

CHAPTER TWO

LITERATURE REVIEW

A. Law Enforcement

Discussing about law enforcement, firstly, we must understand the meaning of law enforcement and the influencing factors so that we can analyze it further. In the modern state constellation, law can be functioned as a means of social engineering (law as a tool of social engineering). Roscoe Pound emphasizes the importance of law as a means of social engineering, especially through case-resolution mechanisms by judicial bodies that will result in jurisprudence. The social context of this theory is the society and the judiciary in the United States.¹

Law enforcement is a preventive act taken by every law enforcer.² It all aims to get legal certainty. It is similar in maintaining the sovereignty of maritime. Law enforcement is also an attempt to actualize the justice, legal certainty and social benefit to become a reality. So, law enforcement is essentially a process of materializing ideas.³

According to Black's Law Dictionary, the definition of law is the regime that orders human activities and relations through

¹ Lili Rasjidi, 1992, *Dasar-dasar Filsafat Hukum*, Bandung, Alumni, p. 43.

² Atip Latipulhayat, 2016, "Khazanah: Hart", *Padjadjaran Jurnal Ilmu Hukum*, Volume 3 Nomor 3, 2016, ISSN 2460-1543, e-ISSN 2442-9325. p. 658.

³ Dellyana, Shant, 1988, *Konsep Penegakan Hukum*, Yogyakarta, Liberty, p. 32.

systematic application of the force of politically organized society, or through social pressure, backed by force, in such a society; the legal system (respect and obey the law). The aggregate of the legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative actions; esp., the body of rules, standards, and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them (the law of the land). It is the set of rules or principles dealing with a specific area of a legal system (copyright law). The judicial and administrative process; legal action and proceedings (when settlement negotiations failed, they submitted their dispute to the law).”⁴

Aside of that, the Dictionary also define “the enforcement” as an act or process of compelling compliance with a law, mandate, command, decree, or agreement. Enforcement Power is the authority by which Congress may enforce a particular constitutional amendment’s provisions by appropriate legislation.”⁵

The Law Enforcement itself defines as a preventive act taken by every law enforcer. It all aims to get legal certainty. It is similar in maintaining the sovereignty of maritime. Law enforcement is also an attempt to actualize the justice, legal certainty and social benefit to

⁴ Garner, B.A., 1999, *Black’s Law Dictionary*, Seven Edition, West Group, Dallas, Texas, p. 962.

⁵ *Ibid*, p. 608.

become a reality. So, law enforcement is essentially a process of materializing ideas.⁶

To enforce the law in illegal fishing, Indonesia has ratified the United Nations Convention on the Law of the Sea (UNCLOS) 1982 with Law No. 17 Year 1985. Before ratifying the Convention, Indonesia already has Law No. 5 Year 1983 on the Exclusive Economic Zone of Indonesia. In Article 3, Paragraph 1 of the Law on Exclusive Economic Zone of Indonesia states that if the Exclusive Economic Zone of Indonesia overlaps with other countries whose beaches are facing each other or side by side with Indonesia, the boundary is settled by agreement. Indonesia has made 7 Exclusive Economic Zone border agreements with seven neighboring countries of Indonesia.⁷

Indonesia as a State that has Exclusive Economic Zone makes many illegal fishers tends to do the illegal fishing more due to Indonesia's Exclusive Economic Zone that has a lot of good quality of fish.⁸ Aside of UNCLOS 1982, there is the International Plan of Action which aims to Deter, Prevent and Eliminate Illegal Unreported

⁶ Dellyana, Shant, 1988, *Konsep Penegakan Hukum*, Yogyakarta, Liberty, p. 32.

⁷ Damos Dumoli Agusman, 2006, *Hukum Internasional tentang Batas Maritim dan Praktik Indonesia*, Bandung, Universitas Padjadjaran. p. 67.

⁸ Zoe Scanlon, 2017, "Taking Action against Fishing Vessels without Nationality: Have Recent International Developments Clarified the Law?", *The International Journal of Marine and Coastal Law*, Volume 32, Issue 1, p. 54-68. DOI: 10.1163/15718085-12341431, ISSN: 0927-3522 E-ISSN: 1571-8085.

and Unregulated Fishing (IPOA-IUU).⁹ It is made within the framework of the 1995 CCI Code of Conduct for Responsible Fisheries (CCRF) and is not binding, but the Food and Agriculture Organizations (FAO) implementing IPOA-IUU in their respective national policies through the National Plan of Action (NPOA) of IUU Fishing¹⁰. The underlying consideration of the IPOA-IUU is the concern about the increasing IUU Fishing, so the FAO drew up a global action plan to deal with it.¹¹

IPOA-IUU Fishing as a voluntary international instrument is expected to be a guide for countries in preventing, reducing and eliminating IUU Fishing.¹² IPOA-IUU Fishing aims to prevent, eliminate and eliminate IUU Fishing by providing guidance for all countries to develop comprehensive, transparent and effective steps and in collaboration with competent regional fisheries management organizations.¹³

⁹ Jaelani, Abdul Qodir dan Udiyo Basuki, 2014, "Illegal Unreported and Unregulated (IUU) Fishing: Upaya Mencegah dan Memberantas Illegal Fishing dalam Membangun Poros Maritim Indonesia", *Supremasi Hukum*, Vol. 3 No. 1, June 2014. p. 24.

¹⁰ Richard G. Hildreth, 1991, "Managing Ocean Resources: New Zealand and Australia", *International Journal of Estuarine and Coastal Law*, Volume 6, Issue 2, p. 89-126. DOI: 10.1163/187529991X00018, ISSN: 0268-0106 E-ISSN: 1875-2993.

¹¹ FAO, 2001, *International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing* adopted on 23 June 2001 at the 120th Session of the FAO Council, Food and Agriculture Organization of the United Nations, Rome, Italy, 2001, see www.fao.org/DOCREP/003/y1224e/y1224e00.htm, accessed on November 9th, 2017 at 10 am.

¹² Carl-Christian Schmidt, 2005, "Economic Drivers Illegal, Unreported and Unregulated (IUU) Fishing", *The International Journal of Marine and Coastal Law*, Volume 20, Issue 3, p. 479-507. DOI: 10.1163/157180805775098630, ISSN: 0927-3522 E-ISSN: 1571-8085.

¹³ Chomariyah, 2014, *Hukum Pengelolaan Konservasi Ikan: Pelaksanaan Pendekatan Kehati-hatian oleh Indonesia*, Malang, SETARA Press, p. 69.

B. Illegal Fishing

The term “illegal act” means an act or omission that violates any law, or any rule or regulation having the force of law.¹⁴ In Black's Law Dictionary the word illegal means forbidden by law, unlawful (prohibited by law or invalid).¹⁵ Thus, illegal fishing is a series of harvesting and transporting activities conducted illegally because they do not have the consent of the authorities. The acts contrary to the applicable law and is seen as an act that may damage the sea. Thus it can be said that illegal fishing includes the destruction of sea that may result in the loss of both aspects of the Economic, ecological and socio-cultural.

There is no proper definition of illegal fishing in the legislation on the waters or marine. Even in the Law No. 45 Year 2009 on Amendment of Law No. 31 Year 2004 on Fishery, there is no further information on what is illegal fishing.¹⁶

Actually, illegal Fishing or IUU-Fishing terminologically can be interpreted as fishing action done by ignoring the existing rules. The arrests were made illegally and did not include reports. Some of the cases included in the IUU-Fishing category in Indonesia include fishing by using false permits, fishing by prohibited fishing gear, and

¹⁴ Anonymous, 2012, *Illegal Act*, https://definedterm.com/illegal_act accessed on November 9th, 2017 at 10:27 am.

¹⁵ Garner, B.A., *Op.Cit.*, p. 750.

¹⁶ Nunung Mahmudah, *Op.Cit*, p.79.

also fishing of types of fish that are prohibited or not in accordance with the permit issued.¹⁷

Illegal fishing is the activity that is:

- a. Conducted by a foreign person or ship on water which becomes the jurisdiction of a country without the consent of that country or contrary to applicable laws and regulations.
- b. Contrary to applicable national regulations or international obligations.
- c. Conducted by the ship raising the flag of a country that is a member of a regional fisheries management organization but operating not in accordance with the preservation and management requirements adopted by that organization or applicable international legal provisions.¹⁸

C. Exclusive Economic Zone

In Article 55 of the 1982 United Nations Convention on the Law of the Sea there is a definition of an Exclusive Economic Zone, and it may be interpreted that the Exclusive Economic Zone is a sea lane located outside and adjacent to its territorial sea, where the sea lane adheres to a special legal regime set out in Chapter V of United

¹⁷ Lisbet, 2014, "Diplomasi Indonesia Terhadap Kasus Penenggelaman Kapal Nelayan Asing", *Info Singkat Hukum Vol. VI, No. 24* [pdf]. Pusat Pengkajian, Pengolahan Data dan Informasi (P3DI). p. 12.

Nations Convention on the Law of the Sea 1982.¹⁹ Article 57 of the 1982 United Nations on the Law of the Sea stipulates that every country with a coastal area shall have the right to determine its Exclusive Economic Zone. However, the specified distance should not exceed 200 nautical miles measured from the same line used to measure the width of its territorial sea.²⁰

In the provisions of Article 56 of the 1982 United Nations Convention on the Law of the Sea, it is stipulated that in an Exclusive Economic Zone, coastal states have sovereign rights for the purpose of exploration, exploitation, conservation and management of natural, biological and non-biological resources from waters on the seabed and from marine and subsoil and in respect of other activities for the purpose of exploration and exploitation of such economic zones, such as energy production from water, currents and wind.²¹

This is very different from a coastal state that has sovereignty over its sea territory, the authority of the coastal state against fish in the Exclusive Economic Zone designated as sovereign rights. This can be said that coastal states have no sovereignty over these rights.²² The United Nations Convention on the Law of the Sea 1982 contains provisions governing different maritime zones with different legal

¹⁹ Article 55 of United Nations Convention on the Law of the Sea 1982.

²⁰ Dikdik Mohamad Sodik, 2016, *Hukum Laut Internasional dan Pengaturannya di Indonesia*, Bandung, PT Refika Aditama, p. 81.

²¹ *Ibid*, p. 82.

²² *Ibid*.

status. Broadly speaking, the Convention divides the sea into two parts of the maritime zones that are below and outside the national jurisdiction. Maritime zones under national jurisdiction are subdivided into maritime zones which are under the sovereignty of a coastal state, and maritime zones where coastal states can exercise special powers and privileges provided for in the Convention.²³

Maritime zones that are under sovereignty are entirely internal waters, archipelagic waters (for archipelagic countries), and territorial sea. Maritime zones that are under the authority and privileges of coastal states are contiguous zones, Exclusive Economic Zones, and continental shelf. Meanwhile, maritime zones that are outside national jurisdiction are high seas and international seabed areas.²⁴ The notion of the state here cannot be separated from the basic concept of the state as a geographical union accompanied by its sovereignty and jurisdiction. Thus, the territory of the state becomes the most fundamental concept in international law, to show the existence of the supreme and Exclusive powers of the state within its territorial boundaries. State sovereignty over its territory has two aspects, both positive and negative.²⁵

²³ *Ibid.*, p. 19.

²⁴ *Ibid.*

²⁵ Mochtar Kusumaatmadja and Etty R. Agoes, 2003, *Pengantar Hukum Internasional*, Bandung, P.T. Alumni, p. 161-162.

Sovereignty has two very important characteristics possessed by a country. First, sovereignty is a legal prerequisite for the existence of a country. Second, sovereignty denotes the independent state which is also a function of a country.²⁶ With regard to sovereignty and jurisdiction at sea it is necessary to inform that the setting of maritime zones has two objectives. First, establish the authority of the coastal state to draft regulations (law) and to force other countries and their citizens to comply with the rules. Second, grant the rights and obligations to other countries and their citizens in certain parts of the sea.²⁷

Under the provisions of Article 58 Paragraph 2 that the provisions of Articles 88 to 115 and other international legal provisions apply to activities in the Exclusive Economic Zone as long as these international law provisions are in accordance with the rights and jurisdiction of the coastal state. So even though the foreign ships enjoy the freedom to sail in the Exclusive Economic Zone, the UNCLOS 1982 provides the coastal state with general authority to enact legislation relating to international freedom of shipping.²⁸

²⁶ Huala Adolf, 2002, *Aspek-Aspek Negara dalam Hukum Internasional*, Jakarta, PT. Raja Grafindo Persada, p. 112.

²⁷ Dikdik Mohamad Sodik, *Op.Cit*, p. 21.

²⁸ *Ibid*, p. 84.

