

## CHAPTER TWO

### LITERATURE REVIEW

#### A. State Responsibility

State responsibility arises from the principle of equality and sovereignty contained in international law.<sup>9</sup> The principles are the authority of a country whose rights are violated and demands its right in the form of full reparation of damages caused by the internationally wrongful acts.

Definition of State Responsibility based on the Dictionary of Law is “Obligation of a state to make reparation arising from a failure to comply with a legal obligation under international law”.<sup>10</sup> From that formulation, state responsibility can be interpreted as an obligation to make reparation which arises when a country made a mistake to comply with legal obligations under international law.

Based on Black’s Law Dictionary there are only narrow sense of responsibility or accountability is answerability.<sup>11</sup> According to Shaw there are three (3) essential characters of a state responsibility, namely:<sup>12</sup>

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<sup>9</sup> Hingorani, 1984, *Modern International Law*, Second Edition, New York: Oceana Publications, p. 241.

<sup>10</sup> Elizabeth A. Martin, 2002, *A Dictionary of Law*, New York: Oxford University Press, p. 477.

<sup>11</sup> Henry Campbell Black, *Black’s Law Dictionary*, New York: Claitors Pub Division, p. 211.

<sup>12</sup> Malcolm N. Shaw, 2008, *International Law*, 6th Edition, New York: Cambridge University Press, p. 781.

- a. The existence of an international legal obligation in force as between two states;
- b. There has occurred an act or omission which violates that obligation and which is imputable to the state responsible; and
- c. That loss or damage has resulted from the unlawful act or omission.

From the three characters of state accountability above according to Shaw, there are three (3) elements that must be fulfilled by a state in order to be held responsibility. First, that there should be a binding international obligation on the state to be held responsible. Second, the existence of an act or omission that resulted in the violation of an international obligation of a country which then lead responsibility for the country. The last is the damage or loss incurred due to acts and omissions by the state. So that Shaw clearly stated that the country is going to be held responsible must meet the three elements above and if one of the elements of state responsibility is not met then a country can not be held responsibility.

State responsibility is a fundamental principle in international law that comes from the doctrine of international legal experts. State responsibility arises when there is a breach of an international obligation to do something, whether such liability is based on international agreements and based on international practice.<sup>13</sup>

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<sup>13</sup> Andrey Sujatmoko, 2005, *Tanggung Jawab Negara Atas Pelanggaran Berat HAM: Indonesia, Timor Leste dan Lainnya*, Jakarta: Grasindo Gramedia Widiasarana Indonesia, p. 28.

In international law, it has been stipulated that sovereignty is related to the obligation not to abuse the sovereignty itself, because when a country is abusing its sovereignty, then the state can be held accountable for an act and omission.<sup>14</sup> Although some countries have sovereignty over itself, not necessarily the country can use its sovereignty without respecting the sovereignty of another countries.

## **B. Illegal Fishing**

Indonesia is an archipelagic country, which is mostly covered consists of territorial waters (sea) with fisheries potential which is very large and diverse. Potential of owned fishery is the economic potential that can be exploited for the development of national economy.<sup>15</sup> Indonesian ocean is huge and which has big natural resources.

The problem that many emerging and potentially disrupt the Indonesian national economy in the use of fishery resources and marine namely the practice of illegal fishing or IUU (Illegal, Unregulated and Unreported fishing practices) by fishermen who use fleets of foreign ship and fishing gear that can damage marine ecosystems is most detrimental to the state.<sup>16</sup> Illegal, Unreported, and Unregulated (IUU) fishing undermine efforts

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<sup>14</sup> Huala Adolf, 1991, *Aspek-aspek Negara dalam Hukum Internasional*, Jakarta: CV Rajawali, p. 174.

<sup>15</sup> Yusuf Istanto, "Peneggelaman Kapal Pelaku Illegal Fishing Sebagai Upaya Penegakan Hukum Perikanan di Indonesia (Studi Putusan Nomor 4/Pid.Sus-Prk/2014/Pn Tpg Pengadilan Negeri Tanjungpinang)", *Kajian Multi Disiplin Ilmu untuk Mewujudkan Poros Maritim dalam Pembangunan Ekonomi Berbasis Kesejahteraan Rakyat*, ISBN: 978-979-3649-81-8. p. 2.

<sup>16</sup>*Ibid*, p. 2.

to sustainably manage fish stocks and threaten fish populations worldwide.<sup>17</sup> So that Thus, IUU practices do not only cause big impact for the country, but also threaten for the fisherman, because too much fishes are loose which caused by the perpetrators of illegal fishing.

Problem of illegal fishing occurs because it is caused at least two things,: the overlap of legislation that led to obscurity Indonesian institutions which has Indonesian state where the authorities in dealing with the problem of illegal fishing in addition to the conflict of interest between state institutions in managing their own affairs, then the uncertainty creates legal loopholes for the perpetrators of illegal fishing.<sup>18</sup> From the explanation above, the big problem of conducting illegal fishing is the lack of awareness of Government and human being to keep and save the Indonesian natural resources.

The practice of illegal fishing is a criminal offense in the field of fisheries, and isare categorized as crimes under Article 84, Article 85, Article 92, Article 93 and Article 94 of the Law No. 45 Year 2009 concerning the Amendment of Law No. 31 Year 2004 on Fisheries.

The impact that caused by thisa criminal act, sothen the Indonesian Government suffered losses as well asalso has the consequencial to hamper national development. Therefore, based on criminologically, illegal fishing is a type of crime that can be classified into economic crimes. The formulation

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<sup>17</sup> David J. Agnew, John Pearce, et al, "Estimating the Worldwide Extent of Illegal Fishing", taken from <http://dx.doi.org/10.1371/journal.pone.0004570>, accessed on Thursday, October 27<sup>th</sup>, 2016 at 8.31 am.

<sup>18</sup> Akhmad Solihin, 2010, *Politik Hukum Kelautan dan Perikanan*, Bandung: Nuansa Aulia, p. 4.

of the offense in the field of fisheries has criminogenic/criminogen factor similar to economic crimes, and the consequences impact on the interests of the nation in achieving prosperity.<sup>19</sup>

### C. The Sinking of Foreign Ship

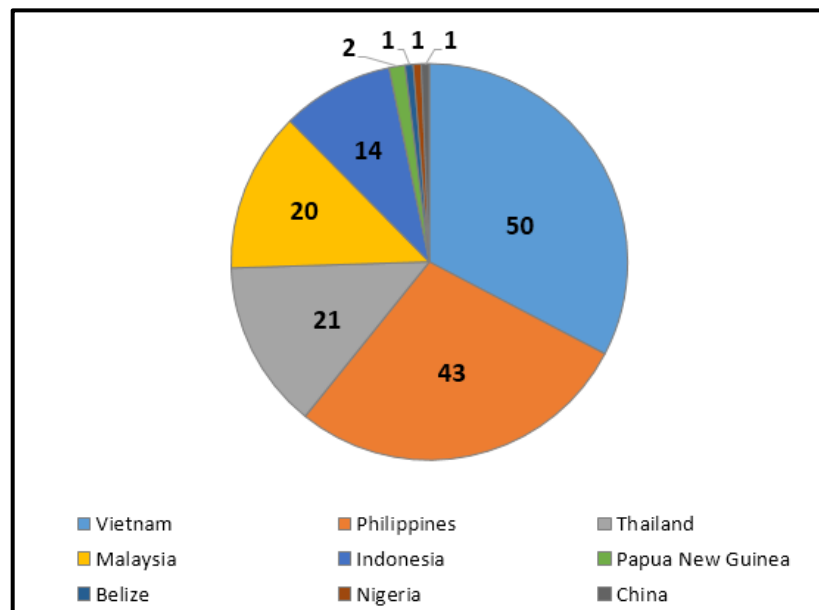
To combat illegal fishing practices, President Joko Widodo has ordered that the probation officers in the field can act decisively, if necessary by sinking foreign ships that conduct illegal fishing in Indonesian waters. This is certainly done in accordance with the applicable rules and procedures, which are secured in advance by of the crew before sinking the ship, in order not to cause new problems and international condemnation.<sup>20</sup>

Since the policy of sinking of foreign ship applied, Indonesia has sunk many foreign ships which conducted illegal fishing in Indonesian water. Through the Ministry of Marine Affairs and Fisheries of Republic of Indonesia, Susi Pudjiastuti, believed that the policy of sinking of foreign ship will give the deterrent effect for the perpetrators. Besides, the policy gives the signal for the other countries that Indonesia is a sovereign country and can establish law enforcement against illegal fishing. Here are the data of the ships that have been sunk by Indonesia:

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<sup>19</sup> Yanti Amelia Lewerissa, 2010, "Praktek Illegal Fishing di Perairan Maluku sebagai Bentuk Kejahatan Ekonomi", *Jurnal Sasi*, Vol. 16 No. 3, July-September 2010, p. 68.

<sup>20</sup> Zaqiu Rahman, 2015, "Peneggelaman Kapal sebagai Usaha Memberantas Praktik Illegal Fishing", *RechtsVinding*, Media Pembinaan Hukum Nasional, p. 2.



*Picture 1. Data of Sinking Fishing Boats*

*Source: Directorate General of Marine Resources and Fisheries of Ministry of Marine Affairs and Fisheries*

Sinking action against illegal fishing boats actors who are undocumented or in violation of the legal provisions of Republic of Indonesia is based on the provisions of article 69 paragraph (1) and paragraph (4) of Law No. 45 Year 2009 on the Amendment of Law No. 31 Year 2004 on Fisheries.

Article 69 paragraph (1) of the Fisheries determines that a fishery patrol ship shouldto work with oversight and enforcement in the field of fisheries in the fishery management area of the Republic of Indonesia. Whereas Article 69 paragraph (4) reads that, in carrying out the functions referred to in paragraph (1) the investigator or fisheries supervisor can perform specific actions such as burning and sinking of the fishing vessel or a foreign flag is based on sufficient preliminary evidence. The next act of genocide

refers to the provisions of Fisheries Law in the article 76 paragraph (a), stated that the object or instrument used or resulted from criminal fishery can be seized or destroyed after obtaining approval from the head of district court.<sup>21</sup>

Although there are pros and cons regarding the instructions of President Joko Widodo to sink the foreign ship who commits an act of illegal fishing in Indonesian sea territory, the instruction was clearly for the punishment. The rule is the authority of the Indonesian Government to protect Indonesian territory and the natural resources. The important thing is to protect Indonesian sovereignty, to avoid the arbitrary of authority of the perpetrators, and so on.

The Indonesian Government had never been protested by the other countries, if all the crew is still alive. Thus, throughout if the implementation is done in accordance with legal regulations, this policy will not influence with Indonesia's bilateral relations with other countries whose ships have been sunk by Indonesian Government.

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<sup>21</sup> Law No. 45 Year 2009 on the Amendment of Law No. 31 Year 2004 on Fisheries.