 1990 and the Vienna Convention on the Prevention and Eradication of Illegal Traffic of Narcotics and Psychotropics 1988. This term is used to refer to a crime that has the following characteristics: a) involving two countries or more; 2) The victims or the suspects are foreigners; 3) Beyond state borders or more. Furthermore, the United Nations Convention against Trans-Nasional Organized Crime specifies that criminal act categorized as transnational, if:

- a. Conducted by two countries or more;
- b. Conducted in one country but an important part of the preparation, planning, directing or control activities takes place in another country;
- c. Conducted in one State but involves an organized criminal group engaged in criminal activity in more than one country; or
- d. Conducted in one country but has major consequences in another country.

In 1994, the UN developed a strategy against organized international crime through the Naples Political Declaration and Global Action Plan against the Organized Transnational Crime adopted by the UN General Assembly by Resolution 49/159 in December 1994. In

1995 the UN had identified 18 types of transnational crime, among others related to IUU Fishing. These include: 1) illicit drug trafficking; 2) money laundering; 3) environmental crime; 4) trafficking in persons; and 5) trade in human body parts.

The first international instrument to suppress TOC is the United Nations Convention against Transnational Organized Crime (UNTOC or commonly called the Palermo Convention). The Convention asserts that parties to the Convention shall criminalize all acts related to IUU Fishing in its domestic law. In addition, there are some additional protocols in this matter, such as Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and Protocol against the Smuggling of Migrants by Land, Sea, and Air. According to the Convention, TOC includes drug trafficking, trans-border organized a criminal activity, money laundering, financial crimes, willful damage to the environment, and others. These can be described as follows:



Fig. 1

Source: <http://www.kemlu.go.id/id/kebijakan/isu-khusus/Pages/Penangulangan-Kejahatan-Lintas-Negara-Teroganisir.aspx>

The international instruments embodied in UNTOC serve as a basic guideline for States in the effort to combat transnational crime. Because of its strategic location, Indonesia is very vulnerable to various transnational crimes. Cooperation with countries or other parties is necessary to protect national interests and sovereignty. It is caused by a transnational crime cannot be solved on their own, due to the nature of the crime itself. Indonesia has a large number of illegal fishing activities in Indonesian waters. There is a phenomenon that illegal fishing is a crime in the field of fisheries, and should be dealt with using existing international frameworks such as the mandate granted by UNTOC by involving international bodies like UNODC, CCPCJ, ILO, and Interpol. At CCPCJ resolution in 2011 and 2013, also Doha Declaration 2015, stated that all TOCs in the sea including illegal fishing become part of the TOC. According to BUDIMAN (2015), there are differences in perception, understanding, and position of illegal fishing between fisheries management and TOC. Illegal fishing is part of a fisheries crime and can be categorized as TOC.

But, if illegal fishing is part of IUU Fishing, they cannot be categorized as TOC (BUDIMAN, 2015). The reason for illegal fishing called TOC because it can be categorized as a serious crime and organized illegally. In general, illegal fishing activities are accompanied by human trafficking and environmental damage due to illegal fishing gear. Its activity can cause damage or harm either to individuals or communities generally. According to data from KKP, here following types of violations of fisheries crimes (SANTOSA, 2015): (1) Forgery of vessel's document; (2) Double flagging and

double registered; (3) Fishing without licenses/appropriate documents (sailing without port and seaworthiness clearance); (4) Illegal modification of vessels (including market down, changing call sign, machines); (5) Using foreign captain and seamen; (6) Deactivation of vessel transmitter; (7) Illegal transshipment at sea; (8) Forgery of logbook record; (9) Absence of health certificate and export declaration; (10) Violation of fishing ground; (11) Using prohibited fishing gear; (12) Non-compliance in owning /partnering with a fish processing unit; (13) Unlawful landing of catches

Based on observations and interviews with KKP, the Water Police and the Indonesian Navy, the modus operandi of Illegal fishing activities in Indonesia has progressed year by year, by all means of foreign or domestic vessels committing violations in fishing in Indonesian waters,; (1) the ship licensing issue for fisheries, which is not in accordance with its designation, in the case of the field it was found by the CTF that the Government succeeded in catching a 1,200 gross tons (GT) foreign vessel fishing illegally in Indonesian waters. By 2015 the CTF enacted the capture and drowning of illegal vessels, on the basis of Law No. 31 junction 45 on Fisheries, where we may sink the ship.

After moratorium foreign vessels by KKP around 7,000 foreign ships are fishing illegally in Indonesian waters, and come from 10 countries (ZULFIKAR, 2017), (2) human trafficking activities; (3) forgery of vessel documents; and (4) smuggling of drugs and weapons; (5) counterfeiting ship size. KKP noted that Indonesia has 525,000

types of ships, boats, and canoes spread throughout Indonesian waters. The institutions of the vessel's license are separated based on the volume of vessel, (a) under 10 GT – does not need to get permission, (b) 5-10 GT – permits are located at the city level, (c) 10-30 GT – permits are located at the provincial level and (d) above 30 GT – permits at the Centre level. The effort made by the CTF is to encourage ship owners and fishermen to re-register the ship.

The Government of Indonesia is currently strengthening regulation in the field of fisheries, as an effort to combat illegal fishing. The Ministry of Marine Affairs and Fisheries has banned 100% of the permits of foreign vessels that want to fish in Indonesia. But the CTF opens a great opportunity for foreigners to invest in the fish processing industry. Another effort to strengthen regulation to save fisheries resources in Indonesia is by prohibiting the use of trawling, bomb, overfishing gear, licensing transparency, financing for fishermen and the development of integrated marine fishery centers on small islands and border zone.

The biggest challenges in combating illegal fishing include several aspects such as politics, law, institutions, educations and law enforcement. The best ways to overcome these challenges include strengthening legal framework in national, regional and global, enhancing the capacity of developing countries to manage, supervise and control of fisheries activities, and developing globally accepted standards for market access, trade, and traceability mechanisms.

4. CONCLUSION

IUU Fishing is not a mere issue of fisheries management. It is also a fisheries crime with trans-national characteristics. Then, IUU Fishing triggers other related crimes, e.g. money-laundering, people smuggling, human trafficking, and drug trafficking. Moreover, IUU Fishing should be regulated within the UN framework as well as the UNTOC arrangements by involving international institutions, i.e. the UNODC and the Interpol. Therefore, Eliminating IUU Fishing requires bilateral, regional, and international cooperation and it needs common perception among States to categorize IUU Fishing as TOC so that the criminal justice system can be implemented effectively.

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