

RECONSTRUCTION OF LAW ENFORCEMENT AGAINST FISH THEFT IN INDONESIAN TERRITORIAL WATERS BY CORPORATIONS

SAHAT MARISI HASIBUAN ^{1*}, LAZARUS TRI SETYAWANTA ² and
RB SULARTO ³

^{1, 2, 3} Doctoral Program in Law, Faculty of Law, Diponegoro University, Jl. Prof. Soedarto, SH., Tembalang, Semarang. * Corresponding Author Email: sahatmarisihisibuan@students.undip.ac.id

Abstract

This study aims to study; 1) What are the problems in law enforcement of illegal fishing committed by corporations in Indonesian territorial waters?; 2) How is the reconstruction of law enforcement against the criminal act of fish theft in Indonesian territorial waters by corporations"? The research method used is normative juridical with a statutory approach, concept approach, and case study approach. The results showed that; 1) the problems in law enforcement of illegal fishing committed by corporations in Indonesian territorial waters, namely There are many cases of corporations committing illegal fishing crimes in order to get far greater profits than fishing legally. Some cases can be seen only stopped at people who do it, namely the Fishing Master or Skipper and Crew (ABK) but have not reached out to the corporation. Article 101 of the Fisheries Law states that if the crime is committed by a corporation, the corporation will also be subject to criminal sanctions through its management. The provision of criminal sanctions to corporate administrators for corporations that commit illegal fishing crimes causes problems. 2) Reconstruction of law enforcement against the criminal act of fish theft in Indonesian territorial waters by corporations requires revision of Law No. 45 of 2009 concerning Fisheries. Corporate liability in article 101 is a form of criminal provision for illegal fishing crimes and if the corporation commits illegal fishing crimes listed in the article, then criminal charges and sanctions can be imposed against its management and the fine is 1/3 of the crime imposed which is not comparable to the crime committed by the Corporation.

Keywords: Reconstruction, Law, Enforcement, Illegal Fishing, Corporation.

A. INTRODUCTION

The problem of *illegal fishing* theft that often occurs has a huge state loss. Thus, *illegal fishing* can be said to be an extraordinary crime that requires law enforcement against criminal acts in tackling it. Because basically facing the situation in the sea area is different from on land. The need to tackle the crime of *illegal fishing* is not only sufficient with means outside the criminal law. Related to this, the role of criminal law policy in tackling crime really needs attention.¹

Regarding the crime of *illegal fishing* corporations, there are many pros and cons among legal experts, especially criminal law. In criminal law there is a doctrine that has developed, namely *the doctrine of the university delinquere non potest* that corporations cannot commit criminal acts, this is influenced by the idea that the existence of corporations in criminal law is only legal fiction, so it does not have a moral value that is hinted to be criminally blamed (element of guilt). Whereas in a delict (criminal act) requires the existence of a mistake (*mens rea*) in addition to the existence of an act (*actus reus*).²

Crime can be identified by the onset of losses, which then result in the emergence of liability or *criminal liability*. In the end, it invites debate is how corporations account or *corporate liability* considering that in the Indonesian Criminal Code (KUHP) what is considered a subject of criminal law is an individual person with natural biological connotations (*natuurlijke persoon*). In addition, the Criminal Code also still adheres to the principle of *sociates delinquere non potest* where legal entities are considered unable to commit criminal acts. In this concept of corporate criminal liability, there are several main principles that form the basis of the theory or philosophy of justification in imposing criminal liability on corporations, namely *the doctrine of strict liability* and *the doctrine of vicarious liability*.³

The development of crimes committed by corporations today both within the borders of one country and those committed across the borders of other countries is increasing.⁴ The problem of *illegal fishing* by corporations is no longer a new problem in legal and economic matters for a country because the problem of corruption has existed since thousands of years ago, both in developed and developing countries including Indonesia.

B. DISCUSSION

1. Problems In Law Enforcement of Illegal Fishing Committed By Corporations In Indonesian Territorial Waters

Law Number 31 of 2004 concerning Fisheries as amended by Law Number 45 of 2009 concerning Fisheries reads as⁵ follows:

"Article 1 in this law, what is meant by fisheries is all activities related to the management and utilization of fish resources and their environment starting from preproduction, production, processing to marketing carried out in a fishery business system".

One of the biggest losses of the country is the problem of *illegal fishing* practices. State losses are due to the continuous theft of fish in Indonesian sea waters which have a wealth of abundant marine resources and are beneficial to all Indonesian people. The practice of fish theft referred to as *illegal fishing* is illegal fishing activities.⁶

1. Carried out by national ships or foreign vessels in waters under the jurisdiction of one State, without permission from that State, or contrary to laws and regulations;
2. Carried out by vessels flying the flag of a member state of a regional fisheries management organization but acting contrary to the conservation and management provisions adopted by that regional organization and binding on that country, or other relevant general international provisions;
3. Violate national law or other international obligations, including those committed by States cooperating with a relevant regional fisheries management organization.

In *illegal fishing* activities that commonly occur in Indonesian waters are:⁷

1. Fishing without valid permits such as Fishing Business License (SIUP), Fishing License (SIPI) and Fish Carrier Permit (SIKPI).
2. Fishing by forging permits.
3. Fishing using prohibited fishing gear.
4. Fishing of species *that* are not in accordance with the applicable permit.

There are many kinds of *illegal fishing practices*, such as manipulation of administrative requirements, the use of fishing gear that is not permitted, nets that are not in accordance with laws and regulations, and others. *Illegal*⁸ *fishing* is known as *Illegal Unreported and Unregulated Fishing* (IUU). Quoted from the Directorate General of Capture Fisheries (Ministry of Maritime Affairs and Fisheries of the Republic of Indonesia) IUU *fishing* is a fishing activity that:

- a. *Illegal*
- b. *Unreported*
- c. *Unregulated*

Some fishery activities that are considered to have carried out *illegal fishing* are as follows:

- a. Fishery activities by foreign persons or vessels in waters under the jurisdiction of a State, without permission from that State, or contrary to laws and regulations;
- b. Fisheries activities carried out by vessels flying the flag of a State that is a member of a regional fisheries management organization, but carried out in a manner contrary to the resource management and conservation arrangements adopted by that organization, where such provisions are binding on the member State, or contrary to other relevant international law;
- c. fisheries activities contrary to national law or international obligations, including the obligations of member states of regional fisheries management organizations to such organizations;

The types of violations committed by Indonesian-flagged fishing vessels include:

1. Fishing vessels in operation are not equipped with a Fishing License (SIPI);
2. Fish transport vessels in their operation are not equipped with a Fish Transport Vessel License (SIKPI);
3. The fishing grounds and areas are not in accordance with those stated in the permit;
4. Use of hazardous fishing materials or equipment or prohibited fishing gear;
5. Forgery of fishing licenses;

6. manipulation of ship documents, including the size, location of manufacture, and ship ownership documents;
7. The vessel name, vessel size and/or brand, serial number, and engine power do not match those stated in the permit;
8. The type, size and number of fishing gear and/or fishing aids are not in accordance with those stated in the permit;
9. The ship operates without a Sailing Approval Letter (SPB);
10. Not installing or not activating designated fishing vessel and fish carrier monitoring devices (including VMS transmitters);
11. Fishing vessels and fish carriers carry out loading and unloading in the middle of the sea without permission;
12. Fishing vessels transport catches directly abroad without reporting at designated ports;
13. Indonesian-flagged fishing vessels and fish carriers catch/transport fish in the jurisdiction of other countries without permission from the country concerned and without approval from the Government of the Republic of Indonesia.

Based on the International Plan of Action to Prevent, Deter and Eliminate IUU Fishing (IPOA-IUU Fishing)⁹ in 2001, fishery activities that are considered Unreported Fishing are:

1. fishery activities that are not reported or reported incorrectly, to the competent national authorities, contrary to laws and regulations;
2. fisheries activities conducted in RFMO competence areas that have not been reported or reported incorrectly, contrary to the reporting procedures of that organization

The types of fisheries activities that are not reported include:

- a. Reporting of inappropriate catch data
- b. Transfer of catches in the middle of the sea or sea transshipment without being recorded / reported to the competent authorities;
- c. The perpetrators did not report their catch, in order to avoid paying levies on the work done;
- d. fishing vessels and fishing vessels do not report at the port of the ship base according to the permission granted;
- e. Fishing boats directly from the sea carry caught fish abroad.

Fisheries activities are not regulated *Unregulated Fishing based on the International Plan of Action to Prevent, Deter and Eliminate IUU Fishing (IPOA-IUU Fishing) in 2001, what is meant by fishery activities that are considered to be*¹⁰*Unregulated Fishing are:*

1. Fisheries activities carried out in relevant RFMO areas of competence carried out by vessels without nationality, or by vessels flying the flag of a country that is not a member of such organization, or by fishing companies, conducted in a manner contrary to the conservation and management arrangements of that organization;
2. Fisheries activities carried out in territorial waters or for fish stocks where no conservation and management arrangements can be applied, carried out in a manner contrary to the State's responsibility to conserve and manage marine living natural resources in accordance with the provisions of international law.

IUU *fishing activities* include violations related to the management and preservation of fishery resources in national and international waters. Fish-producing countries enter into bilateral and multilateral cooperation agreements so that they are bound by the rules of fisheries organizations that are followed.¹¹ If there is a violation of the rules set by the fisheries organization, the state must automatically comply with the articles of violation that have been regulated, especially with regard to administrative sanctions. If violations related to *illegal fishing* are committed in the sovereign territory of the Indonesian government, whether any territorial area in the EEZ area, then national law shall apply while referring to international law (1982 Convention on the Law of the Sea)¹² which Indonesia has ratified.

In Indonesia, although the law can be used as a legal basis to impose criminal *liability* on corporations, criminal courts have until now been reluctant to recognize and apply these regulations. This can be seen from the small number of corporate crime cases in court which have an impact on very few court decisions related to corporate crime.

Law Number 31 of 2004 concerning Fisheries recognizes the existence of "legal entities" (other than natural persons) as legal subjects regulated in fisheries crimes. However, the law does not further regulate when a legal entity is said to have committed a criminal offence and who can be held accountable for the crime. As a result, handling cases of fisheries crime is difficult to resolve, especially those involving corporations. In many cases, those who are brought to justice are only perpetrators in the field such as the ship's captain, the head of the engine room, and the crew, while the parties behind them (the corporation) are never touched.

The bright spot of the problem began to appear when the principle of corporate responsibility was regulated in Law Number 45 of 2009 concerning Amendments to Law Number 31 of 2004 concerning Fisheries. In this case, those who can be prosecuted for a fisheries crime are not only those who are direct perpetrators in the field, but also the corporations behind them. However, the formulation of the principle of corporate responsibility in the Law has actually regressed.

In Article 101 of Law Number 31 of 2004 concerning Fisheries jo. Law Number 45 of 2009 concerning Amendments to Law Number 31 of 2004 concerning Fisheries it is stated, that: "In the event that a fisheries crime is committed by a corporation, criminal charges and sanctions are imposed against its management, and the fine is plus one-third of the crime imposed". With this formulation, although the corporation is recognized as the perpetrator of a criminal act, the corporation itself cannot be held criminally liable. Such an arrangement will cause many weaknesses for certain cases, where the profits obtained by the company and/or the losses felt by the community are so great that the imposition of imprisonment or fines only to the management of the corporation is not comparable. In addition, criminal convictions to corporate administrators are also not enough to guarantee that the corporation does not take similar actions in the future.

Based on the norms and rules outlined in Law Number 45 of 2009 concerning Fisheries, it is clearly illustrated that in law enforcement *illegal fishing* in Indonesia leads to large-scale punishment, due to large-scale losses that have an impact on the economy of the Republic of Indonesia. Corporate crime is a criminal act committed by and therefore can be charged against a corporation because the activities of its employees or employees are often also referred to as white-collar crimes.

The three main ideas of *Braithwaite's* definition of corporate crime, among others, are: 1) The illegal actions of corporations and their agents are different from the criminal behavior of the socioeconomic class and below in terms of administrative procedures, therefore, which is classified as corporate crime not only criminal law crimes, but also violations of civil law and administrative law. 2) Both the corporation as an individual legal subject and its representatives are included as perpetrators of crimes, which in practice depend on the crime committed, the rules and quality of proof and prosecution. 3) The motivation for crimes committed by corporations is not for personal gain but for organizational profit.¹³

The provisions of Law No. 31 of 2004 Jo. Law No. 45 of 2009 do not impose criminal liability on corporations, and do not distinguish criminal sanctions between "individuals" and "corporations". If *illegal fishing* is carried out by a corporation, the criminal sanction is imposed on the management, and the fine is added to one-third of the crime imposed.

Law enforcement against illegal fishing cases in Indonesia is still new so, in its application there are many obstacles, among others, in some cases of fish theft which is actually the main perpetrator is a corporation, because the corporation cannot be accounted for according to Law Number 31 of 2004 Jo. Law Number 45 of 2009 and the principle of *sociates delinquere non potest*.

2. Reconstruction of law enforcement about illegal fishing by corporation in Indonesia

Articles relevant to the criminal act of illegal fishing in the Fisheries Law are contained in: "Article 84 (1): Any person who intentionally in the fisheries management area of the Republic of Indonesia conducts fishing and/or fish farming using chemicals, biological materials, explosives, tools and/or methods, and/or buildings that can harm and/or endanger the sustainability of fish resources and/or the environment as referred to in Article 8 paragraph (1),

punishable with a maximum imprisonment of 6 (six) years and a maximum fine of Rp1,200,000,000.00 (one billion two hundred million rupiah).

Article 92: Any person who intentionally in the fisheries management area of the Republic of Indonesia conducts fisheries business in the field of catching, cultivating, transporting, processing, and marketing fish, who does not have a SIUP as referred to in Article 26 paragraph (1), shall be punished with a maximum imprisonment of 8 (eight) years and a maximum fine of Rp1, 500,000,000.00 (one billion five hundred million rupiah).

Article 93: 7 (1) Any person who owns and/or operates an Indonesian-flagged fishing vessel fishing in the fisheries management area of the Republic of Indonesia and/or in Taut lepas, who does not have a SIPI as referred to in Article 27 paragraph (1), shall be punished with a maximum imprisonment of 6 (six) years and a maximum fine of Rp2, 000,000,000.00 (two billion rupiah). (2) Any person who owns and/or operates a foreign-flagged fishing vessel fishing in the fisheries management area of the Republic of Indonesia, which does not have a SIPI as referred to in Article 27 paragraph (2), shall be punished with a maximum imprisonment of 6 (six) years and a maximum fine of Rp20,000,000,000.00 (twenty billion rupiah).

Article 94: Any person who owns and/or operates a fish transport vessel in the fisheries management area of the Republic of Indonesia who carries out fish transportation or related activities that do not have SIKPI as referred to in Article 28 paragraph (1), shall be punished with a maximum imprisonment of 5 (five) years and a maximum fine of Rp1, 500,000,000.00 (one billion five hundred million rupiah). Article 96: Any person operating a fishing vessel in the fisheries management area of the Republic of Indonesia who does not register his fishing vessel as an Indonesian fishing vessel as referred to in Article 36 paragraph (1), shall be punished with a maximum imprisonment of 1 (one) year and a maximum fine of Rp800,000,000.00 (eight hundred million rupiah)

Article 101: In the event that a criminal act as referred to in Article 84 paragraph (1), Article 85, Article 86, Article 87, Article 88, Article 89, Article 90, Article 91, Article 92, Article 93, Article 94, Article 95, and Article 96 is committed by a corporation, criminal charges and sanctions are imposed against the management and the fine is added to 1/3 (one-third) of the crime imposed"

It can be known that the legal subjects of Article 101 in the Fisheries Law are not only individuals but can also be corporations. Corporations are legal subjects who can carry out legal relations like people, so corporations are included in the qualification of legal entities (rechtsperson). Corporations are presented as the reality of a group of human beings who are given rights as a unit of law, given personal law for a specific purpose.¹⁴

Furthermore, according to Subekti and Tjitrosudiro, a corporation is a combination of people who in legal association act together as a separate legal subject (personification). Its members have their own rights and obligations that are separate from the rights and obligations of their respective members.¹⁵ Furthermore, the existence of this corporation according to Moenaf H Regar is a business entity whose existence and legal status are equated with humans (people), regardless of the form of organization. Corporations can have wealth and receivables, have

obligations and rights, can act according to law such as making a lawsuit and being sued before the court, because a corporation is man-made that is not the same as humans, it must be run by humans called administrators or managers. A corporation usually has 3 (three) organs, namely the General Meeting of Shareholders (GMS), the Board of Commissioners, and the Board of Directors.¹⁶

Corporations because they are legal subjects who can carry out a legal relationship or legal act, in fact corporations must be held accountable, because a corporate crime can be categorized as a transnational crime that has an organized nature. It is said that because the crime of a corporation must involve a systematic system. It is said to be the most systematic because in it there is a very solid criminal organization (*Criminal Group*). We can know that a corporate crime often contains elements of *deceit*, misrepresentation, *concealment of facts*, manipulation, breach of trust, subterfuge or illegal circumvention so that it is very detrimental to society at large.¹⁷

Regarding corporations as perpetrators of criminal acts, when a corporation is said to have committed a criminal act, the corporation should be held accountable for the criminal acts committed by both the corporation concerned, and its managers. This is in line with Supreme Court Regulation Number 13 of 2016 concerning Procedures for Handling Criminal Cases by Corporations (Perma 13/2016), especially Article 4 paragraph (1) which states that: "Corporations can be held criminally responsible in accordance with the Corporation's criminal provisions in the law governing corporations" From the formulation of the article, it is very clear that a corporation can be held accountable if the corporation commits a criminal act but in accordance with the criminal provisions of the relevant law. In the world of fisheries business in this era of globalization, the existence of a corporation has a considerable share because it can boost national fisheries production, create jobs, and increase state revenue through taxes. The important and positive role of the corporation is not always realized because often corporate actions are followed by violations or even unlawful acts including crimes.

There are many cases of corporations committing *illegal* fishing crimes in order to get far greater profits than fishing legally. The handling of illegal fishing cases has so far been considered not running optimally from the courts in Indonesia. Some cases can be seen only stopped at people who do it, namely *the Fishing Master* or Skipper and Crew (ABK) but have not reached out to the corporation. This can be seen in the decision of the judge of the Jayapura High Court who decided the case of KM Sino-29, the Ambon High Court which decided KM Sino-36 and KM Sino-26 from each decision for the case, all of which only stopped at the captain but did not reach to his corporation, namely PT. Sino Indonesia Shunlida Fishing.

Meanwhile, Article 101 of the Fisheries Law states that if the crime is committed by a corporation, the corporation will also be subject to criminal sanctions through its management. The provision of criminal sanctions to corporate administrators for corporations that commit *illegal fishing* crimes raises a new problem, namely how can a corporation that commits a criminal act not be set.

Through the formulation of Article 101, even though a corporation is recognized as a criminal offender, the corporation concerned cannot be held criminally responsible. Such an arrangement would create many weaknesses, logically, for certain cases where the profits obtained by the corporation are so great and/or the losses borne by the community are so great, the imposition of imprisonment/fines 'only' on the management of the corporation would be disproportionate.

Corporate accountability for illegal fishing in Indonesia already exists in Law No. 31 of 2004 Jo. Law No. 45 of 2009 concerning Fisheries. Criminal acts committed by corporations are divided into two, namely violations and crimes. Article 101 is a form of criminal provision for illegal fishing and if the corporation that commits illegal fishing crimes is listed in the article, then criminal charges and sanctions can be imposed against the management and the fine is 1/3 (one-third) of the crime imposed

Indonesia still adheres to corporations in the second stage, only administrators can be held accountable, while corporations themselves as legal entities have not been touched. In addition, if the judge cannot prove that ZNL and the crew are included in the corporate bond, which corporations can cross countries, but at least there is a dissenting opinion related to illegal fishing corporations, considering that the biggest beneficiaries are corporations and the losses caused are also very large to the people of Indonesia.

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There are many cases of corporations committing illegal fishing crimes in order to get far greater profits than fishing legally. The handling of illegal fishing cases has so far been considered not running optimally from the courts in Indonesia. Some cases can be seen only stopped at people who do it, namely the Fishing Master or Skipper and Crew (ABK) but have not reached out to the corporation. This can be seen in the decision of the judge of the Jayapura High Court who decided the case of KM Sino-29, the Ambon High Court which decided KM Sino-36 and KM Sino-26 from each decision for the case, all of which only stopped at the captain but did not reach to his corporation, namely PT. Sino Indonesia Shunlida Fishing.

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C. CONCLUSION

The problems in law enforcement of illegal fishing committed by corporations in Indonesian territorial waters, namely there are many cases of corporations committing illegal fishing crimes in order to get far greater profits than fishing legally. The handling of illegal fishing cases has so far been considered not running optimally from the courts in Indonesia. Some cases can be seen only stopped at people who do it, namely the Fishing Master or Skipper and Crew (ABK) but have not reached out to the corporation. Article 101 of the Fisheries Law states that if the crime is committed by a corporation, the corporation will also be subject to criminal sanctions through its management. The provision of criminal sanctions to corporate administrators for corporations that commit illegal fishing crimes causes problems.

Reconstruction of law enforcement against the criminal act of fish theft in Indonesian territorial waters by corporations requires revision of Law No. 45 of 2009 concerning Fisheries. Corporate liability in article 101 is a form of criminal provision for illegal fishing crimes and if the corporation commits illegal fishing crimes listed in the article, then criminal charges and sanctions can be imposed against its management and the fine is 1/3 of the crime imposed which is not comparable to the crime committed by the Corporation

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