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Reconstruction of the legal basis for the policy on sinking foreign flag ships that commit fishing theft in Indonesia's Exclusive Economic Zone

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Abstract. Indonesia is a country whose territory consists of thousands of islands, most of which consist of waters and the rest are land. The ocean area is divided into territorial seas of 12 nautical miles, adjacent seas of 24 nautical miles, and an Exclusive Economic Zone of 200 nautical miles, measured from baseline of Indonesia. The total area of Indonesia reaches 7.7 million km², with a sea area of 3.2 million km², consisting of 2.8 million km² of inland waters, and 0.3 million km² of territorial waters, and 2.7 million km² of the Indonesian Exclusive Economic Zone (ZEEI). In this study, the focus of attention is on fishing in ZEEI waters, which is carried out by foreign fishing vessels. The fact of fishing by foreign fishermen is indeed an unavoidable reality. From a legal perspective, fishing in the waters in ZEEI area is a criminal act or what is known as a fisheries crime. This is because fishing by foreign fishermen violates the provisions of fishing permits in Indonesia. Against these fisheries crimes, Indonesia as a sovereign country has the authority to supervise, secure, in the ZEEI area, and also has the authority to take action against foreign flag vessels that fish in the ZEEI area. The territory of Indonesia, most of which is approximately two-thirds ocean, contains enormous natural wealth, especially fishery resources. These fishery resources trigger foreign fishermen to commit fish theft, especially in the ZEEI area. As a sovereign country, Indonesia has full authority to enforce the law against criminal acts in the ZEEI area. Based on provisions of Article 69 paragraph (4) of Law No. 45 of 2009, Indonesia can impose sanctions on foreign-flagged fishing vessels by sinking vessels.

Keywords. Ship Sinking, Unconstitutional, Legality, Reconstruction, Judicial Process

Introduction

Indonesia is a country whose territory consists of thousands of islands, most of which consist of waters and the rest are land. The ocean area is divided into territorial seas of 12 nautical miles, adjacent seas of 24 nautical miles, and an Exclusive Economic Zone of 200 nautical miles, measured from baseline of Indonesia. The total area of Indonesia reaches 7.7 million km², with a sea area of 3.2 million km², consisting of 2.8 million km² of inland waters, and 0.3 million km² of territorial waters, and 2.7 million km² of the Indonesian Exclusive Economic Zone (ZEEI).[1]

In this study, the focus of attention is on fishing in ZEEI waters, which is carried out by foreign fishing vessels. The fact of fishing by foreign fishermen is indeed an unavoidable

reality. From a legal perspective, fishing in the waters in ZEEI area is a criminal act or what is known as a fisheries crime. This is because fishing by foreign fishermen violates the provisions of fishing permits in Indonesia. Against these fisheries crimes, Indonesia as a sovereign country has the authority to supervise, secure, in the ZEEI area, and also has the authority to take action against foreign flag vessels that fish in the ZEEI area.

Indonesia's authority to take action against foreign vessels that carry out illegal fishing in the ZEEI waters is based on the sovereign rights of coastal states over their sea areas, which are guaranteed in Article 59 of the United Nation Convention on The Law of The Sea 1982 (UNCLOS). As is known, Indonesia has ratified UNCLOS based on Law Number 17 of 1985, thus Indonesia has full authority to enforce the law in the ZEEI, especially against perpetrators of illegal fishing in the ZEEI area. The action is based on the reason that illegal fishing by foreign vessels, in addition to violating state sovereignty, and can disrupt security at sea, and harm the state, also violates international maritime law (UNCLOS).[2]

The concrete steps of the Indonesian government in protecting fishery resources are carried out by monitoring and taking action against violations in its sea area. These efforts are carried out by forming and enforcing Law Number 31 of 2004 concerning Fisheries.

However, cause the law is considered incapable of anticipating and addressing technological developments and legal needs, particularly related to the management and utilization of fisheries resource potential in Indonesia, the law was amended by Law Number 45 of 2009 (Law No. 45 of 2009). One of the fundamental changes in Law No. 45 of 2009 is to reconstruct Article 69 paragraph (4), which is formulated: "In carrying out the functions as referred to in paragraph (1) investigators and/or fisheries supervisors may take special actions in the form of burning and/or sinking foreign-flagged fishing vessels based on sufficient initial evidence".

The provisions of Article 69 paragraph (4) are the basis for the policy of sinking foreign vessels that carry out fish theft in Indonesian waters, and this policy has been implemented during era of President Joko Widodo's administration by Minister of Maritime Affairs and Fisheries. The policy of sinking these vessels has given rise to pros and cons from various parties, both from within and outside the country, especially friendly countries of origin of the vessels.[3]

Research Method

This research is a normative legal research.[4]

Discussion

Indonesia's efforts to unite its territory began when Ir. Juanda served as the Indonesian Minister of Foreign Affairs, who in 1957 unilaterally declared the use of straight baselines and determination of width territorial sea as far as 12 nautical miles from the baseline. This statement was later known as the "Juanda Declaration of 1957", which was later strengthened by Government Regulation in Lieu of Law Number 4 of 1960, which was later upgraded to Law Number 4 Prp of 1960.

The use of straight baselines and determination of territorial sea width of 12 nautical miles is not legally binding on other countries, cause's law derived from the declaration of the word "declare" which means statement, which only has a unilateral meaning, so it is not a legal norm that is binding on all countries as members of the international community. The statement of the use of straight baselines and the determination of the territorial sea width of 12 miles has caused various problems, including the absence of a mutually agreed international maritime

law. So that, debate related to legality of declaration with consequences related to status of the strait which used to be an international sea route was later unilaterally claimed by Indonesia as an inland sea, because it is within the baseline.[5]

The approval of UNCLOS indirectly provides great benefits for Indonesia, because UNCLOS has ratified breadth of territorial sea of each country as far as 12 miles measured from the baseline. The provision is stated in Article 3 Breadth of territorial sea Every State has right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention”.

In addition, UNCLOS also stipulates the division of sea areas into inland seas, territorial seas, contiguous zones, Exclusive Economic Zones, and high seas or free seas.[6] Regarding the definition of EEZ, it is regulated in *Article 55 UNCLOS*, which essentially determines that EEZ is a sea area that is outside and adjacent to territorial seas and applies a special legal regime stipulated in UNCLOS based on the rights and jurisdiction of coastal states and the rights and freedoms of other states are regulated by relevant provisions of this convention.[7] Furthermore, according to *Article 56 UNCLOS*, countries, including Indonesia, have sovereign rights to explore and exploit, conserve and manage natural resources, both living and non-living, from waters above the seabed and the land beneath it and other activities for the purposes of economic exploration and exploitation of zone, such as energy production from seawater, ocean currents and winds.[8]

In relation to the right to economic exploitation, especially fishery resources in the ZEEI waters which are the rights of Indonesia, Law No. 31 of 2004 concerning Fisheries has been enacted, which was later amended by Law No. 45 of 2009, to be adjusted to Indonesia's needs and international developments. In an effort to provide protection for fishery resources in marine waters, including in the ZEEI area, Law No. 45 of 2009 has stipulated several provisions, including provisions containing law enforcement in marine waters, including taking certain actions against perpetrators of violations as a consequence of the state's sovereign rights over its marine territory.

One of the authorities granted by Law No. 45 of 2009 in the law enforcement efforts is authority stipulated in Article 69 paragraph (4), which is formulated as follows: "In carrying out the functions as referred to in paragraph (1), investigators and/or fisheries supervisors may take special actions in the form of burning and/or sinking foreign-flagged fishing vessels based on sufficient initial evidence." This provision gives the government the authority to sink foreign fishing vessels that are proven to have committed fisheries crimes in the ZEEI area, with the aim of creating a deterrent effect as well as preventing illegal fishing.[9]

First, the policy of sinking ship is considered unconstitutional, because it doesn't comply with Article 28D paragraph (1) of the 1945 Constitution Republic Indonesia, which states that: "Everyone has the right to recognition, guarantee, protection, and certainty of fair law and equal treatment before the law". Regarding the equal position before law for everyone, Jimly Ashiddiqie said that: "Everyone has the right to recognition, guarantee, protection, and certainty of *fair law and equal treatment before the law*. In accordance with the principle of due process of law and equality before the law, justice must be certain and at the same time certainty must also be fair". From a constitutional perspective, the policy of sinking ships without going through a judicial procedure is considered to ignore the two principles that place everyone as having equal rights before law, so it is considered unfair and doesn't have legal certainty guaranteed by constitution.

The enactment of UNCLOS has given sovereign rights to coastal states over their sea areas, the implementation of which is in accordance with the provisions of UNCLOS.[10] It has

been explained above that Indonesia has ratified UNCLOS based on Law Number 17 of 1985, as a consequence of ratification, Indonesia must comply with UNCLOS. Because ratification is basically a process of ratifying the enactment of international law for countries that ratify. Article 73 of UNCLOS determines that the authority and jurisdiction of coastal states is limited to enforcing the laws and regulations of party states in order to exercise their sovereign rights in accordance with Article 56 of UNCLOS.

Regarding types of law enforcement actions that can be carried out, they are not regulated comprehensively (*non-exhaustive*). Furthermore, Article 73 paragraph (1) of UNCLOS also stipulates that law enforcement is carried out based on principle of "*may be necessary*" or as long as it is deemed necessary to ensure compliance with the law. However, the provisions of this article do not explain who has authority to determine the actions that are deemed necessary. However, the provisions of this article state as may be *necessary* to ensure compliance with the laws and regulations adopted by it in conformity with this Convention, meaning that it must still be in accordance with the provisions of the convention.[11]

Furthermore, Article 73 paragraph (1) stipulates that: "The coastal state in exercising its sovereign rights to explore, exploit, conserve and manage natural resources in the EEZ shall take such action, including boarding, inspection, arrest and conduct judicial proceedings, as are necessary to ensure compliance with laws and regulations it has established in accordance with the provisions of this Convention." In the provisions of this article there is the sentence "conduct judicial proceedings", this sentence indicates that in law enforcement, against foreign vessels that carry out fish theft in the EEZ must be carried out through a judicial process.

Article 73 paragraph (2) of UNCLOS stipulates that: "Every ship and its crew that is captured must be (*promptly released*) after payment of a reasonable bond or other form of security.[12] In the case of capture or detention of a foreign ship, the coastal state must promptly notify flag state, through the normally used channels of communication, of measures and sanctions imposed on the ship." It also stipulates that captured ships and their crew must be promptly released after payment of a reasonable bond or other form of security.

The provisions of Article 73 paragraph (3) of UNCLOS, emphasize that sanctions for violations of laws and regulations on fisheries in the EEZ may not include imprisonment, unless there is an agreement to the contrary from the relevant country, or other forms of corporal punishment. According to Article 73 of UNCLOS, if it is necessary to arrest and/or detain a foreign flag vessel, the coastal state must immediately notify the flag state of actions taken and legal sanctions to be imposed. Thus, regarding the policy of sinking foreign flag vessels involved in *illegal fishing* by Indonesia, it should refer to Article 73 of UNCLOS 1982, although it does not explicitly determine whether or not the action of sinking fishing vessels involved in *illegal fishing* may be carried out. This provision has given rise to debate regarding the policy of sinking foreign flag vessels regulated in Article 69 paragraph (4) of the Fisheries Law, which is considered to be contrary to internationally applicable norms, especially in international maritime law.[13]

Conclusion

The territory of Indonesia, most of which is approximately two-thirds ocean, contains enormous natural wealth, especially fishery resources. These fishery resources trigger foreign fishermen to commit fish theft, especially in the ZEEI area. As a sovereign country, Indonesia has full authority to enforce the law against criminal acts in the ZEEI area. Based on provisions of Article 69 paragraph (4) of Law No. 45 of 2009, Indonesia can impose sanctions on foreign-flagged fishing vessels by sinking vessels. However, the policy of sinking vessels is

unconstitutional against the 1945 Constitution of Republic of Indonesia, is not in line with the Criminal Procedure Code, Human Rights, and UNCLOS. In addition, there is a tendency to cause a rift in bilateral relations between Indonesia and friendly countries of fishermen who commit fish theft. Therefore, Article 69 paragraph (4) must be reconstructed with an alternative policy of sinking foreign flagged vessels that steal as a final sanction of an ultimum remedium nature, and not an ultimum remedium, so that it can still guarantee the sustainability of fisheries resources, minimize friction in bilateral relations with friendly countries, and maintain harmony with international law.

References

- [1] V. Mascarenhas, "Assessment of Stakeholder Options to Participate in Disputes Over Seabed Mining," *AJIL Unbound*, vol. 118, 2024, doi: 10.1017/aju.2024.13.
- [2] Y. C. Shih, "Ocean governance in practice: A study of the application of marine science and technology research techniques to maritime law enforcement in Taiwan," *Mar Policy*, vol. 163, 2024, doi: 10.1016/j.marpol.2024.106081.
- [3] P. Alat *et al.*, "Penyebaran Alat Peraga Kampanye Dengan Materi Kampanye Diluar Jadwal Sebagai Pelanggaran Pemilu," *Innovative: Journal Of Social Science Research*, vol. 3, no. 6, pp. 7716–7732, Dec. 2023, doi: 10.31004/INNOVATIVE.V3I6.6820.
- [4] A. Ariyanto and T. Michael, "Legal politics of the governor's position in ratio legis on the regulatory aspects of regional government," *Technium Social Sciences Journal*, vol. 59, pp. 91–96, 2024.
- [5] Y. Minyou and N. Yao, "Law enforcement in the implication of Blue Cooperation – A reflection of China," *Mar Policy*, vol. 163, 2024, doi: 10.1016/j.marpol.2024.106080.
- [6] S. A. R. Nova, S. Isra, F. Ferdi, and S. Husin, "Juridical analysis of the regulation of fishery resources in the Indonesian exclusive economic zone," *Linguistics and Culture Review*, vol. 5, no. S4, 2021, doi: 10.21744/lingcure.v5ns4.1984.
- [7] P. Mastrolia, "Transferred Malice: Historical Underpinnings of the Rule and Legal Arguments for Its Abrogation," 2023. doi: 10.1177/00220183231191262.
- [8] R. Strating, S. Rao, and S. Yea, "Human rights at sea: The limits of inter-state cooperation in addressing forced labour on fishing vessels," *Mar Policy*, vol. 159, 2024, doi: 10.1016/j.marpol.2023.105934.
- [9] S. Sanghi and R. Mitra, "'Natural' islands in UNCLOS: reframing artificial islands in the context of climate change, inhabitation, and human mobility," *Australian Journal of Maritime and Ocean Affairs*, vol. 16, no. 1, 2024, doi: 10.1080/18366503.2023.2187140.
- [10] T. V. Zanella, "The United Nations Convention on the Law of the Sea and the marine environment: a contribution to the analysis of the regulation of the protection and preservation of the marine environment in UNCLOS," *Revista Juridica Portucalense*, no. 35, 2024, doi: 10.34625/issn.2183-2705(35)2024.ic-04.
- [11] B. Dong, L. Bautista, and L. Zhu, "Navigating uncharted waters: Challenges and regulatory solutions for flag state jurisdiction of Maritime Autonomous Surface Ships under UNCLOS," *Mar Policy*, vol. 161, 2024, doi: 10.1016/j.marpol.2024.106039.
- [12] M. Marimin, "Penal Policy for Handling Illegal Fishing in Indonesian Exclusive Economic Zone Based on Pancasila," *IJCLS (Indonesian Journal of Criminal Law Studies)*, vol. 7, no. 1, 2022, doi: 10.15294/ijcls.v7i1.35928.
- [13] M. M. Hasan, H. Jian, M. W. Alam, and K. M. A. Chowdhury, "Protracted maritime boundary disputes and maritime laws," *Journal of International Maritime Safety*,

Environmental Affairs, and Shipping, vol. 2, no. 2, 2019, doi:
10.1080/25725084.2018.1564184.