

CHAPTER TWO

LITERATURE REVIEW

A. The Overview of Illegal Fishing

The term of fishing in Law No. 31 Year 2004 is an activity to obtain fish in waters that is not in a condition cultivated by means or in any manner, including activities that use a vessel to load, transport, cool, handle. Process and/or preserve it.¹ Illegal fishing refers to activities conducted by National or foreign vessels in waters under the jurisdiction of a state, without the permission of that state, or in contravention of its laws and regulations. Other illegal activities include those conducted by vessels flying the flag of state that are members of relevant regional fisheries management organizations but operate in contravention of the conservation and management measures adopted by them and by which the flag states are bound. Similarly, breaches of relevant provisions of the applicable international laws or violation of national laws or international regulations, including those undertaken by states cooperating with a relevant regional fisheries management organization, contribute to the crime of illegal fishing.²

¹ Marhaeni Ria Siombo, 2010, *Hukum Perikanan Nasional dan Internasional*, Jakarta, Gramedia Pustaka Utama, p. 3.

² Gregory Rose, 2014, *Following the Proceeds of Environmental Crime Forest, Fish and Filthy Lucre*, London and New York, Routledge, p. 72.

According to International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUUFishing), illegal fishing refers to activities:³

1. Conducted by national or foreign vessels in waters under the jurisdiction of a State, or in contravention of its laws and regulations;
2. Conducted by vessels flying the flag of states that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the states are bound, or relevant provisions of the applicable international law; or
3. In violation of national laws or international obligations, including those under taken by cooperating States to relevant regional fisheries management organization.

Indonesia has long been a magnet for foreign illegal fishing activity because law enforcement in Indonesia is still weak. Illegal fishing in Indonesia is performed by fishing boats that operate without fishing permits. This is a major issue because it causes large losses in state revenue as illegal fishers do not report their catch or pay the taxes they owe to the government.⁴

³ International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulate Fishing (IPOA-IIU Fishing), taken from <http://www.fao.org/docrep/003/y1224e/y1224e00.htm>, accessed on Thursday, November 3rd, 2016 at 8:26pm.

⁴ Gregory Rose, *Op. Cit.*, p. 72.

B. The Law Enforcement

According to Jimly Asshiddiqie, the law enforcement is a process for the enforcement of remedies, or functioning of legal norms significantly as a code of conduct in traffic or legal relations in the society and state. The law enforcement in a wide sense includes activities to carry out and implement the law and to take legal action (sanctions) against any violation or violations of the law committed by legal subjects. In a narrow sense, in terms of the subject, the law enforcement is only interpreted as an attempt of certain law enforcement officials to guarantee and ensure that a legal rule as it ought. In ensuring the law enforcement, if necessary, law enforcement officials are permitted to use the power of force.⁵

In securing the illegal fishing in Indonesian sea, there are set of rules that support law enforcement on illegal fishing in Indonesia, as follows:

1. Law No. 32 Year 2014 on Marine;⁶
2. Law No. 45 Year 2009 in conjunction with Law No. 31 Year 2004 on Fishery;⁷

⁵ Jimly Asshiddiqie, “Penegakan Hukum”, taken from http://www.jimly.com/makalah/namafile/56/Penegakan_Hukum.pdf, downloaded on Friday, November 4th, 2016 at 10am.

⁶ State Gazette No. 32 Year 2014, taken from www.hukumonline.com/pusatdata/downloadfile, downloaded on Monday, November 7th, 2016 at 7:28pm.

3. Law No. 17 Year 2008 on Cruise;⁸
4. Law No. 1 Year 2014 in conjunction with Law No. 27 Year 2007 on Management of Coastal Area and Small Islands;⁹
5. Government Regulation No. 60 Year 2007 on Fish Resources Conservation;¹⁰
6. Government Regulation No. 30 Year 2008 on the Implementation of Research and Fisheries Development;¹¹

⁷ State Gazette No. 45 Year 2009, taken from <http://www.bpn.go.id/Publikasi/Peraturan-Perundangan/Undang-Undang/undang-undang-nomor-45-tahun-2009-886>, downloaded on Monday, November 7th, 2016 at 7:30pm.

⁸ State Gazette No. 17 Year 2008, taken from <http://www.hukumonline.com/pusatdata/detail/27983/nprt/1011/uu-no-17-tahun-2008-pelayaran>, downloaded on Monday, November 7th, 2016 at 7:32pm.

⁹ State Gazette No. 1 Year 2014, taken from <http://www.hukumonline.com/pusatdata/detail/lt52e61c61e43b5/nprt/lt510676a22ac1e/uu-no-1-tahun-2014-perubahan-atas-undang-undang-nomor-27-tahun-2007-tentang-pengelolaan-wilayah-pesisir-dan-pulau-pulau-kecil>, downloaded on Monday, November 7th, 2016 at 7:33pm.

¹⁰ State Gazette No. 60 Year 2007, taken from www.bpkp.go.id/uu/filedownload/4/58/798.bpkp, downloaded on Monday, November 7th, 2016 at 7:35pm.

¹¹ State Gazette No. 30 Year 2008, taken from www.hukumonline.com/pusatdata/detail/28718/node/1019/pp-no-30-tahun-2008-penyelenggaraan-penelitian-dan-pengembangan-perikanan, downloaded on Monday, November 7th, 2016 at 7:40pm.

The international regulation has a role in the law enforcement on illegal fishing is the United Nations Convention on the Law of the Sea (UNCLOS). There are some laws enforcement set out in UNCLOS, namely:¹²

1. Enforcement Jurisdiction over the Territorial Sea

Although the UNCLOS is silent as to coastal states general rights to enforce their laws in the territorial sea, it is presumed that coastal states full sovereignty within the territorial sea includes the authority to enforce its laws. Indeed, it is common practice for coastal states to apprehend and punish (such punishment possibly including imprisonment) those found in breach of the coastal states fishing laws. Article 25 (1) of the UNCLOS, however, does provide general enforcement authority for coastal states to take the necessary steps against foreign vessels that violate their right of innocent passage.¹³

Consistent with the exercise of sovereignty over the territorial sea, the UNCLOS regime does not impose obligations on coastal states to conserve and manage the living resources of the zone. Nor are they obliged to take action to ensure that their laws are enforced. Importantly, however, coastal

¹² United Nations Convention on The Law of The Sea (UNCLOS), taken from www.un.org/depts/los/convention_agreements/texts/unclos/unclos-e.pdf, downloaded on Friday, November 4th, 2016 at 9:12pm.

¹³ Malcolm Barrett, Illegal Fishing in Zones Subject to National Jurisdiction, taken from <http://www.austlii.edu.au/au/journals/JCULawRw/1998/1.pdf>, downloaded on Thursday, November 24th, 2016 at 10pm.

state sovereignty over their territorial sea is exercised subject to the UNCLOS and to other rules of international law. As will be discussed below, a body of international obligations has been adopted which apply to all the maritime zones subject to coastal state jurisdiction. Although these obligations do not bind states and therefore cannot be classified as hard law, they do set standards in which states are expected to adopt. Over time, if state practices are consistent with these obligations, they may crystallise into accepted binding principles of international law.¹⁴

2. Law Enforcement in Exclusive Economic Zone

The law enforcement of coastal State in Exclusive Economic Zone regulated in Article 73 (1) UNCLOS 1982 states that:

“The coastal State may, in the exercise of its sovereignty rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest, and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention”.¹⁵

¹⁴ *Ibid.*

¹⁵ UNCLOS Article 73 Paragraph 1

From the wording of article 73 (1) it is clear that the coastal state's powers of enforcement are not limited to the specific actions identified within the provision. The specific measures of boarding, inspection arrest and judicial proceedings are examples of actions that can be taken, and are not intended to limit the exercise of states enforcement jurisdiction.¹⁶

C. The Overview of International Law of the Sea

The law of the sea is that law by which states, coastal and landlocked, and/or international organizations regulate their relations in respect of those areas subject to coastal state jurisdiction and in relation to those areas of the sea and the seabed beyond national jurisdiction. The rules governing the sea are drawn from both custom and treaty.¹⁷ The law of the sea is a mixture of treaty and established or emerging customary international law, the customary law having developed over centuries.¹⁸

The law of the sea was developed from the struggle between coastal states, who sought to expand their control over marine areas adjacent to their coastlines. By the end of the 18th century, it was understood that states had

¹⁶ *Op. Cit.*

¹⁷ Rebecca MM Wallace and Olga Martin-Ortega, 2013, *International Law*, Seventh Edition, UK, Sweet & Maxwell, p. 156.

¹⁸ Anthony Aust, 2010, *Handbook of International Law*, Second Edition, USA New York, Cambridge University Press, p. 278.

sovereignty over their territorial sea. The maximum breadth of the territorial sea was generally considered to be three miles - the distance that a shore-based cannon could reach and that a coastal state could therefore control.¹⁹

In the 1950s, the profusion of claims, the advancement of technology and the need for a protection of conventional sea uses were responsible for the Geneva Conventions on the Law of the Sea. The Conventions were the outcome of the initial work under-taken by the International Law Commission. The four Conventions adopted by the 1958 Conference were the Convention on the Territorial Sea and Contiguous Zone, the Convention of the High Seas, the Convention on the Continental Shelf and the Convention on Fishing and Conservation of Living Resources of the High Seas.²⁰

The Conventions all entered into force, though by 1982. The Conventions, which codified certain existing state practices and also articulated rules of progressive development, proved inadequate, particularly with regard to the continental shelf and the ocean bed which, with advancing technology, came within the potential acquisition of certain states. The need to preserve the seas as the common heritage of all mankind and the danger of a

¹⁹ Anonymous, “Continental Shelf Programme, Background to UNCLOS”, taken from www.continentalshelf.org/about/1143.aspx , accessed on Friday, November 4th, 2016 at 9:10pm.

²⁰ Rebecca MM Wallace and Olga Martin-Ortega, *Op. Cit.*, p. 157.

scramble for the seas precipitated the calling of the Third United Nations Conference on the Law of the Sea. The 1982 Convention on the Law of the Sea, adopted on April 30, 1982, was the culmination of protracted negotiations over nine years. The Convention was opened for signature in December 1982 and was designed as a complete package with limited provision for reservation.²¹

D. The Sources of International Law of the Sea

Every legal system has its own sources of law. The term sources of law reflects the idea that a rule of law must come from a particular source. The starting point for any study of the sources of international law is Article 38 of the Statute of the International Court of Justice, which provides:²²

1. The Court, whose function is to decide in accordance with international law such disputes as submitted to it, shall apply:
 - a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b) international custom as an evidence of a general practice accepted as a law;

²¹ *Ibid.*

²² Abdul Ghafur Hamid, 2011, *Public International Law*, Third Edition, Malaysia, Sweet & Maxwell Asia, pp. 21-22.

- c) the general principles of law recognized by civilized nations;
 - d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. The provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

The effect of the clause “whose function is to decide in accordance with international law such disputes as are submitted to it” is to emphasize that, by applying what is mentioned in Article 38 (1) (a) to (d), the court will be applying international law. It means that the sources mentioned in those sub-paragraphs constitute recognized sources of international law, and presumably the sole sources of that law. In practice, Article 38 is generally regarded as an authoritative statement of the International Court of Justice because it is provided in the Statute of the court and is authoritative because it reflects State practice.²³

E. International Regulations Related to the Combating of Illegal Fishing

1. United Nations Convention on the Law of the Sea (UNCLOS)

²³ *Ibid.*, p. 22.

The [United Nations Convention on the Law of the Sea](#) lays down a comprehensive regime of law and order in the world's oceans and seas establishing rules governing all uses of the oceans and their resources. It enshrines the notion that all problems of ocean space are closely interrelated and need to be addressed as a whole.²⁴

United Nations Convention on the law of the sea which sought to establish a comprehensive legal framework governing the uses of the oceans through a single treaty. The UNCLOS addressed the topic covered by the 1958 conventions, filled in various gaps in those conventions, and went further by tackling topics such as the management of the sea-bed's mineral resources located beyond national jurisdiction.²⁵

The Convention was opened for signature on 10 December 1982 in Montego Bay, Jamaica. This marked the culmination of more than 14 years of work involving participation by more than 150 countries representing all regions of the world, all legal and political systems and the spectrum of socio/economic development. At the time of its adoption, the Convention embodied in one instrument traditional rules for the uses

²⁴ United Nations Convention on the Law of the Sea of 10 December 1982 Overview, taken from http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm, accessed on Friday, November 4th, 2016 at 9:25pm.

²⁵ Sean D. Murphy, 2012, *Principles of International Law*, Second Edition, USA, Thomson Reuters, p. 383.

of the oceans and at the same time introduced new legal concepts and regimes and addressed new concerns. The Convention comprises 320 articles and nine annexes, governing all aspects of ocean space, such as delimitation, environmental control, marine scientific research, economic and commercial activities, transfer of technology and the settlement of disputes relating to ocean matters and also provided the framework for further development of specific areas of the law of the sea.²⁶

2. International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU Fishing)

Illegal, unreported and unregulated (IUU) fishing occurs in virtually all capture fisheries, whether they are conducted within areas under national jurisdiction or on the high seas. IUU fishing poses a direct and significant threat to effective conservation and management of many fish stocks, causing multiple adverse consequences for fisheries and for the people who depend on them in the pursuit of their legitimate livelihoods.²⁷

The objective of the IPOA is to prevent, deter and eliminate IUU fishing by providing all States with comprehensive, effective and

²⁶ United Nations Convention on the Law of the Sea of 10 December 1982 Overview, *Op. Cit.*

²⁷ International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU Fishing), *Op. Cit.*

transparent measures by which to act, including through appropriate regional fisheries management organizations established in accordance with international law.²⁸

F. National Regulations Related to the Combating of Illegal Fishing

The law enforcement on illegal fishing is still a big responsibility for the Indonesian government. It gives a big challenge for the Indonesian navy, water police and relevant agencies to ensure the security and protection of Indonesian jurisdiction. Illegal fishing practices is one of the most massive violations carried out in the territorial waters of Indonesia. Illegal fishing practices are obviously very detrimental to the state annually.²⁹ Base on the data from the Minister of Marine and Fisheries, Indonesia's losses per year is reaching IDR 240 trillion.³⁰

Law No. 45 year 2009 on Fishery has a set of legal basis related to law enforcement action against illegal fishing, one of them is the possibility to sink a foreign ship conducting fishing activities without permission.³¹ In

²⁸ Paragraph 8 IPOA-IUU Fishing.

²⁹ Data Pokok Kelautan dan Perikanan 2009, taken from http://statistik.kkp.go.id/index.php/arsip/file/14/data_pokok_kelautan_perikanan2009.pdf, downloaded on Sunday, November 27th, 2016 at 8pm.

³⁰ Anonymous, "Menteri Susi: Kerugian Akibat Illegal Fishig Rp 240 Triliun", *Op. Cit.*

³¹ Article 69 Paragraph 4 Law No. 45 Year 2009 on Fisheries

securing the illegal fishing in Indonesian sea, there are set of rules that support law enforcement on illegal fishing in Indonesia, as follows: 1) Law No. 32 Year 2014 on Marine; 2) Law No. 45 Year 2009 in conjunction with Law No. 31 Year 2004 on Fishery; 3) Law No. 17 Year 2008 on Cruise; 4) Law No. 1 Year 2014 in conjunction with Law No. 27 Year 2007 on Management of Coastal Area and Small Islands; 5) Government Regulation No. 60 Year 2007 on Fish Resources Conservation; 6) Government Regulation No. 30 Year 2008 on the Implementation of Research and Fisheries Development.